



10-1974

White v. Regester

Lewis F. Powell Jr.

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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,

The Chief Justice

Copies to Conference

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 multimember 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.

L.F.P., Jr.

Reply to Note

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. *K*

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.
1.31*

P. S.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 5, 1975

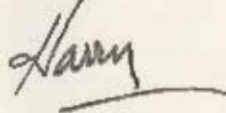
Re: No. 73-1462 - White v. Regester

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,



The Chief Justice

cc: The Conference

3/28/75

73-1462 White v Regents

Byron will join it on my jurisdiction issue. (But then he back-slid)

Robinson also will join on Juris. issue.

After discussion, White was asked to write a memo. on merits.

Brennan, Thurgood & Harry would affirm seven board.

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,

Neil

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 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 BYRON R. WHITE

May 21, 1975



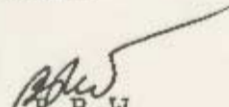
MEMORANDUM FOR THE CONFERENCE

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.

May 22, 1975

No. 73-1462 White v. Register

Dear Byron:

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

Commiserations.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference

LAW OFFICES OF
DON GLADDEN
708 BURK BURNETT BUILDING
FORT WORTH, TEXAS 76102
817-836-8837

RECEIVED
JUN 16 1975
OFFICE OF THE CLERK
SUPREME COURT, U.S.

DON GLADDEN
MARVIN COLLINS
ART BRENDER

June 13, 1975

Honorable Michael Rodak, Clerk
Supreme Court of the United States
1 First Street, N. E.
Washington, D. C. 20543

RE: White vs. Register
No. 73-1462

Dear Mr. Rodak:

We have received a copy of Mr. David Richards letter of June 12, 1975, directed to you relative to the above case.

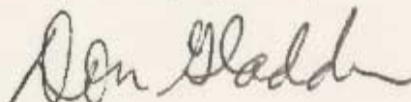
It would appear that the difference of view between the attorneys for other parties plaintiff and our office is one perhaps of semantics rather than law. It is our position that the constitutional question in the litigation is whether or not the various plaintiffs have been denied equal access to the political processes, rather than the means by which such denial is accomplished. We feel that the action taken by the Texas Legislature may not have resolved the issue and render moot the question in the case.

We realize that if Governor Briscoe signs HB 1097 or fails to veto it by June 22, 1975, that the facts before the Supreme Court are not sufficient to determine whether or not the new districts created by the legislature resolve the complaint of the parties plaintiff.

In any event we do concur that upon HB 1097 becoming law the Supreme Court should remand the case back to the district court for further proceedings.

I am forwarding a copy of this letter to all counsel of record.

Very truly yours,



DON GLADDEN

DG:cls

cc: All Counsel of record

File

June 12, 1975

RECEIVED

JUN 13 1975

Hon. Michael Rodak, Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D. C. 20543

OFFICE OF THE CLERK
SUPREME COURT, U.S.

RE: White v. Register
No. 73-1462

Dear Mr. Rodak:

This letter is to confirm the contents of our telephone conversation of this date regarding the current status of legislative reapportionment by the Texas Legislature.

I am enclosing a copy of House Bill 1097 in the form which it passed the Texas Legislature and now awaits the Governor's signature. You will note that the bill passed the House on May 7 by a vote of 103 yeas and 29 nays and passed the Texas Senate on May 28, 1975, by a vote of 30 yeas and 1 nay. This bill, along with many others passed in the closing days of the Texas Legislature, are awaiting the Governor's signature. Under the terms of Article 4 Section 14 of the constitution of the State of Texas the Governor has 20 days from the date of adjournment to act upon the legislation. The Legislature adjourned June 2 and the Governor must act by June 22, 1975. Thus the Governor must either sign the bill or veto it before June 22 or it will become law on June 22.

From a purely practical point of view there is absolutely no reason to think that the Governor will veto House Bill 1097. It passed overwhelmingly in both houses of the Legislature and there has been no expressed opposition to the bill becoming law. Governor Briscoe has been in attendance at the Governor's Conference in New Orleans for much of the time since the Legislature adjourned and House Bill 1097, along with a number of other bills, await his signature, presumably next week.

By its terms House Bill 1097 creates single member legislative districts in each of the counties under consideration,

Hon. Michael Rodak, Clerk
Supreme Court of the United States
June 12, 1975
Page Two

to wit: Jefferson, Galveston, Tarrant, McLennan, Travis, Nueces, Hidalgo, El Paso and Lubbock, and there are no remaining multi-member legislative districts.

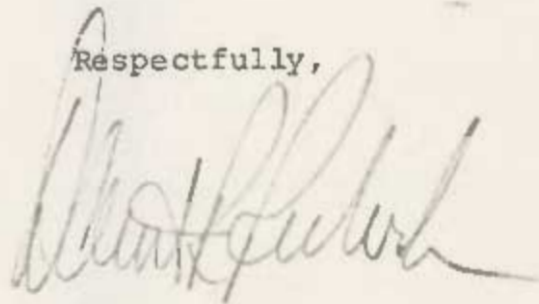
Furthermore, Section 5 of the bill specifically supersedes the Legislative Redistricting Act of the Legislative Redistricting Board of Texas. It was, of course, the Act of the Legislative Redistricting Board of Texas which has been the subject matter of this litigation from the outset.

It is the unanimous view of the attorneys associated in the brief on behalf of the Plaintiffs Register, Moreno, Chapman, Wright and Warren that this action of the Legislature renders moot the questions in the case as it now pends before the United States Supreme Court. We recognize that this view is apparently not shared by Mr. Gladden who represents the Plaintiff Escalante.

If it is not presumptuous, we suggest that it would seem appropriate to follow the practice employed in Diffenderfer v. Central Baptist Church of Miami, 404 U.S. 412 (1972) and vacate the judgment of the district court and remand to the district court to permit any Plaintiffs, who chose, to amend their pleadings, if any chose to attack the newly enacted legislation. In all events, it is our view that the matter has been rendered moot by legislative action, and that final confirmation of this mootness will be forthcoming upon the Governor's signing House Bill 1097. In this connection I will notify you immediately upon any action being taken by the Governor in connection with House Bill 1097.

As indicated below copies of this communication are going to all counsel of record.

Respectfully,



DRR:CSH
Enclosure

Hon. Michael Rodak, Clerk
Supreme Court of the United States
June 12, 1975
Page Three

CC: Ms. Elizabeth Levatino, Esq.
Assistant Attorney General of Texas
Supreme Court Building
Austin, Texas 78701

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Albert H. Kauffman, Esq.
MALDEF
501 Petroleum-Commerce Building
201 North St. Mary's Street
San Antonio, Texas 78205

June 20, 1975

No. 73-1462 White v. Regester

Dear Byron:

Please join me in your circulation of June 20.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference

Sally - Join

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,

WW

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

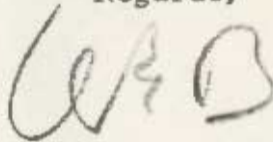
June 20, 1975

Re: 73-1462 - White v. Regester

Dear Byron:

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

Regards,

A handwritten signature in dark ink, appearing to be 'W. B. Brennan', written in a cursive style.

Mr. Justice White

Copies to the Conference

June 20, 1975

*Agreed
with
Order*

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.

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

*Join - if I've
not ~~att~~
already ~~done~~
done so!*

From: White, J.

1st DRAFT

Circulated: 6-23-75

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 73-1462

Mark White et al.,
Appellants,
v.
Diana Register 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
THE CHIEF JUSTICE

June 23, 1975

Re: 73-1462 - White v. Regester

Dear Byron:

I join your per curiam circulated today.

Regards,

Mr. Justice White

Copies to the Conference

WBJ

