April 1, 1986

To: Mr. Justice Powell

From: Anne

Re: No. 84-1244, Davis v. Bandemer

I just wanted to let you know that, in addition to working on your two dissents, I am preparing our response to Justice White's opinion in this case. The more I re-read his response to your position, the more puzzled I become by his erroneous description, not only of your opinion, but also of the case law. In short, I think that we will have a powerful response, and I will have some draft language (based on the draft footnotes you gave to me) for your review soon.
April 7, 1986

84-1244 Davis v. Bandemer

Dear Byron:

The printer has lent me the two colored maps that will accompany my opinion.

I think that Roland and Wilma have done a superb job in reproducing these maps that were a part of the record below. They are generally along the lines of the maps appended to the Karcher opinion.

Roland hopes we can return these promptly. There are no other copies.

Sincerely,

Justice White

1fp/ss
Re: No. 84-1244, Davis v. Bandemer

Dear Byron:

Please join me.

Sincerely,

Justice White

cc: The Conference
April 16, 1986

PERSONAL

84-1244 Davis v. Bandemer

Dear Chief:

In a letter you recently wrote me about another case, you expressed the view that it probably was the most important case before you as a judge since you went on the bench in 1955.

By comparison, in terms of the effect on our system of government, I think upon reflection you will agree that this Indiana redistricting case is similarly important. I have shared your view that the "one person, one vote" rule (it is neither a principle nor a standard) is simply a manipulable formula that does no credit to this Court. The total rigidity with which four Justices are now willing to apply this rule eliminates all judicial discretion.

I invite you again to spend ten minutes looking at the original exhibit maps here in my Chambers. The undisputed record shows that these voting districts were redrawn by mapmakers using computers, and hurriedly adopted by party line vote on the last day of the legislative session. Concededly, their only objective was to entrench the party in power. Under Byron's opinion all that will be necessary in many states - to establish monopoly control by a party for perhaps ten years - is for hired personnel (with the relevant data and computers) to draw the kind of district lines shown on the maps in this case.

Byron's opinion rejects, not as erroneous but as irrelevant, all of the findings of fact made by the three-judge District Court. Despite his finding of justiciability, Byron's opinion effectively eliminates any justiciable issue. As will be clearer when you see the maps, and reread the findings of the District Court, one cannot conceive of a more egregious gerrymandering than this case presents.

In order to agree that there is no justiciable issue, one would have to overrule Baker v. Carr, Reynolds v. Sims, and a half-dozen or more cases in which this Court has assumed jurisdiction and decided claims respecting redistricting and reapportionment. When I mentioned our precedents to Bill Rehnquist, he agreed that this line of cases
should be overruled but recognized the votes aren’t here to do that. If I had been on the Court when Carr and Sims were decided, I probably would have agreed with the dissents of Harlan and Frankfurter on federalism grounds. In view of my respect for stare decisis, and for the integrity of this Court as an institution, I would not vote now to overrule them.

Yet, while proclaiming justiciability, there are four votes to affirm this Indiana case simply on the basis of “one person, one vote”. All of the other relevant factors identified particularly in Reynolds v. Sims, and though found by the District Court to have been ignored by the Indiana legislature, are now said to be irrelevant.

The “one person, one vote” rule, when thus reduced to a mathematical and computerized exercise, has become no rule at all in any judicial sense. A few skilled teenagers, with the requisite data and a computer, will be able to accomplish a wholly partisan redistricting while complying perfectly with “one person, one vote.” The legislature is then free to adopt the plan on party lines without even a public hearing.

In sum, your vote now - even if you join only the judgment to reverse - will establish a precedent under which redistricting is reduced to a simple mechanical procedure to be manipulated by the politicians who happen to be in control. This Court’s decision would foreclose all effective judicial review. In a word, the considerations of public interest so clearly identified in Reynolds v. Sims will be ignored. And in my view, this Court will have abdicated its responsibility.

While I hope you will join my opinion, an option that you might consider is simply to vote to affirm - either on the basis of the findings of the District Court, or without any amplification of your vote.

Let me know if you still wish to see the maps, and I will have them all set for you.

Sincerely,

The Chief Justice

lfp/ss
May 6, 1986

84-1244  Davis v. Bandemer

Dear Chief:

As you indicated an intention to reread my opinion in this case, I enclose - for your convenience - a copy of the 4th Draft in which I replied to Byron.

You will note that none of the District Courts extensive findings of fact was found by Byron to be clearly erroneous. Also, in Part V (p. 24, 25) of my opinion, I make clear that although federal courts have a duty under the Equal Protection Clause to review cases of extreme gerrymandering, a heavy burden of proof rests on those who challenge any redistricting plan.

The colored insert maps that will accompany my opinion are not yet available.

Sincerely,

The Chief Justice

LFP/vde
June 4, 1986

PERSONAL

84-1244 Davis v. Bandemer

Dear Chief:

At long last, samples of the Indiana maps, that will be appended to my dissent, are available. I enclose a copy as it will be folded into the U.S. Reports. The Indiana Senate districts are on one side and the House districts on the other.

You will be particularly interested in the gerrymandering of the heavily populated areas around Indianapolis. This is true of both the House and Senate races.

Also, there are numerous other examples. Take a look at House districts 11, 12, 13 and 14 in northwest Indiana; at districts 5, 7 and 8 in northern Indiana; and at 71 and 72 in the southeast.

It is obvious that contrary to Reynolds v. Sims and its progeny, the Indiana legislature ignored all factors relevant to the validity of redistricting except "one person, one vote" as the DC found. Byron's opinion does not question the detailed factual findings of the DC.

Sincerely,

The Chief Justice

lfp/ss
June 9, 1986

Re: 84-1244 Davis v. Bandemer

Dear Lewis,

I have finally finished my dissent in this case. After our conversation I reread both your opinion and Byron's. I concluded it was best to put off for another occasion any attempt to indicate I favor one approach over the other, given the decision that political gerrymandering cases are justiciable. My opinion simply deals with the issue of justiciability. My inclination is to favor the approach that sweeps in fewer cases for application of judicial review on the merits.

We are not often on opposite sides of a case, and perhaps I am swayed by my own experience as a legislator.

Sincerely,

Justice Powell

Map enclosed
June 10, 1986

Re: 84-1244 - Davis v. Bandemer

Dear Sandra:

Please join me in your opinion concurring in the judgment.

Sincerely,

[Signature]

Justice O'Connor

cc: The Conference
June 27, 1986

To: Mr. Justice Powell
From: Anne
Re: No. 84-1244, Davis v. Bandemer

The following is a footnote along the lines suggested by Justice Stevens:

Insert on page 12, new note 12:

Indeed, in view of the Court's disposition in this case, further litigation will be necessary to establish what standard properly should be used to evaluate a redistricting plan claimed to be an unconstitutional partisan political gerrymander. The standard proposed by the plurality has been explicitly rejected by two Justices, and three Justices have expressed their view that the plurality's standard will "prove unmanageable and arbitrary." Ante, at 12 (O'CONNOR, J., joined by BURGER, C.J., and REHNQUIST, J., concurring in the judgment).
Suggested new note 12, p. 12:

In light of the several opinions filed today, there is no "Court" for a standard that properly should be applied in determining whether a challenged redistricting plan is an unconstitutional political gerrymander. The standard proposed by the plurality is explicitly rejected by two Justices, and three Justices also have expressed the view that the plurality's standard will "prove unmanageable and arbitrary" ante, at 12 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment).
June 27, 1986

84-1244 Davis v. Bandemer

Dear John:

In view of your perceptive suggestion, what do you think of a note along the following lines?

Suggested new note 12, p. 12 (call number to follow last word in text):

As is evident from the several opinions filed today, there is no "Court" for a standard that properly should be applied in determining whether a challenged redistricting plan is an unconstitutional political gerrymander. The standard proposed by the plurality is explicitly rejected by two Justices, and three Justices also have expressed the view that the plurality's standard will "prove unmanageable and arbitrary" ante, at 12 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment).

Sincerely,

Justice Stevens

Ifp/ss
84-1244 Davis v. Bandemer (Anne)

BRW for the Court 10/14/85
1st draft 1/13/86
2nd draft 3/17/86
3rd draft 6/16/86
4th draft 6/20/86
    Joined by WJB 1/16/86
    TM 1/16/86
    HAB 4/8/86
LFP concurring in Part II of BRW's Opinion and dissenting
    1st draft 2/25/86
    2nd draft 2/27/86
    3rd draft 3/5/86
    4th draft 4/8/86
    5th draft 6/20/86
    6th draft 6/24/86
        Joined by JPS 2/26/86
SOC concurring in the judgment
    1st draft 6/10/86
    2nd draft 6/10/86
    3rd draft 6/25/86
        Joined WHR 6/10/86
            CJ 6/24/86
CJ concurring in the judgment
    1st draft 6/24/86