In the

Supreme Court of the United States

DANIEL CHAPMAN and
JACQUE STOCKMAN,

APPELLANTS,

V.

BEN MEIER, Secretary of State
for the State of North Dakota,

APPELLEE.

No. 73-1406

Washington, D. C.
November 13, 1974

Pages 1 thru 35

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IN THE SUPREME COURT OF THE UNITED STATES

DANIEL CHAPMAN and JACQUE STOCKMAN, Appellants,	:	
v.	:	No. 73-1406
BEN MEIER, Secretary of State for the State of North Dakota, Appellee.	:	

Washington, D. C.,

Wednesday, November 13, 1974.

The above-entitled matter came on for argument at 10:03 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOHN D. KELLY, ESQ., 609-1/2 First Avenue North, Post Office Box 1389, Fargo, North Dakota 58102; on behalf of the Appellants.

PAUL M. SAND, ESQ., First Assistant Attorney General of North Dakota, State Capitol, Bismarck, North Dakota 58501; on behalf of the Appellee.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in No. 73-1406, Chapman and others against Meier.

Mr. Kelly, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOHN D. KELLY, ESQ.,

ON BEHALF OF THE APPELLANTS

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

This is an appeal from a judgment from the United States District Court for the District of North Dakota, which established a permanent apportionment plan, that is permit, for the 1970's, based on the 1970 decennial census.

The judgment involves a plan that establishes five large multi-member districts, involving both houses of the North Dakota Legislature, and involves a -- in terms of population, variances in excess of 20 percent, an over-all average of, I think, plus and minus five percent, or an average of ten percent variance.

The issues that we present, first of all, involve the issue of whether a court in fashioning a plan, and absent any contrary State policy which would support the establishment of multi-member districts or unusual or unique circumstances, could deny the appellants the equitable remedy of single-member districting.

QUESTION: Now, let me be sure I have one thing clear here, and what differences may derive from it. You're asking us to review not a plan enacted by the Legislature of the State, but to review a plan manadated some five, six, seven years ago by the Federal District Court; is that right?

MR. KELLY: That is correct, Mr. Chief Justice, except that the plan that we are asking for review of today is a plan that was established as a permanent plan by a judgment that was entered in January of 1974.

QUESTION: That was a judgment of a court not of the legislature?

MR. KELLY: That is correct.

This is not a review of a plan that has been adopted by the North Dakota Legislature.

The facts basically are that following the 1970 Census, the Legislative Assembly in North Dakota failed to adopt a plan. We started this lawsuit in Federal Court, asking for reapportionment based on the substantial changes in population within the State of North Dakota, basically a shift from rural to urban areas, under the Equal Protection Clause, and the decisions of this Court; and then we also, in that case, requested, pursuant to Connor v. Johnson, the application of the equitable remedy of single-member districts.

In North Dakota, the tradition was from Statehood until the mid-1960's a tradition based on a constitutional

provision, specifically Section 29, that Senatorial districts were to be represented by one Senator and no more.

QUESTION: Is this all you're complaining about are Senatorial districts? You had a tradition, haven't you, of multi-member House districts at all times?

MR. KELLY: We have had a tradition that has basically been one Senator and two House district members; now the Constitution, until these provisions were voided by decisions of the Federal Court in the mid-1960's, did provide -- had a restriction on establishment of Senate districts, in that you couldn't break up a county, attach part of one county to another county to form a Senate district.

You could take two counties and make on district, but you couldn't break up a county. You could also break up a county as long as no part of the county was attached to a --

QUESTION: All I'm saying is that your concern is on the Senate side, and you've always had, on the House side, multi-member districts.

MR. KELLY: Our concern is on the -- basically on the Senate side. We concede, based on the traditions of North Dakota, that it is not required, we asked originally for single-member districts for both houses; but there is a tradition of one Senator district -- a district --

QUESTION: Wasn't there a constitutional amendment

that was defeated?

MR. KELLY: There was a constitutional amendment that was defeated, which established basically a --

QUESTION: Single districts?

MR. KELLY: Well, no, the basic thrust of the amendment was not to establish single districts, it was to establish a constitutional apportionment commission.

And it was presented to the people of North Dakota as this was going to provide a way of apportioning the State Legislature, taking this power from the State Legislature.

And the Attorney General, who was responsible for -- with the Secretary of State -- for specifying what this constitutional amendment provided, that was the thrust of the amendment.

Now, the amendment also covered the establishment of single-member districts for both houses of the Legislature. But, in so far as the people of North Dakota knew, it was only after the election that they were ever advised that they had just rejected the concept of single-member districting.

QUESTION: Incidentally, this is the so-called Dobson Plan, isn't it?

MR. KELLY: That's correct.

QUESTION: And I gather he was chairman, was he, of a commission appointed by the court?

MR. KELLY: He was one of three members of the

commission that was appointed by the court.

QUESTION: But that's what it is, a court-appointed commission, isn't it?

MR. KELLY: That's correct.

QUESTION: Yes. And was this -- is this that commission's plan, or just Mr. Dobson's plan?

MR. KELLY: It's just Mr. Dobson's plan. There were other plans -- and Mr. Dobson's plan was first adopted by an order of the District Court in June of 1972, as an interim plan, because they had reached their determination that the then existing apportionment plan was invalid under the Equal Protection Clause --

QUESTION: And there was some expression, wasn't there, of perhaps constitutionally the Dobson plan, even as an interim plan, was perhaps constitutionally deficient?

MR. KELLY: Well, there were some reservations. The majority of the court at that time said, Well, we recognize some deficiencies. The substantial population variances, the fact that the plan does not provide for single-member Senate districts; but they were faced with being in a time situation, much like the situation was in, I think, in Virginia, under the Mahan v. Howell case, where they were really faced with -- and this was when it was adopted, as an interim plan, originally.

QUESTION: But now it's been adopted as a permanent

plan.

MR. KELLY: The reconstituted majority of the District Court adopted it as the permanent plan.

QUESTION: What do you mean by a reconstituted court?

MR. KELLY: Well, originally, two members of the three-member court, Judge Bright and Judge Van Sickle, decided that -- adopted it only as an interim plan, saying: After the 1972 elections, the special masters will report on a permanent plan.

They expressed substantial interest in what was called the Ostenson Plan, which was another plan that had been proposed by one of the special masters.

But then, after the elections, there were some delays for the elections, one of which Mr. Justice Douglas referred to.

I might point out that at that election, where the proposed constitutional amendments were rejected by the will of the people, the people also rejected a legislative plan that had been passed by the North Dakota Legislative Assembly, which provided for multi-member districts, much like the Dobson Plan, and that was voted down.

So I don't think that you can look to the election results in North Dakota, the special elections that were conducted in December of 1973, and say this establishes a State policy in favor of multi-member districts or really in opposition. Because the people voted no on both issues.

QUESTION: If we were to reverse the judgment, as you ask us to do, what sort of instructions are you suggesting that we give to the district, or you wouldn't want us to draw a plan here, I take it?

MR. KELLY: We're not asking for that at all, sir, Mr. Justice Rehnquist.

What we are asking for is, on this issue, is a reversal with directions to follow the supervisory directive that this Court gave in, first, in Connor v. Johnson, and has reiterated, that when the court is called upon to fashion a reapportionment plan, in the absence of some contrary State policy or special or unique circumstances, that you should do so on the basis of single-member districts.

QUESTION: But of course that wasn't an inexorable rule on either of those cases.

MR. KELLY: Right.

It is not -- we're not submitting this issue on the basis that it's a constitutional requirement. But it is the general rule.

Now, in the Whitcomb case from Indiana, there is an exception recognized, based on an Indiana constitutional provision that said you're not going to break up counties to establish Senate districts.

And, as I understand the Whitcomb case, there was a recognition that the general rule, which is an equitable

remedy, had to give way in view of this legitimate State policy.

But in North Dakota we don't have any, either a constitutional or a statutory policy that would favor multi-member districts.

The second exception, which I think the Court recognized in the Virginia case, was that unique or unusual circumstances can justify multi-member districts in a court-fashioned plan. And in this case we're not saying that there may be unique circumstances that will require some type of multi-member districts to handle a situation which is really quite the equivalent to that involved in the Virginia case, we've got substantial military personnel at the Grand Forks Air Force Base and at the Minot Air Force Base.

And if, in fact, based on an analysis which the court had called upon the Masters to make, about how to -- a proposal as to how to handle the military personnel. If, in fact, that unique situation would justify an adoption of a plan that would provide for some type of multi-member districting to handle the military personnel at the two bases, then that's fine, we're not arguing with that.

But what we're saying is that, absent a State policy, and absent special or unique circumstances, this Court should enforce the rule that it established, not as a constitutional matter but as a matter of superintending direction over the

District Courts and the inferior courts, to give us what is the equitable remedy of single-member districting.

QUESTION: Well, do you say that the fact that the Legislature adopted a plan that encompassed multi-member districts, even though it was ultimately defeated in a referendum, can't be used by the District Court as any indication of a State policy?

MR. KELLY: I think that the Governor vetoed it, it was passed over his veto, and the people voted it down. And I would think under those circumstances that, since the Legislature is just the representative of the people, that -- and in North Dakota we have the right to refer measures, the people have the right to refer measures that they are not satisfied with that the Legislature passed; that legislation was referred, and it was defeated.

And I think under those circumstances it would be unsound to draw an inference that this somehow represents a support, as far as State policy goes, for multi-member districts. I would think that, quite to the contrary, it shows a reluctance by the people of North Dakota to accept a program in a situation that was not established in the first instance by the people of North Dakota or the politicians.

We never had this kind of districting in North Dakota until the mid-1960's, at which time the court established multi -- large multi-member districts. And in doing so they

said, Well, if there's any problem, the Legislature can handle it.

Well, the Legislature has been handling it and struggling with it for ten years, and they've never been able to resolve it. Because, obviously, the effect of this kind of districting is, is that one party tends to win all the seats. And eight days ago there was somewhat of a changed situation, in terms of the largest multi-member district, five Senators from the one party were -- all lost to the other party.

But it seems to me that in terms of political fairness -- and we're not talking about political fairness basically to the parties but to the people. You're talking about a situation where people are required to select 15 out of 30 candidates. Well, the conscientious voter is really close to being rendered a basket case, if he really is serious about trying to find out what individual qualifications are.

And these, I think, were factors that this Court recognized back in -- as early as '64 in the Colorado Assembly case, where you enumerated defects in multi-member districts but saying you were not prepared to rule that they were unconstitutional, per se.

QUESTION: Which was the largest number of Senators in any one districts in the State?

MR. KELLY: There were five Senators -- the 21st

district consists of -- is set up for five Senators and ten Representatives, so we are electing, in a large election --

QUESTION: That's the method of using the --

MR. KELLY: That's right.

QUESTION: -- the voters had to make, had to have --

MR. KELLY: There were two other --

QUESTION: -- themselves informed on 15 different people.

MR. KELLY: Thirty different people, if they're going to make some kind of a --

QUESTION: They had to be informed on the 15 --

MR. KELLY: Right.

QUESTION: -- they were going to vote for.

MR. KELLY: Right.

In two of the other districts involved, four Senators and eight Representatives; so it's --

QUESTION: Mr. Kelly, this may be an unfair question. What's your guess as to what, if anything, the Legislature will do come the turn of the year? Are they meeting in January?

MR. KELLY: They are meeting in January.

QUESTION: Is there any serious attempt to talk about reapportionment?

MR. KELLY: Mr. Justice Blackmun, the -- this is not a veto-proof Legislature this time, and there is a -- the Execu-

tive Branch and the majority party in the Legislature are on opposite sides of the fence, and when I say that this is a dilemma or struggle that has been going on for ten years, it is not going to be resolved at the next meeting of the Legislative Assembly, for the reasons that it hasn't been resolved since this type of districting was first established back in 1965. Because the Governor vetoes the multi-member legislation, and this time, as distinguished from last time, they had to take it to the vote of the people. They are not going to be able to override his veto this time.

QUESTION: Of course this Legislative Assembly was elected under this plan, and presumably has a vested interest in the status quo.

That's been true since 1965, hasn't it?

MR. KELLY: I think that that's the reason that history has not borne out the observation by the, I think, Judge Vogel in the '65 case, when it established multi-member districting, that if there was a problem the Legislature would take care of it.

Well, the Legislature has a vested, really quite a vested interest in maintaining this type of districting. And we're really faced with a situation where the constitutional provisions that really provide the State Legislature with authority to reapportion have been declared invalid.

QUESTION: Well, what's --

MR. KELLY: So there's also a substantial question as to whether the Legislature really has the authority to reapportion itself.

QUESTION: Well, really, your troubles all stem from the federal courts having gotten into the thing in the first place, don't they?

MR. KELLY: They stem from -- right, from change in the traditions of our State, and imposing this kind of a legislative districting.

Now, the reconstituted majority in this case said that they justified the continuation of the multi-member districting on the basis that it wasn't, as a constitutional matter they weren't required to break up these large districts.

QUESTION: Mr. Kelly, what was the change in the panel from the interim order?

MR. KELLY: Well, Judge Benson originally wanted to just adopt the Dobson Plan permanently, that was back in '72. Judge Bright and Judge Van Sickle said just for the '72 elections.

The decision on January 30, 1974, Judge Benson and Judge Van Sickle made up the majority, and Judge Bright wrote a dissent.

QUESTION: How many of the three judges live in the

State of North Dakota?

MR. KELLY: All three judges --

QUESTION: All three?

MR. KELLY: -- reside in North Dakota; Judge Bright is, of course, on the --

QUESTION: The Circuit --

MR. KELLY: -- Circuit Court of Appeals. But they all reside in North Dakota.

QUESTION: Mr. Kelly, may I return for a minute to the question asked you earlier by Justice Blackmun: Are you complaining about the multi-member districts for members of the House of Representatives as well as the Senate?

MR. KELLY: In so far as -- we're complaining if it means that we're going to have a district, a House district with ten members; but we are willing to concede that in accordance with the traditions of North Dakota, that a district that would be comprised of one Senator and two House members, which is what the original decision of Judge Benson and -- or Judge Bright and Judge Van Sickle was back in 1972, we are willing to accept that because that is not a large multi-member district, and it is historically, in accordance with our traditions, and it would, it seemed to me, not confront the people of North Dakota with the type of problems that they're involved with now in terms of large districts, involving large numbers of people.

QUESTION: So two Representatives would be all right, in your view?

MR. KELLY: That's --

QUESTION: From the same district.

MR. KELLY: That's our position. We had originally asked for single-member districting across the board, but, on reflection, considering the traditions of North Dakota, in terms of single Senator districts, with two-member representation from the House, we felt that that would be more appropriate and that was all that the District Court was prepared to give us and we at that time thought that really meant -- was a fair compliance with this Court's rule in Connor v. Johnson about avoiding large multi-member districts, as a general rule.

QUESTION: Mr. Kelly, do you think there -- apparently you think there is no difference between our reviewing or being asked to review the action of the State Legislature on reapportionment and the action of a District Court on reapportionment, independent of any legislative enactment.

MR. KELLY: This is -- we're talking about the jurisdiction of the Court now to -- I think that this is --

QUESTION: Well, in any respect. I'm asking you what you think the difference is, or whether you think there is no difference.

MR. KELLY: Well, I think that if you were called upon to review a State plan, as adopted by a State legislative body, and that plan has multi-member districting, that in the absence of some showing that this was discriminatory or objectionable on constitutional grounds, that you'd have to say, then, that that is a State policy which we will respect. If it's not attacked on constitutional grounds.

But for -- I think there's a different standard that applies where -- that this Court has recognized and developed, where you are reviewing a court-fashioned plan. And this is a court-fashioned plan.

And this plan -- that, to me, was, as my understanding of the rule that you first set out in Connor v. Johnson about -- as a general rule.

QUESTION: Here the State is defending the plan, isn't it?

MR. KELLY: Well, the Attorney General of the State of North Dakota appears as the attorney for the Secretary of State of North Dakota, because he is the State officer that's charged with enforcing the election laws, and we sought an injunction against him. And they -- I don't know that the Attorney General's office has any more -- provides any more basis for saying this reflects State policy than the Legislature did.

The people ultimately, in North Dakota, decide what

policy is, and --

QUESTION: But in Mahan, for example, it was the State that came to us and challenged the ruling of the three-judge district court which had revised the legislative apportionment plan.

And here, it seems to me, you're in somewhat different posture, because here the State is defending what the District Court has done.

MR. KELLY: The Attorney General is defending --

QUESTION: Well, the Attorney General.

MR. KELLY: Right. But there's a distinction, because it would not be a fair conclusion to say that, after all, the chief executive officer of the State of North Dakota is the Governor, and he has -- and this is referred to, particularly in Judge Bright's dissent -- a veto message which he refers to, and as the chief executive officer, he states in that veto message to this legislative plan that was adopted and then deafeated on referral, his opposition to the legislative plan based on the establishment of large multi-member districts.

So I do not think that there is, at best, the appellee in this case is faced with a situation where there is no discernible State policy, no identifiable one, pro or con, because if you put aside our traditions -- but to say that the State of North Dakota is here as a jurisdiction saying

this is our policy and our policy is in favor of large multi-member districts, that is really not the situation at all.

QUESTION: The State didn't appeal, did it?

MR. KELLY: The State was not a party to this case. Just the Secretary of State.

QUESTION: Well, did the Secretary of State appeal?

MR. KELLY: No, he --

QUESTION: So he's satisfied with the judgment?

MR. KELLY: Right. The Secretary of State is, presumably, and presumably the Attorney General of North Dakota is satisfied.

QUESTION: He didn't appeal.

MR. KELLY: Right. But the Governor is not satisfied, nor are the people satisfied.

QUESTION: Who is representing the Governor here?

MR. KELLY: The Governor is not a party. The Governor couldn't be a party, because he doesn't enforce the election laws.

QUESTION: Are you suggesting that your friend who will argue in opposition to you is not speaking for the State of North Dakota through its Secretary of State?

MR. KELLY: He's speaking for the Secretary of State. If -- if --

QUESTION: Are you suggesting he's speaking for him as an individual, or as a State officer?

MR. KELLY: He's speaking for him as a State officer.

QUESTION: Yes.

MR. KELLY: Right.

QUESTION: Then what's the difference between that and his being here for the State? You have me lost a little bit.

MR. KELLY: Well, my only point is that if, in fact, this is to suggest that there is a State policy favoring multi-member districts, that that is not a fair conclusion to be drawn by reason of the fact that the Secretary of State and the Attorney General are attempting to support and justify this court-imposed plan.

QUESTION: Well, maybe one speculation, as reasonable as that, or as reasonable as any other, is that the Secretary of State and the Attorney General merely want to let this plan stay in effect until the Legislature can come to grips with it in a few months from now.

MR. KELLY: Well, we've been waiting for ten years or more, and, as I say, in all candor, there is no reasonable prospect that they are going to.

In the few remaining moments, I would also point out that the second issue involves population disparities, and the disparities in this plan exceed those that were involved in the Virginia case, and there is,contrary to the Virginia

case, no justifiable State policy that would support the type of deviations we're involved with here.

The two that were offered were that there is a geographic barrier, the Missouri River. Indeed, it is a geographic barrier, but it provides no barrier at all to the establishment of equal population districts. That is not a problem, and that's covered in detail in the brief.

The second point was, is that North Dakota is a small agricultural, rural State, and it's just not that important to get precise districts.

Well, North Dakota has a tradition that it carried on at this last election, of having extremely close election results. And the individual's voting power in a small State, the one person's vote recally can have a substantial impact.

And with the type of issues that are going to be presented to the North Dakota Legislature, involving not only the future of North Dakota but large parts of the nation, involving the development of resources, it seems to me that equity and fairness and, to say nothing of the Constitution, requires a better job of drawing district lines in terms of establishing fair apportionment.

And the Dobson Plan, which was basically designed to meet an emergency and had, as one of its standards, to draw the new lines as closely as you could to the existing lines which were being stricken, because they provided a representa-

tion that was violative of the Equal Protection Clause.

Thank you.

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

Mr. Sand.

ORAL ARGUMENT OF PAUL M. SAND, ESQ.,

ON BEHALF OF THE APPELLEE

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

Counsel has stated the historic development fairly accurately, but I believe he listed some things as being a little more technical than the real practical situation, as it existed.

Prior to 1965, true, North Dakota had a senatorial district, and they had multi-member House districts. And it was basically on the county setup. The counties could not be taken and attached to another part of a county, but could be moved together, several counties could be comprised to consist one senatorial district.

But in the more populous counties, the county could be divided, and in fact there were several that were divided, in which the Legislature created one, two, or three senatorial districts; but in those districts that were created, the county remained as the basic unit and, for all practical purposes, in the Legislature and in discussion of the Senators, they were referred to as the Senator from Cass

County, even though Cass County had two senatorial districts. It was --

QUESTION: How many counties are there in your State?

MR. SAND: Fifty-three, Mr. Justice Stewart.

QUESTION: Thank you. And under the old system, before the court got into it, how many Senators were there?

MR. SAND: Forty-nine.

QUESTION: And twice as many Representatives?

MR. SAND: No, sir.

QUESTION: More than that?

MR. SAND: There we had no one-to-two ratio. The one-to-two ratio came into being in 1965 by the Federal District Court's action --

QUESTION: By the court plan, unh-hunh.

MR. SAND: But prior to that time we had a variance of anywhere from one Representative to five.

QUESTION: Per county.

MR. SAND: Per district.

QUESTION: Per district.

MR. SAND: Right.

Even though the ordinary reference was to the county, but in some counties we had more than one senatorial district.

And, true, the Legislature has toiled with this

problem and has made some very sincere efforts.

But about 1960, through our constitutional process, a constitutional amendment was adopted which froze the senatorial districts as they existed. It also created a board which was charged with the duty of reapportioning the State if the Legislature failed to do so.

This board consisted of the two majority leaders of each house, the Secretary of State, the Attorney General and the Chief Justice of the State of North Dakota.

They labored with this problem long and heavy, but because of the provisions of Section 35, it was just impossible to do what the language provided.

And, as a result of that, the reapportionment plan that was adopted by this committee was declared unconstitutional, and then from there the actions were brought in the federal courts, and then from 1965 we have developed a different pattern.

And this is where the Federal District Court-fashioned plan provided for senatorial districts with more than one Senator, but the ratio was, for each Senator they would have two Representatives.

Now, this plan stayed in existence, and the Legislature in 1971 did not reapportion. There were feeble efforts made, but if I can summarize some of the comments made by the Legislators, they said: We just don't know where

to go, what we can do; and some even said, Well, let the court do it.

Well, these are some of the difficulties with the Legislature.

When this action was initially brought, and a temporary plan established, a bi-partisan committee was created for the purposes of proposing a plan to the 1973 Legislature. This committee worked hard and long and developed what I would say is a very good plan, as far as the variants; but, because it contained multi-member districts, the Governor vetoed the plan. It was overridden, and then referred to the people.

About the same time, an initiated constitutional measure was submitted to the people. This measure provided for a board to reapportion the State and also provided that the board provide for single-member districts.

Now, when the people rejected both of these measures, we had to assume that the people were, in effect, saying: Leave us be; let us have the plan that we have now.

The constant changing of boundary lines, I believe, hurts a representative form of government more so, or equally so, than a variance in population.

Identification with the district lines is an essential element of representation. And the people, when they rejected the legislative plan, my impression was that it

was rejected because it broke entirely too many county lines.

To say that it was rejected because it had multi-member districts flies in the face of the people's rejection of the constitutional measure which would have provided for single-member districts.

And on that basis, we are representing the people of the State of North Dakota, even though counsel may have some reservations about that. The Secretary of State, of course, is a State constitutional officer, and the Attorney General, by law and by common law in the State of North Dakota, represents the people there.

So we have no reservation whatsoever that the Attorney General and the Secretary of State, Ben Meier, are representing the people of the State of North Dakota.

So, historically, we have consistently had multi-member districts for the House of the State of North Dakota, and from 1965 we have had multi-member districts for the Senate.

QUESTION: But that's only as a result of the court intervention, isn't it?

MR. SAND: Right.

Now, prior to the court's intervention, and recognizing also Section 35 of this constitutional amendment which froze the districts, I think at that point the State actually operated what we would refer to as a little federal

system.

The Senate had area, the House was on population. Even though the counties, in several instances, were gathered together to make an area, and in other instances counties were divided to make an area.

But it was still basically a concept of the little federal system.

QUESTION: General Sand, let me get straightened out.

Prior to 1965 were your House districts single-member districts?

MR. SAND: No, no, they were not, Justice Blackmun. They were anywhere from one to five, depending on the population.

QUESTION: So that the two-to-one isn't a very long tradition at all, it's only a decade?

MR. SAND: Since 1965.

QUESTION: And it's a court-imposed tradition, then?

MR. SAND: Correct, Your Honor.

QUESTION: Did you have many -- you say one to five before 1965; did you have many multi-member House districts? Probably far fewer than you had single-member districts.

MR. SAND: I think we had quite a few with two Representatives;we had a sizable number, I would -- just recalling here for the moment, about five or six that had more than two.

QUESTION: Unh-hunh. Largely the larger cities?

MR. SAND: In the larger counties, like Cass, Grand Forks, Barnes, Richland, Ward, and the larger counties, or the counties that had the larger cities.

We also believe that where the Legislature is -- where the court is required to fashion the plan, that the court should fashion a plan which is somewhat patterned after the State plan in existence.

Now, true, a plan can be developed which would cut down the variants, but in order to accomplish that and at the same time maintain some respect for county lines, we'd have to reduce the number of Senators and Representatives, the legislative bodies, both would have to be reduced.

But as far as the number of Senators and Representatives, I think this is basically a judgment of the people. We have had consistently representation in the House from 98 to 101, or in that vicinity. And 49 to 51 in the Senate.

Now, if the court would have gone to a reduced number, yes, our variances may not be that great. But I think the number should be respected, because it gives the greater division amongst the electorate; and in the same way it also gives members in the House and Senate, which are more responsive to that particular area.

And again in North Dakota, the county is the basic political subdivision. The county performs many, many

functions for, in behalf of the State. And to break up the county lines actually destroys the responsiveness to the county needs.

And on the variants, we find it a little difficult to attempt to speak about accuracy or exactness in population, when we know that the initial Census is not accurate in itself. As this Court has said, that is a process, but it is not necessarily accurate.

We have in our brief set out a few of the cities which have had a Census taken since the 1970 Census, and we find that quite a few of them have grown substantially, and in one instance where the variance was 11 percent, by taking new population, it has been reduced to 4 percent.

And it would seem to me that it would be somewhat inequitable to require an exact mathematical formula, based upon a figure which is initially not accepted as being correct, and then go from there, when it's reasonably understood that in the matter of a year or two those population figures will no longer be representative.

And we operated under that for a ten-year period.

And in the State of North Dakota, under the situation that we have here, I would submit that a population variance of 20 percent, or in that area, is not out of line. We have the natural barrier to contend with. And I think the Court in this instance, they are people from the State, they know

the needs, they know the area, they came up with a plan that is satisfactory to the State of North Dakota.

And if I may just simply repeat, that when the elections on the initiated measure, constitutional measure, and the referendum on the legislative plan were rejected by the people, the people were in fact saying: Leave us be as we are created.

QUESTION: Of course, General, the fact that this is satisfactory to the people of your State, under the decisions of this Court, rightly or wrongly, just doesn't cut any ice at all. You remember Lucas vs. Colorado Assembly, in which the people of the State, by vote, had accepted that plan, and the Court said, nonetheless it's unconstitutional; or even going back to Baker v. Carr, the State, officials of the State were wholly satisfied with that system, so they told us. They were defending that system in this Court.

MR. SAND: I would agree with that, Justice Stewart.

QUESTION: So, that alone doesn't, rightly or wrongly, as I say, under the precedents of this Court, that doesn't cut any ice whatsoever.

MR. SAND: What I should have said, and really had in mind, was that within the constitutional limits, the people are satisfied with this system that they have now, and we think that a 20 percent variance is not unconstitutional

under these conditions.

And if the people are satisfied with it, and if it meets the constitutional requirements, then there should be no change made.

QUESTION: Mr. Attorney General, you've just mentioned again the 20 percent variance. I don't recall whether in any opinions of the Court we have ever distinguished between, in percentages between a large area like New York or California, and a smaller State like North Dakota; but if my arithmetic is correct, and I don't vouch for it, the variation per Senator elected from the highest to the lowest is only 786 votes; 786 voters.

That is, 11,775 in the 29th district to 12,561 in the 18th district. That's on page 3 of your brief.

Now, having said that, if my arithmetic is correct -- which I'm not sure it is -- do you think the Court ought to exert much greater flexibility in dealing with a small number of voters than with a percentage that would make a variation of hundreds of thousands?

MR. SAND: Chief Justice Burger, in that respect, in the small number, I mean these percentages really can be, in a sense, frightening, because you have a change of 100 or 200, and the percentage goes way out.

Whereas if you had larger numbers, you can have this --

QUESTION: Cuts both ways.

MR. SAND: Yes, it cuts in both directions.

And the reason why we believe that this variation is justifiable is because we have had a constant change in population. Ironically we have had, up until 1970, a decrease in population, but also a change from rural to urban within the State.

But from 1970 to 1974, according to the latest report in the U.S. World News, based upon the U. S. Census, the State of North Dakota has gained, since 1970, a little better than 4 percent population.

Where that population is at the moment, I am not prepared to say.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Kelly?

REBUTTAL ARGUMENT OF JOHN D. KELLY, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. KELLY: Just two points.

In response to a question that Mr. Justice Blackmun asked Mr. Sand, I would point out that the one Senator to two House member ratio has been, over-all, the standard since Statehood, except in so far as our original Constitution provided that both houses should be -- districts should be of equal population, to the extent that that could be done.

But the problem was that since there was a restriction on Senate districts, not taking part of one county and making it a part of a Senate district that involved another county, that there were necessarily population imbalances; and in order to correct that situation, certain districts were given additional House members. But the vast majority of districts since Statehood have always had two House members and one Senator.

And so that while it's not an absolute tradition of one Senator and two House members, the over-all tradition is clearly on that kind of a basis.

In so far as, Mr. Chief Justice, your reference to the disparities in populations, based on the Dobson Plan, I think we're talking about between -- in terms of people, of just about something between 2400 and 2500 people, the difference between the largest or most under-represented district, or the smallest or over -- most over-represented district; and I think there's an Appendix -- there is an Appendix --

QUESTION: Where is that found?

MR. KELLY: -- on page A-6 and A-7 of the Appendix to the Jurisdictional Statement.

I think that --

QUESTION: A-6 and 7 of the Jurisdictional.

MR. KELLY: Yes.

But, in any event, the -- it's a small population and each one is important.

QUESTION: There's a population difference of 2444 between the largest and the smallest.

MR. KELLY: That's correct, Mr. Justice White.

QUESTION: 1064 in district 4, and 1384 in district 11, and they add up to 2400.

MR. KELLY: Right.

QUESTION: Not 700.

QUESTION: But when you allocate that per Senator, you get a slightly different figure.

MR. KELLY: Well, that's true.

QUESTION: Those are both single-member districts?

MR. KELLY: Right.

QUESTION: Do you know what percentage of the Senate can -- well, never mind.

MR. KELLY: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:52 o'clock, a.m., the case in the above-entitled matter was submitted.

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