In the

Supreme Court of the United States

BOB BULLOCK, et al.,

Appellants,

v. No. 72-147

DIANA REGESTER, et al.,

Appellees.

Washington, D. C.
February 26, 1973

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v.	:	No. 72-147
DIANA REGESTER, et al., Appellees.	:	

Washington, D. C.
Monday, February 26, 1973

The above-entitled matter came on for argument at 1:02 o'clock p.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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LEON JAWORSKI, Esq., P.O. Box 12548, Capitol Station, Austin, Texas 78711; for the Appellants

DAVID R. RICHARDS, Esq., 600 West 7th Street, Austin, Texas 78701; for the Appellees Regester, et al.

ED IDAR, JR., Esq., 211 East Commerce Street, 319 Aztec Building, San Antonio Texas 78205; for the Mexican-American Appellees Bernal, et al.

THOMAS GIBBS GEE, Esq., 204 Austin National Bank Building, Austin, Texas 78701; for the Republican Appellees Willeford, et al.

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 next in Bullock against Regester.

Mr. Jaworski, you may proceed whenever you are ready.

ORAL ARGUMENT OF LEON JAWORSKI, ESQ.,

ON BEHALF OF THE APPELLANTS

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

As was true in the case argued just before this one, the Attorney General of Texas, the Honorable John Hill, has participated in the preparation of this appeal as has his staff with us. And, in order to avoid the dividing of arguments, he has asked that I present the argument on behalf of the state.

I think that perhaps a more accurate description of what this case really involves could hardly be made than the characterization given it by the dissenting judge who stated that this was an instance of the majority entering fields of purely state and local management.

Under the provisions of Article III, Section 28, of the Constitution of Texas, a legislative redistricting board is assembled if the legislature fails to redistrict the state after its first regular session following the publication of each United States decennial census. So, the

legislature convened in January, 1971 was under constitutional mandate to provide this redistricting.

Texas has a bicameral legislature. And because the legislature had failed to redistrict both houses, of course any effort at redistricting failed and, as a consequence, the redistricting board was assembled and considered the matter of providing a plan of redistricting the Senate and also a plan of redistricting the Lower House.

This board is constituted by several elected state officials serving on it. It is the lieutenant governor, the speaker of the house, the attorney general, the comptroller of public accounts, and the commissioner of the general land office. Three or more of these members of the redistricting board may sign whatever plan they agree upon, and it is certified to the secretary of state, and then it becomes an effective plan.

I might say that the House plan is the only one, the plan relating to the representatives, is the only plan that is involved on this appeal.

Perhaps brief reference should be made to the commencement of this litigation. After the plans were filed, a suit was instituted in Houston, Texas by Curtis Graves, a black state representative from Harris County--that is Houston--in which he contended that there was unconstitutional apportionment of the senatorial districts because of

an alleged racial gerrymandering, his point being that there should have been a district carved out in which 80 percent are blacks and that because one was not carved out in that manner, it was unconstitutional.

And then next came a number of other suits that were filed, challenging the board's plan for the House of Representatives in different parts of the state with different groups filing these suits, and interventions were also filed on behalf of a number of groups. And there was a consolidation of all of these actions, and they were heard before a three-judge court.

The court ordered first that, unless the legislature of Texas on or before July 1, 1973 adopted a plan to reapportion the legislative districts in accordance with the constitutional guidelines set out in the court's opinion, that the court will then proceed to reapportion the state itself. And then the court further ordered that the county of Dallas--that is where the City of Dallas is--and the County of Bexar--that is where San Antonio is--that both of these be reapportioned into single-member representative districts in conformance with a plan of reapportionment that the court provided.

Q Mr. Jaworski, was injunctive relief granted?

MR. JAWORSKI: Yes, sir. The injunctive relief consisted of the state being restrained from proceeding. The

elections could not be held in accordance with the plan that had been filed by the redistricting board.

Judge Wood stated very frankly that he wholeheartedly disagreed with his colleagues in declaring the state plan unconstitutional, saying that he could think of nothing that illustrated more vividly the chaos that existed in the area of restructuring the political districts of a state as was attempted to be done and ordered by the court in this particular instance, to be done by July 1, 1973 or else the court's plan had to be adopted.

Of course, the Mahan v. Howell case is very significant. A number of the Court's pronouncements in that case are quite applicable here. Perhaps I should point out that what the majority did in our case was rely on the Kirkpatrick v. Preisler case, repeatedly referring to it; also on Wells v. Rockerfeller, both of which, as we know, are congressional redistricting cases.

Q Mr. Jaworski, a great deal more flexibility is permitted in state legislature than in congressional districts?

MR. JAWORSKI: That is what this Court, of course, said in the Mahan v. Howell case.

Q It was said before that.

MR. JAWORSKI: And also said it--yes, sir--in the Reynolds v. Sims--

Q Reynolds against Sims.

MR. JAWORSKI: Right, sir. But it was quite well emphasized in the case that was decided or rather was handed down last week.

Q So, there is nothing new in Mahan v. Howell in tha respect.

MR. JAWORSKI: No, I do not think so. I think it did some re-emphasizing that perhaps--and having come so recently--is something that we might talk about a little more, I mean as counsel. But certainly there was nothing new in it.

The interesting thing is that Judge Wood who so strongly dissented in this case from the actual majority recognized that difference in his dissenting opinion, and he recognized a difference between congressional districts and legislative districts, pointing to the cases, pointing to Reynolds v. Sims.

What the majority did here was require, first, a much stricter standard of state legislative reapportionment, permissible deviation, than had been approved heretofore. Actually, in this case the total variation of 9.9 percent under the board was unquestioned as far as the majority opinion was concerned.

I noticed where in one of the briefs some question was raised whether that might be entirely accurate, but there

had been nothing before the lower court that raised any question beyond that of it being assumed and considered that the total variation was only 9.9 percent. This was under the board's redistricting plan.

I should point out that actually the average variation was only 1.82 percent.

One of the problems in this case, a matter on which so very much stress was laid by a majority of the court which, in our view, led the court exactly to nothing as far as the end result was concerned, were the procedural niceties that were followed by this board.

There were several things that took place. Of course, these men, all of them, had to depend upon staff assistants because they had other duties to perform as state officials, and they did have considerable staff assistance. Perhaps the one official who participated more than anyone else in this particular matter was the attorney general himself who counseled with the redistricting board constantly on what should be done and also letting them know on what was permissibly legal as he interpreted the decisions.

But the court has gone to considerable extent in talking about not the end result so much as these procedures that were employed and finding fault with them and finding fault with the particular assistance that had been rendered

by members of the staff and such as that, forgetting, it seemed to me, at least for a moment that even judges need the assistance or at least utilize the assistance of law clerks at times. But that also it is very clear there was a complete misapprehension of what Whitcomb v. Chavis actually said.

What the court here did was not only, as indicated, went into the matter of redistricting the entire state but also found fault with what had been done specifically insofar as single- and multi-member districts were concerned in the two counties that are mentioned.

What the court failed to do, as we see it, was to employ the Equal Protection test, that a state must make an honest and a good faith effort to construct the districts as nearly of equal population as is practicable. And there is nothing here to indicate in this record that this good faith effort was not made.

Let me digress for a moment, if I may, because I have noticed that there were some references made in some of the briefs to some alleged evidence in this case that frankly is no evidence. What happened at the outset was that the chief judge of this three-judge court, the presiding judge, announced that everything that was offered by anyone would be admitted into evidence. He did not want us to even make any objections. If the matter was conjectural, if it

was hearsay or whatever the proper objection may have been, it went into the record anyway, the announcement being that the court would at the end consider those things that were admissible and those matters that were not admissible. But there were no rulings that were made by the court. And, as a consequence, the floodgates were opened and everybody who had anything that he wanted to bring before the court, just introduced it into evidence and it was received.

We do not know actually what the court did consider and what it did not consider, speaking of the majority. But we do know that there were some matters tendered here that were not admissible into evidence and that the record presently is cluttered with some of those matters.

I mention that simply because what should really be a relatively easy case to discuss with the Court and the issues being well defined, as we see it, is complicated a little because of some of the references that have been made in some of the briefs to what the evidence purportedly showed.

The court, the majority, apparently everywhere just placed the burden upon the state to show that there was no inequality of any kind, that there was no discrimination of any kind, that there was not any type of dilution, and had us carry the burden throughout the case. So far as I can

tell, we discharged the burden, although it is questionable as to whether we had the burden in all of these instances.

Texas is a large state, as is known. We will not engage in talking about how large it is. But it is not only a large one but it also has a shape, and it does not render it very easily susceptible to the division among districts. So, some problem is going to be encountered. What was necessary here were--well, let me say first the ideal district was about 74,000--74,000 plus. There were 150 representatives to be elected to the Lower House, and a large number of districts had to be carved out.

In addition to it, this particular board was confronted first with a provision of the constitution of our state which had been interpreted in the case of Craddick v. Smith, which we cite in our brief. And under that, county lines could not be crossed unless it were absolutely necessary to do it in order to make up this district of 74,000, the ideal.

It also required that it go to a contiguous county if it were necessary to do that.

Texas, as we know and as the Court doubtless knows, not only has its large metropolitan cities, but it has rural areas. It has large areas that are very sparsely settled. Actually there was no instance in which our constitutional requirements and the integrity that was required for this

board to follow was not carefully embraced in each instance with the possible exception--well, with the exception--of Red River County, and there we had a real problem up in the part that adjoins Arkansas with the Red River and between the two of them had a problem as to Bowie County. So, what was actually done is that in that one instance the county line was crossed.

The total population, incidentally, as the Court probably has already gathered from what I had said is, according to the last census, about 11,200,000.

The senatorial district is not involved here but may be of interest to the Court, is of approximately 360,000 to 368,000.

If we were to draw comparisons here--and I do this only because the case has just been decided by this Court and to show the similarity of the situations. If I may review those in Virginia, there was a total variation of 16.4; under what the board did here, a total variation of 9.9; and an average variation in the Mahan case of 3.89; and Texas of 1.82.

Within the four percent, there were 35 of the districts in Virginia. In Texas we had 93 under this board's plan. Those that exceeded six percent were nine in Virginia. There were none under this board's plan in Texas. And only two exceeded five percent.

I indicated a few moments ago that it was our view that Whitcomb v. Chavis had been misinterpreted. And we do feel that that is definitely in the case.

I want to mention one effort that was made in particular. There was injected in the case the fact that perhaps one difference was that in Indiana, particularly in Marion County, which was involved in the Whitcomb v. Chavis case, that there was no racial history. And a suggestion was made that Texas had a racial history. There is no one that would deny that Texas, as is true with some many of the states, has a racial legacy. It is untrue that there is any showing whatever that there has been any such happenings, any sort of racial violation, with respect to the electoral process in our state. The last one, according to the testimony in this case, undisputed and coming from a witness who appeared on behalf of the appellees, was back in 1956.

So that this is really not in the case, despite the fact the witness was put on the stand to testify or undertake to testify--and this is one of the particular matters to which I refer that has made it somewhat difficult to brief and argue this case because the court admitted everything--a man who posed as an expert and undertook to say that there was a difference as far as racial history in Indianapolis and Marion County was concerned and in Texas. And then it turned out, when I asked him the questions on

cross-examination, that he had never even been to Indiana, much less Indianapolis, had not made any type of study or the matter, and this is set out in our brief to show what we had to contend with.

I should say that there is a stipulation in the record in order to lay at rest completely the matter of all having been free to engage a process of registration as well as voting. There is a stipulation that there has been none of that in our state for a number of years, and of course the evidence shows nothing of the kind.

Now we get into another phase that I want to discuss with the Court, if I may, and that is what happened with respect to Harris County, Houston. Under the board's plan, being divided into single-member districts, and what happened insofar as Dallas--that is, Dallas County--and San Antonio, Bexar County, being multi-member districts.

There, of course, is some difference, one could say. Houston, a very large city, 1,700,000, either fifth or sixth largest city in the nation at the present time; Dallas, a million three, Dallas County; San Antonio, even a much smaller city than that. Traditionally Dallas has had multi-member districts. The same is true of Bexar County. As far as Houston is concerned, Harris County, the legislators themselves, the delegation from there, more or less favored single-member districts.

So, on the surface you might say, "Well, why does Harris County have single-member districts and why does Dallas and Bexar Counties have multi-member districts?" It really was done without there being the slightest intimation in the record that any individual group sacrificed any constitutional rights by virtue of it. It was done largely because the board had before it witnesses who thought that this was a sensible thing to do, and Harris County had witnesses before it that thought it was a sensible thing to do in Dallas and Bexar County, what was done in those.

Our position is that absent the showing of something that shows that either voting strength has been diluted or that something has been done that has occasioned the transgression of a constitutional right, that certainly much has been made of nothing.

May I say this with--

Q Mr. Jaworski, historically has this always been true?

MR. JAWORSKI: No, sir. I did not intend to say that, sir. I did intend to say that that was true as far as Dallas was concerned and, I believe, Bexar County. But it was not true as far as Harris County is concerned. Harris County had some mixtures in the past. They had floterial representatives even.

I said what really brought it on more than anything else is that delegations should come from these particular areas and the board insisting what people wanted, what their representatives said they wanted, made these provisions of single-member districts for Houston, for Harris County, multi-member for Dallas and for Bexar County.

Q And Dallas and Bexar historically have had multi-member?

MR. JAWORSKI: Dallas and Bexar historically have had multi-member.

Q And Houston has also had multi-member, plus--

MR. JAWORSKI: It has had but also some mixture, Mr. Justice Stewart. There have been mixtures of floterial representatives and such as that. I recall voting for some of them.

Q Was there not a state policy expressed somewhere earlier that the state would have multi-member until the number got to 15; is that not somewhere here in the record?

MR. JAWORSKI: That may have been in the history of--

Q And that thereafter you would have--

MR. JAWORSKI: I do not think that this was a part of what was before the board.

I do want to make mention of this. You take Bexar County, for example. This is a county, San Antonio, where a large segment of the population is Mexican-American, actually 50 percent of them are. You do not have a minority there of Mexican-Americans at all. The record shows that if they undertook to exercise the election process, their right to vote, to register and vote, there would not be any problem. The problem has been that less than 30 percent of them, or approximately 30 percent of them, seek to exercise that privilege. This is where your trouble has been as far as Bexar County is concerned.

I should make mention of this too, because it is in the record and a matter that probably will be talked about. Dallas County has a strong political party. It is a party that has had on its slate blacks as well as whites. The record shows that they were contemplating three blacks on their slate following this act of redistricting.

Actually, they have had at different levels, that is, even including the legislative level, blacks on the slate before.

It is true that it is a strong political organization. It is true that a black placed on that slate probably would be elected. It is also true that a white placed on that slate would be elected. It is also true that if this organization opposed the white, that he would have a

hard time being elected, just as much as if the organization opposed a black.

While rooted in history, as I answered to Mr. Justice Stewart's question, the matter of multi-member districts has never been used in Dallas and the record is completely silent. There is nothing to show that the multi-member district arrangement for Dallas County was used or conceived either to dilute or to cancel the voting strength of blacks. And I think this distinguishes it from some other inferences and some pronouncements that have been made by this Court in other cases.

And I believe with that, Mr. Chief Justice, and may it please the Court, I will wait with the concluding argument until after counsel for the appellees have argued.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Jaworski.

Mr. Richards.

ORAL ARGUMENT OF DAVID R. RICHARDS, ESQ.,

ON BEHALF OF THE APPELLEES

REGESTER, ET AL.

MR. RICHARDS: May it please the Court, Mr. Chief Justice:

Let me open with a brief preliminary. We are dividing our 45 minutes between three counsel. I will attempt to open to discuss what we consider to be the

underlying irrationality of the state plan and the dilution of the Negro vote in Dallas County. Mr. Idar will follow, discussing the underlying distinctions, we think, on this record between Whitcomb v. Chavis and the impact of the at large scheme on the Mexican-American minority of Bexar County.

Mr. Gee, on behalf of the state Republican Party, will follow to discuss everything we forget, including jurisdiction, and I think the inordinate costs of election campaigns in the counties which we are discussing.

As a preliminary matter, the order below--well, first, there was a complicated four-part--four lawsuits consolidated with various contentions. I guess the order below is of two parts. There is a declaratory judgment which does speak to the statewide apportionment plan. But that was not effectuated by injunction but rather was left to be operative only in July of this year in the event the legislature did not address themselves to it. There was injunctive relief. It was nil. It affected only two counties in the State of Texas. Those counties are Dallas and Bexar. Their single-member district plans were implemented by the court unanimously. Judge Wood, who did dissent from the other portions of the court's opinion below, agreed that this was so egregious in Dallas and Bexar County that implementation of immediate single-member

districts was in order. So, we think the jurisdictional issue is in the case, and Mr. Gee will address himself to it.

The root problem that confronted the Texas legislature when it--or, rather, the redistricting board--when it began to consider the reapportionment of the Texas legislature was what to do with the urban counties. The testimony is clear that this was, in the words of one witness, "a raging controversy across the state of Texas."

Hearings were held by the legislative redistricting board on two occasions concerning what was to be done. All of the witnesses who appeared were concerned only with this single issue. The urban counties of Dallas, Bexar, and Harris--were they to be divided into individual districts or something less than at-large, or were they to be left at-large?

The board in what remains an utterly unarticulated decision decided to divide Harris County into 23 individual member districts and to leave Dallas and Bexar County running at-large. Dallas has become what we all, I think, recognize to be the largest legislative district in the nation's history: 18 legislators elected at-large from a county of 1,400,000 people. No requirement of geographic distribution; they could all come from one city block in the city of Dallas.

The peculiarity here, granted there was a history

of at-large representation in the urban cities of Texas--it was true of all the cities of Texas--until 1965, when the Texas legislature did for the first time apportion Harris County, Houston, into something less than county-wide districts. At that time in Kilgarlin v. Martin, the State of Texas explained to the federal courts that a policy existed, and that policy was that any time that a county became one million in size or more than 15 legislators, it became simply unworkable to run at-large and that in the future, then, any time a county became that size, that county itself would be apportioned down into something less than at-large representation.

When Dallas County hit a million four this year, larger than Harris was in '65, that policy went by the boards without even a whisper on the part of the board members of this legislative redistricting board, three of whom had been defendants in the Kilgarlin case, who presumably had sponsored that explanation at that time for the apportionment of Harris County.

At no time--although now in their reply brief--the appellants say that that never really was a policy. They certainly never told the court that. The court's opinion said it was a policy. And when the appeal papers were filed here, there is no any indication of any disclaimer of that policy when Kilgarlin v. Martin was considered here as

Kilgarlin v. Hill.

The only reason it appears ever for this rather curious treatment of the two counties was in the jurisdictional statement filed by the appellants, and they suggested there that the reason they left Dallas County at-large was that the dominant Democratic organization in Dallas County preferred to take a winner-take-all election. They had not sponsored that as their reason in their subsequent briefs.

We talked about the board procedures in our briefs, and we did deal with it, not because we want to go behind the board or not because we want to indict what they did because they did it in a sloppy manner, but because it points to no rational state policy that underlies this very crucial decision in terms of how people are going to be elected in a county the size of Dallas. Five hundred thousand registered voters in that county to which any person who seeks to be elected to the legislature must somewhow communicate.

The last general primary election ballot in Dallas had 68 races on it, three plus congressional seats, three plus state senate seats, and a submerged 15-member legislative delegation. The results of this rather whimsical, if you will, if not venal decision with respect to Dallas, of course, is to isolate the black minority of that city which has suffered a traditional isolation that

this record speaks to quite strongly into simply an intolerable bind. There is no relief. Texas remains a one-party state. This is not a situation such as Indiana in which conceivably the explanation for the under representation of the ghetto was winning and losing elections in November. What happens in Texas is you win or lose in the Democratic primary; the Democratic primary is a majority place system. That means in order to obtain the nomination you must, if you are a black candidate, ultimate be pitted vis-a-vis a white candidate in a county in which racial segregation, discrimination, has still been the order of the day. Granted it diminishes, but as this record establishes, it diminishes rather slowly.

And what this record further shows is that the dominant political organization of that county, the DCRG, when circumstances require and their candidates are threatened by a black candidate or by a candidate that has the support of the Negro minority, they simply trot out the old game of race in order to win. In 1970 two candidates made it into the runoff, Democratic primary runoff, against the DCRG candidates, the DCRG being a private sort of modern day jay bird association, as far as we are concerned.

In that runoff, the DCRG mailed to some white voters of Dallas County literature saying, "Block voting tactics will take place in the South Dallas"--the Negro

area of Dallas--"if you don't get out to the polls and vote." And it said, "The philosophy of these candidates is best described by the enclosed."

One of the candidates was white. In the previous year he had sent out a mailing for a biracial voter registration activity. It was this philosophy which the DCRG, which runs Dallas County politics, concluded was the most effective way to appeal to the voters of Dallas County, and it was quite effective.

The other tool they used, they simply used a picture of a black candidate contrasted with his white opponent. It was quite effective, as I say; in the black precincts of Dallas these candidates got, white and black, got 90 percent and 87 percent of the vote. They were obliterated in the white precincts and were defeated very sizably.

That is the reality, the political reality this record establishes, as we see it, for the black minority of Dallas County. It is fostered, as we see it, by other factors. The massive size of the legislative district is such there is simply no way that a candidate can address himself to that electorate without enormous financing. The record ranges estimates to run a state legislative race from anywhere from $60,000 to $125,000. This means that only if a candidate has that kind of financing could he ever even expect to receive individualized consideration in the

race as a legislative candidate.

The effect of it has been to really prevent the emergence of a two-party system in Texas. The record, although it may be a little shocking, but that is what the record is--but the Republican Party in Dallas has been unable and unwilling to mount serious legislative races in November simply because the financing is beyond their means. And so what we have is again a one-party system, determinations being made in the Democratic primary, and a majority place system in a primary that continues to be dominated by a white oligarchy that has not permitted black participation.

Q Let us assume for the moment that the validity of the entire state plan is here, assuming they have jurisdiction of the issue; the district court upset the entire plan, based on three things. One, variation--

MR. RICHARDS: Just straight deviation.

Q Did that variation on the numbers reach Harris, Dallas, and Bexar Counties? What if the multi-member district issue had not been here?

MR. RICHARDS: The deviation of the two major districts, Harris and Bexar, was not central to the court's decision on deviation, if I make myself clear. The way the deviation was calculated in those two counties was simply dividing the number of legislators--

Q Some parts of the plan were invalidated solely on deviation--

MR. RICHARDS: Some parts were but not those parts dealing with the multi-member, single-member district issue. Some parts of the plan, I do not think it is purely deviational. I think, if I read the court's opinion correctly, what we have is the state sponsoring an explanation, a county line explanation as being the justification for deviation. But once you go behind that explanation and look to plan, you think it just does not make sense.

Q I understand. But on the multi-member district rationale, that was because Harris was divided and the other metropolitan areas were not?

MR. RICHARDS: Yes, in part. There are two strings to that, I suppose, the irrationality. Why cut Harris and leave Dallas and Bexar at-large for no apparent reason? Two, the effect of having those two at-large was to minimize, dilute, or oppress the minority vote in those two--

Q But there are other metropolitan areas that had multi-member districts?

MR. RICHARDS: There were and--

Q And they did not touch those.

MR. RICHARDS: And that, I suppose, is a shortcoming on the part of the plaintiffs. This case was tried--

Q That was because there was not any finding with respect to racial impact.

MR. RICHARDS: There were no findings made with respect to racial impact as regards the other multi-member districts in the state. And the reason was, and it is of record, this case was put together and tried in a compressed period of time and we stated very frankly to the court we were not conceding the legitimacy of the onus, but we simply could not muster the proof in the time frame in which we were operating.

Q Other than the racial item, the district court would have contemplated handling all metropolitan areas the same one way or another, absent the racial--

MR. RICHARDS: They did not do that and they did not--

Q Eventually they would have--

MR. RICHARDS: That may or may not be a fair construction of the opinion. I suppose they clearly would have in the event evidence came forward in terms of racial or ethnic discrimination; but clearly yes, they would have considered it. Whether they would have in absence of such evidence or findings implemented single-member districts, I cannot second-guess them on.

Q Otherwise, they would have left existing what they said was an irrational--

MR. RICHARDS: In all candor, I suppose we would be back to the court saying, "You ought to cut the rest of them off," but I do not want to be dishonest with the Court. But they did not do it and the contentions were not there. And how they would react, if and when we were back in court making that contention, I cannot tell you.

But there is--at least let me say--that there is a difference in my mind between a multi-member district that lets a county of 150,000 electing two legislators and a multi-member district of a million four electing 18, simply in the capacity to isolate the minority. Inertia alone is a force, it seems to me, when it becomes that size.

Q Would you refresh my recollection, Mr. Richards, as to how many representatives Harris had?

MR. RICHARDS: Twenty-three.

Q Harris had 23. Bexar had how many?

MR. RICHARDS: Eleven. Dallas, 18.

Q Dallas, 18.

MR. RICHARDS: And one of the ironies, I guess, in the plan was that in Bexar County, one of those counties left at-large and presumably all operating pursuant to a state policy of preserving county lines, the board for some reason cut a piece out of Bexar County, attached it to a rural district, for no reason that this record will explain. It worsened the deviation, as a matter of fact, that would

have resulted had it been left intact. And I suppose it was whimsical things of this nature which caused the-- or capriciousness, I suppose, is a better word--caused, I believe, the lower court to find that there was simply no rational purpose underlying this plan, clearly no rational purpose as far as the at-large representation in the urban counties.

Or stated the other way, the at-large representation in the urban counties in no way fostered a state purpose of preserving county lines. Indeed, of the 11 counties in which they were left at-large, eight of them were actually cut. There are county lines and portions of the county removed and allocated to other districts.

Q Something you said prompts me to ask this question, and I will try not to take too much time with it. Suppose in a large county like Harris it was demonstrable that there was no racial problem at all but that Republicans were concentrated in certain areas and Democrats in the larger areas, and that the Democrats in an at-large situation could dominate it indefinitely, electing all of their party members. Do you think that gives rise to a constitutional problem?

MR. RICHARDS: The court below did not think so. It refused to find so--

Q Has this Court ever indicated that there is

a constitutional issue in that kind of situation?

MR. RICHARDS: Well, there is dicta or at least certain opinions of this Court suggesting that if the plan diluted, as I recall, racial or political minorities, that it might be invalidated under the Equal Protection Clause. You have not so held, as I understand it.

Q No, but it has not been held.

MR. RICHARDS: That is my impression.

Q Suppose the Catholics, for example, were concentrated in one area and non-Catholics of all kinds in another. Would you say that gives rise to a constitutional problem?

MR. RICHARDS: If there were historical exclusions of the Catholics from the franchise and from every aspect of life in that community, I would suspect so.

Q No, I am not assuming any of that.

MR. RICHARDS: We are not here arguing--I do not mean to suggest that we are--that only blacks can represent blacks or only Catholics can represent Catholics or that there is an entitlement to a representation sort of vertical of someone of my like kind. We are simply arguing that this system on this record establishes the kind of dilution that this Court said it would invalidate when it saw it.

Q On this religious hypothesis that I gave you--

MR. RICHARDS: Conceivably it could rise to the

dignity of a constitutional question.

Q I assume it is a reality that people who are Catholics tend to want to live in areas where there are Catholic churches or if there are none, to build them. And so it is not surprising if they happen to be concentrated, is it?

MR. RICHARDS: I would think such concentrations certainly do exist. I think that is clear.

Q But you see no constitutional--

MR. RICHARDS: I am not saying I see none. I simply see that I do not have to carry that burden, I think, in this case.

Q I am just trying to see how far this problem of dealing with abstract minorities is carried.

MR. RICHARDS: We feel that we are dealing with a precise minority that comes in a context that we think demonstrates how it can be submerged.

Q The Court has used the term "identifiable minorities."

MR. RICHARDS: And Texas identified that minority by statute, by its practices and policies for a number of years, and it is just finally beginning to cease identifying them. Now, having identified a minority, I suppose they are stuck with it, we would argue.

Q In Dallas County has there been any racial

discrimination in voting of any kind in Dallas County since April 14, 1944?

MR. RICHARDS: If you mean, Your Honor--the record would show that in 1956 there is testimony that black voters presented themselves at the polls in a Democratic primary in Dallas and were told they could not vote there. I would not suggest to you, however, that that has been the case. I think the case has been the poll tax; the case has been the substitution for the poll tax the annual registration system. I think the record will show other factors which in fact did deter black voting, and I think the poll tax being the clearest one of that case.

But physical intimidation, we did not argue--did not argue that physical intimidation or blockage was--

Q Have they not been voting since April 14, 1944?

MR. RICHARDS: Mr. Justice Marshall, I am simply not informed. I am uninformed, I am sorry to say. I have participated in Dallas politics for a number of years--

Q I am just trying to get this statement you said in an atmosphere where there had been racial discrimination in voting. And you put Dallas in that category.

MR. RICHARDS: I am sorry. If I fit it in that way, I guess I meant--in voting, I do not know. I meant racial discrimination. Blacks in Dallas were segregated by

law well into the decade of the fifties and by practice into the sixties.

Q If I remember correctly, the Dallas segregation ordinance was thrown out in the 1940's.

MR. RICHARDS: I participated in a stand-in in Dallas in the mid-1960's.

Q Against an ordinance?

MR. RICHARDS: No, against a policy.

Q Oh, a policy.

MR. RICHARDS: But we still had segregation in the Dallas County Jail as recently as three or four years ago. The record will show there were still black and white drinking fountains in the county courthouse up until four years ago.

Q If we are going to apply this rule in every state that has segregated jails--

MR. RICHARDS: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Idar.

ORAL ARGUMENT OF ED IDAR, JR., ESQ.,

ON BEHALF OF THE MEXICAN-

AMERICAN APPELLEES BERNAL

ET AL.

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

Pursuing the matter that has just been raised, I

think that for our part we would like to stress that we conceive of the right to vote as going far beyond merely casting a ballot, marking it and casting. And this Court has so held. And our position here primarily as to Bexar County is that because of certain statutes in Texas, our minority in Bexar County has been totally submerged.

I would like to point out that the lower court found that race is still an important issue in Bexar County and that because of it, Mexican-Americans are frozen into permanent political minorities destined for constant defeat at the hands of the controlling political majority.

I will emphasize that this is a finding made by three judges who have spent their entire life in Texas, one of them being Judge Wood from San Antonio. I would like to stress on the multi-member district issue that as far as the legislative redistricting board, when it initiated its work on the House redistricting plan, it expressly had before it certain cautionary language on the part of the Texas Supreme Court in the case of Mauzy v. Legislative Redistricting Board, which is the one that mandamused the board to redistrict the House.

The Texas Supreme Court, who presumably is familiar with the demography of our state, of our municipalities, our metropolitan areas, of the distribution and concentration of the minority groups, expressly stated as follows: "In

exercising its discretion as to whether to create multi-member districts within a single county, we must assume that the board will give careful consideration to the question of whether or not the creation of any particular multi-member district would result in discrimination by minimizing the voting strength of any political or racial elements of the voting population."

I would like to point out to this Court that it is on the record that from 1880 to 1970 there was only five Mexican-Americans who had been elected to the Texas House, one of them in 1890, four of them since 1961.

I would further stress that between 1960 and 1970, and this is part of the record and it is uncontroverted, out of 133 races in the Democratic Party primaries, only 22 were entered by Mexican-Americans. And, of course, as I have already stated, only four were actually elected during that period.

From the particular area where the Mexican-American is concentrated in San Antonio, which is on the record as the 23th contiguous census tract area, only four candidates ran from that area between 1960 and 1970, two Mexican-Americans, one Negro, one Anglo-American.

I cannot overstress what Mr. Richards touched upon, and that is the size of the multi-member districts that we are dealing with. Bexar County, 830,460 population--the city

of San Antonio is 654,000--is larger than 17 of the 132 countries in the United Nations. It is larger than the combined population of four of those countries. It is larger than 11 states that elect 22 United States senators. It has a land area larger than the state of Rhode Island, 1,246 square miles. It is larger both in land area and population than the District of Columbia. Four senators are elected from states that have a total population less than Bexar County.

Q You will touch upon the suggestion made by your opposition that one of the reasons is that the Mexican-Americans do not turn out to vote.

MR. IDAR: We do not vote. I think we have to--that is where the racial history of our state comes into play, Your Honor, and I would like to stress something. Since 1966 through 1972, we have had six federal court decisions dealing with the electoral system in Texas, five of those between 1970 and 1972. The poll tax was set aside in 1966. The excessive file and fee requirement in 1970. The six months residency requirement in 1972.

Over in Crystal City, a small town in South Texas, a local city charter provision requiring property ownership for election to city office was set aside by a single judge district court.

In the case of Garza v. Smith in 1971, certain

provisions in the Texas Electoral Code denying the right to illiterate voters to have an election officer help them mark the ballot was set aside on the grounds that that same right was not denied to blind or physically disabled voters.

When I touch upon illiteracy in that case, I must point out that persons that may be illiterate in English are not necessarily illiterate persons, because they do speak and read Spanish and they do follow Spanish radio and television, and they do have the means at hand to form political judgments.

We have had in addition to that, since 1971, three decisions having to do with jury service, the denial of opportunity to serve on juries, and we have had six decisions since 1970 dealing with education. One of them is now before this Court, which is the one involving the Rodriguez case in the Edgewood School District in San Antonio on school finance.

So, in reply to that question, Why do we not vote?, we need to assess the situation of the Mexican-American as he has developed in the history of this country, as late as 1972. We cannot wipe all of these hindrances and then overnight expect the injured group to be able to compete on an equal footing with those people who have never been hindreed. And when you throw them into the type of multi-member district county that we have where they have to

compete in an area of over a thousand square miles, where they have to appeal to an electorate that is close to a million voters, where they have to raise the finance--and I am not minimizing the fact that the record in our brief makes some profuse references to the economic, educational, and any number of other factors that have been adverse to the Mexican-American population. We cannot equate numbers simply with the denial of a right.

I think a minority constitutionally is not defined purely on the basis of numbers. So, our position is that because of these hindrances--true we do not vote to the extent that other people have done so. Incidentally, I forgot to mention that another part of the record is that the Anglo-American population in Bexar County will vote on a ratio of six to one to nine to one against Mexican-American candidates.

I might further point out that as a result of the single-member districts that were imposed on the county, were ordered for the county by the trial court, at the time the case was tried, out of ten representatives from Bexar County to the state legislature, nine were Anglo-American, none was black or Negro, none were Republican, and only one was of mixed Mexican, Anglo-American parentage.

Today, as a result of last year's elections, there are four Mexican-Americans, one Negro, and two Republicans.

In Dallas County today we have three--

Q How many Democrats?

MR. IDAR: The Mexican-Americans and the black or Negro are Democrats.

Q Out of how many--

MR. IDAR: Out of 11. That would make eight Democrats--I am sorry, ten Democrats, because only two Republicans were elected.

Q But there were four Mexican-Americans?

MR. IDAR: One black or Negro and two Republicans.

Q So, five out of the 11 were Mexican-American or Negro?

MR. IDAR: Yes.

Q Is that what you would expect--

MR. IDAR: Not necessarily, because we recognize that a single-member district is no millenium, it is no panacea.

Q I suppose that you probably have a majority, an actual head-count majority in the district.

MR. IDAR: In the suburbs, yes, Your Honor.

Q Again, you are failing to register to vote.

MR. IDAR: In the ones where no Mexican-Americans were elected, I do not know about any Mexican-Americans running in any of those suburb races. I do not believe so, Your Honor. I think they were mostly concentrated in those districts where

they felt they had an opportunity, whether or not they had a substantial majority of the vote.

But our argument here is not that we feel entitled to representation as such. Our argument is that we are entitled to participate, to an opportunity to compete, not to be counted out by the cost of running an election, the cost of campaigning, the area in which we would have to campaign, by the attitude of the other people in the organization.

I must stress the fact that as far as the Mexican-American is concerned, there is no need to circulate campaign literature showing what he looks like, because his name his name makes it pretty self-evident on the ballot. And if you do not want to vote for a Mexican-American, all you have to do is look at the name on the ballot. You do not have to resort to overt measures or racial methods, say, for hitting back at your opponent.

I would like to make reference to one stipulation that was referred to this Court, and that is a stipulation is on the record that nobody has been denied the right to register and vote. I have already stated that we feel the right to vote goes far beyond just the right to register and vote. But I would like to say the stipulation relates only to the named plaintiffs in the lawsuit. We are not hinging our case on denial of the right to register and vote. We are hinging it on the fact that we have been submerged

totally in this tremendous multi-member district. I want to stress the distinction between this district and Virginia and the Mahan case. Fairfax County, 455,000 population being represented, and the legislature there has stated in its opinion it expressly went out of its way not to fragment the county but to simply divide it so as not to wind up with too large a multi-member district. They wound up with two five-member districts.

In contrast to that, we have Bexar County with 830,000 population--that is almost twice the size of Fairfax County. And with that I would like to thank the Court and allow Mr. Gee.

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

Mr. Gee.

ORAL ARGUMENT OF THOMAS GIBBS GEE, ESQ.,

ON BEHALF OF THE REPUBLICAN APPELLEES

WILLEFORD, ET AL.

Q The argument seems to be made, as I recall it, that a minority, any kind of minority, is entitled to have the area structured so that it can get the maximum amount of representation without respect to whether they do or do not register to vote. Did I follow that?

[Continued on page following.]

MR. GEE: Perish the thought, Mr. Chief Justice. That is not our position. Our position is that any minority, except perhaps a political one, such as I represent, is entitled not to have the area structured so that they do not have a fair opportunity to participate. We claim no right to any special preference.

May it please the Court, I would like to respond very briefly to a question which was asked by Mr. Justice Stewart of Col. Jaworski. As regards the state policy, the trial court noted at page 21-A of the Appendix, the jurisdictional statement; in their trial brief the state asserted--this is the trial brief, may it please Your Honor, in the Kilgarlin case--in their trial brief the state asserted that the explanation for the differing treatment of Dallas and Harris Counties was that whenever a county attained a million residents or was allocated 15 legislators and so forth.

I would like to respond to one other suggestion made by Col. Jaworski, and that is that Dallas was multi-membered because of the desires of the citizens there. This record makes it amply clear that the desires of the citizens there, taken by a professional and disinterested poll, which testimony was before the redistricting board, were two or three to one in favor of single-member districts, and that in fact the desires of the people in Dallas were

not at all for the multi-membered plan. The Court will find that in the record in the testimony of Mr. Robertson at page 964 of the record.

It falls me to me, may it please the Court, to attempt to handle in a very short time quite a few things, and I am going to attempt to move along rather quickly.

Q What about jurisdiction?

MR. GEE: I intend to say a word on that and I--

Q Jurisdiction comes rather early in a case, you would think.

MR. GEE: Customarily, Mr. Justice White, it does. I will attempt to deal with that right now then.

In the past this Court has--which certainly is the expert on its own jurisdiction in these matters--has held that the three-judge court, as in Moody v. Flowers or in the New Left case, must be properly constituted by a pleading asking for an injunction having statewide impact.

Q Do you the challenge the legitimacy of the three-judge court in this case?

MR. GEE: No, not at all. Not at all.

Q I would not think so. I would not think you would. So, there is a properly constituted three-judge court?

MR. GEE: There is no doubt of that, Your Honor.

Q So, the only question is whether there was an

injunction entered of the kind that would invoke the jurisdiction of this Court.

MR. GEE: Mr. Justice White, in the gun case--in the gun case this Court held that where an injunction was not entered, even though the three-judge court was properly constituted, that this Court did not have jurisdiction.

It is only a step from that to a holding that the Court's jurisdiction is inappropriate in this case where an injunction which is now--which applies to only two counties in Texas, for example.

Q You do not have any authority for that?

MR. GEE: No, sir, we have no authority whatsoever, but I suggest that by a melding of what the Court has held in the Moody and in New Left, with its decision in--

Q But the statute just says an injunction.

MR. GEE: I am aware of that, Your Honor. However, I would like to point this out to the Court--

Q That was the only jurisdictional question there is, then?

MR. GEE: Yes, Your Honor.

Q Let us assume that we disagreed with you and said that there was a jurisdiction--of what?

MR. GEE: Of the injunction, which applies to Dallas County and Bexar County, Mr. Justice White--

Q And you would say that even if we have

jurisdiction, it would not extend to reviewing the judgment of the court with respect to the variations?

MR. GEE: I would not wish to say that the Court's pendent jurisdiction would not extend to that.

I will say this, however, if the Court intends to hold that the procedural device of alleging a claim for statewide relief and perhaps contending only narrow injunctive relief, a complainant can place jurisdiction in this Court whether it will or no, then the Court's jurisdiction is likely to be widely extended.

I would suggest that if the relief sought here had been only in Dallas and Bexar Counties and the relief sought had been granted, then we would have precisely the same case as regards the practicalities of the matter at this point. It is not the seeking of relief having statewide impact which calls for immediate review by this Court. It is the granting of it and the disruption of the state's processes which is incident thereto, it seems to me.

I would like to say a word about Dallas County. Time is very short. Quite a bit has been said about it. The Court has long been troubled, it seems to me, by the tendency to submerge minorities which is inherent in the size of multi-member districts. Connor v. Johnson notes that the single-member district is the preferable model, and in Whitcomb v. Chavis the same note is made, and even earlier

in the Lucas case way back in 1964. The Court realizes that the larger the district gets, the more invidious its effects are. Here we deal with the largest districts known to exist in the entire country, and if Dallas is number one, if it please the Court, Bexar is number two.

At the time of the trial--and heaven knows what it is now--Dallas had 1,327,000 people in it and 500,000 registered voters. Dallas was larger in population than 15 states. Thirty United States senators are elected from constituencies which are smaller than that to which a man who wants to sit in the Texas House of Representatives from Dallas, Texas has to run to. I submit that this situation is intolerable. It might have been otherwise. This is not the case of the great wide open spaces of west Texas where you have to take in a great deal of land in order to get an ideal district.

This is something which could have been and should have been otherwise, and would have been but for the board and its plan.

Bexar County is described by Col. Jaworski as much smaller. It is smaller. It is not quite a million people. It is larger than Rhode Island, 830,460 people. This is still a bracket which is fair sized, I submit. But if this district, may it please the Court, passes its First and Fourteenth Amendment muster, then any will, any in the

country. And the Court's concern with multi-member districts, with the size of districts, is over until Dallas reaches two million or three million or whatever within a short period of time.

In such a district as this, may it please the Court, the record shows that although the state law forbids it, the voters had to take cheat sheets with them to the polls even to remember who it was that they wanted to vote for. It shows that you cannot get the number of candidates who are on the ballot on the standard voting machine. There is not enough room. It shows that even the chairman of the DCRG, the dominant political sub-party in Dallas, when he was asked before a legislative committee to name the 15 Democratic legislators from Dallas County, was able to name only five. And that appears in the record as well.

Q Supposing Dallas County were 100 percent white or 100 percent Negro, so you did not have any racial question, would you say there is a constitutional claim simply on the basis of the fact that it is created as a multi-member district?

MR. GEE: Mr. Justice Rehnquist, I would. I would because Houston, which is only 200 miles down the pike, has got--if I want to run for the legislature in Houston, I can run to 75,000 people.

Q Would it be an Equal Protection claim?

MR. GEE: Yes, yes.

Q Supposing Harris and Bexar and Dallas are all multi-district type of places so there is no Equal Protection Claim, would you still claim there is any constitutional deprivation?

MR. GEE: I think it would be very bad policy to have districts that size, Mr. Justice Rehnquist, but it seems to me that it is the disparate treatment, the selection of different systems of representative government in Texas, which raises the Equal Protection question.

Q In your view, how many people should be in a district or the state legislature under the Constitution? Under the Federal Constitution, how many people should there be in a district?

MR. GEE: That is very clear, sir, it is between--

Q I am not talking about the federal; I am talking about the state legislature.

MR. GEE: Between 74,000 and 75,000 people, Mr. Chief Justice. That is all we can do. Does the Chief Justice refer to a multi-member district?

Q I am just talking about districts. Take your choice.

MR. GEE: Mr. Chief Justice, I do not know what it would be. But I am satisfied that it ought to be less than a million and a half. It seems to me that this is out

of all reason. It seems to me that under the opinion written by the Chief Justice in Bullock v. Carter we have an arrayment of the affluent against the poor under such a system. This record shows that you cannot run effectively in a district the size of Dallas without going to television and radio, and that in Houston you can. You can campaign on posters and shoe leather.

Q I thought, Mr. Gee, going back to my Brother Rehnquist's question, that you were making the argument that in a district as big as Dallas, quite apart from how the state treats Houston and quite apart from any racial discrimination, that you were making the basic argument that in a district as big as Dallas it violates the Constitution to have multi-member districts. Are you not making that argument?

MR. GEE: Mr. Justice Stewart, I certainly am.

Q You did not answer that way to Justice Rehnquist.

MR. GEE: If I answered the question that I was not, I beg Justice Rehnquist's pardon.

Q Would you mind telling me what section of the Constitution you are talking about?

Q Equal Protection Clause.

MR. GEE: Yes, sir.

Q Is that what you are talking about?

MR. GEE: Yes, sir, I am, sir.

Q In spite of Whitcomb v. Chavis?

MR. GEE: In spite of Whitcomb v. Chavis and because of Bullock v. Carter, Mr. Justice White.

I would like to say one last word on the subject of Mahan v. Howell, which has just been handed down and which I think no argument on this subject ought to disregard. In Virginia, a 16 percent variation was upheld by this Court because Virginia had decided to let its legislature pass local legislation, as I understand the Court's opinion.

I would like to point out that under the Texas constitution, the legislature not only is not authorized to pass local legislation; under the Texas constitution the legislature is specifically forbidden to pass local legislation. Article III, Section 56, of the Texas constitution states: "The legislature shall not, except as otherwise provided in this constitution, pass any local or special law authorizing regulating the affairs of counties, cities, towns, wards, or school districts, locating or changing county seats, incorporating cities, towns, and so forth, creating offices or prescribing the powers and duties of officers"--

Q Does the Texas legislature ever pass laws dealing with all cities having populations over a million

or over a 1,500,000?

MR. GEE: Yes, sir.

Q Are they sustained by the courts?

MR. GEE: They are in some instances, Mr. Justice Rehnquist. We call this bracket legislation and this is the means whereby the legislature attempts to get around this provision. Sometimes they are, if the brackets are broad enough. Legislation with closed brackets which says cities of so and so population is generally not sustained.

It seems to me that this is a valid distinction between Mahan v. Howell. If county legislation is done by the Texas legislature, it is certainly done in the dark of the moon, and it is frequently invalidated by the Texas Supreme Court.

Further, Texas unlike Virginia, as is indicated by the Court's opinion, has not consistently followed a state policy respecting county lines. In Smith v. Craddick, the Texas Supreme Court felt constrained to invalidate a legislative plan enacted by the Texas legislature for its disregard of county lines; and it has not, may it please the Court, done so in this case where 19 counties are cut. I am confused by the recurring statement only one county is divided. The record is clear that 19 counties--

Q Out of how many?

MR. GEE: Out of 254, Mr. Justice Rehnquist, 19

counties have been cut and four of them have been exploded--cut into three pieces, in defiance of the Texas Supreme Court's mandate in Smith v. Craddick.

Q How many counties in Texas?

MR. GEE: 254, I believe.

Q The statement is that only one small county has been invaded and that threw me off too. It means that only one of the 19 counties that was invaded was a small one?

MR. GEE: I think that is what it must be, or it is sometimes described in the brief as a rural one, Mr. Justice Stewart.

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

Mr. Jaworski, you have some time left.

REBUTTAL ARGUMENT OF LEON JAWORSKI, ESQ.,

ON BEHALF OF THE APPELLANTS

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

On the jurisdictional question, I think that perhaps the questions that have been asked by members of the Court have brought out the basis on which we argue the matter of jurisdiction, and I would merely say to the Court that we have cited in our brief the cases that are applicable. We also have undertaken to show to the Court that the cases on which the appellees rely are not applicable.

Actually what has been done here has a statewide

impact.

Q Did the state take an appeal to the court of appeals, effect an appeal?

MR. JAWORSKI: No, sir. No, sir.

What happened was that a part of the appeal, you may recall, this Court entered a judgment and the appeal that came up from Harris County, you may remember, the Court entered a judgment dismissing that part of it, not for lack of jurisdiction but for other reasons.

In any event, this has been fully briefed. I do not think that I need to take the time of the Court. Actually I did not see, because of the rule first that this actually had statewide impact; but, secondly also, the pendent jurisdiction rule I had not taken the time to really argue that to the Court in the original argument.

Passing on to something else, Mr. Justice Stewart did ask me about the history with respect to Harris County, and it was that history, with respect to Houston, Harris County, that I undertook to say I was not fully familiar with. The history as to Dallas County has been one consistently of multi-member districts. But as far as Harris County is concerned, I answer that there were floterial districts in 1965; there were three multi-member districts in 1966; five multi-member districts in 1971. This is the history as the record shows it to be. I merely point that

out because Harris County did have some history of some multi-member districts. But it also has a history that really shows, boy, that there has been a division.

And when we speak of polls, for instance, in Dallas County in connection with the matter of polls, I think we get into some difficulty, because the polls, as we know, if they are going to be polls, relate to how well a candidate is running; they may have some accuracy. But I was not referring to polls. I was referring to what had actually been requested of the representatives of the people. And the record shows this. The legislators had made known the wishes with respect to what they wanted in Harris County and also what the situation was as desired in the other counties.

With respect to the matter of policy, actually I do not know where the idea got into the record that there had been any state policy with respect to the matter, Mr. Justice Stewart, that was raised by a question you referred to where the 15 district matter arose.

What actually happened was that the limitation was never offered in the state policy. At one time, the House Committee on Congressional and Legislative Districts had felt that multi-member districts should be somewhat limited in size because of the voting machine problem. These changes in the voting machines and the difficulty of getting them and

the difficulty of their cost and placing so many of them did raise a question. But this was largely done to accommodate the new change that had been made in the voting machines.

The limitation was never offered as a state policy, as this record will show, and there is no indication, as I read the Kilgarlin case, that the Court was assured that the limitation would be continued in future apportionment plans. This is just simply something that we find unable to follow completely.

Then when we speak of single-member and multi-member districts, or single-member districts throughout the state, there is an interesting Texas Supreme Court case which we have referred to in our brief. It is the Mauzy case, as we often refer to it, and there the Texas Supreme Court refused to grant the relator's request that the board be ordered to use single-member districts throughout the state. And you will also find under Smith v. Craddick case, decided by the Supreme Court of Texas, that there is absolutely nothing found in there. This is the Texas Supreme Court talking about multi-member districts itself. If they found that in any part of the state there was an unfairness with respect to the matter of multi-member districts, I think they would have said so, and consistently there has been nothing along that line intimated.

On Bexar County, I just want to again say this, may it please the Court, that what the court said in effect, the trial court, is, "We are condemning it, not because it operated to dilute or cancel the votes cast by the Mexican-Americans," which I think is the test which would apply here. What the court said in effect is, "We believe that this way"--and the hypothesis and the reasoning that the court applied--"we believe this will encourage more Mexican-Americans to vote." Well, of course, this we cannot accept as the test of the criterion in determining the constitutional issues that are before the Court here.

Q Mr. Jaworski, I still have a problem between Dallas and Harris County as to why one is single and one is multi. I still have trouble with that.

MR. JAWORSKI: I can just say this to you. If I saw anything in the record at all, anything that showed that it was done as a result of doing more than just seeking to comply with what the legislators have said they thought was appropriate in those districts, then I would have some trouble with it too. But I find nothing.

Q They could have just as easily told Dallas single-member districts, just as easily, could they not?

MR. JAWORSKI: They could have, yes, sir. I mean, except unless you get in some minutia, some very great refinements which, very frankly, I would not even suggest,

although you do have a difference in size, you do have some difference. You would find it perhaps more acceptable in Houston than you would in Dallas County. There is a considerable difference in the size of the two. There is considerable difference in the way the two metropolitan areas actually lie. One is much more compact than the other one. But I just have to frankly say that if there were anything here that suggested that it had been done for the purpose of diluting or canceling strength of any group, I would immediately say that there was a serious question with respect to it, but you just will not find that in the record. And this is why I say that there is nothing, absent something that casts doubt upon it or that shows that it was done for some ulterior purpose or that there is some lack of good faith involved, I say that there is nothing to keep a state from having both multi-member and single-member districts in some of its localities.

I thank the Court.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Jaworski. Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:26 p.m. the case was submitted.]

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