

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1244

TITLE SUSAN J. DAVIS, ET AL., Appellants V. IRWIN C. BANDEMER, ET AL.

PLACE Washington, D. C.

DATE October 7, 1985

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 SUSAN J. DAVIS, ET AL, x

4 Appellants-----x No. 84-1244

5 v. x

6 IRWIN C. BANDEMER, ET AL. x
7 -----x

8 Washington, D.C.

9 Monday, October 7, 1985

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 11:40 o'clock, a.m.

13 APPEARANCES:

14 WILLIAM M. EVANS, ESQ., Indianapolis, Indiana; on behalf
15 of the Appellants.

16 THEODORE R. BOEHM, ESQ., Indianapolis, Indiana; on
17 behalf of the Appellees.
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on behalf of the Appellants	
THEODORE R. BOEHM, ESQ.	21
on behalf of the Appellees	
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on behalf of the Appellants -- rebuttal	

1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Evans, you may
3 proceed whenever you are ready.

4 ORAL ARGUMENT OF WILLIAM M. EVANS, ESQ.
5 ON BEHALF OF THE APPELLANTS

6 MR. EVANS: Mr. Chief Justice, and may it
7 please the Court, in 1981 the Indiana legislature passed
8 a Reapportionment Act following the 1980 census, and
9 this Act was modified and amended in certain minor
10 respects in 1982.

11 The defendants, the Democrats in this case,
12 did not apparently, according to the record, pursue
13 their legislative remedies any further and there's no
14 evidence that in 1983, the 1983 General Session of the
15 Indiana General Assembly, that they introduced any bill
16 in the legislature to try to change the Reapportionment
17 Act in any way. So, instead of pursuing a legislative
18 remedy before the Indiana voters, they chose to attempt
19 a judicial remedy in the federal court and filed their
20 lawsuit in federal court in 1982.

21 This case is before the Court, and it is what
22 appears to me to be a high visibility case, and a lot of
23 articles in the newspaper about this case. I think the
24 reason for that is because of the strange alignment of
25 parties on both sides of this appeal.

1 But, I don't believe that the issues in this
2 case are all that novel, and I believe that this Court
3 in past opinions has in fact considered many of the
4 issues that are before the Court today.

5 So, I will start my argument with a discussion
6 of the Whitcomb v. Chavis case decided by this Court in
7 1971, which I feel deals with many of the issues that
8 the Court has in our briefs this morning. Whitcomb v.
9 Chavis was a case that came from Indiana, involved the
10 same state, involved the same county, Marion County, and
11 involved the same city, of Indianapolis, and even
12 involved on the three-judge panel a District Court Judge
13 on that panel in 1969, who is also on the panel of this
14 appeal today.

15 In Whitcomb v. Chavis, this Court first of all
16 carefully considered the question of racial
17 discrimination in the electoral rules and laws in
18 Indiana involving particularly multi-member districts in
19 1969. And what this Court says is a matter of racial
20 discrimination, they said there is no evidence that the
21 multi-member districts which had existed in Indiana for
22 many, many years were created, designed or maintained to
23 further racial discrimination.

24 In making that statement, in the opinion by
25 Justice White, he mentioned the Sims v. Baggett case as

1 an example of what he meant. That was a District Court
2 case where the blacks were gaining political power under
3 a single-member district system, and all of a sudden,
4 for the sole reason of defeating black voting strength
5 in that case, the issue the Court found, they went to a
6 multi-member district system.

7 And obviously, the Court said in Whitcomb v.
8 Chavis, that is a discriminatory use of multi-member
9 districts, and the Court struck it down in Sims v.
10 Baggett. But in the Whitcomb v. Chavis case, this Court
11 said it found no evidence in Indiana of racial
12 discrimination at all. The Court commented on the fact
13 that there had been multi-member districts for many
14 years, and there had been a mix in the House of
15 Representatives of multi-member and single-member
16 districts, again for many, many years.

17 So, the Court considered this racial question
18 first of all, which obviously is of great concern to
19 this Court, to protect the rights of the minority of
20 black citizens of Indiana. Then it went on and it
21 looked at the kind of people that were raising a
22 question, the plaintiffs in that case who were ghetto
23 poor in the center of Indianapolis.

24 And, this Court in Whitcomb v. Chavis said
25 that these voters were overwhelmingly Democrat voters.

1 So the Court, then, was dealing with a racial question
2 put aside with a question of outvoted Democrats in the
3 center of Indianapolis and what their constitutional
4 rights were.

5 QUESTION: Mr. Evans, did the court below
6 consider the effect of this plan under Section 2 of the
7 Voting Rights Act as amended?

8 MR. EVANS: Justice O'Connor, in this case the
9 lower court did, and this makes this case so different
10 from other cases because in this case the lower court
11 said, there has been no violation by this
12 Reapportionment Act in Indiana of Section 2 of the
13 Voting Rights Act. There has been no violation of the
14 right of black citizens under the fourteenth or
15 fifteenth amendment.

16 There is absolutely nothing in this record
17 that would justify any relief on the part of black
18 voters, and there was some plaintiffs where the NAACP
19 filed an action, a companion action and the Court denied
20 their claim and they have not cross-appealed at all.

21 So, it is fair to say, in Whitcomb v. Chavis
22 there was no racial discrimination in Indiana, from the
23 record, nor is there any in this case before the Court
24 today. So, we have to put race to one side.

25 And then in Whitcomb v. Chavis, decision by

1 Justice White, he said, what constitutional rights do
2 outvoted Democrats have as a political group in the
3 center of Indianapolis, and he very carefully looked to
4 the question, are they able to participate in the
5 political process.

6 Did these ghetto poor citizens have a right to
7 vote? Did they have a right to participate in the
8 party, their party, the Democratic party? Were they
9 hurt? Were they an effective force?

10 And, the Court said, yes, they were and
11 perhaps anticipating the Court's decision later in White
12 v. Regester, the Court found that not to be true with
13 blacks around Dallas, Texas. But here the Court said
14 all political processes had been met in the Whitcomb v.
15 Chavis case and therefore these outvoted Democrats have
16 no constitutional right to a remedy.

17 And the Court said, in Whitcomb v. Chavis
18 again, this is true whether we're dealing with
19 multi-member districts or single-member districts. In
20 our system of government, the Court said, where you have
21 a majority rule some people win; some people lose. We
22 don't have a proportional representation system.

23 The Court could find no need to give
24 constitutional remedies where in any particular
25 district, single-member or multi-member, you have a

1 situation where one -- adherents of one party lose, even
2 if they might be in what the Court said was a safe
3 district, and that might be true year after year after
4 year.

5 That was the political system set forth by the
6 Indiana Legislature and the Court found no
7 constitutional wrong with that. So, the Court went on
8 and finally said, perhaps the idea of cancelling the
9 vote is a euphemism for political defeat at the polls,
10 so in the Whitcomb v. Chavis case this Court was
11 considering a claim of a political group, namely the
12 outvoted Democrats in the city of Indianapolis.

13 Now, in dissent -- the opinion was written by
14 Justice White and joined by the Chief Justice and
15 Justice Blackmun, but in dissent Justice Brennan and
16 Justice Marshall did not argue with that point. They
17 said that an ideological, political interest group does
18 not get the same constitutional protections as is true
19 of black citizens, because they mention the fifteenth
20 amendment and they mention the Civil War amendments
21 which were designed to help black citizens in their
22 constitutional rights.

23 So, we have -- these Justices, I feel, in
24 Whitcomb v. Chavis have taken a strong stand that what
25 the Indiana General Assembly did in 1981-'82 is not

1 unconstitutional.

2 QUESTION: Well, I thought one of your major
3 points was that we shouldn't review this case at all, on
4 the merits; we should say it is not justiciable.

5 MR. EVANS: That is true, Your Honor.

6 QUESTION: It does not sound to me like if you
7 are citing the multi-member district case, and I suppose
8 you are going to talk about Gaffney --

9 MR. EVANS: We had thought of Gaffney, yes.

10 QUESTION: Well, are you still pressing us to
11 say that this issue is not justiciable?

12 MR. EVANS: I am, Your Honor, but we are here.

13 QUESTION: It doesn't sound much like --

14 MR. EVANS: We are here today, so the Court
15 must be interested in the question. But I do believe
16 that the issue is not justiciable, and in the briefs we
17 went into that at great length and the Court, I assume,
18 is familiar with the legal arguments.

19 I am trying to say it is a practical matter.

20 QUESTION: So, you are making an argument,
21 assuming it is justiciable, you do not think there was
22 an unconstitutional gerrymander here?

23 MR. EVANS: Yes, Your Honor, that is my
24 position. I do not believe it was justiciable at all.
25 I believe, if the Court were to think about it, who in

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1 this room could say how many Republicans and how many
2 Democrats should serve in the Indiana General Assembly?

3 Those kind of judgments are inherently
4 political and it would be almost impossible for a court
5 to come up with an acceptable standard.

6 QUESTION: But if you say it's not
7 justiciable, that means that even the most extreme
8 example of gerrymandering would not be subject to any
9 judicial review?

10 MR. EVANS: Your Honor, I believe particularly
11 where we're dealing with two major parties, I believe
12 that is true. I believe that ever since the Carrollton
13 Province case where this Court showed special concern
14 for discrete and isolated minorities, the Court has some
15 duty and as Justice Marshall said in his dissent in the
16 Mobile v. Bolden case, you take a group that has been
17 discriminated against for a long time, decades and
18 decades, and cannot because of that past discrimination
19 and the effect of the Civil Rights Amendment, can't have
20 their views presented through the political process,
21 that might give rise to a need for some sort of judicial
22 relief.

23 But, when you are dealing with two major
24 political parties, I would say under no conditions --

25 QUESTION: Well, no, Mr. Evans, the line you

1 are drawing is one between partisan gerrymandering and
2 racial gerrymandering, are you?

3 MR. EVANS: I believe the Court made that
4 distinction in Whitcomb v. Chavis, Your Honor, and I was
5 in my argument making that distinction. I think that is
6 an important distinction, because I think this Court is
7 --

8 QUESTION: Well, on the question of
9 justiciability.

10 MR. EVANS: Oh, yes.

11 QUESTION: Partisan gerrymandering, you say,
12 is non-justiciable?

13 MR. EVANS: But racial is.

14 QUESTION: But racial gerrymandering is
15 justiciable?

16 MR. EVANS: And has been, yes, sir.

17 QUESTION: What about Gaffney? That was not a
18 racial gerrymander. That was a partisan gerrymander.

19 MR. EVANS: That is right.

20 QUESTION: And we reviewed it.

21 MR. EVANS: Yes, and in the Gaffney case the
22 Court did review and approved the reapportionment plans
23 in the Gaffney case. And that case is interesting,
24 speaking of the question of seat vote ratios which were
25 so important to the lower court here, it said in Indiana

1 that 51.9 percent of the votes were for the Democrats in
2 the House of Representatives and they only got 43 seats
3 in the 1982 election.

4 That was one of the main, perhaps the single
5 most important point in the minds of the two-to-one
6 majority in our case. But in Gaffney v. Cummings we
7 have a situation where the seat vote differential was
8 greater than even that differential, and the Court
9 upheld the 1972 election which was part of the record in
10 Gaffney v. Cummings.

11 But, I am only now speaking of the
12 justiciability or non-justiciability of partisan
13 gerrymandering.

14 QUESTION: Mr. Evans, may I ask you this
15 question. Putting the racial issue aside, is it your
16 position, if the one-man, one-vote rule is
17 satisfactorily met, that that's the end of the case and
18 nothing else is to be considered by us?

19 MR. EVANS: That is our position.

20 QUESTION: Putting the racial issue aside.

21 MR. EVANS: Racial issue aside, Your Honor, I
22 believe that when the Court in Wells v. Sims and other
23 cases in the early '60s established a one-vote,
24 one-person rule based upon residence of, everybody's
25 vote is the same, has equal weight, I think that was a

1 rule that was well accepted in the nation.

2 QUESTION: If that rule is met, is that the
3 end of this case?

4 MR. EVANS: Yes, that is the end of this case.

5 QUESTION: Your position then is that the
6 equal protection clause has no application to the case
7 at all?

8 MR. EVANS: That is my position, Your Honor.
9 I believe that what this Court should do, when it gets a
10 case by someone who is not a discrete and insular
11 minority, particularly somebody represented by the
12 powerful -- one of the major political parties in this
13 country, that the Court should not get involved in that
14 particular political thicket.

15 I believe that is correct, Your Honor.

16 QUESTION: Excuse me. I just wanted to be
17 clear, in your view the Equal Protection clause has no
18 applicability absent discrimination against race, or
19 some other minority?

20 MR. EVANS: I believe, Your Honor, that that
21 is correct, where you have, as I say, two major
22 political parties as we have in this case. I do not
23 believe that the equal protection clause is intended or
24 designed to give protection to one major party in this
25 context.

1 QUESTION: So, by gerrymandering, one party
2 could put the other party entirely out of business,
3 entirely, if you were using the computer, without
4 discriminating against the voters in the other party?

5 MR. EVANS: Well, Your Honor, I believe that
6 that question has been raised, perhaps by Justice Powell
7 in some of your arguments. I believe that that is
8 true. I believe that where you have two major parties,
9 either party may have the use of a computer.

10 I don't believe the computer in itself is
11 unconstitutional, and I believe that where you have a
12 situation where this question is presented, and in this
13 case we have a situation where the Democrats did not
14 present their point, apparently again to the voters of
15 Indiana to try to get some relief, we had a situation,
16 remember -- I believe Justice Stevens when he was still
17 in Chicago commented that the original gerrymandering
18 was reversed by the Massachusetts Legislature and the
19 next year or so through the normal political process.

20 I have great confidence in the political
21 process, and I believe in Indiana that in due time it
22 changes. These things do change.

23 QUESTION: Did the Republican majority
24 consider any purpose in adopting this plan other than
25 maximizing the Republican vote and minimizing the

1 Democratic vote? Did it have any other purpose?

2 MR. EVANS: Absolutely, Your Honor. In fact,
3 there is no evidence that that was even their purpose.

4 QUESTION: Did I read in the record that the
5 Speaker of the House said the only purpose was
6 political, just to maximize the Republican vote?

7 MR. EVANS: The Speaker of the House was
8 quoted as saying words to that effect, Your Honor. You
9 are correct about that. He did say that. But that's
10 not a finding by the Court at all. That's a statement
11 of the House leader.

12 And, what you have, frankly, is a political
13 statement. You are dealing with a very political
14 subject. I ask the Court whether it would be better to
15 have candor or, as Justice Stevens said, litigation
16 oriented silence.

17 Of course, when you are dealing with this
18 subject you are going to have partisan comments made on
19 both sides. One can hardly expect the leader of a party
20 to say, "I am going to help my opponents." It is a
21 political statement.

22 I think the thing the Court should do is look
23 at, as we say, the bottom line. What was the effect of
24 the reapportionment on the Democrats? What was actually
25 done?

1 We know, for example, that the Republicans
2 saved a seat for the Democrats in the House in Marion
3 County where there was a vast movement out of blacks,
4 which were Democrats.

5 QUESTION: What other purposes were considered
6 by the Legislature?

7 MR. EVANS: One-man, one-vote was met. That
8 was the first criterion.

9 QUESTION: Yes.

10 MR. EVANS: Then the record is clear that the
11 rights of black citizens, black vote, was absolutely --

12 QUESTION: Apart from that, what other things?

13 MR. EVANS: The Legislature then followed the
14 tests under the state law which were emphasized by this
15 Court in Karcher. For example, they avoided contests
16 between incumbents; they preserved the core of previous
17 districts, were two state guidelines that were followed.

18 I think before the Court can make a judgment
19 on -- that you might be interested, you must recognize
20 that no other alternative plan was ever presented in the
21 Indiana General Assembly.

22 QUESTION: They did not have very much time,
23 did they, in view of the schedule followed by the
24 Republican majority?

25 MR. EVANS: Well, Your Honor, they had about

1 as much time as the Republicans did. The census tapes
2 were made available in early or middle of April of 1981,
3 and they did not hire a computer, that is true. But,
4 after the case was over, I mean, after the Legislature
5 was over, we had a trial in the fall of 1983, there were
6 no alternative plans presented to the three-judge panel.

7 No alternative plans have ever been presented,
8 nor to this Court, that follow the guidelines recognized
9 by this Court.

10 QUESTION: But in the Legislature the plan was
11 adopted, as I recall, on either the last or the next to
12 the last day of the session.

13 MR. EVANS: Your Honor, you are right. It is
14 a very complicated piece of legislation and as necessary
15 as all very difficult legislation is in the state
16 legislature, it sometimes takes the last day to get
17 these things done.

18 It was done on the last day, but I don't
19 believe --

20 QUESTION: No Democrats on the conference
21 committee, were there?

22 MR. EVANS: No Democrats were on the
23 conference committee, Your Honor, but I wonder if this
24 Court wants to draw great weight on that.

25 Again, I think if you look at the bottom line,

1 what was the effect, what happened, and we know one
2 thing. We know the Democrat leader himself said that
3 Republicans were piggish. They had so many Republicans
4 elected in the Reagan landslide of 1980 that they only
5 had so many votes to go around, so meeting all these
6 guidelines, there were so many marginal districts that
7 as a matter of fact the Democrats could win in a good
8 Democrat year.

9 We know based upon their own exhibits, their
10 own statistics, there were 67 seats in the House in the
11 1982 election that were either safe Democrat seats or
12 competitive seats within a 45 to 55 percent range, 67
13 out of 100 seats in the Indiana House. That is the
14 result of the reapportionment.

15 Now, if we have candidates that can't move
16 with that kind of a chance, I think that's not a problem
17 this Court need address. As I say, there are some
18 Justices who would perhaps look at this question, on the
19 question of rationality. Is it rational? Was the plan
20 entirely motivated by a desire to severely damage the
21 other party?

22 That question has been raised by some of the
23 Justices, and I would like to say a word or two about
24 that. Amplifying on what I said to Justice Powell, we
25 have a situation where the Indiana Legislature,

1 consistently throughout the state, without question, all
2 over the state followed these guidelines.

3 Now, in the Karcher case we have just the
4 opposite. In the Karcher case there was a justification
5 offered of not diluting the black voting strength. But
6 the district court said, that is not true because in the
7 Fourth District in Karcher where I think there was a 17
8 percent black majority vote, the Court said -- they just
9 ignored that. They did not adjust that. They did not
10 take any effect to protect the black voting strength in
11 the Fourth District.

12 Just the opposite here. The Court found in
13 Indiana that the General Assembly did in fact protect
14 the black vote, so we have a fact. It is rational, and
15 no one has to re-invent the wheel. The Legislature has
16 districts that are multi-member. They didn't have to go
17 to single-member districts.

18 They had a right to take what they had before
19 them in the background of the Whitcomb v. Chavis case.
20 They knew multi-member districts were proper. So, they
21 used multi-member districts in the new plan and they
22 went ahead with what they had, took care of the blacks,
23 took care of the one-man, one-vote.

24 Those were their top priorities.

25 CHIEF JUSTICE BURGER: We will resume there at

1 1:00 o'clock.

2 [Whereupon, at 12:19 o'clock p.m., the Court
3 recessed, to reconvene at 1:00 o'clock p.m. this same
4 day.]

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1 AFTERNOON SESSION

2 [1:01 p.m.]

3 CHIEF JUSTICE BURGER: Mr. Evans, you may
4 resume your argument.

5 MR. EVANS: Mr. Chief Justice, and may it
6 please the Court, I would like to reserve the balance of
7 my time for rebuttal.

8 CHIEF JUSTICE BURGER: Mr. Boehm.

9 ORAL ARGUMENT OF THEODORE R. BOEHM, ESQ.

10 ON BEHALF OF THE APPELLEES

11 MR. BOEHM: Mr. Chief Justice, may it please
12 the Court, I should like to begin by correcting what we
13 believe to be a few factual misapprehensions that the
14 Court may have gained in the course of the presentation
15 this morning.

16 There were indeed alternative maps presented
17 to the General Assembly, both in the session during
18 which these laws were enacted and in subsequent
19 sessions. However, the Court will not be startled to
20 learn that they never saw the light of day.

21 An example appears as Exhibit 48 in the
22 record. I simply want to point out that what this
23 underlines is that there is no remedy within the
24 legislature for the wrong of which we are complaining,
25 and that it is and was a useless act to present to the

1 fox a correction of the chicken coop guardian situation.

2 The competitive districts to which Mr. Evans
3 referred are by his measure competitive in the sense
4 that if an additional 15 or so percent of the statewide
5 candidates on the Democratic ticket had run an
6 additional ten percent ahead of the top of the
7 Democratic ticket, it would have been possible to gain
8 control of the state legislature.

9 That's what the cotton line of that
10 "competitive" as he uses it is.

11 QUESTION: How does that come to be? Is that
12 done by computers?

13 MR. BOEHM: Mr. Evans' statistics are done
14 manually, Your Honor. What he did is, took the top of
15 the Democratic statewide ticket and created a chart that
16 was not an exhibit in the case, was not introduced in
17 evidence, and is a summary, though, of data that is in
18 the record.

19 It is, we submit, a manipulation of the data
20 but even on that manipulated data it demonstrates that
21 the high-water mark for the Democrats doesn't do the job
22 on this map, and that even if the Democrats have a
23 substantial majority of the votes they cannot gain a
24 majority of the seats under foreseeable election returns.

25 Finally, on the comment about multi-member

1 districts, it is correct in one sense that Indiana has
2 historically had multi-member districts. However, from
3 the Constitution of 1851 forward through the districts
4 involved in Whitcomb against Chavis with which this
5 Court dealt, those multi-member districts were counties.

6 The legislature was apportioned among the
7 counties, which is the basic unit of government in
8 Indiana, and by 1971 fifteen, for example, were
9 apportioned to Marion County which is the City of
10 Indianapolis.

11 That scheme is not what is involved here.
12 Those were multi-member districts, but there was no
13 showing and there was no contention, and it was not true
14 that those multi-member districts were done for
15 invidious discriminatory purposes. They simply were an
16 effort to allocate representation among the counties and
17 they respected the historical practice of attempting to
18 give counties representation within the state
19 government, a perfectly legitimate objective of state
20 government.

21 The multi-member districts that we are
22 attacking here today bear no relationship to anything
23 other than the objective of maximizing the preservation
24 of the transient majority's control of the state
25 legislature. They are fundamentally, qualitatively

1 different types of districts.

2 QUESTION: And they conform perfectly to
3 one-man, one-vote or one-person, one-vote?

4 MR. BOEHM: Well, within two percent, Your
5 Honor.

6 QUESTION: Which is satisfactory for state
7 districts?

8 MR. BOEHM: We submit it is satisfactory if
9 justified. The whole theory of permitting greater
10 deviations from perfect populations stemming from the
11 early cases, Mahan versus Howell if that is how you
12 pronounce it, in '64 and forward in Virginia allows the
13 greater population deviations because the state may
14 properly conclude that it wishes to recognize, for
15 example, cities, towns, counties, other legitimate
16 objectives.

17 Here they took the population deviation but
18 didn't carry with it the burden of honoring all these
19 other proper objectives. They discarded all the proper
20 objectives and just took an arbitrary two percent
21 benchmark.

22 The point is simply, the justification for
23 population deviations is wholly lacking in this map, so
24 we submit it analytically should fail under the
25 population test as well because the reasons for the

1 population --

2 QUESTION: But you would be no happier,
3 however, if it were zero percent deviation and still
4 came out with this sort of gerrymander?

5 MR. BOEHM: That is correct.

6 QUESTION: Under your theory, it seems to me
7 that almost any time a reapportionment or redistricting
8 by a state legislature occurred and the result was not
9 close to perfect proportional representation, that there
10 would be a violation?

11 MR. BOEHM: No, sir, we want to be absolutely--

12 QUESTION: Now, everybody knows who is
13 districting, knows exactly what the political
14 consequences are going to be of any set of districts
15 that are drawn.

16 MR. BOEHM: That's correct.

17 QUESTION: And so, they know that if this
18 particular set of districts downgrades the Democrats or
19 downgrades the Republicans, that that is going to be the
20 result, and they thoroughly intend it?

21 MR. BOEHM: That is correct Your Honor.

22 QUESTION: Well, how much of a deviation would
23 you allow?

24 MR. BOEHM: There are several ways you can
25 have a perfectly constitutional plan, Justice White.

1 QUESTION: That ends up with the Democrats not
2 getting what, arguably, what they desire, what they are
3 entitled to vote-wise.

4 MR. BOEHM: We do not claim that we are
5 entitled to any specific number of seats in the General
6 Assembly. We do claim that we are entitled to be free
7 from a statute that arbitrarily, that is to say without
8 justification in any proper governmental purpose, harms
9 us. That is a fundamental equal protection doctrine,
10 any classification of citizens.

11 QUESTION: Well, what justification could
12 there be to give the Democrats fewer seats than they are
13 entitled to in terms of their voting population?

14 MR. BOEHM: Several things could do it, and
15 they have been iterated in the opinions of this Court.
16 Adherence to county lines, recognition --

17 QUESTION: Well, were they articulated by the
18 Court of Appeals or not?

19 MR. BOEHM: They were, by the District Court,
20 Your Honor. Yes, and the District Court uniformly found
21 that none of these proper justifications was present in
22 this case including specifically a finding that the
23 claim that these maps were somehow designed to preserve
24 the integrity of the black vote, was fanciful.

25 There is simply no showing in this record that

1 this map was required by any desire to prevent a
2 degradation of the black vote, and the district court
3 specifically rejected that contention.

4 QUESTION: What if we were to uphold your
5 claim in this case and say there has to be some kind of
6 neutral objective, and so it goes back to the Indiana
7 Legislature, and this time they say, the Republican
8 majority says, we can still get the Democrats and that
9 is what we intend to do, but we will kind of preserve
10 county lines in most of them.

11 Now, would that eliminate your claim, or would
12 you still have the claim even though there was some
13 neutral factor they could point to, if their intent was
14 simply to get as much for the Republicans as they could,
15 and that preserving county lines was just a kind of a
16 gimmick?

17 MR. BOEHM: Preserving county lines is one
18 restriction, Your Honor, just like population equality
19 is a restriction, just like the requirement that if
20 they're going to have different sized districts, in
21 other words some multi, some single, different sized
22 multis, there has to be a reason for it, a proper
23 governmental reason which there was in Whitcomb against
24 Chavis, but they decided Marion County ought to get 15
25 seats.

1 Now, the effect of that scheme, of course, was
2 not to discriminate against one party or another,
3 because whichever party then carried Marion County
4 carried all 15 seats and had reasonable access to the
5 control of the Legislature.

6 Here they took the very same body politic,
7 Marion County which previously had 15 seats under the
8 '70 census, discovered that it had only 14 -- and by the
9 way, coincidentally, a perfect 14 -- it could have been
10 carved up into 14 single member districts perfectly.
11 But, in order to preserve its 15 seats in the
12 Legislature they took Marion County, patched on areas
13 from three contiguous counties, to create five
14 three-member districts out of an area that is
15 essentially 47-53 Republican.

16 Now, having done that, they took the hole of
17 that doughnut and gave it three seats. The hole in that
18 doughnut is approximately 90 percent Democratic. The
19 rest of the Democratic vote is by and large on the
20 periphery of the hole, and it was carved up into four
21 separate parts, each of which was then subjected to
22 additional votes from suburban and exurban areas.
23 Result, twelve to three out of an area that is 57 to
24 three, with no legitimate governmental purpose being
25 served by this scheme.

1 In Ft. Wayne, Indiana, something very similar
2 happened but with even more effect. There the city is a
3 city consisting of 170,000-odd people. It is entitled
4 on any sort of a proportional representation to
5 three-plus seats in the Indiana House. It has a
6 Democratic mayor.

7 Yet, neither the City of Ft. Wayne nor Allen
8 County in which it resides became a district or an area
9 that was carved up into districts. Rather, they went
10 out into the surrounding areas, took farmland and
11 patched it on to Allen County to create two three-member
12 districts, a total of six people elected from this area,
13 split the city of Ft. Wayne right down the middle, and
14 produced a six-zero Republican majority out of a city
15 that has a Democratic mayor and is entitled to over
16 three seats itself.

17 QUESTION: Well, suppose the prior districting
18 in Indiana had been done by a Democratic legislature and
19 they had gerrymandered it in their favor, and now comes
20 along a Republican legislature and they decide to do
21 exactly what was done in Gaffney, try to get
22 proportional representation, so their purpose has to be
23 -- is to cut down the Democrats.

24 Now, would that be a legitimate reason?

25 MR. BOEHM: Yes, it would be a legitimate

1 reason. If their purpose is to achieve a fair plan,
2 it's perfectly constitutional. That is what Gaffney
3 holds, and we embrace it.

4 QUESTION: Would you say, then, that the first
5 step in attacking a plan like this is, you have got to
6 prove intent, or do you prove intent from just the
7 consequences, or both:

8 MR. BOEHM: I think in this case we have got
9 an easy case because on the question of -- there are two
10 questions presented by this case. The first is --

11 QUESTION: It may be, but in theory do you
12 think you have to prove intent first?

13 MR. BOEHM: I think you can talk about it as
14 intent if you wish. However, I think intent normally
15 should be proved by objective criteria. You normally
16 judge what a person intends to do by what he does and
17 what the consequences of his acts are. That's the test
18 that we would apply here.

19 Now, in this case we have the remarkable gift
20 of a confession. They essentially said, "We did it."
21 Now, that is pretty good evidence that they did it.

22 QUESTION: Mr. Boehm, if this were a
23 non-justiciable -- that is, if partisan gerrymandering
24 is non-justiciable, I guess we do not have to address
25 some of these questions, do we?

1 MR. BOEHM: That is the threshold question,
2 Your Honor. There are two questions. One of them is,
3 is it justiciable, and the other one is, did they do it.

4 QUESTION: Are you going to address
5 justiciability?

6 MR. BOEHM: I certainly am, Your Honor.

7 QUESTION: Before you come to that, is there
8 any evidence in this record about the impact of the
9 mobility of population in periods of one or two years?

10 MR. BOEHM: None, other than, we have the
11 census of 1980 which is obviously different from the '70
12 census that was the predicate of the previous plan.

13 QUESTION: Well, there are cases which have
14 shown conclusively that between the time the plan is
15 enacted and the time it is carried out in an election,
16 the mobility of people has altered the validity of the
17 plan. Would you suggest there is nothing like that here?

18 MR. BOEHM: There is nothing in this record,
19 Your Honor, and we would agree that it may be a
20 validation of a deviation from a legitimate plan if
21 there were a showing that for perfectly good reasons we
22 have identified that this area is likely to be bigger in
23 1982 than it was in 1980 so we're going to tip it a
24 little bit, and besides it is a city.

25 There is nothing in this record of that sort,

1 and we submit that if the state is going to come up with
2 what is on its face, and what the district court found
3 to be a totally arbitrary plan, then the state has to
4 come forward with that evidence. The burden shifts to
5 the state to say, oh, we took into account population
6 shifts.

7 There is not a shred of evidence in this
8 record on that point, and if there were we would have a
9 different case, but we do not.

10 To return to the intent point, though, Justice
11 White, we submit that on this record we proved that they
12 intended it because they said that is what they intended
13 to do, but we also proved it by a separate set of
14 evidence that is of more general interest.

15 There is no point in having an intent test
16 that is satisfied only by the sort of subjective
17 evidence we have here. There is no point in having
18 state-legislators jump through all the proper hoops, say
19 all the proper things, and then come up with an
20 arbitrary, capricious and discriminatory map. That is
21 not what we are contending.

22 We contend that you judge a map not by
23 hindsight, and in this respect we respectfully disagree
24 with the district court that the primary test is not now
25 many seats were in fact elected, but what does the map

1 look like on the basis of the data that is available as
2 of the time this map was drawn, and that data is in the
3 Court, before the Court, in the form of Exhibit 36 in
4 the joint appendix.

5 It shows how on data that was agreed by every
6 expert to be the most reliable measure of a party's
7 strength, how these districts actually shape up, and it
8 shows that 62 percent of the House districts are
9 weighted in favor of the Republicans and 38 percent are
10 weighted in favor of the Democrats on a 50 percent vote.

11 In other words, if you have a 50-50 statewide
12 vote, which we happen to have as a result of the
13 anonymous races statewide, things like the Clerk of the
14 Courts are elected in Indiana and as everybody can see,
15 nobody really runs as an individual for offices like
16 that.

17 QUESTION: Clerks of Court are always
18 anonymous.

19 [Laughter.]

20 QUESTION: What would you say about a state
21 that consistently has two Senators of one party but a
22 two-to-one minority or balance the other way on the
23 House members? Would you say that is objective evidence
24 that somebody has been playing games with the lines of
25 the Congressional districts?

1 MR. BOEHM: No, sir, I would not, on the face
2 of it, draw any conclusion from that. I need to look at
3 other baseline data to have any opinion on that subject.

4 It could well happen that the Senators are
5 just great Senators and as everybody in this courtroom
6 knows, the higher profile the office, the more possible
7 it is for an individual to run well ahead or well behind
8 his or her party's baseline vote.

9 QUESTION: In a Congressional district, do you
10 suggest that a House member doesn't have as much profile
11 as a Senator?

12 MR. BOEHM: I think it is correct, that he
13 does not have as much.

14 QUESTION: Does not have?

15 MR. BOEHM: That is correct, at least in
16 Indiana.

17 QUESTION: I am not so sure the House members
18 would agree with you.

19 [Laughter.]

20 MR. BOEHM: I am sure they would not, to be
21 frank. But even if they are of equal profile --

22 QUESTION: But seriously, the Senators have
23 fallen quite far away. The House members are down there
24 dealing with local problems, whether it is a farm
25 district or a manufacturing district or whatever.

1 MR. BOEHM: Assuming that is true, Mr. Chief
2 Justice, for our purposes the point is that a difference
3 between the Congressional representative seats and the
4 Senate, U.S. Senate seats, we could reflect the profile
5 of both players. In other words both the
6 representatives and the U.S. Senators, could run well
7 ahead or behind of their respective party's strengths
8 for reasons that are unique to them, and without regard
9 to whether -- as between the two of them they are
10 stronger or weaker.

11 It is just that each of them are able to carve
12 out for themselves a distinctive position and do not
13 necessarily run along party lines.

14 QUESTION: Is it possible that perhaps
15 inadvertently you would have put your finger on the
16 problem in this kind of a case, that the voters will
17 vote one way in the House and vote another way in the
18 Senate and vice versa, in the different blocs?

19 MR. BOEHM: In the state map there is very
20 little basis for that, but again the test is not, does a
21 given candidate win or lose. That candidate may win or
22 lose, and there is evidence in this record that it does
23 indeed happen, by running significantly ahead of his
24 party's strength.

25 But the point is, you have got a statute of a

1 state that is designed to and does handicap a group
2 severely. The fact that the horse with the 50-pound
3 weight might actually end up winning the race, versus
4 the unhandicapped horse, doesn't mean it's a fair race.
5 It simply means that that horse was that much stronger,
6 and that does happen.

7 The point is, there is a significant -- not
8 just significant but virtually insuperable handicap
9 imposed by this map on Democrats as a group to no
10 legitimate governmental end whatever, and part of it, of
11 course, is simply the classification of districts.

12 Here we have something that does not occur at
13 all in the Congressional map, and that is, multi-member
14 districts are used in conjunction with single member
15 districts for the sole and explicit reason of coming up
16 with more Republicans, and the proof of that pudding is
17 in the eating.

18 Look at those three-member districts. Ft.
19 Wayne has two of them. Indianapolis has five of them.
20 Together they elect 18 Republicans and three Democrats
21 out of an area that is 54 percent one party, 46 and a
22 fraction another. On any reasonable map, those 21
23 percent of the legislature should be something like
24 eight-seven one way or the other, nine-six at the worst,
25 but they are 12 to three, and the way it is done is

1 purely, simply and arbitrarily classifying one group of
2 voters at the expense of another.

3 That, of course --

4 QUESTION: You said, in response to Justice
5 Brennan's question, you were going to say something
6 about -- I would be interested to hear what you were
7 going to say.

8 MR. BOEHM: Yes, sir. On the justiciability
9 point, first and foremost our proposition is that
10 justiciability of this case is evident from Baker and
11 Carr itself, that this case is capable of being analyzed
12 in traditional equal protection terms.

13 There is nothing in the Equal Protection
14 Clause that limits its application to a group defined by
15 race. Indeed, our brief and that filed by Common Cause,
16 submit a series of cases in which other definitions of a
17 target group are held to be equal protection violations.

18 QUESTION: Well, what does Gaffney say about
19 it? Wasn't that a political gerrymander?

20 MR. BOEHM: Yes. Gaffney came out that it was
21 constitutional because it was not a discriminatory
22 plan. It does not mean it is not justiciable. It
23 simply means it is okay, what they did in Connecticut in
24 1970.

25 QUESTION: Is justiciability at issue in that

1 case?

2 MR. BOEHM: Implicitly. I always hesitate to
3 tell the person who wrote the opinion what it means.

4 [Laughter.]

5 QUESTION: That is not what I asked you. Did
6 you read the briefs in the case?

7 MR. BOEHM: I have not recently, Your Honor.

8 QUESTION: My question was, was justiciability
9 put at issue?

10 MR. BOEHM: I do not know the answer to that.
11 It certainly was at least implicitly put at issue in the
12 fact that the Court dealt with the question and resolved
13 it.

14 QUESTION: That is not always the case.

15 MR. BOEHM: In any event, Baker and Carr, we
16 submit, does deal with the question at length and says
17 what is and is not justiciable, and it holds that a
18 matter is justiciable unless it falls into the area
19 reserved to another co-equal branch of the federal
20 government, which this plainly does not.

21 You are simply adjudicating the validity of a
22 statute of a state, the sort of thing this Court does
23 all the time, and it is analyzable in very traditional
24 equal protection terms. Is the statute a classification
25 of citizens? The answer is plainly yes. It puts people

1 in different parts of the state in different categories.

2 It is aimed at a category of citizens, in this
3 case those aligned with the Democratic Party, and it
4 does in fact very severely harm them. That is what the
5 Equal Protection Clause says cannot be done.

6 QUESTION: But it is certainly different from
7 the holding in Baker against Carr in that each of these
8 people's vote is going to be counted the same way in the
9 ballot box?

10 MR. BOEHM: Well, that's correct, and I think
11 you need to realize, you need to focus on the impact of
12 the plan as a whole here. Does the plan as a whole
13 disadvantage one group or another?

14 Any individual, of course, gets his or her
15 vote counted and that happens in a map that is
16 population erratic or a map that has districts like we
17 have. The question, though, ultimately boils down to --

18 QUESTION: But, in the population erratic
19 districts, the votes counted for less in the district.

20 MR. BOEHM: The votes of Democrats count for
21 less in Indiana in general..

22 QUESTION: Not in the same way as in the
23 one-person, one-vote cases.

24 MR. BOEHM: Qualitatively identical,
25 quantitatively, technically, mechanically different.

1 The result is identical. The equal population
2 gerrymander, as it has come to be called, is a
3 well-known phenomenon and anybody with the time and the
4 computer technology in 1980 can draw a map, and a good
5 example is presented in the briefs submitted by the
6 Republican National Committee in which they took the
7 very same election results for Marion County, Indiana
8 that produced 12 to 3 Republican and drew a map that
9 shows 11 to 4 Democrat within a Republican unit.

10 QUESTION: Should that encourage us to push
11 the doctrine of Baker against Carr beyond where it is
12 now applicable?

13 MR. BOEHM: On the question of justiciability,
14 Baker and Carr, we submit, does not require any
15 pushing. It already gives you the doctrinal framework
16 that leads inevitably to the conclusion that this is
17 justiciable.

18 It does not involve another co-equal branch of
19 government. It is resolvable in equal protection terms,
20 and indeed this Court has repeatedly, at least with
21 respect to the multi-member district aspect of it, said
22 that racial or political groups, if the subject is
23 invidious discrimination, may present constitutional
24 claims.

25 So, there is nothing novel about that, at

1 least in the context of multi-member groups. Now, the
2 question whether it is justiciable, once you are there,
3 then the question is what is the standards. How do you
4 identify whether this matter is or isn't constitutional?

5 I submit that Justice Stevens in Karcher has
6 given us a framework within which to analyze that, and
7 you can go at it either way. You can attack it along
8 the subjective intent lines.

9 I submit that the objective evidence of intent
10 is the proper way for the Court to analyze it, because
11 it then gives the map-makers themselves confidence that
12 they can draw a constitutional map. They have the data
13 available to them at the time they draw it, and there
14 are several ways you can do that.

15 One of them is what was done in Gaffney, a
16 procedural remedy whereby you place the drawing of a map
17 in the hands of somebody whose motives are not
18 inherently suspect, and unless somebody comes up with
19 something that is really bad about it, it is
20 presumptively valid and I would submit should be upheld.

21 The other way to go about it is to do what we
22 attempted to demonstrate in the district court and that
23 is to demonstrate that the maps are susceptible of
24 analysis in terms of the districts. You can look at
25 them and determine exactly whether the map is or isn't

1 fair, in round terms, and then you look at whether it's
2 justified.

3 QUESTION: What would be the most fair thing
4 in your view? Is it straight proportional
5 representation?

6 MR. BOEHM: No. Again, we are not advocating
7 proportional representation.

8 QUESTION: When you say something is unfair,
9 it suggests a standard of fairness. Now, just what
10 would be the most fair thing to have done?

11 MR. BOEHM: The simplest -- well, the most
12 fair thing to do, we submit, is to have an arbitrary
13 checklist of objective criteria, that you go down until
14 you come to the map that meets most of them. For
15 example, you initially look at the equal population
16 requirement within your population deviation, whatever
17 the legislature sets. Second, how few county lines does
18 it break? Third, how few city lines does it break?
19 Fourth, how compact are they?

20 QUESTION: Maybe the Indiana Legislature
21 decides, we want to break city lines. We want to break
22 county lines.

23 MR. BOEHM: Then let it say so, and why. If
24 it has a legitimate objective, it can say so in its
25 preamble or in its legislative history. The legislative

1 history of this is, it is designed to disadvantage
2 Democrats.

3 Now, if somebody says, we want to have a map
4 that gives representation to farmers because we think
5 they are a group that has interests, or we want to have
6 a map that recognizes any other legitimate proffer --

7 QUESTION: And by the way, it also
8 discriminates against Democrats, but that is just
9 incidental.

10 MR. BOEHM: If they can do it for legitimate
11 reasons, I submit they can do it. If they can draw a
12 map within the proper lines and relying on recognizable,
13 legitimate governmental objectives, then they also can
14 play a few games within those parameters. But you have
15 accomplished a very great deal.

16 On the map here in Indiana, you would at a
17 minimum gain several seats for the Democrats simply by
18 breaking up these multi-member districts which are the
19 most egregious abuse in this thing. The other egregious
20 abuses require a familiarity that the district court had
21 with the map of Indiana.

22 When you look at the maps they don't look
23 particularly odd because Indiana is, after all, laid out
24 in township and range. Everything is square in Indiana,
25 and the minimal voting unit in some parts of the state

1 is the township.

2 So, you end up with something that doesn't on
3 its face look too strange, but if you look at Senate
4 District 39 that pairs downtown Terre Haute with coal
5 mines three counties south, that is very peculiar from
6 any reasonable objective, and the district court went
7 through this analysis, made its findings of fact which
8 are not clearly erroneous. They are clearly correct.

9 This map enjoys no rational basis whatever.
10 It is purely and simply an effort to perpetuate a
11 transient majority.

12 QUESTION: You would apply the rational basis
13 standard in your equal protection analysis?

14 MR. BOEHM: Yes, we would.

15 QUESTION: Perhaps not with respect to
16 discrimination against the blacks?

17 MR. BOEHM: With respect to the blacks, of
18 course there is the Voting Rights aspect that Justice
19 O'Connor's question raised. There was a Voting Rights
20 Act claim raised in the parallel case filed by the
21 NAACP. My clients did not assert a Voting Rights Act
22 claim for the obvious reason that a majority of them are
23 white, and some parts of the state that are horribly
24 gerrymandered do not have a great Voting Rights Act case.

25 Other parts do. The District Court held that

1 it didn't find the requisite intent that it believed
2 under the 382 version of the Voting Rights Act was
3 required, and therefore didn't reach that issue, but I
4 submit you would find under the '82 Act, a Voting Rights
5 Act violation if you looked at the facts and the law as
6 it now sits, but that is not an issue in this case by
7 reason of our not having presented it and then NAACP's
8 not having appealed it.

9 That is explained in the NAACP --

10 QUESTION: Mr. Boehm, if your view prevails,
11 do you suppose it will make much work for the judiciary?

12 MR. BOEHM: Your Honor, you are well familiar
13 with flood-of-litigation arguments. We submit that
14 Baker and Carr is to the first wave of reapportionment
15 what this may well be to the second. There will no
16 doubt be a time of adjustment, but by and large the
17 state legislatures were very capable of adapting to the
18 one-man, one-vote rule.

19 QUESTION: I'm just wondering, at least in
20 cases where the redistricting is done by a partisan
21 majority, whether Republican or Democrat, whether the
22 other party isn't going to run right to court and
23 challenge the redistricting, and with all that that
24 entails.

25 MR. BOEHM: Well, there will undoubtedly be

1 some of that, Justice Brenner, but I submit that if you
2 follow the proper analysis which is firmly rooted in the
3 fourteenth amendment itself, and under well established
4 doctrines within the fourteenth amendment, the state if
5 it is going to classify has to come up with a rational
6 explanation for its classification, and that there are
7 objective quantifiable ways to look at these maps
8 including simply mechanical tests, equal population,
9 number of districts divided, number of cities and towns
10 divided.

11 And, if the state wants to deviate from those,
12 that's fine but it needs to explain why it's doing that,
13 particularly, of course, if you have a one-party plan as
14 you have here where the legislature in both houses and
15 the governor who signs it are all in the same party.
16 It's inherently suspect.

17 QUESTION: Would you insist that the
18 legislature leave those kind of tracks behind them, or
19 would you take -- accept an argument by the attorney
20 general of the state as to what is a defensible reason
21 for this plan?

22 MR. BOEHM: How you prove it is the question
23 that we haven't thought through fully. If I were
24 drawing a map, Justice White, I would put in the
25 preamble why we've done what we've done. I'm not

1 accorded that privilege in Indiana and won't be unless
2 this Court affirms the district court's decision, but in
3 -- you could, of course prove it any way you could
4 legitimately prove it, I would think.

5 By the way -- I'm sorry.

6 QUESTION: What time is it?

7 Do you have anything further?

8 MR. EVANS: Thank you, Your Honor.

9 ORAL ARGUMENT OF WILLIAM M. EVANS, ESQ.

10 ON BEHALF OF APPELLANTS -- REBUTTAL

11 MR. EVANS: Mr. Chief Justice and Members of
12 the Court, I believe it is unfair to say that this plan
13 was an arbitrary plan adopted by the Indiana General
14 Assembly, because no plan was presented to the
15 legislature or to the courts that followed the
16 guidelines that were followed in Indiana with a
17 different result so far as the Democrats are concerned.

18 There is no alternate plan that follows these
19 guidelines, and particularly the guideline of black
20 voters, because -- and that is a constitutional
21 requirement which was met by the Indiana Legislature.

22 When my colleague mentioned the guidelines to
23 the Court today, he didn't mention anything about not
24 diluting the black vote. He mentioned crossing county
25 lines, and if you read his brief you wouldn't know that

1 there are two parties in Indiana.

2 When he uses the term "minority," he means
3 Democrats in his brief, but the legislature is faced
4 with a real problem. We must deal with black voters
5 fairly, and within that context we developed a plan, and
6 no plan has ever been presented to show any different
7 alternative plan with the same guidelines would produce
8 a different and more beneficial --

9 QUESTION: What about the multi-member
10 districts? How do you defend them?

11 MR. EVANS: I defend them the same way that
12 they were defended successfully in Whitcomb v. Chavis,
13 Your Honor, because they don't have anything to do with
14 the fact that you've got people that lose in some
15 multi-member districts or single-member districts. It
16 doesn't make any difference.

17 These multi-member districts have been in
18 Indiana for centuries, I mean, for hundreds of years.

19 QUESTION: Not these same ones?

20 MR. EVANS: Pardon?

21 QUESTION: Not these same ones?

22 MR. EVANS: No, but the only reason these were
23 changed was because of the one-man, one-vote
24 restrictions. You see, if the Democrats had put on a
25 plan that followed the one-man, one-vote and followed

1 the protected black vote, and had less -- and were
2 county-wide, you'd have a different situation. But they
3 don't --

4 QUESTION: Is your only answer to the
5 multi-member districts, is it, well, we've always had
6 multi-member districts somehow, someplace in Indiana?
7 Is that your --

8 MR. EVANS: I would say that there are a lot
9 of --

10 QUESTION: Let's get right around the specific
11 reason. Take one of your multi-member districts and
12 give me your -- what your justification is for it.

13 MR. EVANS: Well, I will say on the record,
14 there is no particular justification for a particular
15 district, Justice White. The fact is, it was there and
16 there were constitutional --

17 QUESTION: Well, it really wasn't -- it's not
18 the same multi-member district, was it?

19 MR. EVANS: No, it wasn't the same, but it was
20 the same in the sense that they'd been there and they
21 had 15 members at the time.

22 QUESTION: Are you saying you can't find in
23 the record any justification for any specific
24 multi-member district?

25 MR. EVANS: I'd say there is some testimony of

1 governmental purpose, but I think, being frank, what
2 happened --

3 QUESTION: What is it for a multi-member
4 district?

5 MR. EVANS: Well, there's some evidence in the
6 record that it's easier in urban areas to have it
7 because of media, of one media source to have the voters
8 vote for several different representatives in the same
9 district in the House.

10 But I don't think that's the point. I think
11 it's quite true that these districts were there. The
12 record does show, when it came time to do the
13 redistricting there were multi-member districts. There
14 were single-member districts. And the legislature left
15 those districts in accordance with the wishes of the
16 voters or the representatives unless there was a
17 requirement for a specific change.

18 I don't think the record is any more
19 specific. I know in Whitcomb v. Chavis there are notes
20 as to some of the rationale for multi-member districts,
21 but why these particular districts were retained, I
22 don't think the record is specific on that.

23 QUESTION: Well, Mr. Evans, is it correct, if
24 you look at Marion County, the history was as a
25 multi-member district for the entire county, and then

1 with the population change 14 representatives would have
2 satisfied that county.

3 What is the reason for it making a 15th member
4 in Marion County? Does the record give any indication?

5 MR. EVANS: Well, it depends on where you
6 start. As a matter of redistricting process, Justice
7 Stevens, if you start in Marion County that's probably
8 true. But in this case the legislators started in a
9 different part of the state and as they got down to
10 Marion County with the changes back and forth, it just
11 doesn't fit in that neat a package.

12 Also, in a sense it's helpful to the Democrats
13 because it gives Marion County, the urban area, 15 seats
14 where they might otherwise only have had 14. I think
15 that's a matter within the discretion of the
16 legislature, Your Honor. I don't think that --

17 QUESTION: If you get over the hurdle of
18 justiciability, if your opponent does, would you agree
19 that there must be a rational basis for the plan?

20 MR. EVANS: I would say so, Your Honor, and I
21 think, following the guidelines of this Court as were
22 done would justify it, yes.

23 QUESTION: If you say there must be a rational
24 basis, would you say that the desire to maximize the
25 political strength of the majority party is a rational

1 basis within that standard?

2 MR. EVANS: No, I wouldn't think that that
3 would be, in and of itself, a rational basis. But as I
4 said --

5 QUESTION: You would say there would have to
6 be some other basis?

7 MR. EVANS: That isn't before the Court in
8 this case. As I say, there's no plan that does
9 everything the legislature wanted to do and gives the
10 Democrats more seats. There is no such plan.

11 They had plenty of time to develop such a plan
12 based upon the facts, and that hasn't been done.

13 QUESTION: Well, would the case be different
14 if the majority of the legislature adopted a statute
15 saying, we will not entertain any Democratic plan and we
16 will refer the districting job to the Republican State
17 Committee which apparently hired the computer firm here,
18 would there be a different case?

19 MR. EVANS: Yes, there would be, Your Honor,
20 because this wasn't just a plan worked out just by the
21 Republicans. They went through the legislative
22 process. All the rules were followed. This argument
23 about due process, I suggest, is a make-weight argument
24 and as presented, perhaps is justification --

25 QUESTION: But why would the suggestion I made

1 to you, what would be wrong with that suggestion, if
2 your view of the law is correct?

3 MR. EVANS: Because the plan should be made by
4 the representatives -- the citizens through their
5 representatives. That hasn't been done in this case,
6 Your Honor.

7 The fact that a computer was used certainly
8 can't be of concern to the Court because the Democrats
9 had every opportunity to develop another plan with the
10 same criteria with less impact in their party if they
11 cared to do so, and this was done in accordance with all
12 the procedures and processes of the Indiana General
13 Assembly.

14 QUESTION: I don't understand why it would be
15 wrong for the Republican Party to prepare the plan and
16 the legislators say, well, we've taken a look at it and
17 it looks okay to us, and adopt it. What would be wrong
with that?

18 MR. EVANS: Well, I don't think it would be
19 right to have it done outside of the normal electoral
20 process.

21 QUESTION: Well, didn't the District Court
22 find that the only reason for this plan was to minimize
23 the Democratic representation?

24 MR. EVANS: No, Your Honor. I think there's a
25

1 statement that --

2 QUESTION: What did they -- on what ground did
3 they invalidate this?

4 MR. EVANS: The plan? They said -- they made
5 a statement that some of the leaders intended to try to
6 continue their control but they didn't say as a finding
7 if that was done.

8 They invalidated the plan, basically upon a
9 seat vote ratio, and what they said was that there are
10 so many percent of votes that were Democrat votes in the
11 House and so many seats. That, I think, is the main
12 basis for their doing it.

13 But, I think a proper test in that regard, you
14 should only consider -- the Court should only consider
15 contested seats. There are a lot of unopposed seats in
16 their ratio, which is an improper assumption.

17 As a matter of fact, on this record if you
18 take the vote for the contested races for the House of
19 1982, you find Republicans had a majority in the House,
20 Democrats had a majority in the Senate, and in both
21 cases the party that got a majority of the votes for
22 contested races won a majority of the seats, which meets
23 one of the tests that was in the mind of the lower court.

24 QUESTION: Is community of interest a factor
25 that properly may be considered in determining whether

1 there is a rational basis for the plan?

2 MR. EVANS: It is a consideration, Your Honor,
3 but I think it's a minor consideration. I believe the
4 statement was made in the record that if the numbers
5 fit, they would consider that point.

6 But the key questions are one-man, one-vote,
7 preserving the black vote, and -- were the two main
8 considerations. No dispute that those governed the
9 Indiana General Assembly when it passed --

10 QUESTION: The district court thought
11 community of interest was fairly important?

12 MR. EVANS: Well -- I don't know, Your Honor.
13 It's a factor but it also said, it must give way to
14 other considerations.

15 QUESTION: It realized it wasn't top priority?

16 MR. EVANS: Yes. It mentioned it, though.

17 QUESTION: I think one could agree with that.

18 But it did say that little attention was given to
19 community of interest in a number of districts.

20 MR. EVANS: It said that, but what are you
21 comparing that with, Your Honor?

22 Again, you see there is no plan that gives
23 more weight to community of interest and meets the
24 guidelines which are accepted and approved by this Court
25 as carried out in the plan itself. We're comparing

1 apples and --

2 QUESTION: You have no other plan to compare
3 it with?

4 MR. EVANS: That's my point. There are no
5 other plans presented to compare with the Legislative
6 Reapportionment Acts themselves. That, I think, is a
7 fatal defect in the case. Before you get into this
8 quagmire of political -- political thicket, at least
9 they should have put something before the Court, to see
10 clearly that there was some other way to do it with less
11 damage to the Democrats.

12 Thank you very much.

13 CHIEF JUSTICE BURGER: Thank you, gentlemen.
14 The case is submitted.

15 [Whereupon, at 1:40 p.m., the case was
16 submitted.]

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CERTIFICATION

Anderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of Electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1244 - SUSAN J. DAVIS, ET AL., Appellants V. IRWIN C. BANDEMER, ET AL.

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BY Paul A. Richardson

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