The Burger Court Opinion Writing Database

White v. Regester
422 U.S. 935 (1975)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1975

Re: 73-1462 - White v. Regester

Dear Byron:

I agree with your proposed per curiam of today's date.

Regards,

WED

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 23, 1975

Re: 73-1462 - White v. Regester

Dear Byron:

I join your per curiam circulated today.

Regards,

WEB

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 21, 1975

RE: No. 73-1462 White v. Regester

Dear Byron:

If your Memorandum becomes the Court opinion, will you please add the attached at the foot thereof.

Sincerely,

Bill

Mr. Justice White

cc. The Conference

RE: No. 73-1462 White v. Regester

Mr. Justice Brennan, concurring in part and dissenting in part.

I join Part I of the Court's opinion and concur in the affirmance of the judgment of the three-judge court as respects Tarrant, Jefferson and Galveston counties. I dissent however from the reversal of the judgment with respect to Nueces County and the vacation of the judgment with respect to El Paso, Travis, Lubbock and McLennan counties. I do not think that our ability to appraise the factual circumstances with respect to those counties can possibly equal the informed approach that the three-judge court brought to the intricacies of the respective situations, political and otherwise, in the several counties. We ought accept the judgment of the three-judge court - as we did as respects Dallas and Bexar counties in Regester I, and as we do today as respects Tarrant, Jefferson and Galveston counties - as a "blend of history and an intensely local appraisal of the design and impact of the . . . multi-member district [of each county] in the light of past and present reality, political and otherwise." Regester I, at 769-770. I would affirm the judgment of the three-judge court in its entirety.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 20 , 1975

RE: No. 73-1462 White v. Regester

Dear Byron:

I agree with your proposed Per Curiam in this case.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 4, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. 73-1462 - White v. Regester

I agree with Lewis that the proper disposition of this case is to vacate the judgment and remand to the district court for entry of a fresh decree so that there can be a timely appeal to the court of appeals. Lewis, in his memorandum of today, has stated my reasons for that view better than I could have done, and I have nothing to add.

If I reached the merits in this case, which I do not expect to do, my tentative views would coincide with those expressed by Byron. That is, I would tentatively affirm with respect to Jefferson, McLennan, Tarrant, and Galveston Counties, and to reverse with respect to Lubbock, El Paso, and Nueces Counties, with a possibility of remand as to Travis County.

P. S.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 21, 1975

No. 73-1462 - White v. Regester

Dear Byron,

In view of the telegram from Regester's counsel, I agree that we should not waste any more time on this case, at least for now. Unfortunately, it was your time that was wasted -- in the preparation of your very thorough memorandum. Perhaps, as Felix Frankfurter used to say, you can now put the memorandum in a letter to a friend.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 20, 1975

Re: No. 73-1462, White v. Regester

Dear Byron,

I agree with your proposed Per Curiam in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 1, 1975

Re: No. 73-1462 - White v. Regester

Dear Chief:

My tentative vote in this case is to affirm with respect to Jefferson, McLennan, Tarrant and Galveston Counties and to reverse with respect to Lubbock, El Paso and Nueces. Also, perhaps there should be a remand as to Travis County.

Sincerely,

Byron

The Chief Justice

Copies to Conference

Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: 5-22-75

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1462

Mark White et al., Appellants, v. Diana Regester et al. } On Appeal from the United States District Court for the Western District of Texas.

[May —, 1975]

Memorandum of MR. JUSTICE WHITE.

This case originated when, following the failure of the Texas Legislature to reapportion itself in constitutional manner, the Texas Legislative Redistricting Board, pursuant to the requirements of the Texas Constitution,[1] promulgated reapportionment plans for both the State Senate and the House of Representatives. Four suits challenging these plans were consolidated and were heard and decided by a three-judge District Court. That court sustained the Senate plan, and we summarily affirmed. *Archer* v. *Smith*, 409 U. S. 808 (1972). As to the plan for the House of Representatives, the District Court invalidated it on the ground that population variations among the districts were unconstitutionally large. At the same time, it held unconstitutional the multimember districts which the plan prescribed in two of the State's counties, Dallas and Bexar, without adjudicating the challenges leveled against multimember districts in nine other counties.[2] At that stage, after plenary con-

[1] See *White* v. *Regester*, 412 U. S. 755, 757 n. 1 (1973).

[2] It was because of time considerations and through agreement of the parties that the first trial did not deal with the nine districts. *See Graves* v. *Barnes*, 343 F. Supp. 704, 718 n. 7 (WD Tex. 1972); 378 F. Supp. 640, 642 (WD Tex. 1974).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 21, 1975

MEMORANDUM FOR THE CONFERENCE

Re: No. 73-1462 - White v. Regester

Mike Rodak has just given me the following memorandum and I suggest we not waste any more time on the matter:

"From Austin, Texas, and signed by David R. Richards, attorney for Regester, et al.

"This wire is to confirm our telephone conversation of this date concerning White v. Regester, No. 73-1462. It would appear that the subject matter of this litigation will be shortly rendered moot. The Texas House of Representatives has adopted legislation creating single member legislative districts for all counties involved in this litigation. The bill is to be considered by the Texas Senate on Friday and will be presumably adopted and there is every reason to believe that the bill will be signed by the Governor before the legislature adjourns June 2, thereby eliminating all remaining multi-member legislative districts in Texas."

B.R.W.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 17, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. 73-1462 - White v. Regester

The attached letters represent the extent of the current information with respect to this case.

B.R.W.

Attachments: Ltr of June 12, 1975,
fr Clinton & Richards
Ltr of June 13, 1975,
fr Don Gladden, Esquire

Not copied

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 18, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. 73-861 - East Carroll Parish School Board v. Marshall
Held for No. 73-1462 - White v. Regester

This case raises the question of the constitutionality of an apportionment plan imposed by the District Court for the election of the school board and police jury in East Carroll Parish. The plan provides for the at-large election of one school-board member and one police juror resident in each of six wards and three of each resident in a seventh ward. A three-judge panel of the CA 5 affirmed,[1/] but the Court of Appeals en banc then reversed, 9-6.

Negroes make up approximately 59% of the population in the parish but only 46% of the registered voters. The total population is 12,884. The Court of Appeals en banc relied heavily upon White v. Regester I in finding the at-large plan to be unconstitutional. The Court of Appeals described a history of racial discrimination in the parish touching upon the right to vote. While the devices through which that

Wm Douglas
Oct 74

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 20, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. 73-1462 - White v. Regester

This case had been argued and a memorandum giving my views was circulating when we were informed that the Texas Legislature had passed a new apportionment statute creating single-member districts in each of the counties at issue before us. That bill is now before the governor and he has until June 22 to sign or veto. I assume that the bill will become law, and on that assumption the question arises as to the disposition of this case.

In pursuit of this question, I should first say that I have been advised by my law clerk, the Library and the Department of Justice that Texas is not subject to § 5 of the Voting Rights Act. As you know, I had been proceeding on the contrary assumption! (Texas is covered in the proposed 1975 extension of the Act.)

The problem is thus considerably simplified but not wholly solved. Section 2 of the new apportionment statute states as follows:

> "This Act shall become effective for the elections, primary and general, for all representatives from the places herein specified and described to the 65th Legislature, and continue in effect thereafter for succeeding legislatures; provided specifically that this Act shall not affect the membership, personnel, or districts of the 64th Legislature; and provided further, that in case a vacancy occurs in the office of any representative of the 64th Legislature by death, resignation, or otherwise, and a special election to fill such vacancy becomes necessary, said election shall be held in the district as it was constituted on January 1, 1975."

The Act also provides in § 5 as follows:

> "When this Act becomes effective, the Act of October 22, 1971, of the Legislative Redistricting Board of Texas apportioning the state into representative districts, as altered by decision of the United States District Court, Western District of Texas, is superseded."

There will not be legislative elections in Texas until 1976, and under the foregoing provision the old districts will be effective until those elections take place. Section 2 expressly provides that special elections to fill vacancies will be held in the districts "as constituted on January 1, 1975." Whether this reference is to the districts ordered into effect by the District Court, as § 5 arguably would indicate, I do not know.

In any event, I would let the District Court deal first with the impact of the new Act. Perhaps the following per curiam would suffice:

"Per curiam.

"We are informed that the State of Texas has adopted new apportionment legislation providing single-member districts to replace the multimember districts which are at issue before us in this case. That statute by its terms does not become effective until the 1976 elections, and intervening special elections to fill vacancies, if any, will be held in the districts involved as constituted on January 1, 1975. Rather than render an unnecessary judgment on the validity of the constitutional views expressed by the District Court in this case, which we do not undertake to do at this time, we vacate the judgment of the District Court and remand the case to that court for reconsideration in light of the recent Texas reapportionment legislation and for dismissal if the case is or becomes moot.

So ordered."

B.R.W.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: 6-23-

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1462

Mark White et al., Appellants, *v.* Diana Regester et al. | On Appeal from the United States District Court for the Western District of Texas.

[June —, 1975]

PER CURIAM.

We are informed that the State of Texas has adopted new apportionment legislation providing single-member districts to replace the multimember districts which are at issue before us in this case. That statute by its terms does not become effective until the 1976 elections, and intervening special elections to fill vacancies, if any, will be held in the districts involved as constituted on January 1, 1975. Rather than render an unnecessary judgment on the validity of the constitutional views expressed by the District Court in this case, which we do not undertake to do at this time, we vacate the judgment of the District Court and remand the case to that court for reconsideration in light of the recent Texas reapportionment legislation and for dismissal if the case is or becomes moot.

So ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 24, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. 73-1462 - White v. Regester

The Clerk has now received the following wire from the Texas Attorney General's Office:

"Re White v. Regester, No. 73-1462.

"In answer to your request of this morning the position of appellant Mark White, Secretary of State of the State of Texas, in the above cause in light of the enactment of H. B. 1097, is that the case has been thoroughly prepared and presented to the Court and urges the Court to decide the substantive constitutional issues."

I would still dispose of the case as has been suggested.

B.R.W.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: _____

Recirculated: 6-24

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1462

Mark White et al., Appellants, *v.* Diana Regester et al. | On Appeal from the United States District Court for the Western District of Texas.

[June —, 1975]

PER CURIAM.

We are informed that the State of Texas has adopted new apportionment legislation providing single-member districts to replace the multimember districts which are at issue before us in this case. That statute by its terms does not become effective until the 1976 elections, and intervening special elections to fill vacancies, if any, will be held in the districts involved as constituted on January 1, 1975. Rather than render an unnecessary judgment on the validity of the constitutional views expressed by the District Court in this case, which we do not undertake to do at this time, we vacate the judgment of the District Court and remand the case to that court for reconsideration in light of the recent Texas reapportionment legislation and for dismissal if the case is or becomes moot.

So ordered.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

74-1462

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 24, 1975

Re: No. 73-1462 -- Mark White et al. v. Diana Regester

Dear Byron:

I agree with your Per Curiam.

Sincerely,

T. M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 5, 1975

Re: No. 73-1462 - White v. Regester

Dear Chief:

I definitely feel that we have jurisdiction in this case, and I would dissent from a holding that we do not.

On the merits, I am still inclined to adhere to my vote at Conference, that is, to affirm. With respect to one or two of the districts, my feeling is not so firm that I would dissent if a majority is inclined to reverse.

Sincerely,

Harry

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 20, 1975

Re: No. 73-1462 - White v. Regester

Dear Byron:

Please join me.

Sincerely,

H. A. B.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 4, 1974

A-734 BRISCOL v. GRAVES, et al

TO THE CONFERENCE:

Further litigation in Texas as a result of our decision in White v. Regester, 412 U.S. 755 (1973), has resulted in several applications being filed here. One of these, received this morning, is addressed to the Court and requests that it vacate a stay which I granted on Saturday.

On January 28, a three-judge court in Texas held unconstitutional seven multi-member districts established by a Texas House reapportionment plan, and declined to stay the effective date of its order. With respect to two other multi-member districts, the Court gave the Texas legislature a further opportunity to modify its plan. The opinion of the Court was joined in by Judges Goldberg and Justice, with Judge Wood dissenting.

As the filing date for the May 4 primary is today (February 4), the district court afforded the parties little time in which to take action of any kind. The Attorney General of Texas filed an application for a stay which reached me late Thursday afternoon (January 31st). Jim Ginty and one of my clerks immediately went to work on it, and as a result of a good deal of night work, Jim was able to deliver a helpful memorandum to me by midday on February 1st

As you will observe, the papers are voluminous. After reviewing them and talking with Byron, I granted the application for a stay Saturday morning (February 2nd). In view of the rather widespread controversy over this case (evidenced by numerous phone calls from various persons, routed primarily to the Clerk's Office), I anticipated that whichever way I acted a motion would be made to the entire Court. Such a motion - to vacate my stay - was filed this morning. As noted above, today is the date on which candidates for the general state primary elections (in which three parties are eligible to participate) must file.

The Clerk's Office is reproducing the necessary papers, which I am told will be delivered to each of you during the afternoon. These will be accompanied by Jim Ginty's memo of February 1, together with a supplementary memo summarizing some of the facts with respect to each of the seven districts.

As Jim's memo describes the situation very well, I write primarily to alert you to the situation. I assume a Conference will be called, perhaps tomorrow. I would doubt that there will be sufficient time this afternoon for review of the documents.

You will recall that in Regester we held invalid the multi-member districts in Dallas and Bexar County (San Antonio). These large urbanized areas had a combination of history and restrictions which clearly demonstrated both intent to dilute, and dilution in fact of, the voting strength of racial and Mexican-American minorities. A majority of the DC in the present case considered that conditions in the seven districts were sufficiently close to those before us in Regester for that case to be controlling. The dissenting Judge (who also sat, I believe, in the three-judge court which decided Regester) took a different view.

In vacating the stay, I considered two points primarily: (i) whether there would probably be four votes to note this case, and (ii) where the balance of equities lay with respect to granting or denying the application to vacate.

As to the first point, my guess is that there could well be four votes to note. This was Byron's view, and as he wrote Regester I would be inclined to follow him. This is not to say that I would

necessarily guess that the judgment of the district court will be reversed if we note the case. The majority opinion below concludes that conditions in the seven districts in question so closely resemble those in Dallas and San Antonio as to make Regester controlling. This is persuasive. Yet, the dissenting judge disagreed. These were the same three Texas judges who unanimously concurred in the judgment we affirmed in Regester.

I would be inclined to note this case for the following reasons: invalidating reapportionment action of a state legislature by a single court, and substituting the court's plan, all without further judicial review, should be allowed only where affirmance is clearly predictable. I am not sure that this can be said in the present case. Seven districts are involved, each including a Texas city. These cities all are smaller - considerably so - than Dallas and San Antonio. Four of them have populations of only 150,000 or less. While I have no doubt that the dominant Democratic Party in Texas has endeavored, to the extent it could, to perpetuate itself in office throughout the State, it is not clear to me from what is presently before us - without more careful study, briefing and argument - whether substantially the same situation exists in each of these cities and whether the Regester holding controls in each. I rather suspect that it does, at least in several of them. But as of now, this is not self-evident. We have held that multi-member districts are not invalid per se, requiring an examination of the facts and circumstances in each case.

As to the "balance of equities", I think the State has the stronger arguments. You will see the supporting affidavits as to the "disruption" and alleged irreparable injury, and also the counter affidavits. To a certain extent, they contradict each other. But some facts are clear. Today, February 4, is the filing deadline under Texas law for candidates in the state primary on May 4; and voting by absentee ballot commences on April 14th, requiring completed registration lists. The single member districts created by the Court are based on census tracts, and in many instances will deviate from and fractionate existing precincts. This means that precinct lines will have to be relocated, new voter registration lists compiled, new polling places established and staffed, and there may

be insufficient time to inform and educate the voters as to the candidates, the new districts, and where to vote. There are also references (which I do not understand) to the necessity of re-registering voters, and to precinct chairmen being entitled under state law to receiving lists of registered voters in their respective precincts by a specified date. A total of 27 legislators, a large segment of the Texas legislature, is involved. It is obvious that on this short notice there will be substantial inconvenience to officials, candidates and voters. It is difficult to judge how serious this is.

A majority of the district court did not think it necessary to put single districts into operation for the forthcoming primary in two of the nine districts involved in the litigation, giving the legislature further time to re-examine the situation. I concluded, on balance, that the likelihood of irreparable injury would be slight if we allowed (by noting this case) a similar delay as to the remaining seven districts. Assuming that it will not be argued and decided until next Term, there will still be abundant time for necessary changes well in advance (rather than on the eve of) the 1976 primaries.

In any event, refusing to grant a stay would have the practical effect of affirming the district court's reapportionment plan. If this is to be done, I think the Conference should take the action.

Lewis F. Powell, Jr.

LFP/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 7, 1974

MEMORANDUM TO THE CONFERENCE:

Absent objection we will meet tomorrow - Thursday, February 8 - at ten o'clock to discuss the following:

A-734 - Briscoe v. Graves
A-742 - Harris County Commissioners Court v. Moore

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 7, 1974

Re: A-734 - Briscoe v. Graves

MEMORANDUM TO THE CONFERENCE:

Pursuant to the special conference this morning I am instructing the Clerk to enter an order today denying the order to vacate the stay previously entered by Mr. Justice Powell in the above case.

Regards,

WEB

cc: The Clerk

THURSDAY, FEBRUARY 7, 1974

ORDER IN PENDING CASE

A-734 DOLPH BRISCOE, GOVERNOR OF TEXAS ET AL. V. CURTIS GRAVES ET AL.

The motions to vacate the stay heretofore granted by Mr. Justice Powell are denied.

Mr. Justice Douglas dissents.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 28, 1975

No. 73-1462 White v. Regester

MEMORANDUM TO THE CONFERENCE:

In accord with the suggestion that we circulate our vote on the merits, if these are reached, I enclose a conclusory memo which I dictated for my own use at the Conference today.

Subject to the reservation at the end of the memo, my thinking is as follows:

Regester I requires affirmance only in the Fort Worth district, the one district which compares even remotely in size with Bexar and Dallas. I also think there appear to be sound reasons for affirming as to Jefferson.

I would vote, however, to reverse as to El Paso, Lubbock, McLennan, Travis and Nueces - for the reasons summarized in my memo. In view of the election last fall of a minority race candidate for the legislature in each of El Paso and Travis, I would be willing to remand as to these two districts if my vote would make a "Court".

I will circulate a memo on the jurisdictional issue early next week.

L.F.P., Jr.

ss

February 28, 1975

No. 73-1462 WHITE v. REGESTER

This memorandum "to the file" is for my own assistance in voting at Conference, if we reach the merits. My first vote will be to dismiss the appeal for want of three-judge court jurisdiction.

On the merits, we must apply the principles of Whitcomb v. Chavis, and White v. Regester (No. I) in determining whether any, or which, of the multimember districts are unconstitutionally structured. It is clear from Whitcomb and Regester that:

1. Multimember districts are not per se unconstitutional

2. Some districts in a state may be multimember and others single-member.

3. To sustain invalidity "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential."

4. The complaining parties have the burden "to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question . . ." Regester I p. 766.

In Regester I, we noted - and relied upon - the following findings by the District Court:

(a) The Texas history of race discrimination

(b) The Texas rule requiring a majority vote in a

primary (although this is by no means an unusual requirement in states across the country).

(c) The Texas "place" rule, limiting a candidate from a multimember district to a specified place on the ticket - resulting in head-to-head contests for each position.

In Regester I, we said that "these characteristics of the Texas electoral system, neither in themselves improper nor invidious, enhance the opportunity for racial discrimination." Moreover, in Regester I, the facts relating to Dallas County showed that no Negroes had ever been slated by the controlling faction of the Democratic party. Also, the District Court found that there was a lack of "good faith concern for the political and other needs and aspirations of the Negro community". Finally, the District Court in Regester I concluded that "the black community has been effectively excluded from participation in the Democratic primary selection process".

As to Bexar County, the evidence of political exclusion of Mexican-Americans was much less forceful, but the Court declined to overturn the District Court's findings. We noted that the cultural and educational exclusion of Mexican-Americans from the white community, coupled with a poll tax and restrictive voter registration procedures, had kept voting participation artificially low. We also relied on the fact that few Mexican-Americans had been elected to the legislature from Bexar County, and accepted (perhaps

too uncritically) the District Court's conclusion that the Bexar County delegation was "insufficiently responsive" to the identifiable interests of Mexican-Americans.

Size of Districts

In Chapman v. Meier the Court suggested that the opportunity for discrimination in a multimember district varies directly with the size of the district and the number of persons elected. In the Texas House of Representatives there are 150 representatives, selected from 79 single-member and 11 multimember districts. The ideal district is about 75,000 people. In Regester I, Dallas County - with a population of 1,300,000 - elected 18 representatives, more than 10% of the total House of Reprentatives. Bexar County (San Antonio) - 800,000 - elected 11 representatives. In Whitcomb, we sustained a multimember district in Marion County, Indiana, with a population of 740,000 in which 8 of 50 senators and 15 of 100 representatives were elected.

Seven Districts in Question

With the foregoing principles and precedents in mind, my tentative thinking - subject to discussion at the Conference - is as follows:

District	Population	No. of Reps.	% Minority
Tarrant (Fort Worth)	675,000	9	18

Tentative View: Affirm - primarily on basis of size. It is difficult for voters in a district of this size to know candidates in a multidistrict election. It is also much more likely that the interests of a 20% minority can be ignored by the political majority. The district has never elected a minority candidate.

El Paso	300,000	4	60

Tentative View: Reverse - It is inherently incredible that 60% of the population (and 40% of the registered voters) can be denied participation in the political process for any substantial period of time. The past exclusion of the Mexican-Americans is undoubtedly due to the factors mentioned in Regester I as to Bexar County, but the poll tax and the restrictive voter registration procedures have now been abolished, and the Mexican-American majority elected a member to the legislature this fall. The record shows increasing participation and success and these factors provide a strong distinction between this and Bexar County.

Travis	295,000	4	32

Tentative View: Reverse(?) - Although this is about as large as El Paso, the evidence indicates that two minority candidates were nominated in the Democratic primary last year; that there are no slate-making groups; and the size of the minority population (about 1/3) suggests that there is little likelihood that this segment of the population will be denied access to the political process if it elects to assert itself.

District	Population	No. of Reps.	% Minority
Nueces (Corpus Christi)	200,000	3	48

Tentative View: Reverse - With almost 50% of the total population Mexican-American, it is difficult to believe that they can be excluded effectively from the political process. Indeed, since 1964 the legislative delegation from Nueces County has included at least one Mexican-American each term.

Jefferson	221,000	3	29

Tentative View: Affirm(?) - Although a 30% minority group population usually has significant political influence, no black has been elected to any district-wide office since 1900; organized labor apparently dominates politics and has never supported a black. As this is a small district, I am - despite the past record of exclusion - in doubt as to the current situation.

Lubbock	147,000	2	23

Tentative View: Reverse - With only a two-member district evidence of racial discrimination and denial of access to the political process would have to be very strong indeed for me to hold that the Constitution invalidates the action of the Texas legislature. Apparently there is no slate-making group in Lubbock, although no minority group member has run in a district-wide race.

McLennan	147,000	2	24

Tentative View: Reverse - Again with only a two-member district, evidence would have to be rather overwhelming to justify invalidating it. No black has sought a legislative seat; the district court found no slate-making group, and no evidence that the county delegation had voted contrary to the wishes of minority citizens.

The foregoing summary is obviously superficial, and is based on information in the briefs and opinions of the Court below. I will feel free to change my vote on the basis of a more thorough study of the record.

L.F.P.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 3, 1975

No. 73-1462 White v. Regester

MEMORANDUM TO THE CONFERENCE:

In accord with the suggestion at Friday's Conference, I have prepared this memorandum on the question of our jurisdiction. Under § 1253 this depends, of course, on whether this was a case "required . . . to be heard and determined by a district court of three judges."

On the first appeal, White v. Regester, 413 U.S. 755, we held that the original case was one requiring three judges because the plaintiffs had sought an injunction against the statewide redistricting plan on the ground of impermissible population variances. Although the District Court had granted only declaratory relief on the statewide issue, we had appellate jurisdiction because the court had granted an injunction against the multimember districts in Dallas and Bexar counties. Because the court's order therefore was literally one granting an injunction in a case required to be heard by three judges, our jurisdiction was established and the opinion did not inquire whether the challenge to multimember districts by itself would have required a three-judge court.

Following our reversal on the statewide redistricting issue, the plaintiffs (joined by intervenors) resumed their quest . for an injunction against the nine remaining multi-member districts on the ground that each diluted the voting strength of minorities. No other issue was left in the case. The prayer for injunctive relief would require a three-judge court under § 2281 only if it was an attack on a statute of statewide application.

Moody v. Flowers, 387 U.S. 97, held that a state statute providing a districting scheme for the selection of members of a county governing body was not a statute of statewide application for purposes of § 2281, despite the existence of similar statutes applying to other counties. Id. at 102. Companion cases decided with Moody are consistent in principle. In Sailors v. Board of Education, 387 U.S. 105, the Court held that a Michigan statute prescribing a uniform method of selection for all county school boards was a statute of statewide application. But in Dusch v. Davis, 387 U.S. 112, the Court held that a statute prescribing the method of selecting the county governing board for Princess Anne County, Virginia, was not a statute of statewide application.

Board of Regents v. New Left Education Project, 404 U.S. 541, extended Moody v. Flowers to cover rules issued by a state-level body affecting more than one locality within the State. Because the Board of Regents of the University of Texas system governed only a few of the state's college campuses, the Court held that its rules were not rules of statewide application even though the affected campuses were located in different parts of the state. In a footnote the Court distinguished a summary affirmance finding jurisdiction in Alabama State Teachers Assn. v. Alabama Public School and College Authority, 393 U.S. 400, saying that although the "legislative direction" in that case directly applied only to the issuance of bonds for one college in Alabama, it was expressive of an official statewide policy of maintaining a racially identifiable, dual system of higher education.

I believe Moody and New Left furnish the basis for holding that this case was not one required to be heard by three judges. The state statute at issue, reproduced in the Juris. Stmt. Appx. at 113B-146B, makes separate provision for each legislative district. There was no uniform policy of using multimember districts in all urban areas: for example, the Redistricting Board created single-member districts in Harris County (Houston), the most populous county in the state. Whitcomb v. Chavis, 403 U.S. 124, establishes beyond question that the use of multimember districts is not per se unconstitutional. Consequently, the plaintiffs' claim that these districts minimize the voting strength of minorities must stand or fall on facts peculiar to each district. The record in this case demonstrates how intensely local and varied these facts can be.

Arguably this case can be distinguished from Moody v. Flowers, by the fact that it involves the members of state legislature rather than of a local governing body. The state at large undoubtedly has more interest in the selection of members of its state legislature than it has in the selection of local officers, but the nature of its interest is different from that motivating the three-judge requirement. A decree invalidating one or more multimember districts does not frustrate statewide policy to the extent that may occur when a federal court declares a state regulatory statute unconstitutional. The effect is local, especially if (as I believe) the court's decree must be limited to prospective relief. The decree would not unseat any legislators or invalidate any action of the current legislature; it would simply change the method of choosing legislators within a particular district at future elections. That it involves several districts rather than only one is irrelevant under New Left, at least as long as there is no uniform state policy such as that in Alabama State Teachers Assn., which would be nullified by a decree against any one of the districts.

For me, at least, a further reason for holding that three judges were not required in this case is the difficulty this Court will have in making an intelligent appellate review of factual issues which are essentially local and often turn on subjective judgments (e.g. whether legislators have been appropriately "responsive" to minority group needs). This is quite unlike the usual three-judge case in which the central issue is rarely so fact-specific. Deciding that these cases must be taken in the usual manner would be consistent, I think, with the policy of minimizing our responsibility for first-line appellate review.

Nor do I think such a ruling in this case would foreshadow a similar result in a redistricting case. A suit challenging reapportionment on grounds of impermissible population variance is different from this case, both in theory and practical effect, from a suit challenging multimember districts on a claim of discrimination against minorities. The issue in a Baker v. Carr suit is whether one or more districts are over-represented (or under-represented) by comparison to other districts within the state. Even if only one district is off the norm, the alleged discrimination is statewide. Any relief granted to the plaintiff must affect more districts than one. A challenge to a multimember

district, however, is essentially local. I believe, therefore, an opinion could be written in this case that would not alter the usual course of proceeding by three-judge courts in cases that allege impermissible population variance among districts.

For these reasons, I adhere to the view that the proper disposition of the case is to vacate the judgment and remand for entry of a fresh decree so that the parties can take an appeal to CA5.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 22, 1975

No. 73-1462 White v. Regester

Dear Byron:

I also have a memorandum in the New Jersey Lottery case which I am saving to send "to a friend".

Commiserations.

Sincerely,

Lewis

Mr. Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 20, 1975

No. 73-1462 White v. Regester

Dear Byron:

Please join me in your circulation of June 20.

Sincerely,

L.F.P.

Mr. Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 25, 1975

Re: No. 73-1462 - White v. Regester

Dear Chief:

I passed on the jurisdictional question in this case at Conference on Friday. I have gone back over Moody and New Left, and remain very much on the fence. My principal concern is that if we dismiss this case for want of jurisdiction, it seems to me all but certain that a challenge to all multimember districts within a state could not be heard by a three judge court, and it seems probable that a challenge to some but not all legislative districts on a claim of population variance could not be heard by such a court. This would represent such a complete departure from practice since Baker v. Carr that I could not concur in it. One possible way to avoid such a result would be for the three judge court and then this Court to evaluate the "impact" in terms of state-wide consequences in each case, but I think this would be the worst of all worlds when dealing with what is presumably a jurisdictional standard. If something can be written to avoid these consequences, I am open to persuasion; but as of now, my tentative conclusion is that I would reach the merits.

Sincerely,

WER

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1975

Re: No. 73-1462 - White v. Regester

Dear Byron:

Please join me in your circulation of June 20th.

Sincerely,

WHR

Mr. Justice White

Copies to the Conference