Bandenetz 2/2/86

1. Rather than join Part I, A + B, I'll agree on Part II.

2. P 10, 11 (Part III - don't understand final sentence). Also, should Part III address new relevant factors before stating claim that C 3 failed to provide guidance?

Also A of Part III - p 11, 12

Is it helpful to a sub-part B to Part III? Perhaps the first A of the third question should be defined. C 3 should by overwhelmed.

3. P 12 - last sentence that carries over to 13, of Anni's disagreement seems unnecessary.

4. P 13

5. Cite White v Regular. What about same point BRW makes on p 12 his of.

6. Agree, proportionate ratio is not.


8. Cites

Anne - 2 Execution

No paper on behalf.

B RW at 13

B RW conveys a appellate claim on "statewide" - not simply on certain districts. But the crux is that Gen. Assembly legislator for the State at the purpose of gerrymandering certain districts was to control the State 13/18/19

Also see B RW's effective use of Georgia v. Cummings, 412 U.S. 752 - 755 (11/14, 15)

B RW agrees there was "intent to discriminate." - B RW 11/14, 15

But both "intent" and "actual discriminatory effect" on an "identifiable group" must be proved 12

B RW reads the DC as held "proportional representation" is required, & this has been rejected 16, 17

Loseum have as much opportunity to influence the winning candidate as those who supported the winner. - 18, 19
Also see BRW’s effective use of Gaffney v. Cummings, 412 U.S. 728, 752-53 (BRW 14, 15).

Agreed.

BRW agree these were "intent to discriminate." — BRW 14, 15.

But both "intent" and "actual discriminatory effect" on an "identifiable group" must be proved. 13

BRW note the DC as held "proportional representation" is required, & this has been rejected 16, 17

Answer: 

Those have as much opportunity to influence the winning candidate as those who supported the winner. 18, 19

Dear IS question DC’s findings. They are inadequate to show a violation of ECP. 20
My general comments on Anne's draft

1. Rewrite the first 7. (I may do this according to very briefly) p1, 2

2. Part I - p3 (ok)
   # Summary of facts in good - p3, 4
   # to total of p5.

3. Part II p5
   In my reading students
   I must rectify the Q: in adopting
   whether a majority of a state leg,
   solely for the purpose of extending itself
   in power, may justify enough defects
   rely solely on the factor of the man
   & ignore all other neutral factors relevant
   for identification to fundamental flaws

   Pp 6-10 is excellent - subject
   to any minor elaboration.

4. Part III (p 10-19 - must be separate)
   p 10-14 address "intent" unnecessarily
   p 15 (point #7) then p 19 addressess
   "effect"

   On p 16, Anne refers to scholarly
   comment: interesting but unnecessary.

   P18 makes good points that
   can be included elsewhere.

   P19 some good points
5. Part IV p 19

Introductory stuff ox (?), as edited.

Sub-Part A p 21-23 good; even though partly between.

Sub-Part B p 24 (excellent), 25 (also excellent).

Sub-Part C p 25-26 OK.

6. Part V (Anne's A to IV). p 26 (call this Sub A'.)

Sub B' p 30-31 (Scratch - best up by example.)

Sub C 31- end.

OK as edited.
Having read and reread BRW's opinion and your draft dissent of 1/31/86, I have some doubts as to exactly how best to write our dissent. Given the fact that "gerrymandering", loosely defined, is a way of life when redistricting plans are adopted, as your draft clearly recognizes, all drawing of district lines for the purpose of political advantage are not invalid. Justice White concedes, however, that this practice - known as gerrymandering - may violate the Equal Protection Clause where the plaintiffs may prove "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group". P. 13. He has no difficulty in finding "intent" to discriminate in this case. It would probably be easy to show "intent" in almost any gerrymandering of districts. But, as your draft emphasizes, BRW does not make clear how a cognizable group (here members of the Democratic party) can show "discriminatory effect" as that term is used by Justice
White. He concludes there has been a failure to make the "threshold showing of discriminatory vote dilution" necessary to constitute an equal protection violation (p. 24).

A basic point in his memorandum is, as the DC found, that in this case the plaintiffs below (members of the Democratic party) "claim that the 1981 apportionment discriminates against Democrats on a statewide basis". That is, that Democratic voters "over the state as whole, not Democratic voters in particular districts", have been subjected to unconstitutional discrimination. P. 13.

It seems to me, Anne, that this is where BRW makes one of two basic errors. If Democratic voters in a number of critical districts are discriminated against (as certainly is the case here), the effect is felt by Democratic voters over the state as whole. In short, the Democrats lose control of the entire state legislative, administrative - and often judicial - components of state government. BRW seems to overlook this entirely. This, it seems to me, is one of the fatal flaws in his opinion, and therefore should be the focal point of our dissent. Of course, your draft does make the point: I believe it needs clarification and emphasis.
The second and closely related flaw in BRW's reasoning, perhaps necessary to his "statewide" argument, is that if one man one vote is recognized in the newly created district there has been no discrimination. Here, his opinion - as your draft makes clear - is that Reynolds v. Sims requires consideration of other "neutral factors" in addition to one man one vote. BRW does not mention any other neutral factor.

If I am correct in the foregoing, our draft dissent requires some reorganization. Although I may not have thought this out as carefully as I could if you and I discussed it together, I suggest the following as a possible outline for changes in your preliminary draft:

1. Omit what is now the long paragraph beginning on p. 1, and substitute something along the following lines:

"This case presents the question whether a majority of a state legislature in adopting a redistricting plan, and for the purpose of entrenching itself in power statewide, may rely solely on the factor of one man one vote, and ignore all other neutral factors relevant to a nondiscriminatory redistricting plan."
Justice White's memorandum agrees - as I have noted above - with the District Court "that in order to succeed the Democratic plaintiffs "were required to prove both intentional discrimination against an indentifiable political group and an actual discriminatory effect on that group." The memorandum agrees that the record in this case supports "a finding that the discrimination [against Democrats] was intentional." P. 14. Justice White concludes, however, that there was a failure to make a "prima facie case of an equal protection violation" because the plaintiffs below failed to show that there was statewide "discriminatory vote dilution". Perhaps Justice White would agree - though I do not think he has said so - that serious statewide dilution of a party's voting strength would occur if the plan at issue involved discrimination in a sufficient number of districts to achieve statewide control by one political group or party. His memorandum appears to hold that no such discrimination exists so long as the requirement of one man one vote is met in the relevant districts. In short, his opinion ignores all other relevant neutral factors. This view, as you properly have emphasized, is irreconcilable with the
teaching of *Reynolds v. Sims*, 377 U.S. 533 (1964) and other relevant cases.¹

2. A summary of BRW's memorandum along the foregoing lines could establish the framework for the more detailed discussion to follow. Your Part I (p. 3 to the top of p. 5) is fine, and could follow.

3. I will now comment, Anne, on your Part II. If we conclude that the essence of what I suggest above for the beginning of our dissent is correct, the first paragraph in Part II should be rewritten. I suggest the following as a rough draft:

"Gerrymandering is 'the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes' *Kirkpatrick v. Prielsler*, 394 U.S. 526, 538 (Fortas, J., concurring).² The term 'gerrymandering', however, is loosely used to include the common practice of the party in power — when

¹ Anne: The foregoing merely purports to state in conclusory terms my understanding of what BRW is saying in his opaque memorandum. You have emphasized his rejection of statistics. It seems to me this is subordinate to his basic reasoning, namely that so long as there is one man one vote provided in each district (and I suppose this is a simplistic matter of statistics), other factors are irrelevant. We can talk about this.

² Add here a dictionary definition of gerrymandering.
it has the opportunity to redistrict - to do so to its own advantage. The intent to discriminate in this sense almost always is present. Moreover, depending on a variety of circumstances, the effect of redistricting often is unfair in the sense that the legislative bodies - indeed, this also occurred in Congress - do not accurately reflect the popular voting strength of the principal political parties. Thus, the difference between gerrymandering that generally is accepted and that which becomes discriminatory in an Equal Protection sense is not easy to identify. It is for this reason that courts can avoid their responsibility to enforce the Equal Protection Clause by finding that the issue is nonjusticiable. (Here we will cite dissenting opinions). I agree fully, however, with Justice White that a justiciable issue is presented by the allegations in this case. The justiciability of an Equal Protection issue in a voting rights case is made explicitly clear by prior decisions of this Court. (Here, Anne, start with Reynolds v. Sims and Baker v. Carr and add several other cases). Justice Fortas' definition of discriminatory gerrymandering is properly focused on whether district boundaries are 'deliberate[ly] and arbitrari[ly] distort[ed]. In this
case, the District Court expressly so found with respect to a substantial number of districts, with the purpose and the result of depriving Democratic voters of equal participation in the political process until 1991. As noted above Justice White looked only to whether the one-man-one-vote rule of *Reynolds v. Sims* had been adhered to each district and when viewed statewide."

The foregoing (that you, Anne, should feel free to rewrite) would be a substitute for the present full paragraph on p. 5 of your draft. Pages 6, 7, 8, 9 and including the first full paragraph on p. 10 are very good. My editing is stylistic.

4. Your Part III, p. 10-19, may require more thought than I have given it. My present view, however, is that much of it can be omitted entirely. In my revision suggested above, I have included some of the views expressed in Part III. But I do think it is unnecessary to debate with BRW his definition of "intent", though I agree with what you say. He agrees that discriminatory intent existed, and this is sufficient for our purposes.

In view of changes suggested above, I also would omit the first paragraph in Part III. Although we will
certainly want to cite Gaffney somewhere, all of what is now Part A (p. 11, 12) can be omitted. I would not try to improve on or reframe Abe Fortas' definition of invalid gerrymandering. We also certainly want to use the excellent quote from Justice Stevens on p. 12, I would omit, however, the remainder of Part B including pp. 13, 14, 15, 16 (critical scholarship is excellent, but unnecessary), 17, 18, and through the first full sentence on p. 19.

Some of the points made in these pages are good, and can be incorporated elsewhere. I agree that BRW's memorandum would afford little guidance to lower courts. But rather than try to spell out new standards it is best - I think - to rely on the "neutral factor" argument approved in Reynolds v. Sims and strongly reiterated by JPS in Karcher.

5. Your Part IV is quite good. The introductory paragraph may require some modification if the above outline is adopted. It could, perhaps, commence with Justice Stevens' quote from Karcher that you now have on p. 12, making clear that JPS' view that all relevant neutral factors must be considered in the holding of Reynolds v. Sims. If the "neutral factor" argument has
been reiterated in any other Supreme Court decision, we should, of course, cite it. We also should note at an appropriate place that BRW relies heavily on Reynolds for his one-man-one-vote position but ignores all of the other neutral factors.

Pages 21-23 in Part IV are repetitious, but are sufficiently important to be repeated.

I do suggest that it may be helpful to divide the draft of Part IV into subparts A, B and C - as I have suggested. My editing has been essentially stylistic.

6. I would have a Part V commence at the bottom of p. 26 where you consider the House Districts. Perhaps it would be helpful to have a subpart "A" dealing with the House Districts (pp. 26-29); a subpart B on the Senate Districts, p. 30, and a subpart C as you now have it in your draft beginning at the top of page 31.

7. Present Part V is satisfactory as drafted, perhaps with my suggested additions. It may be that we could repeat Abe Fortas' language in describing how the Republicans have gerrymandered in this case in total disregard of the Reynolds v. Sims neutral factors.

***
I repeat, Anne, that the foregoing outline should be reviewed by you with your usual care and discernment. I have dictated this with considerable interruptions both from presence of gracious hosts and friends, and the fact that I am looking out - in 80 degree weather - on beautiful flowers, green foliage, and a wide expanse of blue water.

* * *

A few minor stylistic thoughts. We should keep in mind that the parties in this case are a group of Democratic voters, not the Democratic party. It is best to refer to the voters as a group. After identifying them as a cognizable group (that BRW does not question), I would refer to these parties as the appellants. The appellees are not the state, but rather identified Indiana state officials.

One major point that I have not mentioned above, but you have included it - though perhaps with insufficient emphasis - is the following: Justice White, relies rather strongly on the argument that if every citizen has one vote, and the districts are not disproportionate in the number of voters (thereby comporting in this respect with Reynolds v. Sims and Baker...
v. Carr), it is immaterial whether you happen to be on the losing side in an election. He states that all citizens then are represented, and can be expected to be treated fairly - the losers as well as the winners in political elections. Coming from Justice White, who has participated in politics, this is little less than astonishing. He must have had "tongue in cheek" as he wrote this utopian language. You have indicated, but we should give it greater emphasis, that the party in power controls the entire state government, including the legislative, executive, and often the judicial branches. All committees in the legislative body will be controlled by the party in power, and the majority in any committee can prevent almost legislative bill from ever reaching the floor of the House or Senate. Moreover, it is almost ludicrous to suggest that public officials are not more responsive to the views of the party leaders and campaign managers - not to mention district and precinct leaders - who helped elect them than they are to the losers. In sum, this sort of disadvantage resulting from discriminatory districting does adversely affect the victims of the discrimination. No one who understands how our political system works questions this truth.

L.F.P., Jr.
End 'Judicialmandered' Redistricting

BY BRIAN MILLER
AND MARVIN OLASKY

Two cases now before the Supreme Court pose striking questions about the future of local government and equal voting rights in the U.S. Court decisions, expected this spring, will indicate whether federalism and electoral fairness will be allowed to coexist.

One case, Davis vs. Bandemer, developed in Indiana when Democratic candidates won 57% of the statewide vote but a minority of seats. Several Indiana Democrats and the Indiana National Association for the Advancement of Colored People alleged racial and political gerrymandering. The district court found no evidence of racial discrimination but demanded a new redistricting plan, contending that the disparity between votes won and seats gained showed that Democratic communities had been treated unfairly.

Indiana's Republican officials appealed. In their Supreme Court brief they acknowledged partisan political gerrymandering but argued that judicial involvement in such traditional electoral maneuvering sends the court down a river of no return. Hokum, said the Democratic and NAACP briefs—the high road of righteousness demands that finagling stop.

The other redistricting case before the Supreme Court, Thornburg vs. Gingles, in this North Carolina case, the issue is whether election-district boundaries must be redrawn whenever possible to guarantee “safe seats” for minorities. Here, the other foot wears the shoe: The high road of righteousness, a NAACP brief argues, demands in this case that judicial finagling be encouraged.

The North Carolina case has an interesting pedigree. It and similar cases grew out of 1982 amendments to the Voting Rights Act. Some judicial activists have been using those amendments to pressure state and local governments that currently elect some officials “at-large.” Their goal—in Chicago, Austin, Texas, and even tiny Roswell, N.M. (pop. 39,676)—has been a legally forced change to single-member districts, with lines drawn to ensure one or more “safe” districts for minorities (normally a district must have a minority population of 65% to 70% to be considered safe).

Such court coercion is “judicialmandering.” Gerrymandering historically refers to the minimizing minority voting power through crazy-quilt drawing of voting districts. In judicialmandering, however, it is minorities, backed up by courts, that do the stitching in order to minimize majority voting power.

The juxtaposition of the Indiana and North Carolina cases signals a potential loss of fair and effective representation in these states. The trial court tried to sort out the issue by seeing where justice may lie in the judicialmandering case, and then examining how the court's decisions in both cases might come out.

Judicialmandering has one thing going for it: the old folk wisdom that "turnabout is fair play." Since majorities fool around with electoral boundaries when they have the power, why shouldn't minorities as soon as they can get a judge on their side? Shouldn't past violations of the Voting Rights Act be remedied?

The problem is that, reasoning, is that judicialmandering cannot really remedy the past: It can only exchange victims. Since representation is a zero-sum game, any favoring of one group disfavors others. The slanting of an election to favor a minority dilutes the voting power of others. The favoritism induced in rigging "safe districts" slants how an election will turn. The one type of intentional manipulation of the political process only by imposing another. Or, in other words, two wrongs don't make a voting right.

Ascending to a higher plane, judicialmanderers then assert that their practice is merely an extension of affirmative action into the voting booth. Maybe so, but at least affirmative action in admission of students, while unfair, does not necessarily lead to unqualified graduates, as long as rigorous standards are maintained for graduation. A legislature elected only by crafty boundary-drawing, though, has lost its representative integrity.

Furthermore, judicialmanderers should see that their short-run grabbing will endanger the long-run chances of affirmative-action plans. After all, those favoring reverse discrimination often defend it politically by arguing that, at least, the majority has willed such discrimination upon itself. Yet, by systematically favoring some political interests to the possible exclusion of others, affirmative action in the political process undermines the legitimacy of all legislation, even affirmative-action programs. When the political process is polluted, the question arises: Did the majority really will this?

The court should have no logical problem turning down judicialmandering, since the right to an equally weighted vote already has been recognized by five justices in Karcher vs. Daggett (1983), which invalidated a New Jersey gerrymander scheme. The court merely has to accept the reasoning of Justice John Paul Stevens in his concurrence: "Political gerrymandering is one species of vote dilution.""

But what, then, of the Indiana case? Will the court also have to oppose gerrymandering? Probably, and conservatives should bend on judicialmandering. There, however, is a practical worry: 数理 the long run, judicialmanderers and political groups will find ways to sign anti-SALT (Strategic Alternative to Lines) treaties.

Mr. Miller practices law in Roswell, N.M. Mr. Olasky teaches journalism at the University of Texas at Austin.

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In concluding this dissent, I want to make clear its limits. Traditionally, the determination of electoral districts within a state has been a matter left to the legislative branch of the state government. Apart from the doctrine of separation of powers and the federal system prescribed by the Constitution,* federal judges are ill equipped generally to review legislative decisions with respect to redistricting or apportionment. As the memorandum opinion makes clear, however, since the decisions in *Baker v. Carr*, 369 U.S. 186 (1962) and particularly *Reynolds v. Sims*, 377 U.S. 533 (1964), a colorable claim of discriminatory gerrymandering presents a justiciable issue under the Equal Protection Clause.
Even so, federal courts should exercise restraint in reviewing legislative redistricting, and should impose a heavy burden of proof on those who claim a constitutional violation. In my view, this clearly is such a case.

Unless the Court is willing to reconsider Baker v. Carr, Reynolds v. Sims and their progeny - including such comparatively recent cases as Gaffney v. Cummings - this case presents a paradigm example of deliberate discrimination - both as to intent and effect - against the political party that happened to be out of power.

Moreover, the findings of the District Court have not been found to be clearly erroneous.

Accordingly, I would affirm the judgment of that court.
In my view, there is a great deal of merit to the eloquent dissent of Justice Frankfurter in Baker v. Carr, joined by Justice Harlan, and to the historically documented dissent of Justice Harlan in that case. Similarly, had I been a member of the Court at the time, I may also have been persuaded by the opinion of Justice Harlan in Reynolds v. Sims. But these cases, and the principles they enunciated, have been repeatedly followed. Unless and until this line of precedents is reconsidered, federal judges - including this Court - are duty bound to follow them.
It was freely conceded in this case by Republican leaders, as the District Court found (add citation), that the purpose of gerrymandering a number of critical districts was to assure Republican control of the legislative branch of the General Assembly of Indiana until after the 1980 census.

Political reality is ignored when it is suggested - as the Memorandum does, ante, at 18 - that members of a losing party have as much influence politically as do members of the victorious party. One need not recall the political adage that "to the victor goes the spoils", to know that even the most conscientious state legislators do
not ignore opportunities to favor or reward groups or persons who were active supporters in the election campaign. I need not detail what we all know, namely, that partisan politics play a significant part in the enactment of legislation and the making of appointments. In these respects, a state government is not essentially different from the federal government.* In sum, one cannot take seriously the Memorandum's suggestion as to the degree of influence of the "losers" under our system.

---

*One example only need be mentioned: The legislative process is largely controlled through the operation of committees, and the majority in a committee - in addition to shaping legislation - often can prevent it even from coming to a vote. Moreover, the judicial branch of government maybe directly affected by discriminatory gerrymandering in states that elect judges.

Memo to Anne:

This rider is intended to summary what you have very well said on pages 15 and 16. Justice White must
have had "tongue in cheek" when he made this suggestion. Its unreality will be obvious. I am prompted to inquire, Anne, do you think we are misreading Justice White?

Perhaps it would be well when we mention his suggestion on p. 18 of the Memorandum, to quote it verbatim in a footnote - if the quotation would be fair when taken out of context.
Bring up the question as to the printing in 84-1244, the Bandemer redistricting case, and attached to the memo I should have my memo to Conference in which I expressed the view that the map should be printed in color.
February 21, 1986

84-1244  

Davis v. Bandemer, et al

Dear John:

Here is a Chamber's draft of my proposed opinion in this case.

As we were together at Conference, I would be grateful if you would review the draft prior to circulation, and give me the benefit of your thoughts.

Sincerely,

Justice Stevens

LFP/vde
February 22, 1986

84-1244 Davis v. Bandemer

Dear Henry:

The Conference has now approved the reproducing in color of the two maps showing the redistricting in Indiana.

I understand that you make the necessary arrangements.

Sincerely,

Mr. Henry C. Lind
lfp/ss
cc: The Chief Justice  
Mr. Joseph F. Spaniol, Jr.
February 24, 1986

Re: 84-1244 - Davis v. Bandemer

Dear Lewis:

Confirming my telephone conversation with you on Saturday, I think you have done a really excellent job in drafting your opinion in this case. These are the flyspecks that I mentioned on the telephone:

1. I think it is Part I rather than Part II of Byron's Memorandum that we will be joining.

2. In footnote 10 on pages 12-13, you refer to Judge Pell as a resident of Illinois. He just moved to Illinois at the time of his appointment to the Court of Appeals and has the same kind of connection with Indiana that you have with Virginia. He was president of the Indiana Bar Association and a practitioner in Indiana throughout his pre-judicial career.

3. We are going to check past history to see if the fact that there are one hundred House districts and fifty Senate districts may in the past have led the legislature to follow what would seem to be a natural pattern of placing two House districts in each Senate district.

4. At the end of the first sentence in the text on page 12, you might want to append a footnote citing to the maps in the Official Reports of Karcher v. Daggett, and also Gomillion v. Whitefoot, in which some truly grotesque shapes provide pretty convincing evidence of gerrymandering. (I may have failed to make this suggestion when we talked on Saturday.)
5. On page 21, I think you should omit the words "unless the Court is willing to reconsider" and perhaps substitute something like: "It is perfectly clear, however, that under the Court's precedents such as Baker v. Carr, ...." (I hope you can also make a comparable change in n. 18 on page 21.)

6. I'll study the opinion again in the light of Byron's writing, but you can definitely count on my joining you.

Respectfully,

Justice Powell
February 26, 1986

Re: 84-1244 - Davis v. Bandemer

Dear Lewis:

Please join me.

Respectfully,

Justice Powell

Copies to the Conference
March 11, 1986

Dear Roland:

This is to say again how we appreciate your intelligent cooperation, and the cooperation of your fine associates, in working out a solution to the problem of printing, with the colors, the redistricting maps to accompany the Court opinions in *Davis v. Bandemer*.

The reproduction, in greatly reduced form, of the maps that were introduced in evidence at the trial, will facilitate an understanding by readers of the opinions in this case.

With thanks and admiration.

Sincerely,

Mr. Ronald H. Goldstraw

1fp/ss

cc: The Chief Justice
    Mr. James R. Donovan
Anne: We need some answer to BRW along the following lines:

The Court, in Part D of its opinion, ante, at 24-28, undertakes to answer this dissent. It characterized my opinion as holding "that the intentional drawing of district boundaries for partisan ends and for no other reasons violates the Equal Protection Clause in and of itself". Ante, at 24. This misstates my opinion as I have not approved - either explicitly or implicitly - any such simplistic view of a complex issue. My reasoning is based primarily on Reynolds v. Sims that requires a close examination of what in fact the legislature did in its
redistricting. In this case, the District Court made
detailed findings of fact as to the gerrymandering that
are relevant. None of these findings is found to be
clearly erroneous, and they are ignored by this Court.

Having failed in the first 23 pages of its
opinion to identify a standard of analysis, the Court
finally attempts this. See, ante, at 27. In summary, the
Court analysis is reduced to conclusory statements. It
merely "assumes" discriminatory intent at this point,
despite having explicitly found it to exist earlier in its
opinion, ante, at ___. Addressing the second
requirement, discriminatory effect, the Court finds "there
was insufficient discriminatory effect to constitute an
equal protection violation, and therefore [we] did not
reach the question of state interests (legitimate or
otherwise) served by the particular districts . . .

[Consequently, the valid or invalid configuration of the districts was an issue we did not need to consider.]

Id., at 27. In a footnote at this point, the Court states "we have rejected none of the District Court's subsidiary factual conclusions. We have merely, based on our view of the applicable law, disregarded those that were irrelevant in this case and held insufficient those that inadequately supported the District Court's ultimate legal conclusions." Ante, at 27, n. 17.

I must say, in all respect, I have rarely seen more conclusory reasoning, if it can be called reasoning. Even though in a gerrymandering case, the facts as to where and why the legislature drew the lines of the new voting districts go to the heart of the equal protection
issue, the Court - without explanation - simply finds the
undisputed facts developed with care by the District Court
to be "irrelevant" or "insufficient". No explanation is
offered as to why the facts upon which the District Court
based its judgment are peremptorily rejected in this
manner. I will not repeat the facts that the Court
ignores, as they are summarized generally in Part III-B,
and particularly with respect to the findings with respect
to the House Districts in Part IV-A, and the Senate
Districts in IV-C, ante, at ____ and ____. (Anne,
please be more precise in these references.

Anne: As always, this is a first try. I want your views
as to substance and form.
The Court's opinion appears to hold that although the equal protection issue is justiciable, a court must await several elections to determine whether a gerrymander has had a discriminatory effect. For example, the Court states that a "mere lack of proportionate results in one election cannot suffice" to show that a group is "in fact disadvantaged at the polls", ante, at 25. Again, the Court states that my dissent would allow a constitutional violation to be found where the "only proven effect of a political party's electoral power was disproportionate
results in one (or possibly two) elections", ante, at 26.
The Court misreads my opinion, as I do not rely on the outcome of one or two elections except to illustrate the predictable effect of the legislature's studied discrimination. Its conceded purpose was to assure Republican control until 1991. Nor do I make any claim for proportional representation, a result not even required by §2 of the Voting Rights Act of 1984. See Thornburg v. Gingles, 83-1968. As should be clear from my opinion, I have followed the rationale of Reynolds v. Sims, repeatedly reaffirmed until today, see Chapman v. Meier, 420 U.S. 1, 17 (1975), and particularly Gaffney v. Cummings, 412 U.S., at 751. Sims made clear that the concept of "one person one vote" related only to gross population disparities among districts. This case does
not involve such disparity, as computers now make it a simple matter to accomplish this result in the bizarre manner so vividly illustrated by the maps attached to this opinion.

*Sims* and its progeny also recognize that discrimination against citizens generally that minimizes their ability to exercise political influence through their vote and party affiliation, would violate the Equal Protection Clause. As my opinion emphasizes, there are several neutral factors, initially identified in *Sims*, that are highly relevant. As stated more fully above, these include compactness of districts, respect for existing political subdivisions, and some reasonable grouping of House Districts within the same Senate District in the absence of identifiable reasons to the
contrary. For democracy to work well and fairly, citizens must have an opportunity to become familiar with the relevant boundary lines, familiar with voting precincts, and there must be some rationality in these lines and locations. The party political system works to a large extent because citizens, commencing at the precinct level, become acquainted and work together for their respective parties and candidates. Confusion inevitably follows (as so clearly will be the case in Indiana) when a citizen finds himself or herself associated with different groups of citizens depending on the election, and often required to vote at different polling precincts.

The entire rationale of the Court's opinion ignores the rights and interests of citizens, and the way the democratic process is likely to work best. All that
is required under the Court's view today is that a gerrymander, however irrational and unfair it may be, [see maps attached] is not a violation of equal protection unless - viewing the results statewide for several years - there is no gross disproportionality in the vote of the contending parties. I know of no authority supporting this view.
March 18, 1986

PERSONAL

84-1244 Davis v. Bandemer

Dear Chief:

Before you come to rest in this difficult case, I would welcome the opportunity to have you take a look at the original maps put in evidence in this case.

The Clerk's Office obtained these and I have them in my Chambers. They are dramatic, and - support the old adage - that a "picture" is more effective than a thousand words. When you read Byron's opinion and my dissent, bear in mind that this may be the last chance the Court will have to escape the straitjacket of "one person one vote" regardless of all other relevant factors.

I am making a substantial reply to Byron's latest circulation, and think you will find that he wholly ignores critical factual findings of the District Court in a desire to consider only whether redistricting comports with one person one vote, and does not result in any statewide lack of proportionality.

You can see the maps in 10 minutes, and you would be welcome.

Sincerely,

The Chief Justice

lfp/ss