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Supreme Court of Texas.
Rick PERRY, in his official capacity as Governor of The State of Texas, and
Henry Cuellar, in his official capacity as Secretary of State of The State of
Texas, Appellants,
v.
Alicia DEL RIO, et al., Appellees.
Alicia Del Rio, et al., Appellants, v. Rick Perry, in his official capacity as
Governor of The State of Texas, and Henry Cuellar, in his official capacity as
Secretary of State of The State of Texas, Appellees.
No. 01-0988-01-1002.

October 18, 2001.

Appearances:
John Cornyn, Attorney general, Austin, Texas, for Appellant.
Paul Smith, Ware Jackson Lee Chambers, Houston, Texas, for Appellees.

Before:

Thomas Phillips, Chief Justice; Priscilla Owen, Xavier Rodriguez, Craig Enoch, Wallace B. Jefferson, Deborah Hankerson, and Nathan Hecht, Justices.

CONTENTS
ORAL ARGUMENT OF JOHN CORNYN ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF PAUL SMITH ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF JOHN CORNYN ON BEHALF OF THE RESPONDENT

SPEAKER: May it please the Court, Mr. John Cornyn will present argument for the appellant. Appellants have reserved five minutes for rebuttal.

ORAL ARGUMENT OF JOHN CORNYN ON BEHALF OF THE PETITIONER

MR. CORNYN: Mr. Chief Justice, may it please the Court.
The trial court below abandoned its role as an impartial adjudicator of the law on facts and assumed an unconstitutional role as a legislature in Burrows. This violates Article 2 Section 1 of the Texas Constitution. In fairness to the trial court, this Court has written only one time, in Terrazas v. Ramirez, on the appropriate conduct of a redistricting case in state court. And so, that points out the necessity of this Court, not only hearing this case -- reversing

the judgment, but also rendering guidance for the future.

CHIEF JUSTICE PHILLIPS: Whatever that necessity is, its bounded by constitutional restrictions on our jurisdiction. And could you address why this Court can take a direct appeal from this [inaudible]?

MR. CORNYN: Mr. Chief Justice, simply because it meets the terms of the statute, Government Code Section 22.01(c) which merely -- reports on the rule which merely says that the -- an appeal may be taken directly to the Supreme Court from an order of the trial court granting or denying interlocutory or permanent injunction on the grounds of the constitutionality of the statute in this State. And that simply, what we have here. We have a statute, Article 197(h) as modified by the court in Bush v. Vera.

JUSTICE HANKERSON: But -- but who was appealing from the grant of the injunction against that statute? The appeals to me here, seems to be to go towards the remedy that the trial court has included in its judgment's remedy that problem. Who was appealing from the grant of the injunction?

MR. CORNYN: Justice Hankerson, we are appealing from the order of the Trial Court in -- in the terms of the statute, not from a single aspect of the -- what is contained in the order because, of course, we agree that the statute, given the addition of two additional congressional seats to Texas after the [inaudible] census includes, obviously, a -- a finding of unconstitutionality of 197(h) as modified by the Federal Court, a -- an injunction against its use but then it also then necessitates a remedy which is our primary concern.

JUSTICE HANKERSON: My -- my concern is that the plain language of the statute gives us jurisdiction from a trial court order "granting or denying" an -- trial court's "grant or denial of an interlocutory or permanent injunction" on the ground of constitutionality. And I'm working for where that is in this appeal.

MR. CORNYN: Well, the Court's -- the Court's findings of fact and conclusions of law, it says that if it is as if holding the 197(h) unconstitutional --

CHIEF JUSTICE PHILLIPS: But you're not -- nobody in the [inaudible] is complaining about that.

MR. CORNYN: Not to my knowledge.

CHIEF JUSTICE PHILLIPS: Nobody's advocating we should just send up 30 congressmen and save the taxpayer some money.

MR. CORNYN: I haven't heard that suggestion.

CHIEF JUSTICE PHILLIPS: In 1957, in Bryson v. High Plains Underground Water Conservation District, the -- the Court, speaking to an opinion by Judge Walton said that, "For us to have jurisdiction over a direct appeal, it must appear that the question of constitutionality of a statute or administrative order was properly raised in the trial court," as this was. It says, "Question was determined by order of such court granting or denying an interlocutory or permanent injunction," as this was. And then, "And that the question is presented to this Court for a decision." And it's that part -- and -- and really, the specific language of the -- of the constitutional provision "from an order" that I'm having trouble and maybe Justice Hankerson is too. Seeing how -- It looks like we're bootstrapping without a strap here.

MR. CORNYN: I -- I disagree, Mr. Chief Justice. The order necessarily encompasses a number of different rulings. One, there is a finding of unconstitutionality. Another, finding that an injunction was appropriate. And another aspect of the order being appealed from provides a remedy --

CHIEF JUSTICE PHILLIPS: But is the question presented to this

Court for decision -- if -- if this language of the Court is a correct interpretation?

MR. CORNYN: Well this -- yes, it is. And because it is a -- from an order of the court which includes a -- a granting of an injunction based on the unconstitutionality of the statute, this Court has also recognized that more recently, that once the Court has jurisdiction, by virtue of this statute, that it has extended jurisdiction over all other questions related thereto.

And really, the fundamental question this Court has to determine in this case is whether this Court is going to approve of a process where the trial court dives head long into the political thicket that makes political judgments about what Texas policy should be involving inherently political choices because, of course, not only did the trail court do that here without hearing evidence, without a fair trial. But is, in essence, the appellees are asking this Court to approve and affirm of that type of role for the Texas judiciary. One that is plainly [inaudible] to --

CHIEF JUSTICE PHILLIPS: You think -- you think that it tainted the first plan 1065(c)?

MR. CORNYN: We do. We -- we believe it -- it did. Although -- And we believe that its error for Judge Davis to tentatively adopt that as the plan, although, as this Court recognized in Terrazas v. Ramirez in deciding to prove a Bullet -- the Bullet case v. Texas Skate -- Skating Association. It is within the discretion of the attorney general, as the constitutional officer authorized to speak for the State in court whether to appeal or whether to accept even a flawed judgment [inaudible].

JUSTICE O'NEILL: Now, you -- you were emphatic in Terrazas. I think I quote here, the Executive Branch, including the attorney general, has no reapportion of power. Now how do you square that statement with the position you're taking here?

MR. CORNYN: I was. Well, the Court -- the Court held that -- the Court held that --

JUSTICE: Next question, how do you square your position with what the plurality said, "As a matter of law, the attorney general had no power to effectuate a valid reapportionment of senatorial districts himself. That can only be done by judgment of the district Court."

MR. CORNYN: We wholeheartedly -- I wholeheartedly embrace that statement as a correct statement of the law and that's not what we're asking for here. The attorney general is not asking to reapportion the -- the congressional districts in Texas. We are asking for the recognition that's given by the Texas Constitution and the cases that this Court has decided, which recognize that in a void left by legislative non action and especially in litigation, where the attorney general is the authorized official elected by the people of the state to represent the State's interests in court. That under those circumstances, the attorney general has the authority to propose a --

JUSTICE: But your position is not just to propose. Your position is to not only propose, but to require, at trial court, to adopt a plan you proposed.

MR. CORNYN: [inaudible]

JUSTICE: On what the other side characterizes as a "one-man legislative act."

MR. CORNYN: Well, of course that's not the case. And what Judge Davis did below, without guidance and here again I don't want to be unduly harsh, he did not have any controlling authority from this Court describing what his duties were in a case of this nature because it

just hadn't come up before. But -- but what the -- the official who orders a congressional redistricting plan the court. The attorney general is the voice of the State in court in saying what the state policy should be. If it's legal, once the attorney general proposes a congressional redistricting plan in the absence of any legislative action, then the question is, what -- is what the State proposes through its only authorized official, legal.

JUSTICE: But -- but don't the cases have a broader view on who has the opportunity to appear in one of these trials and present a plan that, quote, represents their interests --

MR. CORNYN: Well, I agree with the first --

JUSTICE: -- as citizens of the State and so forth? But your view is that because you're the attorney general and you're constitutionally authorized to represent the State that you can propose a plan which I don't think anybody disagrees with but the result of that is the trial court is required to adopt your plan to the exclusion of any other?

MR. CORNYN: This Court recognized in Terrazas v. Ramirez that -- that apportionment involves uniquely political judgments and there are a vast number of -- of potentially legal apportionment plans that might be proposed. And so the question is, who's gonna make the political judgment in the absence of legislative action when no one else can? Is it going to be the attorney general as the authorized spokes -- spokesman for the State in litigation in court --

JUSTICE HANKERSON: [inaudible]

MR. CORNYN: -- or is it gonna be a court being a politician?

JUSTICE HANKERSON: General Cornyn, if that were the case, then we wouldn't need -- we wouldn't need a court proceeding in order to resolve it. That in fact, if there -- if the legislature failed to act, then we would have a provision where there was just a default to the attorney general, on behalf of the State, representing it to say, "Here's the plan." Instead, what we've done is we [inaudible] over into the adversarial process in the courts, which seems to me a very different playing field than having it -- the -- the [inaudible] taken in the legislative arena.

MR. CORNYN: With all due respect, I disagree, your Honor. What I'm suggesting is, the attorney general has the authority to propose for the State what the judgment should be on what the plan should look like subject to --

JUSTICE HANKERSON: But -- but -- [inaudible] --

CHIEF JUSTICE PHILLIPS: Does a trial judge have to take -- start somewhere? Do you believe that -- that a trial judge has to start with something?

MR. CORNYN: I do.

CHIEF JUSTICE PHILLIPS: -- [inaudible] or can you just start with a blind man?

MR. CORNYN: I do not believe it's an appropriate role for the trial judge to start with, in essence, what is a legal [inaudible] and to start from a blank map and then create a map made out of whole cloth, particularly --

CHIEF JUSTICE PHILLIPS: And -- and what's your best authority on that that we need -- It seems to me you're argument is premised on the notion that the trial judge has is [inaudible] past to have something to start with. Whether that's what the legislature did 11 years ago or -- or your plan or some -- or something else. And what's the best authority for that that it needs to start somewhere?

MR. CORNYN: Well Article 2 Section 1 of the Texas Constitution provides, under the Separation of Powers Principles, that it's improper

for a judge, basically, to act like a legislator. And in order to compare with the process in the Federal Court as recognized by the United States Supreme Court in Lawyer v. Department of Justice. The attorney general is, at least for federal purposes, recognized as the spokesperson in litigation on what the State's policies should be when it comes to a --

JUSTICE OWEN: Aren't we, essentially, in the same shoes that this Circuit was in Bush v. Vera? This is a remedial action, is it not? We -- we're not fashioning a plan in lieu of a legislature. The Courts are only stepping in at the void to fashion a remedy for an unconstitutional plan as it exists.

MR. CORNYN: What makes this a little different, Justice -- Justice Owen, is the fact that there is no plan that's been passed by the state officials given the responsibility to do it. So we're acting to fill the void --

JUSTICE OWEN: But it's still a remedial plan pending the legislature taking action in [inaudible] --

MR. CORNYN: Oh, I agree with that, certainly. [inaudible] --

JUSTICE OWEN: So why -- why aren't we in the same position as the [inaudible]. The statute on the [inaudible] is unconstitutional by all the -- by all the tests. So why aren't we just in a remedial mode?

MR. CORNYN: [inaudible]

JUSTICE OWEN: In that sense, why isn't the State and the attorney general simply another party proposing the remedy?

MR. CORNYN: Well, because the -- the founders of our State Constitution resolved that we should have a -- a legislature that was in session only 140 days every two years and thus have limited power to act, particularly during the interim when it was not in session. And it's black letter law that the legislature, including the Lieutenant Governor and the Speaker, have no authority to speak for the State or to -- to establish any law in the act that they might --

JUSTICE OWEN: But -- but my -- I guess my point was that the Court said in Bush v. Vera, the three-judge court fashioned their own remedy without giving deference to any particular State Act in it's plan. And the U.S. Supreme Court took that [inaudible].

MR. CORNYN: Well, they started with 197(h), which was a congressional redistricting map passed by the legislature in 1991 and --

JUSTICE OWEN: But the remedy that they adopted was not based on any particular State Act or is proposed for these.

MR. CORNYN: I think that's right. What they did is they found out where the statute was unconstitutional and they acted narrowly to try to -- to try to correct those errors.

JUSTICE OWEN: Then why are we in -- why are -- are we in a different posture [inaudible]?

MR. CORNYN: Because there is no -- there is no statute that's been passed by the legislature. Legislature did not fulfill its responsibilities to pass the legislative redistricting plan for Congress. The governor's declined to call a special session which is his right. And so we simply have a void that's left that needs to be filled by some --

CHIEF JUSTICE PHILLIPS: Why is it wrong to go back to the last time the legislature did act?

MR. CORNYN: Because you --

CHIEF JUSTICE PHILLIPS: [inaudible] Basic policy decisions like should Lubbock and Amarillo be combined or separate. Why not [inaudible] to what the legislature did the last time they validly

enacted ?

MR. CORNYN: Because as you said, Mr. Chief Justice, we have 32 congressional seats now and we had 30 under the last census and it simply is not possible to add two new congressional districts without having a ripple effect throughout the states. And secondly, there is no precedent for going back to a -- ten years, to the last validly enacted plan. I mean there was a --

JUSTICE: Is there a precedent for the legislature just refusing to do its constitutional duty on redistricting?

MR. CORNYN: Well, I think that's certainly within their power, Justice --

JUSTICE: Well, I understand that's within their power but is there any precedence where the legislature says, "Well, we gotta do redistricting, we're just not going to"?

MR. CORNYN: This is the first time, to my knowledge.

JUSTICE: So if -- if the -- process that is -- that -- that governs how courts deal with redistricting, acknowledging all what you said, the separation of powers, that this legislative function is not a court function, and the -- the rules that seem to govern redistricting, even in Bush v. Vera, they don't have to assume -- accept one plan or another, but they are constrained to make only the minimal changes necessary to make the plan constitutional. It seems to me, why doesn't it work? For the Court to take the position the legislature has just decided, "I know we have 32 positions, but we just decided we only want 30 congress people in Washington," and so people sue and say, "Wait a minute, that's not right." The Court gets involved and the Court takes that plan, 197(h), we look at what the feds did to it to modify it, affecting three counties, essentially. And we say, "We start with that as the base plan." And now we make a minimum number of changes required constitutionally to make the plan now constitutional. And that's what we do. Why isn't that the format or the -- the model that -- that this Court ought to look to, to decide whether or not the trial court was properly functioning in this redistricting case?

MR. CORNYN: Well, of course, to get there the Court must first reverse Judge Davis' judgment because Judge Davis did not perceive nor did the plaintiffs perceive a trial and seek a judgment based on that theory of the appropriate approach to the remedy. But because -- Because the -- the problem -- the practical problem about having two additional congressional districts, the changes that we're talking about would be massive. They would be state-wide. Even in Bush v. Vera where only three congressional districts were found to be illegal, it required changes in 13 out of the 30 congressional districts.

JUSTICE O'NEILL: Well, let -- let me ask you about that because it seems like we're being asked to make judgment call as to how significant a proposed change is. There appears to be some sort of theme among the briefs that we have the power or the trial court has the power to make some sort of change as long as they're not too -- don't change the plan too much. How are we to make the substantive judgment call as to whether Speaker Laney's amendments changed the plan's substantively. I think the other side is gonna say they really weren't that substantive, they corrected some minor problems. It sounds like we've either got to say, "The trial court has no power to make any corrections to any plan," or "How are we to decide on our limited jurisdiction at what point the trial court crosses over?"

MR. CORNYN: Justice O'Neill, we weren't given the -- the opportunity to test in court, to calling witnesses, to the right of cross examination, to the right to present expert witnesses, to test

the conclusions that Speaker Laney's lawyers called for in their brief. 1089 was born -- 1089(c) was born at about 10 a.m. on October the 10th of 2001. No one had seen it before. It bears only a remote resemblance to any other map --

JUSTICE: [inaudible]

JUSTICE: Because anything that speaks their [inaudible] proposed during the course of the trial -- the same as what he proposed between the 3rd and the 9th of October. It was [inaudible] in the record?

MR. CORNYN: No. The answer to that, I believe, is no. And -- But there is no evidence, one way or the other because we weren't -- because the evidence close at 20 to 28 --

JUSTICE: No. [inaudible]. We -- we could tell from the record that what was proposed at -- at least four out of the five things the trial court indicated it was gonna do by its October 10th letter, were those suggested by Speaker Laney and they had planned numbers on. And so my question is -- was -- whatever was in those four things, they were presented by Speaker Laney during the course of the trial before the evidence was closed and the parties argued the case.

MR. CORNYN: No, your Honor. There was a 5 o'clock deadline on October the 9th where proposed changes or comments to the map the judge had tentatively approved on October the 3rd. Everybody saw those roughly at the deadline, 5 o'clock on October the 9th. The court sent out a fax the next morning approximately 10 o'clock, maybe 11 o'clock saying, "You have an hour to comment on this and then sign a judgment for 4 o'clock that afternoon.

JUSTICE: Well, so is the answer to my question, yes or no?

MR. CORNYN: Sorry, I -- I've lost track of your question.

JUSTICE: Well, I thought you had. My question is -- was what Speaker Laney proposed between October 3rd and October 9th, in those four things that the trial court to -- is adopting, part of any plan that the speaker introduced into evidence during the time of September 17th to September 28th when this case was tried?

MR. CORNYN: [inaudible]

JUSTICE: Yes or no.

MR. CORNYN: I believe the answer to that is no.

JUSTICE: Okay.

MR. CORNYN: And of course the Court needs -- will recognize the fact that any change, whether it's so called drop ins or any -- any change at all would have ripple effect throughout --

JUSTICE: [inaudible]

CHIEF JUSTICE PHILLIPS: You're -- you're [inaudible] is to, first, for us to buy your plan and send that to the Federal [inaudible] alternatively as a remand with instructions. How -- If -- if we opted for number two, how long in other -- What -- what conditions could we give to the trial judge? I -- I think it's still illegal to -- for a court to meet on Sunday. I hope that statute didn't bother you at all. And the federal judges want you in court tomorrow for a trial started Monday, is that correct?

MR. CORNYN: [inaudible]

CHIEF JUSTICE PHILLIPS: I -- I'm trying to get your sense of the practical --

MR. CORNYN: [inaudible]

CHIEF JUSTICE PHILLIPS: -- [inaudible] the court ordered [inaudible]

MR. CORNYN: Well, if the Court reverses the judgment of the trial court below, as I believe -- as we urge you to do, the questions do you -- obviously, do you remand or do you render --

CHIEF JUSTICE PHILLIPS: Well I'm --
MR. CORNYN: -- and you're asking if you --
CHIEF JUSTICE PHILLIPS: -- just call it a remand.
MR. CORNYN: -- if you remand.
CHIEF JUSTICE PHILLIPS: If we did that, what -- would it be really up to the federal judges whether to honor that or not?
MR. CORNYN: Well, I -- I think -- I think first of all, it would be -- if there's time before the federal court essentially sweeps up the process as they indicate they're gonna do starting on Monday, it would mean that there is no state plan enacted by a state court that would be -- that would be entitled to deference in Growe v. Emison. But that does not mean that there won't be a state plan proposed. Indeed I will propose a state plan in federal court, even if Judge Davis' judgment does not stand. Now, if there's time for Judge -- for this Court to articulate the standards by which Judge Davis might adopt a judgment -- render of judgment using appropriate criteria after giving the parties a chance to present evidence, then -- then that judgment --
JUSTICE: Well the -- I'm a little concerned when you say, "For our courts to establish the parameters of the standards that Judge Davis would use to this." Hadn't they already been established?
MR. CORNYN: Not --
JUSTICE: When a -- when a court is either a state or federal three-judge panel looks at it, they know what the parameters are. It's supposed to be constitutional, etc., etc.
MR. CORNYN: Well I'm -- I'm suggesting merely that Judge Davis misconceived his role and if the Court's gonna reverse the judgment on that basis, then --
JUSTICE: Well what would you suggest to the Court to be the standards then, under your view?
MR. CORNYN: Well I -- My suggestion is that in the absence of legislative direction, a void, left by the failure of the legislature to be able to redistrict, that the attorney general as the official who is accountable to a statewide -- all the people, as the official spoke -- spokesman for the state in court, should be able to propose a plant to the court, in state court or in federal court. And that would be the starting point for the litigation in question.
JUSTICE O'NEILL: Presuming -- presuming that that argument doesn't carry the day, would you say that we would not have the power to render an alternative plan?
MR. CORNYN: I think it would be hard for the -- other -- other than what I proposed, it would be difficult for me to see how you could render an -- on an alternative --
CHIEF JUSTICE PHILLIPS: Aren't there some fact issues in your plan?
JUSTICE O'NEILL: So even though --
MR. CORNYN: That's --
CHIEF JUSTICE PHILLIPS: I mean --
MR. CORNYN: No, they're not, your Honor. There's no -- there's no --
CHIEF JUSTICE PHILLIPS: Nobody in the trial court attacked any part of your plan as violating the constitution or the Voting Rights Act.
MR. CORNYN: I didn't say that there weren't -- there was a vigorous contest over the plans of the work. There are no findings and there are no conclusions --
JUSTICE: [inaudible]
CHIEF JUSTICE PHILLIPS: If we can only decide legal matters, how

can we decide -- how can we render a judgment for your point --

MR. CORNYN: [inaudible]

CHIEF JUSTICE PHILLIPS: -- if there was a fact issue raised as to defects in the plan?

MR. CORNYN: Well, I believe simply that that matter has been waived by the -- by the plaintiff's below since they proceeded on -- on an erroneous theory of case. They obtained no fact findings, no judge -- no conclusions of law that supports their theory of the case and that -- and we believe --

JUSTICE HANKERSON: But -- but we have -- but we have no ruling by the trial court on the plan that you proposed and is it the fashioning of a remedy a fact-intensive inquiry?

MR. CORNYN: I think not under these circumstances. Under the approach that I've suggested, if the courts --

JUSTICE HANKERSON: I understand that but assuming that we reject that approach, that as a matter of law, your plan should be the one that goes to the federal judges. Assuming that we reject that, then isn't the fashioning of a remedy in this case a fact-intensive inquiry?

MR. CORNYN: I think that's right.

JUSTICE HANKERSON: And if that's the case, then are we limited to a remand in the event that we agree with you that Judge Davis' plan must be reversed?

MR. CORNYN: If you disagree with my argument that the attorney general is constitutionally the voice of the state in court and entitled to propose policy choices in the first instance.

JUSTICE HANKERSON: Then it does have to go back.

MR. CORNYN: I think so.

JUSTICE O'NEILL: So all the other parties who filed briefs and requested that we render on additional or alternative plans, on their plans, I think we've been asked to do 1044(c), 1089(c), 1034(c), 1044, or 1046. We -- we've been requested to render on all kinds of different plans. You disagree with their positions, we have the power to do that.

MR. CORNYN: Most emphatically because what these litigants are asking you to do is work where they lead Judge Davis astray into making an inherently political judgment which is in violation of the separation of powers --

JUSTICE O'NEILL: Well, for our purposes, a fact-intensive judgment.

MR. CORNYN: That too.

JUSTICE OWEN: Let me -- I just want to go through your view of [inaudible]. If we were to say yes, you were the person to present the plan. But it's one thing to say -- to present it, it's another to say that the trial court has to rule judgment on your plan as is. Shouldn't everyone have an opportunity to comment and the trial court to have an opportunity to make any adjustments too?

MR. CORNYN: Certainly, Justice Owen. And they -- there is a two-week trial where the plan that I've -- Texas plan that I proposed was subject to that exact sort of treatment and so there was evidence produced and opportunity to be -- witnesses and the like. The plaintiffs simply declined because they took an erroneous theory -- approach for the case to get findings of fact and conclusions of law. Finding any legal invalidity in the plan. In fact --

JUSTICE OWEN: But -- but we don't have any -- It's -- The trial court didn't adopt the plan either so there's no presumption in favor of any judgment in favor of your plan. Don't you have to give due process consideration to other people's objections to your claim?

MR. CORNYN: Well, I believe there should be due process

consideration. That's part of the reason we're here. But let me point out that the federal three-judge court will hold a trial on, essentially, what -- virtually the same issue that the trial court below did. So there will not be a lack of due process or consideration of any legal arguments anybody has attacking the state plan. The question at this point is, "Is the State of Texas going to be heard in federal court about what its policy preferences are?" And --

JUSTICE: May I ask you, are you a party in the federal court, you meaning the State of Texas?

MR. CORNYN: Yes, we are.

JUSTICE: Okay. So, we presume you'll be heard.

MR. CORNYN: Well, we'll be heard both as a -- as a State.

JUSTICE: [inaudible] to be a fair statement to speculate that every party that's been involved in Judge Davis' court with a plan or whatever, will also be involved in the same way in the federal court when that trial begins.

MR. CORNYN: I think everybody will have a chance to be heard but the question, your Honor, I believe is, how the trial should be conducted if the federal courts are pretty well established that the federal court does not have authority to determine incumbency protection, let's say, is a criteria in the [inaudible] used -- that Judge Davis used in violation of Bush v. Vera and other decisions, saying, "That's an inherently political judgment." And what -- what the state courts need is guidance from this Court on how this matter should be conducted in state court. The federal courts have it pretty well hashed out and we're just asking --

JUSTICE: But -- but the default situation is that there's no plan to go to the federal courts and so they start from scratch and everybody gets their day in court and puts in whatever they want to say, expert testimony and the draft a plan. Isn't that the default position?

MR. CORNYN: That's correct.

JUSTICE: And you have full opportunity to make your arguments and do the same thing.

MR. CORNYN: Well, that's correct but under Lawyer v. the Department of Justice the United States Supreme Court has recognized that the attorney general is the -- the spokesperson for the State in court.

JUSTICE: Well, I understand that if you would be acting as the spokesperson for the State when you present your plans so that's consistent with Lawyer and Terrazas' case.

MR. CORNYN: I believe so.

JUSTICE: Okay.

JUSTICE: But if -- but if we were to hold that -- that your authority, that the plan that you craft doesn't have to be the starting point for litigation and then we say all the parties can come in. And if -- if that's our holding, then won't that affect litigation in the federal court and the -- and state's position. In other words, if we were to say that the attorney general's plan does not have to be the starting point and we uphold that opinion here in the judgment hearing and when you go to federal court, you're just going to be in the soup with everyone else.

MR. CORNYN: Well, I think that's -- I think that's a high-risk event. I -- I agree. Now, the problem is -- is this is not just about the attorney general's power. I'm not going to be attorney general more than, if God willing, another years or so, this is about whether trial courts and this Court are gonna be making political judgments in an

inherently political process and that is an inappropriate role.

JUSTICE: I -- If I agree with you that the courts should not be considering the political underpinnings of the redistricting and only get engaged in drawing the lines to the extent of the minimum constitutional requirements. Meaning that if the legislature doesn't do anything about it, the court can only look to what the legislature did do and make whatever changes are necessary to make constitutional effects. If that's the prevailing view, we go back to 197(h), we come forward 12 years and we just say, "Okay, the only thing we can do is change based on constitution minimums. So I accept your argument that the Court shouldn't be deciding whether Republicans get a congressional seat or Democrats get a congressional seat.

You argue, it seems to me that if that the -- the default position becomes the plan the attorney general presents to the trial court and then the trial court must enter that plan unless the trial court makes findings that there's some constitutional infirmity to the plan. But what happens if you say, "I'm -- I'm representing the state," but the Governor says, "I disagree with you on what you say that state does," or the Lieutenant Governor disagrees with you or the House Speaker. How is the Court to give weight to -- give weight to who represents the state, not as the lawyer, but the state as the client?

MR. CORNYN: Well as the -- as the Court knows, the legislature, of course, doesn't have any act of a legislature outside of the -- a general or a special session, is void. So the legislature cannot act outside of the special or -- or the general session of the legislature. The Governor has the power to appoint, has the power to veto, and has the power to call a special session. The only constitutional officer who has the authority to represent the state's interest in court is the attorney general, as recognized by this Court's decision in Maud v. Terrell and most recently in Terrazas v. Ramirez.

JUSTICE O'NEILL: You know, our constitution, specifically in terms of state legislative redistricting, vests authority in the Legislative Redistricting Board which you are a member of as a group.

MR. CORNYN: Constitutionally, yes.

JUSTICE O'NEILL: Constitutionally. Now, if the citizens of Texas wanted to give you the authority on congressional redistricting to draw lines and have your plan be a default position. Couldn't they have clearly expressed that as they did on the state level?

MR. CORNYN: I -- I assume they could have.

JUSTICE O'NEILL: And is their -- is their --

MR. CORNYN: I'm grateful they didn't.

JUSTICE O'NEILL: -- silence deafening?

MR. CORNYN: I beg your pardon?

JUSTICE O'NEILL: Isn't their silence deafening on that point?

MR. CORNYN: I think not, your Honor, because the default position is who represents the state in court in litigation. And there is only one constitutional officer given that authority and the alternative is --

JUSTICE O'NEILL: But you're [inaudible] representation with policy making, aren't you?

MR. CORNYN: Well, in the absence of legislative action, it's either me or the Court. The Court's gonna be the politician, the legislator in robes or the attorney general's gonna be given the discretion to articulate --

JUSTICE O'NEILL: Did you also represent Speaker Laney here and Lieutenant Governor Ratliff?

MR. CORNYN: [inaudible]

JUSTICE O'NEILL: Do you also represent the other state officials?

MR. CORNYN: They have separate counsel.

CHIEF JUSTICE PHILLIPS: How does your position square with what the Fifth Circuit said in LULAC when General Morales [inaudible] follow all of his official [inaudible].

MR. CORNYN: I -- I remember it well. First of all, LULAC was an attempt to affectively amend the Texas Constitution by agreeing that the manner in which we elected judges in Texas was a violation of the Federal Constitution. But to do so through a consent decree as against the wishes of the client, in this instance, Mr. Chief Justice, it was you. And to deny you, in effect, a right to meaningful representation.

CHIEF JUSTICE PHILLIPS: But I hired my own lawyer.

MR. CORNYN: You did. And so -- but he attempted -- If -- if he had been successful in settling the case over your objection and basically preempting the state constitution through a consent decree in federal court, he would not be fulfilling his responsibility to defend the Texas Constitution and defend the law against challenges. But here there is no law. There is no challenge. There's a gaping void in political power that's been left due to the legislature's inability to draw a congressional line. And the question is, "Who articulates the state policy at this point?"

JUSTICE: I'm still a little fuzzy on where the end result of your argument goes. Let's see if I articulate it correctly. Your view is that the attorney general, because of the default, it's you that has the opportunity to present the plan that should be the base plan for the trial court to start with.

MR. CORNYN: That's correct.

JUSTICE: Is it also your position that when you come out of the other end of the process and the trial's over, that unless the trial court finds what you propose is unconstitutional in some way, that your plan is the one that should go to the federal court?

MR. CORNYN: What -- I'm sorry, could you repeat that --

JUSTICE: [inaudible]

MR. CORNYN: -- to make sure I have it right?

JUSTICE: Starting with your view that your proposed plan should be the plan that the trial court starts the trial with is the plan to look at. And assuming that nothing's found unconstitutional but everybody else has put their plans in, that the only judgment the trial court can render is to approve your plan as the base plan to go to the federal court.

MR. CORNYN: If it's [inaudible] the constitution. [inaudible]

JUSTICE: So that they -- he has no discretion to incorporate any other suggestions or changes proposed by any other group, individual or interested citizen of the state.

MR. CORNYN: Because that would be --

JUSTICE: So -- so --

MR. CORNYN: -- in a nut shell --

JUSTICE: -- your plan is that from beginning to end, unless it's unconstitutional in some way?

MR. CORNYN: Yes, sir. But the only alternative is that we have judges --

JUSTICE: No, no.

MR. CORNYN: -- as legislature in robes.

JUSTICE: I've stated it correctly, is that right?

MR. CORNYN: I believe that's accurate, yes sir.

JUSTICE O'NEILL: General Cornyn, assuming that we -- we reject that position, is a trial judge who is hearing a redition of the case,

confined to adopting one of the plans proposed by a litigant or may the judge hear the evidence and as a result of that, fashioned a remedy by himself based on the evidence presented?

MR. CORNYN: Well, I believe the judge could if you reject my argument, then, of necessity, would have to be the judge could draw -- either choose among other plans or -- draw a plan of his or her own. But it must be based on evidence.

JUSTICE O'NEILL: Right. So -- so --

MR. CORNYN: Must be based --

JUSTICE O'NEILL: -- so there is nothing that would prevent the judge from listening to the evidence on the multiple plans that would be proposed by various parties to the litigation. And after hearing that, looking at the evidence, all the relevant evidence to the issues that must be considered and drawing a constitutional plan and then craft a remedy that, in fact, accommodates those factors and incorporates it in the judgment.

MR. CORNYN: I would agree with it, but this qualification, that -- that 1089(c) did no exist before the -- the morning of the 10th and so that was not litigated. But if, in fact, the court had drawn a plan, allowed that proposed plan to be litigated and evidence [inaudible] --

JUSTICE O'NEILL: So -- so, is it --is it your view --

MR. CORNYN: -- that would've been --

JUSTICE O'NEILL: Let -- let's say that the -- the latter happens and the -- the judge hears the evidence on all the plans and determines that there are constitutional remedies with various other plans based on the evidence presented, then crafts a remedy in terms of a new plan, plan c. That's the judge's plan. Must the judge then allow that plan to be litigated and have the parties the opportunity in court to challenge it, or are the proceedings over at the point in time that the judge crafts the remedy so long as that it's based on evidence that has been presented?

MR. CORNYN: I think the -- it must -- there must be evidence -- there must be an opportunity for the parties to litigate it because I will tell you from experience that redistricting is complex enough that with every tweak, there's some impact and it could be the judge's plan might be illegal or unconstitutional on some other respect and so it is -- it's only right, I think, it only accords with the traditional court --

CHIEF JUSTICE PHILLIPS: Doesn't -- doesn't Terrazas require, I mean, isn't that a very slight extension of Terrazas that -- that the trial judge [inaudible] that --

MR. CORNYN: I think --

CHIEF JUSTICE PHILLIPS: Pointed out a meaningful comment?

MR. CORNYN: I think -- I think that's right. I think Terrazas requires as much.

JUSTICE HANKERSON: And there -- and there may not need to be more evidence put on -- put on if -- if, in fact, the judge has based it on evidence presented although it would allow -- it allowed time for comment and legal argument about the viability of the plan.

MR. CORNYN: I -- I can't agree with that --

JUSTICE HANKERSON: Okay.

MR. CORNYN: -- Justice Hankerson and that's because, as I said, 1089 did not exist before the morning of October the 10th and someone may tell you that this is an amalgam, this is a -- using body parts from a variety of different plans and sawing them all together and turned into a Frankenstein. There' no -- You can't say that just because it's an amalgam of other plans that that plan itself has been

litigated because of the potential [inaudible] --

JUSTICE HANKERSON: We -- so we just -- we just have a -- a slightly [inaudible] judicial proceeding in that the judge is free, as in other cases, to craft the remedy based on the evidence presented but if, in fact, the judge does craft a new plan that is different than the plans that had been proposed by the parties and litigated, we have to have, essentially, a second trial based on that plan before, in fact, the judgment can become final and subject to review. Is that your view, basically?

MR. CORNYN: With the assumption that you asked me to make, that is, you're gonna allow the judge to make political choices on --

JUSTICE HANKERSON: Well --

MR. CORNYN: -- on incumbency protection and the like which will --

JUSTICE HANKERSON: Now, let's just say the judge is -- I understand that you -- you complain about the basis for Judge Davis' decision and say that it was based on political considerations. But let's assume that the judge is, in fact, making his or her decisions based upon the parameters that both federal and state law require in order to make the plan constitutional. Those would not be political considerations, would they?

MR. CORNYN: Well, they -- they certainly could because what you're talking about in a case like this and as the Court recognized in Terrazas is the possibility that a multitude of plans would be -- would be legal.

JUSTICE HANKERSON: Well -- we -- we are -- we are back into your original position that basically, even though this is -- this has been defaulted to the state court system, the state court in fact has no discretion, it cannot act as a court in this regard [inaudible] plan. But -- but --

MR. CORNYN: That's not -- that's not my position at all. The position is that the attorney general has the authority to propose what state's policy choice is going to be when it comes to picking between a multitude of legal plans. And then it's the court's obligation to determine whether that policy choice is legal according to the ordinary --

JUSTICE HANKERSON: And what if it's not?

MR. CORNYN: If it's not then it -- then it needs to be --

JUSTICE HANKERSON: Then what --

MR. CORNYN: -- it needs to be fixed.

JUSTICE HANKERSON: -- then what -- then who fixes it?

MR. CORNYN: The -- the court does and the -- and the --

JUSTICE HANKERSON: So why is it --

MR. CORNYN: [inaudible]

JUSTICE HANKERSON: But then -- but then why isn't that a political -- a political decision as you've been talking about? I mean, at some point in time, it seems to me, that the decision is going to -- to default to the court no matter how we look at it. And if it does, then it seems to me, you're arguing that, inherently, the court is incapable of applying the Constitution without it becoming a political decision.

MR. CORNYN: That's not my position at all.

JUSTICE HANKERSON: Okay. I -- I'm confused.

MR. CORNYN: When the -- when the court starts from a starting point and then decides, "Is this legal or is this illegal?" Then it's acting in its traditional role as an impartial adjudicator and not as a political -- a political advocate for a particular plan among a variety of plans that are all presumably legal. And so, I can't agree with characterization as mentioned.

CHIEF JUSTICE PHILLIPS: Your argument -- If I understand your argument, General Cornyn, is that if the policy choice is to have 19 Republican districts and 14 Democratic districts, if that's the policy choice, it's not up to the court to decide whether that would be the end result or not the end result. That would be accepted as a given and is simply tested against the constitutional parameters of compactness of the districts and the racial considerations and the other -- other considerations the Constitution requires. But it's not up to the court to make that determination of who these districts will be voting for. Is that my --

MR. CORNYN: I think that's -- I think --

CHIEF JUSTICE PHILLIPS: And your --

MR. CORNYN: I think I agree with that -- with this --

CHIEF JUSTICE PHILLIPS: -- and your concern is if the legislature does what it did here, makes on policy choices, whatsoever, how these districts will go. Somebody has to make that choice and it is not proper for the court to consider those factors so it would not be proper for the court to enter with a clean slate on a redistricting issue and get embroiled in the decisions of who's gonna represent who and should only be confined to constitutional questions but it's an incomplete picture if there's not a political policy that's established against which to measure the constitutional considerations.

MR. CORNYN: That's correct because if the alternative were true, then you wouldn't need to have a trial. Everybody could submit their plans and the judge could [inaudible] choose either to adopt one of those plans without hearing any evidence or decide to draw a map himself without having a trial. That's essentially what happened here in the interim from September the 28th when the evidence closed and October the 5th when Judge Davis entered his order without hearing additional evidence in adopting a plan that was created out of whole cloth on October the 10th.

CHIEF JUSTICE PHILLIPS: Any other questions?

JUSTICE: We have a number of appellants here and we're told you're speaking on behalf of them all [inaudible]. Some of them say the we can render on 1065(c). I think that you don't disagree with that.

MR. CORNYN: Well, I -- I do think that while I was willing to, in the exercise of discretion, this Court's recognize not appeal that decision [inaudible] the fact Judge Davis had stuck with his original choice on October the 3rd, I do not agree that that was a -- legally correct in all aspects. And so, I think that that would not be -- It would not be appropriate for this Court to render on 1065(c) which is a map the court considered but then rejected in favor of a map that advanced clearly partisan interests.

JUSTICE: So your position then -- inconsistent though with the position taken by some of the other appellants.

MR. CORNYN: I think they disagree with me.

JUSTICE: And the -- the -- was there -- Did you object to 1065(c) on the basis that it was -- Why did you object at all?

MR. CORNYN: We did not. We made a practical choice that every litigant has to live with in a -- in a trial although it's not what we thought we were entitled to. We didn't think it was legally correct in all respects that exercising the discretion that, I believe, the office that I hold has. We were willing not to appeal it. And the base --

CHIEF JUSTICE PHILLIPS: So have you exercised any -- have you committed any waiver then? You claim that -- that certain of the defendants committed waiver by not complaining about your -- by not testing your plan enough in the trial court.

MR. CORNYN: Well, the burden was not -- theirs -- the burden was on them to -- under the theory I proposed and the -- the solution I proposed for them to object crimes -- a legally valid objection to the plan we proposed. They cannot because there is none, but they didn't even try because they misconceived the role of the trial court in this case.

JUSTICE OWEN: Would you help me --

JUSTICE: And the objections that there were, 1065(c), were principally from the Del Rio plaintiffs and from Speaker Laney, is that correct?

MR. CORNYN: That's -- that's correct. I believe one -- one proposal was -- That's correct.

JUSTICE: And the trial judge does not seem to have reacted to the plaintiff, the Del Rio plaintiffs' objections.

MR. CORNYN: I believe that's correct.

JUSTICE: Except, perhaps, in the spirit of Delaney . He doesn't specifically say, but he does specifically say that he is making changes as proposed by Speaker Laney, right?

MR. CORNYN: I believe that's correct.

JUSTICE O'NEILL: I'd like to followup on the Chief Justice's practical effect of our decision question. If we were to agree with you that there was a denial of due process because there was no opportunity to be heard on the plan the trial court entered and we were to remand on that basis. And let's say that Judge Davis then heard your objections, allowed your evidence and projected them and stuck with the plan that he'd originally proposed and that's before us now. Would we have any review power over that? What would then happen, it would still go to the federal court or --

MR. CORNYN: If he -- if he adopted 1065(c)?

JUSTICE O'NEILL: No -- no -- no -- no. If he's stuck with the plan he has now, if we were to say, "Yes, we agree, you were denied due process," and we remanded so that your objections could be heard, I don't know how long that would take, but let's say he heard them, evidence was taken and he rejected all the objections and stuck with the original plan. Then what happens?

MR. CORNYN: Well I think that would be -- it depends what this Court says and it's opinion about what Judge -- the proper role for Judge Davis on remand. But if he adopted that -- the same plan after this Court reversed that the first time and --

JUSTICE O'NEILL: No, no, no. The premise of my question was, if we reversed only on the due process piece and we send it back and you were given due process and the trial court stuck with the original -- with the plan that it proposed, what happens then?

MR. CORNYN: Well, I think part of the trouble I'm having, Justice O'Neill, is, I believe the cases say that due process is -- the state is not entitled, technically, as not being an individual, to the same due process rights that an individual [inaudible] --

JUSTICE: Well but the other personal plaintiffs are making that --

MR. CORNYN: But certainly, we're entitled to a judgment based no evidence and -- and this is not. And so, you're asking us, let me clarify it, that it -- that if on remand, he heard evidence and entered the same judgment, then I think we'd be left with whatever legal objections that we felt were appropriate base on the on those future proceedings will be hard to predict. But I still believe and -- and I guess your question assumes that you declined to accept the other arguments I've made on where the judge got --

JUSTICE O'NEILL: Well no, I -- I'm just posing that hypothetical.

I'm trying to figure out, as the Chief Justice was, where we go from here depending upon how we render our decision.

CHIEF JUSTICE PHILLIPS: Any other questions? I'm sorry we didn't give you 25 minutes Counsel.

The Court will take a brief recess and we'll come back to hear argument of the appellees.

SPEAKER: All rise.

CHIEF JUSTICE PHILLIPS: Thank you. Be seated.

The Court is ready to hear argument from appellees.

SPEAKER: May it please the Court, Mr. Paul Smith to present arguments for the appellees.

ORAL ARGUMENT OF PAUL SMITH ON BEHALF OF THE RESPONDENT

MR. SMITH: May it please the Court. I wanna start with the jurisdictional issue that was raised and I've been asked to -- at the very beginning of my argument to indicate that as to the question of the attorney general's prerogative to come into court and essentially dictate to the courts the selection among the various potential lawful remedies. I speak for, not only the Speaker but also the Lieutenant Governor as to that issue, who are unanimously against that position and I just wanted to make that clear.

JUSTICE: Let me ask you on that point then. Let me ask a question. Who does decide whether or not, let's assume there's a void, the legislature has not done redistricting. You just walk into court and say, "Okay, judge, you're gonna do the redistricting." Who do you say makes the decision of whether there'll be a majority of Republicans in the Texas House or majority Democrats in the Texas House?

MR. SMITH: Your Honor, it is our position and it has been our position throughout this case that this is like any other situation where a statute is being held unconstitutional and that the court -- the right way to go about it is for the court to make changes in the existing law to bring it into constitutional compliance.

JUSTICE: So you would say 197(h) is the base line and everybody measures their plan against that --

MR. SMITH: Yes, your Honor. And the essence of our case at trial, as plaintiffs and a Democratic Intervenor was our map is truer to the existing map. It's truer to the traditions of Texas which have kept the districts in place over many decades. It moves fewer people. It fixes all the Constitution problems with the least disruption to the existing District Map that had been in place for many years.

CHIEF JUSTICE PHILLIPS: So, you agree with General Cornyn that a trial judge cannot just sit down and start drawing lines and -- and you disagree with Mr. [inaudible]

MR. SMITH: Your Honor, I do -- I do disagree with that. I think that a court has to operate in -- judicially and that when it makes a finding of unconstitutionality of the law that it ought to fix that and not go off on a policy-making frolic and detour.

CHIEF JUSTICE PHILLIPS: Do you have any case in American -- American redistricting jurisprudence where a court has looked at lines that are more than ten -- that were done more than ten years ago as their base and that's been held to be the proper thing to do rather than try to look at something with less legislative validity but -- but that's newer?

MR. SMITH: That -- that is precisely what occurred in the Miller v. Johnson litigation in Georgia where -- where the districts were held unconstitutional under the Shaw v. Reno doctrine about five years ago. In that case, the liability decision was upheld by the Supreme Court. It was remanded to the three-judge federal court to redraw the map, they had a remedial hearing. They then drew their own map after the remedial hearing, just as Judge Davis did. And what they said was, "We're not going to start with the 1991 map because that map is the product of -- of Justice Department coercion. We're gonna go back to the '81 map and that '71 and extrapolate from them what the basic traditions of drawing districts in the State of Georgia.

CHIEF JUSTICE PHILLIPS: And Georgia had [inaudible] seats since '71 and '81

MR. SMITH: Excuse me?

CHIEF JUSTICE PHILLIPS: Georgia had changed its total number of seats.

MR. SMITH: In each year they had but they said, "Look, let's look at these maps and see what they do." And they said, "In Georgia, the legislature has always started with districts in each of the four quarters and it has always preserved then Atlanta urban district and so we're gonna do those things and we're going to have rural districts that -- that are not part of the suburbs, those sort of things." So they -- they essentially drew them as judges, by the way, after the remedial hearing. They attempted to, as -- as closely as possible, confine themselves to a remedy that was true to what the legislature, when it was free of what they perceived to be Washingtonian coercion was -- had done. The last uncoerced existing law of Georgia. And --

JUSTICE: But here, there's no question that the demographics state has changed since that law.

MR. SMITH: Sure. They -- they have -- they have changed.

JUSTICE: Remarkably.

MR. SMITH: That is the origin of the constitutional violation that Justice -- Judge Davis found, which was that there's no longer enough districts and there's no longer an even population between them. That's --

JUSTICE: But -- but the -- the split of the population politically, as between the parties, as between the ethnic make up population has changed remarkably since 1991 also, had they not?

MR. SMITH: Sure.

JUSTICE: It seems to me difficult to go back to 1991 as a starting place when so much has changed over that ten-year period.

MR. SMITH: Well, it seems to me that -- that is still the right way to go and then respond to all of those things. With respect to ethnic changes, you do have to create additional, potentially addition -- additional districts under the Voting Rights Act. With respect to population's shifts, you have to draw more districts in the Dallas suburbs than used to exist. Those certain things have to occur, but you're not acting completely unmoored from some law and -- and if you go back to Terrazas, this Court specifically said that, "In that case, the -- the Courts, what it should try to do is to give as much effect as it can to the legislature's law, even the law that has been held unconstitutional under the One Person, One Vote principle." And it cited White v. Weiser which is the U.S. Supreme Court's case taking exactly the same position.

Now, the only difference between those cases and this one is the one that the Chief Justice identified which is that we're going back to a law that's ten years old instead of only two or three years old. But

the -- the principle I -- I submit is the same, that you should work from that base line and certainly, I don't think there's any basis in the law at all for the proposition that the attorney general, as one of the members of the Executive Branch, should be come -- able to come into court and propose a map which makes sweeping changes in the existing array of districts and say, "I'm really the legislature. I get to --"

JUSTICE OWEN: But that -- the attorney general aside, we -- we've also had the -- the federal courts come in since '91 and -- and say that, basically the state plan is unconstitutional [inaudible] and redrew a map that affected one-third of the voters in Texas. So, how do we go back to 1991 when we already know the huge [inaudible] in the '91 [inaudible].

MR. SMITH: There were -- there were infirmities, they were fixed. But it seems to me that if you're going to try to confine yourself to a judicial role, though, as a -- as a trial judge faced with this problem in the -- in the event of legislative default still made sense to take the 1991 plan as fixed to make it lawful in 1996 and [inaudible] --

JUSTICE OWEN: But one started when [inaudible] court ordered in the first place.

MR. SMITH: Yes, your Honor.

JUSTICE OWEN: So you -- you're not looking at legislative intent or at least one-third [inaudible].

MR. SMITH: You're looking at the -- assuming the federal court did it's job which is modify it only to the extent necessary to bring it into constitutional compliance that there maybe some vestige of legislative intent in the sense that some of those districts are still in the same --

JUSTICE OWEN: The Fifth Circuit did that. They did not seem to go back and try to decide incumbency protection or political issues, in fact, that they specifically [inaudible] that and said, "No, we are not going to look at that in drawing these lines." So at least one-third of the existing plan was court-fashioned without regards political consequences or historical factors that the Texas legislature might consider.

MR. SMITH: In -- in a sense that's true. Although they didn't make a fairly small change in the existing districts. They -- they basically more compact in the same place that they already existed.

JUSTICE OWEN: But they said that it affected 1/3 of the voters in Texas.

MR. SMITH: Yes it did because you have to -- you had to make -- Once you draw -- redraw those districts, they were sort of -- sort of intertwined in a way so they had to make a substantial change and it does -- I -- I agree it diminished the extent in which the current map reflects the '91 legislative intent. But still, to a substantial extent, it is the map -- a map that is consistent with the long-standing traditions of Texas.

JUSTICE OWEN: But they also directed the Texas legislature to -- to completely redistrict because the whole plan in the federal courts was unconstitutional. So, why should we start -- why would we use '91 as the start?

MR. SMITH: Well, with respect, your Honor. I don't think there any finding that the whole plan was unconstitutional or any order from the federal court suggesting that the legislature was under an obligation to start from scratch this time around or anything of the sort. There -- there was no such finding asked for or -- or given by the court. And certainly, the court was of the view that as of '96, the plan was --

the map was constitutional. So, there was nothing wrong with them. If there hadn't been any population shifts, there wouldn't be any reason for -- why the legislature would've had to change the map at all, this round. Obviously there were population shifts and there always are. But --

JUSTICE: What basis in the Constitution would authorize the federal courts to interfere in redistricting at all? If the redistricting -- I guess my question is, if redistricting is a legislative function, the only authority the Constitution would give to the federal courts to interfere would be if the statute is written -- it is unconstitutional in some fashion.

MR. SMITH: That's right.

JUSTICE: And the authority of the courts who correct it would only be to correct that constitutional infirmity, not to redistrict the state under some sort of federal redistricting philosophy.

MR. SMITH: Right, your Honor. And that -- and that's precisely what the U.S. Supreme Court said in White v. Weiser. That was a case where the legislative map had too great a population deviation this past -- back in -- this is in the 70s and they had a 4 percent deviation in the population And when it came to the remedy phase, they had two plans. One, which was a minimal change of the districts to bring them into equal population and one was the plaintiff's preferred plan which basically started from scratch and through the whole state and had quite different political consequences. The three- judge district court pitched a second plan. The U.S. Supreme Court reversed and said, "You are obligated to make the minimal changes in the districts to bring it into constitutional compliance." You're not allowed to say, "Well, I like a more compact map," or "I like a -- a prettier map." You should take the map as it stands and fix the Constitution from --

JUSTICE: Would that be the basis -- Would the -- would the underlying basis for that kind of you be to leave the political decisions as much -- the political decisions that lead to the redistricting intact as much as possible?

MR. SMITH: Yes, your Honor. That's correct. And I -- and it's the legislature, not the -- not any particular executive official who makes those political decisions and it's -- it's a routine matter for the -- the courts to make minimal changes to existing law, even a law that may be 10 or 20 or 50 years old. The courts don't go around rewriting old codes when they find some piece of it unconstitutional on the theory that that's an old law and the current legislature might have a different view. You fix the Constitutional problems and --

JUSTICE OWEN: But I'm a bit confused now on what you think the trial court should have done here.

MR. SMITH: We -- our position, your Honor, was that they should pick our map which is -- we -- we -- characterized in the evidence supporting with a least change map. Now what happened in fact was, the trial court decided that it liked the criteria that had been espoused by the Lieutenant Governor and -- and a map was "proposed" as a potential remedy that would -- to -- to a significant extent, based on the Lieutenant Governor's map. Then Speaker Laney came in and said, "Well, accepting that decision that compactness will be important, that minimizing city splits will be important," you know, those really aren't Texas traditional criteria, "We can show you Judge Davis that you could achieve all of that equally well and still move these -- these districts much closer to the existing districts. So we can restore District 1 as a corner East District -- East Texas District and

we can restore District 17 as an agricultural district and we can put back that Majority/Minority District 24 in Dallas. And it'll be just as compact, it'll be just as effective at achieving the -- the Lieutenant Governor's criteria and at the same time it'll -- it'll meld in --"

JUSTICE OWEN: All right.

MR. SMITH: "-- pieces of the -- the Laney map, the Speaker's map." And so --

JUSTICE OWEN: And that requires an evidentiary analysis on our part, does it not?

MR. SMITH: Well, in order to decide whether that was a good idea or a bad idea or -- I think there would be a lot of evidence that you would have to look at. As to Judge Davis, he had the evidence. And I -- I wanna admit, perhaps address that issue if that's appropriate now. This -- this was not a situation where he did something completely on his own without evidence. He had a two-week trial. The evidence at the trial focused on all of these issues. There -- there was testimony about how districts have traditionally been configured in East Texas and what kind of a character the -- the district in District 1 has and District 2 has -- it's a -- it's a district that's focused on the timber industry.

CHIEF JUSTICE PHILLIPS: Let me -- But let me make sure, specifically. You're saying that every line that's in the current map, it's 1089(c), was offered at trial by somebody.

MR. SMITH: Not literally, but the pieces that the modifications proposed to the judge's map by Speaker Laney, were chunks of his map slightly modified because it had to fit in to an existing proposal from the Judge.

CHIEF JUSTICE PHILLIPS: And he -- as I understand it, he did some modifications at the trial judge's request. Between October 3rd and October 9th the trial judge --

MR. SMITH: The trial judge comes out with a -- with a map that says, "How 'bout this guy." [inaudible] good idea.

CHIEF JUSTICE PHILLIPS: And asks for [inaudible]. And -- and furthermore, asked Speaker Laney for more comment like how to meld with the Lieutenant Governor's --

MR. SMITH: Well, he had asked during the testimony that -- it wasn't after at that stage, it was during -- Representative Jones was testifying about how he drew the Speaker's map and -- and what the --

CHIEF JUSTICE PHILLIPS: That was before September 20th.

MR. SMITH: It was during the trial, yes. It was -- the question arose, "Did -- did you ever try to merge your map with the Lieutenant Governor's map?" And nobody had done that. And they were actually quite different maps, but the -- so that was -- I -- I think that's a reference back to amusing, almost, by the trial judge.

CHIEF JUSTICE PHILLIPS: Why under Terrazas wouldn't the trial judge have to reopen the hearing for a meaningful period of time? In Terrazas, as I recall, it was 15 minutes. And these guys it was part of a morning [inaudible] maps

MR. SMITH: Your Honor, there -- there was a two-week trial on everything.

CHIEF JUSTICE PHILLIPS: [inaudible] but the -- but the trial just comes up with lines that weren't authored by anybody at the trial, does he not?

MR. SMITH: As judges do routinely --

CHIEF JUSTICE PHILLIPS: As they -- and they did in Terrazas and -- and they'll settle. But we said that that map has to -- you have to have a meaningful plan for people to make objections and -- and test it

because of the complexity of the issues and the public importance of [inaudible].

MR. SMITH: It's quite a different situation where you have the attorney general and some plaintiffs sitting down negotiating a map and presenting it and asking the court to rubber stamp it. Then -- then one where the court is being asked to enter an equitable remedy and has two weeks of testimony about the criteria that they ought to consider and then goes back and draws the map. The latter situation is very common, not just in redistricting, but in lots of cases where you have a remedial hearing and then the judge designs an equitable decree.

JUSTICE OWEN: But I thought you said they shouldn't be doing that, that that was a policy towards -- left to the legislature and that's where I'm confused.

MR. SMITH: We -- you have to design the map. I'm not -- I'm not suggesting that the court doesn't design the map. The criteria, the -- the primary criteria and aside from the constitutional requirements, should be -- should be fixing the -- the map to meet constitutional requirements but they're still going to have to have a hearing --

JUSTICE OWEN: [inaudible]

MR. SMITH: And the point I was going to make, for example, in Bush v. Vera, Judge Jones and her two colleagues that we just point. They have a hearing, they go to the computer at the TLC, they draw the map and they order it into effect. Nobody claims that that's a constitutional due process, probably.

JUSTICE: Well, but there's a little added factual situation which is what the Chief Justice has said [inaudible] that between October 3rd and October 9th, the judge accepted modification suggestions or whatever from the people. But if we understood the argument from the attorney general, the changes he made were those proposed by Speaker Laney that had not been put into evidence during the course of the trial. Is that a correct statement?

MR. SMITH: Those specific lines were not specifically in evidence.

JUSTICE: Okay.

MR. SMITH: They were reflections of his map. They were pulls -- pulled from his --

JUSTICE: I understand that. So -- and he was saying, "Here's my amendment." And he gave them three-plan numbers or four-plan numbers and the parties have an hour to look at it.

MR. SMITH: But the arguments that --

JUSTICE: I mean, there were those -- that map was never tested in open court with the opportunity for cross examination, other expert testimony and so forth. Is that true?

MR. SMITH: That -- that's absolutely true, your Honor.

JUSTICE: Okay.

MR. SMITH: But -- but the same is true in every case where the judges sit down and draw their own maps in the computer and the due process --

JUSTICE: [inaudible]

CHIEF JUSTICE PHILLIPS: Three-judge panel isn't subject to our Terrazas so why doesn't our Terrazas [inaudible]? Why?

MR. SMITH: Well, I really do think, your Honor, that that's -- that holding is a reflection of the concerns that arises in a settlement situation where an executive official and the plaintiffs gets to sit down and design themselves a -- a plan and then there's no hearing at all on it. When you have a two-week trial with lots of adversarial presentation of -- of maps and considerations and proposed alterations to suggest that there's been no due process or that the

process is comparable to what existed in Terrazas, is -- is wrong. There's a completely different situation where the parties have had two weeks to present everything they want to present to the judge and he then distills it down and says, "Well, I'm gonna take some of your ideas and I'm gonna meld them with some of your ideas and here's the answer." That is a quite different situation than a settlement situation. That's the point I would make, your Honor.

JUSTICE OWEN: Mr. Smith, you characterized plan 1089 as being one that reflects the last legislative intent and the -- the practice as it has been in Texas in accordance with federal jurisprudence, a minimal amount of change [inaudible].

MR. SMITH: It's certainly better than the -- the previous proposal. It's not perfect enough.

JUSTICE OWEN: I understand. But the appellants [inaudible] and point to communications between Speaker Laney and Judge Davis and what Judge Davis said. But in fact, what's going on here is an illegal incumbency protection plan. Would you please, I mean, we've got different spin being put on --

MR. SMITH: We do.

JUSTICE OWEN: -- characterizing what it was that Judge Davis did. Will you please respond to that argument about why this is not based actually on considerations that were inappropriate and the is that it was an incumbency protection plan?

MR. SMITH: Look. Three points, your Honor. First of all, the judge did not say anything about protecting incumbency and I think you have to take it at his word.

JUSTICE: But he did say he was following Speaker Laney's suggestions.

MR. SMITH: The second point is, Speaker Laney didn't say anything about incumbency either. He didn't say one word about it.

JUSTICE: But he said -- but he said, "Traditional core districts, the way the lands always had been ..."

MR. SMITH: This argument was going back to the prior map which was --

JUSTICE: Which -- the plaintiffs will admit it's complimentary with incumbent protection.

MR. SMITH: There -- there is certainly a connection between the two. Certainly, your Honor.

JUSTICE: Is -- is there any area that doesn't overlap?

MR. SMITH: Excuse me?

JUSTICE: Is there any area that doesn't overlap?

MR. SMITH: There -- you -- the court districts and incumbency protection? Well, there may be. It depends on how the demographics have changed in the district. It might be that keeping a district the same will kill them incumbent, sometimes, but --

CHIEF JUSTICE PHILLIPS: Very common, [inaudible].

MR. SMITH: The -- the -- but the -- the bottom line is that Texas legislature has, for 100 years, done both of those things. That's the policy of the State of Texas as been shown at --

JUSTICE: Where --

JUSTICE: But -- can judges do --

JUSTICE: Can judges not change the law?

JUSTICE: No. Can judges use that kind of political consideration in drawing the maps?

MR. SMITH: I think it's perfectly legitimate, indeed, it's the only legitimate thing for a judge to do to say, "We're gonna take the existing map and we're going to fix it to bring it into constitutional

compliance and we're not going to go further and make a lot of discretionary political judgments about how things ought to be done or try to help somebody in this district and not help somebody in that district."

JUSTICE: Where in 1991 did the legislature adopt incumbency protection or district core preservation as criteria?

MR. SMITH: The legislature did not officially say that but there was a brief filed in the United States Supreme Court on behalf of Governor Bush by the attorney general of Texas arguing to the United States -- it's in evidence in this trial - - saying that the official - - that the -- the long-standing central policy of the State of Texas is keeping district cores and preserving incumbency in order to gain seniority in the Senate -- in the -- in the Congress of the United States which has brought huge benefits to the State of Texas. That is the -- that is, in fact, what the State of Texas has done for -- going back to the 20s or before that. That -- that is -- and the State has so told the United States Supreme Court and the evidence is undisputed.

JUSTICE: But if -- Go back to legislative intent. There is no articulation by the legislature.

MR. SMITH: No, the legislature did not, in passing the map, say, "We are keeping districts the same in order for incumbents to be reelected." They didn't say that officially but is, in fact, the case.

CHIEF JUSTICE PHILLIPS: Would you speak to jurisdiction?

MR. SMITH: Yes, your Honor. I -- after that issue, it seems to me that there's two pieces of the order that was entered below. There's the liability portion which is holding unconstitutional the prior plan because it no longer satisfies one person, one vote constitutional requirements and then --

CHIEF JUSTICE PHILLIPS: Is that a prerequisite for any court to act?

MR. SMITH: Sure.

CHIEF JUSTICE PHILLIPS: I -- I mean, routinely [inaudible] number one on their judgment code, whatever the prior that that [inaudible] existence of the illegal in order to proceed?

MR. SMITH: Yeah. You need a --

CHIEF JUSTICE PHILLIPS: Is this something that Judge Davis did to try to justify having jurisdiction and likewise [inaudible]?

MR. SMITH: I -- I don't think it really had much connection with that whole issue of going back to last December that we were here talking about last -- last time, your Honor. I mean, in his -- in his judgment in this after the trial, he made a finding that is based, essentially, on stipulated facts that there were no longer even populations in all these districts and there were too few of them so it violated the Constitution. That was his liability holding that led to - - and he enjoined the statement continuing to use, what we called, Plan 1000(c), the existing plan. That's the liability holding. And then there's the remedy which is, "I'm gonna tell you that the new map our of your plan 1089(c)." Now it's merely a fortuity, it seems to me, that those two things were in the same order. But it's only the former one that is the directly appealable to this Court. The liability portion, the enjoying the State from continuing to enforce its existing law.

CHIEF JUSTICE PHILLIPS: Does somebody have to complain about that finding, that is the -- the [inaudible] plan is unconstitutional in order for us to have jurisdiction?

MR. SMITH: I think, by the plain language of the statute, it's certainly the purpose of the statute, to be ought to be that the direct appeal statute only applies to -- in situations where there's an appeal

from the injunction enjoining the State from continuing to enforce its law.

CHIEF JUSTICE PHILLIPS: Now, if we were to hold there's no jurisdiction, would the complaints that the appellants have about Judge Davis' plan, all of them, all of the different components, whether he gave adequate hearing or -- or used the wrong step or didn't defer to the attorney general's claim, would all of that be fair game for the three-judge federal court to consider -- didn't know about since we did not -- can snow -- State Appellate Court ever exercise jurisdiction over that?

MR. SMITH: I would imagine the federal court would say they can only consider them to the extent that they raise federal questions. That they are not sitting as the Third Court of Appeals to hear arguments about how he should have done something differently. Procedurally, that doesn't raise the due process argument problem and, certainly, they aren't gonna be in a position to rule on the attorney general's argument about his right to deference on this State law. So, that -- those issues that they're going to pursue would have to be pursued would have to be pursued in the Third Court of Appeals which, by the way, is the court that has jurisdiction to consider the vast bulk of what's been presented here which is so fact laden that it seems like it falls way outside anything to support --

JUSTICE: There is pending appeal from the October 10th in the Third Court?

MR. SMITH: Yes, your Honor.

JUSTICE: And you represent any of the appellants?

MR. SMITH: Yes, I do. We do. We -- we have concerns about --

JUSTICE: [inaudible] procedure that appeal is stayed. Is that right?

MR. SMITH: Automatically, under Rule 57, I think so.

JUSTICE: But if we -- If the Court did what the Chief suggests except we don't have jurisdiction, then would your appeal go forward?

MR. SMITH: Well, your Honor, I -- I suspect that the -- the events may pass it by in federal court. The reason we appealed is because we have concerns about a Voting Rights Act violation in one portion of this map and we intend to pursue that in -- in federal court.

JUSTICE: No question, those will be pursued there.

MR. SMITH: That's -- and it seems like that's the more -- more -- rather than having the Third Court of Appeals inspecting this trial record, trying to figure out about how the Section 2 of the Voting Rights Act applies, why wouldn't -- want the federal court to handle that.

CHIEF JUSTICE PHILLIPS: But aren't there some really important state court issues that ought -- that ought to be resolved or else we're gonna be in the soup in 2011?

MR. SMITH: Well, to the extent that we're gonna be still -- that would be unresolved this question of the relative authority of the Lieutenant Governor versus the attorney general at the remedy stage of a case that -- that there would be some value in having that be resolved. Obviously, that would be a -- an issue this Court could address if it has jurisdiction. It seems to me that's the primary legal issue that is within this Court's jurisdiction. The only other even conceivable legal issue that it -- that occurs to me is this issue that, somehow, you have a due process right to have the judge draw -- redraw a map, come back and give it to you and let you attack that in -- in Court with -- in other words, the extension of Terrazas to the -- the non-settlement context.

JUSTICE: Well --

MR. SMITH: I suppose the Court could address that as well.

JUSTICE: One other issue is whether the changes proposed by the Speaker after October 3 are changes that a trial judge ought -- has any legal right to consider because they're, in essence, incumbency protection. And there are a number of cases that suggests that incumbency protection is a very politically-laden factor that is very difficult for judges to evaluate. I -- I wanna help this guy, I wanna help this guy.

MR. SMITH: It strikes me that that would be a -- a sort of a bizarre holding to suggest the because the judge started here and then the Democrats came in and asked to move it back towards the old districts, that somehow the judge's motivation has become illegitimate or the -- the Democrats' self-interest is --

JUSTICE: No, I mean, you said you're -- If the objector comes in and says, "Make these changes for either incumbency protection or what amounts to incumbency protection." I know you can argue that maybe this is not incumbency protection but that seems a little [inaudible]. And -- and the judge says, "Okay, I'll do that." Isn't that considering the fact that he should not have considered at all?

MR. SMITH: Well, you -- your Honor. First of all, I don't accept that proposition at all. That it's illegitimate for a court to say, "I'm going to use core preservation and indeed, incumbency protection as a basis in order to avoid unduly disrupting the status quo." That's -- if that's the policy of the legislature, as we showed it was, the Supreme Court has said, "That's exactly what you should do." And in White v. Weiser where the Court had said, "I'm gonna ignore political consequences. I'm gonna pick the most compact map and I'm not -- I'm gonna make much more drastic changes in the map than are needed to fix the constitutional problem." The Supreme Court said, "No, that's exactly what you shouldn't do. You should go with what the legislature has said it wants, make -- fix the problem and -- and even if that does protect incumbents, even if that preserves the core of districts which were, in part, unconstitutional, that's exactly what a court should do because if you do anything else, you're not being a court. You're being -- you're going off and making policy."

JUSTICE: Well -- But the response to that is it's very difficult to look back to '91 and draw any comparison between the policy makers at that point and the policy makers of 2000. At -- at the very least, you would say, "It's up in the air."

MR. SMITH: Well you certainly have to keep -- it's kind of a vector line that goes -- But you know, if you look at the history of the maps and we've had them up in trial court going back to the 60s when the one person, one vote came in. There's a -- there's a clear picture of how these districts have existed over the years. There's been a corner district in the Northeastern corner of District 1 which was the Rayburn District. It's still there. And, you know, you can say, "This is the way it has existed." You can draw traditional districts that way. That's what the -- the Georgia court -- the federal court did and it's not -- at that point, you're not making it up from nothing. You have a basis as a court to say, "Well, we're trying to do what the legislature would've done." That's your sort of template.

The alternative, if you don't go with the attorney general's view that he is sort the legislature walking around by himself and you don't go with the idea that you go back to '91, well, what exactly do you do? At that point, you have virtually an infinite number of maps that could be picked that are compact and are contiguous. And you -- if you say to

the court, "It shouldn't look at politics. It should ignore the idea that there are incumbents and it should just pick whatever compact map it wants." You basically -- what you have is a game of roulette set up because then you have -- the court will not know what the political consequences of it is and the parties are trying to sort of push them this way or that way without talking about what's really going on. And that doesn't seem like a very good system either.

JUSTICE: For example, the Legislative Redistricting Board, which is just that, does not seem to -- accorded much weight to incumbency protection or preserving core districts at all. In fact it paired 37 members of the legislature. So at least there's some indication that whatever had been true in the past is no longer true through a -- as done by a constitutional agency [inaudible].

MR. SMITH: That's true. Although I would point out that in the history of -- of Texas in the 20th century, there's only been one pairing of incumbent congressmen and that was when West Texas lost so much population, that -- relative to the East, has been [inaudible] one district instead of two in that whole part of the State and this was 30, 40 years ago. So --

CHIEF JUSTICE PHILLIPS: Your -- your history just [inaudible] on that.

MR. SMITH: Is that right? I thought --

JUSTICE: [inaudible]

CHIEF JUSTICE PHILLIPS: District 1, 41 years, but yes.

MR. SMITH: I'm sorry about that, your Honor.

CHIEF JUSTICE PHILLIPS: [inaudible] they were two pairings, at least, in '66 and maybe more [inaudible].

MR. SMITH: I shouldn't -- I should know better than to start [inaudible] --

CHIEF JUSTICE PHILLIPS: I think Clark Thompson got paired [inaudible] Texas.

JUSTICE: Back on --

JUSTICE OWEN: [inaudible]

JUSTICE: Back on the subject.

MR. SMITH: I thought I was reflecting the testimony for the trial. I wasn't just reading you the --

CHIEF JUSTICE PHILLIPS: I'm sorry. They didn't call me.

MR. SMITH: It is, I think, certainly true, that there is a history of avoiding pairings wherever --

JUSTICE: Well, this is what -- This may be what troubles me about what the trial court does when the legislature doesn't do it's job in -- Let's take incumbency protection. Is there some -- is there some court rule out there that says that the court shall not consider incumbency protection other than in the context of saying, "That will not trump the constitutional concerns about compactness and communities of interest ..." and that sort of thing? If it -- if it otherwise meets the constitutional concerns, is there any -- any -- is there any authority for the court to just say, "I'm not gonna consider incumbency protection for the purposes of all these other lines?"

MR. SMITH: Well, your Honor, I think that the truth -- the truth as to that is that there's cases on both sides on that issue. There's some that they've been citing which say, "We shouldn't look at that as politics. We shouldn't do that." We have cases we've cited like Johnson v. Miller in Georgia and White v. Weiser which say, "Once you [inaudible] constitutional compliance, you should do what the legislature would have done and that the tradition of the legislature is to avoid pairings and to try to promote continuity, that that's a

perfectly legitimate thing for the courts to do as well."

JUSTICE: But is that in the context of doing a minimal amount of redrawing or is that in the context of the court's [inaudible] to redraw everything?

MR. SMITH: You know what? It's in the context of a minimal amount of redrawing. I think that's the first point that the courts are supposed to do is fix the problem. Now, there may be situations where you have a multiple opportunity -- multiple ways to do that and then you look at -- at a traditional districting principles of the State and, for example, in Johnson v. Miller, they had -- they had to undo these racially gerrymandering districts and there were lots of different ways they could redraw the map and they said, "Well, we're gonna start -- we're gonna -- we're gonna fix the problem but we have to get some additional guidance from the history of Georgia and from what the legislature has drawn over the years and that's what we're going to do." So, I -- I -- there are some courts and in v. -- Bush v. Vera panel did -- did suggest that incumbents should not be given a lot of weight [inaudible]. The -- the Supreme Court in White v. Weiser, the Miller case, the [inaudible] which was affirmed in the Supreme Court. The Abrams v. Johnson case said, "If the legislature believed in this sort of thing, you should not disrupt that [inaudible] by going in and redrawing all of these. You should stick with what the legislature would have drawn as long as you bring it into constitutional compliance."

JUSTICE: And it's one thing not to [inaudible] on that basis and another thing to go back in and change it [inaudible], seems to me.

MR. SMITH: Well, it seems to me you can't make a legal difference that Judge Davis proposed an idea of -- which was his rewrite of the Lieutenant Governor's plan and said -- he said to us, "What do you think guys, is this a good map?" And -- and we came back and said, "Well, you can do everything that the Lieutenant Governor wanted to achieve in terms of compactness and avoiding city strips for his two criteria. But you could also simultaneously achieve greater compliance with the traditions of Texas and -- and move back toward a more of a least change map and still be just as compact." The fact that he gave more process than had, kind of a dialogue with the parties, can, it seems to me, make that constitutional what would otherwise be a perfectly lawful map. And -- and 1089, if you look at it on the merits and -- and try to identify in their briefs what the inherent problems are as opposed to the process problems, they don't have anything. The -- It's a very compact map, it's very fair on partisan basis, the testing -- this comes out the --

JUSTICE O'NEILL: I've got a stack of briefs here and I think they very much do make an argument.

MR. SMITH: Well, your Honor, the -- the TLC generates the text for partisanship. And there were three or four experts who endorsed this at trial. What you do is you look for a raise that's about a 50-50 raise, statewide and you see how many districts in each map the party -- each party would have carried on that 50-50 raise and --

JUSTICE O'NEILL: Well, I'm not -- my only point is that there is very much an argument over the substance of this 1089 plan. I thought you said there wasn't. But I -- I've read quite a bit.

MR. SMITH: Well, I -- I submit to you there's some arguments in one of them about the Voting Rights Act and some of those I even agree with about some places where there should be better minority representation. But the rest of these -- just the discussion is not about the merits of the map, that it's out there where there's gonna

give Democrats a huge number of districts that they don't deserve. The truth is the Republicans will win about 17 districts out of 32 and a 50 -- with only half the votes in this map. That's what the evidence in the TLC printout shows.

JUSTICE O'NEILL: Well, let me ask you this, if there's been a no evidence challenge made here in 1089(c) and what if we were to find there was no evidence to support that plan, what's the disposition, that plan starting out and then where are we?

MR. SMITH: Well, it -- what -- whether -- if the plan is thrown out then I think the high likelihood is that the federal court will say the same thing as congressional reasons for redistricting that is essentially already said with respect to state legislature redistricting which is, "We're going forward as if Growe v. Emison didn't exist and we've given you more than time -- more than enough time to have the state courts produce a map and there's no map and we have a constitutional obligation to adjudicate these federal plans --

JUSTICE O'NEILL: So then start on a clean slate.

CHIEF JUSTICE PHILLIPS: These deadlines are [inaudible].

MR. SMITH: Well, it all interacts with the state law with respect to filing deadlines and filing deadlines coming up in Texas are coming up within -- within a few weeks and so in order for them to -- they would've had the -- they would have to rewrite the Election Code of Texas in order to delay any further, I mean they may be willing to do that but I think the -- the order of Judge [inaudible] the other two on the panel that came out recently suggests that they are losing patience. I would [inaudible].

JUSTICE: Let me ask a question based on what you've just said to Justice O'Neill. Assuming that there is no plan because 1089 is held an -- an improper deal and we can't go back and put your 1065(c) so it goes to federal court with no plan. Would you agree with what the attorney general said and entered the questions that everyone who's been a party to this state court litigation would have the opportunity to appear and say the same thing they did in the state court before the federal court to try to chew whatever don't go sour on the plan so the entire thing would be litigated with everybody having a due process right to appear.

MR. SMITH: I -- I --

JUSTICE: Including somebody that wants to propose 1089(c) again.

MR. SMITH: I -- I think that's exactly what would happen and there's a number of additional parties sitting up there waiting to -- to litigate in that case as well. So there would be the same kind of, I guess, what you call a beauty contest would occur all over again, operating under federal standards which the White v. Weiser case suggests they would go with the kind of least change in the map but --

JUSTICE: Well, would you tell me what you think the impediment were to be if the court will decide -- this Court will decide to say, "Well, 1065(c)," that's the number of the one that was discussed in the October 3rd, "should be sent to the federal court as the base plan without regards to it's merits and let them decide the constitutionality, etc., etc."

MR. SMITH: I'm not sure what it would mean to suggest that it's the base line without regards to it's merits but whatever this Court could do in endorsing 1065 would seem to me well beyond what is should do in a situation --

JUSTICE: Well, think about here in this Court, as far as I can tell by reading on the briefs, we're not talking about the merits of 1089 per se either, except to the extent that the claims are made while

it's a violation of due process of the individual defendants and there's no evidence that's in the record to support it. And so we're gonna have to make a merits decision on whether it's constitutional or not to answer those questions, do we?

MR. SMITH: No. [inaudible]

JUSTICE: By the same token we can say, "Well, we'll just send 1065(c) to federal court without making any merits decision and they could sort it out there because everybody's gonna be there too.

MR. SMITH: Well, obviously, whether you send it to them or not, it's -- it -- it exists in the record. Indeed the whole state trial record is going to be in the federal record so that it's there. Now, if -- if you're gonna suggest that it is somehow got higher status because of --

JUSTICE: No. I just said, would you take out October 10 and go back to October 3rd, that's the last one that the court was thinking about that was, in somebody's view to -- had due process to arrive there.

MR. SMITH: But -- but there -- I wanna emphasize, there's no findings at all in the record about the characteristics of that map and --

JUSTICE: I didn't say there were.

MR. SMITH: -- the making findings on the basis of the record which I think is well beyond this Court's Jurisdiction.

JUSTICE: Say that again.

MR. SMITH: That -- that for you to sit in -- in any way suggests that that court -- that map is an appropriate map based on the record --

JUSTICE: No -- no. I think -- I would suggest if -- if I was writing this the way we're talking that it's a plan that exists and without it's merits the federal court could start there and everybody can have at it to whatever way they want to -- to change it and you come out the other end with a plan that has due process the whole business.

MR. SMITH: Well, if it's not gonna be the state map, it seems to me, it should be up to the federal court to decide where the starting point is.

JUSTICE: So view is the better way to do is to end up just throwing out the October 10th [inaudible] and just let it go by default to the federal court already.

MR. SMITH: And I think the starting point would then be an existing law of the State of Texas which is still in place and --

JUSTICE: And -- and in your view that's 197(h) plus the federal court order to change three districts.

MR. SMITH: That's correct.

JUSTICE O'NEILL: You said, [inaudible] was interested in, did you say that under -- you have some objection to the Voting Rights Act of 1089(c)?

MR. SMITH: I did, yes.

JUSTICE O'NEILL: But you're nevertheless asking this Court to confirm that as the state plan with [inaudible]?

MR. SMITH: First of all, I'm asking you to dismiss the thing as outside your jurisdiction.

JUSTICE O'NEILL: Assuming we don't do that.

MR. SMITH: But to the extent that -- that the Court reaches the merits, it would certainly be our position that the Court, at this stage and it's kind of odd Growe-Emison situation we have is -- is not in a position to adjudicate the Voting Rights issues, And so to the

extent that -- that there's any legal issue that --

JUSTICE O'NEILL: Why are we not in position to adjudicate?

MR. SMITH: Well, in order to that, you'd have to -- you'd have to sit down and -- and say that Judge Davis' finding that -- that there's no Voting Rights violation is not support -- isn't supported by sufficient evidence.

JUSTICE O'NEILL: Could you say that -- that it does violate the Voting Rights Act, that's my point. Why aren't you compelled to object to the state plans as constitutional [inaudible]?

MR. SMITH: Well, I took that -- I took that objection to the two courts that I think it appropriately should be heard in. One is the Third Court of Appeals and one is the federal court. I don't think this Court, on a direct appeal, can say Judge Davis' finding of compliance with the Voting Rights Act is -- is not supported by sufficient evidence, that he doesn't -- that he was wrong in deciding that District 25 in Houston is effective as an African-American Hispanic [inaudible] which is what we held. That is not something within this Court's bailiwick. And there are other courts that were not appropriate to be heard, either in a regular appeal or more likely in this instance, in the federal court and -- and I intend to pursue those plans.

JUSTICE O'NEILL: If it violated one man, one vote, that would be certainly be within our bailiwick, would it not?

MR. SMITH: Well, if he made a finding that the population of all the districts was identical but the evidence didn't support it, I'm not altogether clear that is within your bailiwick, but there isn't seem to be dispute about that here. As -- as I under it and I know I'm not from Texas, but as I understand it, you can't make sufficiency of the evidence [inaudible] ruling --

JUSTICE O'NEILL: Not if there's no evidence to support a finding. And -- and

MR. SMITH: If there's no evidence, sure. But there's two weeks of evidence about the Voting Rights Act. That was most of what the trial was about. But competing testimony about how many blacks you need in the district to make it effective in Houston versus -- and so, it's not that there's the absence of evidence, there's -- he may have been wrong in his -- his determination --

JUSTICE O'NEILL: That's my point, you're asking us to affirm a plan that you think is fundamentally flawed.

MR. SMITH: Well I think that kind of goes -- that's part and parcel of the limited jurisdiction of this Court -- as to the any question within the jurisdiction of this Court which is, as I understand it, does the attorney general have the power to dictate [inaudible] the -- the results and is the due process --

JUSTICE O'NEILL: [inaudible] Let's start then with the fundamentals. Let's suppose that the legislature passed an appropriation statute and a lower court, the trial court held that it was unconstitutional because it violated equal protection, that you can't pay for certain things for this group without paying it for that group and they brought it at direct appeal to this Court and the remedy that the trial court imposed was not that the state didn't have -- the state so we don't have to pay for anyone, that's our choice. The trial court says, "No." The remedy is, "You pay for everyone." So the state appeals, they say, "The statute's constitutional and alternatively, we disagree with the remedy imposed by the trial court." Why would this Court not have jurisdiction to say, "Yes, the statute's unconstitutional. The trial court applied the inappropriate remedy. The

remedy is not to make the state pay for everyone, but the remedy is it's the states option to stop paying under the statute altogether."

MR. SMITH: I guess my reaction would be that that might well be okay. That there are --

JUSTICE O'NEILL: And how is that different here? Isn't the remedy part and parcel of the injunction? The trial court say, "No, you don't follow none." Your plan is modified by the federal courts, you follow this particular plan and everyone's complaining. Yet the remedy for the injunction, which is part and parcel of the injunction as I understand it. That's what the rub is.

MR. SMITH: If the court committed a legal error in -- in entering that remedy, this Court could correct it. There's no identification of a legal error that's distilled legal issue other than the due process argument and the [inaudible], as I understand it. Anything else going to the Voting Rights Act is not a legal error. As I understand it, it is a sufficiency of the evidence argument and I can see that those things are with -- where is --

JUSTICE O'NEILL: Well, but if there's no evidence to support his finding that there was no Voting Rights violation then we must reverse and send it back.

MR. SMITH: Yes but -- but, you know -- I don't -- Again, this is -- perhaps I'm not the best person to be giving you the -- the details on how the distinction works between no evidence and the sufficiency of the evidence in this Court. But -- but as I understand it, the -- the no evidence thing comes up when there's a finding of there's no evidence. Here you have a -- a Voting Rights Act that's this complicated 14-step process and analysis --

JUSTICE O'NEILL: But if we found that there's some evidence that the Voting Rights Act was violated then his -- and that there's evidence that it wasn't. What we -- and you're contending that it violates it, how do you -- how do you not--I'm, confused that you're asking us to confirm a plan or form a plan that you think is -- is flawed.

MR. SMITH: I -- I honestly don't think that question is probably before the Court so I don't -- I don't think I'm taking inconsistent positions. And there is -- there is some evidence. The Lieutenant Governor testified with respect to the districts in -- in Houston and elsewhere within -- the Northeastern districts were never changed with his plan 1065 to 1089 and he testified that he thought this was an appropriate way, that they would give minorities an opportunity to vote in the districts that I think are -- are inappropriately drawn. So the least test to the Lieutenant Governor's assessment, he testified twice that he thought this was a good way to do it. So I think that constitutes evidence that --

JUSTICE O'NEILL: [inaudible] so at some point has to say, "All right, given these facts it's either a violation or it isn't."

MR. SMITH: Correct. And I think that that probably -- the best -- in this situation that should happen in federal court. [inaudible] conceivably [inaudible] --

JUSTICE O'NEILL: Let me ask you another question followup on Justice Hecht's question. Speaker Laney proposed what now is 1089(c), essentially, and there uses the phrase "restore the core constituencies of districts". So how does that differ, if at all, from incumbency protection?

MR. SMITH: Well, incumbency protection could be, one, effective doing that, but it doesn't mean that there's anything wrong with it.

JUSTICE O'NEILL: What -- what's the difference? Is there any

difference [inaudible] of the law?

MR. SMITH: Well, there's a lot of value to maintaining a district -- the core of a district independent of its effect on the incumbent. For example, [inaudible] if the incumbent was retiring because you have a sense of community that develops over years and decades where people think of themselves as being from District 1 or District 2 or wherever it may be. And they have -- In addition, you have districts which have commonality with respect to the type of district they are so that District 17 is an agricultural district represented by a congressman in the Agricultural Committee and District 2 is a timber based agricultural thing and -- and so that there is value in keeping those specializations called "community of interests" in the Voting Rights area independent of it's effect on the incumbency. It may have that effect and probably more often than not, it does have that effect. But that is really one effect and there's practically legitimate reasons why states would want to maintain continuity where possible, irrespective of incumbency. And those -- those are good illustrations. I think that's how people like -- develop a sense of community around their congressional districts and -- and who they think of themselves who belong to that and they -- there -- and -- and if you try and combine urban and suburban and rural people for example in the district, that makes it a lot more difficult to represent whereas if you keep the rural district separate from an urban district there's value in it.

CHIEF JUSTICE PHILLIPS: Any other questions? Thank you, Counsel.

MR. SMITH: Thank you.

CHIEF JUSTICE PHILLIPS: We will hear rebuttal argument and complete this [inaudible] by lunch.

REBUTTAL ARGUMENT OF JOHN CORNYN ON BEHALF OF THE RESPONDENT

MR. CORNYN: If I may refer the Court to the federal court's order of October 11th between Appendix F of -- to our brief. This is critical. I think to what the federal court is looking to from this Court and then from the State of Texas. They, on the second page under Roman numeral II, said, "They will regard plan 1089(c) as the only candidate for the state base line in the case under the principles articulated in Growe v. Emison," unless, I would add, this Court sets that judgment aside as we urge you to do. It is better --

JUSTICE: Are -- are you saying they've already said that they're not willing to wait for a rule from -- from the Court of Appeals regardless of how quickly that might come out if -- if there was still something left for the Third Court to rule?

MR. CORNYN: I think all they're saying is, at the time they said it, it was October 11th before this appeal was filed and before, I don't recall the date that the Third Court Appeal was filed, is that if there is no change, that the State Court plan adopted by Judge Davis, will be deferred to as the state base line under the principles of Growe v. Emison unless it is set aside, which we urge this Court to do. And so it is -- I believe we, well we -- I would urge you that, at a minimum, it's better on the state's interest to go to federal court with no plan than an illegal plan. And so even if there is not enough time before the federal court takes this matter up on Monday for another court to correctly and legally adopt a state plan, that I would

urge you, nevertheless, to reverse this matter as being illegally -- as an illegal plan.

JUSTICE HANKERSON: Would -- would the -- the federal court not be able to address the due process arguments as to that plan?

MR. CORNYN: No. I think, well, -- there are of course [inaudible] courts and state courts do have concurrent jurisdiction on a number of issues but not -- not on all and there -- But the principal issue at this point now is under principles of federalism [inaudible], what does a federal court have to do in terms of deferring to a state policy choice on what the plan ought to look like.

JUSTICE HANKERSON: No, I understand that but -- but if -- if 1089 is the plan they're gonna be reviewing and that's the presumed plan, the -- the due process arguments can still be addressed in federal court.

MR. CORNYN: I -- I do not agree with that. I think -- what -- If you affirm this judgment, which I implore you not to do, the federal court would, perhaps defer to the state court's articulation on what the proper role of a state redistricting -- what a state redistricting trial ought to look like and how judges ought to conduct themselves under state law and defer to it, which would be a travesty not only to, well to the entire Texas judiciary, transforming the role as I've already said of the -- not only of this Court but the process.

JUSTICE HANKERSON: Has 1089(c) been submitted to the Department of Justice for preclearance?

MR. CORNYN: Not at this time. Of course the state --

JUSTICE HANKERSON: The federal court seemed to -- to indicate that that should be happening. It hasn't happened yet?

MR. CORNYN: It has not happened because of the [inaudible] of this appeal. And of course any state core plan would have to be precleared by the Justice Department or would not be able to be implemented under -- under federal law.

JUSTICE: There was no constitutional infirmity to legislative redistricting enactment. Could the bill be entirely be based on incumbency protection?

MR. CORNYN: The legislature is authorized to make that political choice. A court is not. And as he -- even if the court was, which we disagree with, Judge Davis did not apply an equal hand when it came to protecting incumbents he protected approximately 80 percent of the Democratic incumbents and approximately 50 percent of the Republican incumbents. But we agree with Bush v. Vera and that in a judicial context, that it is a uniquely political judgment to make. There is no -- there's talk about core preservation. We talked about constituent relationships. It is code for incumbent protection which is --

JUSTICE O'NEILL: Would you -- would you respond then to Mr. Smith's argument that while he acknowledges that Bush v. Vera says that, he claims that there are three United States Supreme Court cases that would indicate the slightly different take on that issue. He sited as to White, Miller and Abrams.

MR. CORNYN: Well, I -- I believe that the authorities are to the effect that incumbency protection is an illegitimate choice for the purpose of --

JUSTICE O'NEILL: So -- so your view is that those three United States Supreme Court cases [inaudible] say that or --

MR. CORNYN: I -- to be --

JUSTICE O'NEILL: I mean, [inaudible] due to disagreement between [inaudible] and what the law is on that issue and if you're relying on Bush v. Vera, he says that there are three United States Supreme Court

cases that would weigh to a contrary [inaudible] and I -- I'd like to hear what you're response to that is.

MR. CORNYN: I -- I cannot off the top of my head recall precisely those three cases and the exact holding but we'll be glad to provide a supplemental letter brief in order to distinguish those and although I'm -- I'm convinced that our position is absolutely correct on that being an impermissible political judgment. I would ask the Court to reverse the trial court's judgment below and render in favor of the State's plan and alternatively, if the Court to decline the render in accordance with the state plan that you reverse and remand further proceeding consistent with [inaudible].

CHIEF JUSTICE PHILLIPS: Any other questions? Thank you, Counsel. That's the case in today's argument. The marshal will [inaudible].

SPEAKER: [inaudible] All rise. Oyez, Oyez, Oyez. The Honorable Supreme Court of Texas now stands adjourned.

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