Chapter 2
The Controversy

*Bandemer v. Davis* will be noted in U.S. political history because it was the first lawsuit whose primary allegation was political gerrymandering ever to go to trial over that issue; and second, because it was the case that finally induced the Supreme Court to say that at least one species of political gerrymandering was—at least in theory—justiciable. But it did lose; and if a political gerrymandering suit is ever to win in the High Court those bringing it would do well to examine *Bandemer* and ponder what factors would have been necessary for the outcome to have been different. A book having this title obviously must begin with a study of *Bandemer*.

In the spring of 1981 a Republican-controlled legislature passed, and a Republican governor signed into law, districting plans for the Indiana house and senate that were viewed by Indiana Democrats as drawn “for the purpose of minimizing Democratic Party representation and giving proportionally less representation to Democratic Party members than their numbers warrant.” These plans, as slightly modified nine months later, are depicted in figures 2.1 and 2.2 and provide for 100 seats.

(Figures 2.1 and 2.2 about here)

*The Preceding Plans*

The plans of the preceding decade were also drawn by a Republican legislature—authorship which would lead one to assume they were also partisan plans. The House plan, shown in Figure 2.3, provided:

- elected from 53 Single-Member Districts (SMDs), thirteen 2-member districts and seven 3-member districts—for a total of 73. The Senate plan, shown in Figure 2.4, was for 50 seats
elected from 50 SMDs. These House and senate plans were not “nested,” that is, the senate districts (SDs) were not subdivided to form the house districts (HDs).

(Figures 2.3 and 2.4 about here)

The House plan had been conceived in the aftermath of litigation over the previous (1965) House plan in *Whitcomb v. Chavis*. That plan had constituted Marion County (the state’s largest county containing the city of Indianapolis) as a single district electing 15 members. Plaintiff Chavis, in 1969, received a judgment from the District Court ordering the State to promulgate SMDs for the entire state in time for the 1970 elections. On appeal, defendant Whitcomb persuaded the Supreme Court to stay the ruling because the 1970 census would necessitate a redistricting in 1971 that would presumably correct the constitutional deficiencies. In early 1971 the legislature passed new plans, composed entirely of SMDs, for both House and Senate. But in June, 1971 the High Court “ruled that Multi-Member Districts (MMDs) did not necessarily discriminate against minority groups and reversed the lower court’s order,” previously stayed, requiring SMDs for both houses. Thereupon, in early 1972, the legislature modified its 1971 House plan to consolidate Marion County’s projected 15 SMDs into five 3-member districts; and to perform similar consolidations in other parts of the state so that the plan ended up as described above. The consolidations in Marion and Allen (Fort Wayne) counties advantaged Republicans, but Democrats did not go to court with charges of partisan gerrymandering.

The Republicans’ 1982 plan did not create (MMDs) where their 1972 plan had not already done so. Four of the 1972 plan’s 2-member districts were eliminated and replaced by SMDs so that the new house plan, to be litigated in *Bandemer*, consisted of 61 SMDs, nine 2-member districts, and seven 3-member districts—for a total of 77.

*Legislative Process*
The legislative process by which the new plans were adopted excluded Democrats from any meaningful participation. “Vehicle” bills, devoid of specific content, were introduced in February, 1981. As a contrivance, slightly differing versions were passed by the House and Senate, so that a conference committee was necessary. Only Republicans were appointed to this conference committee. It set up shop in Republican Party headquarters and worked behind closed doors for three months. Days before the mandatory adjournment of the legislature, the plans were made public. A Detroit-based, Republican-oriented consulting firm, Market Opinion Research (MOR) was hired for $250,000 by the Republican Party to do the technical work. Plans were made public. They were adopted by votes “along party lines” in the House and Senate the final day of the session.3

The Republicans made no bones about their intentions. As the trial court majority later noted,4

There is a clear impression that [they] felt insulated from challenge merely by adherence to the ‘one-person-one-vote’ principle, which they could easily follow...The result of that attitude is revealed in the remarkably candid statements of both Speaker Dailey and Senator Bosma in their deposition testimony:

MR. SUSSMAN (N.A.A.C.P. Plaintiffs’ attorney): What I would like you to do here again is to give me whatever reasons were operative in your mind in maintaining or creating multi-member districts…48 through 52.

MR. DAILEY: Political.

MR. SUSSMAN: What were the political factors?

MR. DAILEY: We wanted to save as many incumbent Republicans as possible.

MR. SUSSMAN: This (newspaper) article says further “Under further questioning
from Townsend about input in actual map drawing, Bosma said ‘You will have the privilege to offer a minority map. But I will advise you in advance that it will not be accepted.’” Is that accurate?

MR. BOSMA: That’s accurate. I might add that I don’t make goals for the opposite team.

To the above should be added one further remark by Senator Bosma, quoted in Plaintiffs’ Post-Trial Brief, in which he acknowledged the plans were drawn:

“..to hurt the Democrats as much as possible.”

The Democrats’ Plans

House Speaker Dailey and Senate Majority Whip Bosma did afford the Democrats “the privilege to offer minority maps.” In the spring of 1981 chief aide to the House Democratic caucus David S. Dreyer (see below) began working, under sponsorship of (black) Democratic Rep. William A. Crawford, on an alternative all-SMD plan for the House. This “Crawford plan” (shown in Figure 2.5) covered only the, “more urbanized” areas occupied by 1972-vintage MMDs, conceding the rest of the state to the Republicans. (To accentuate its salient characteristics district lines are shown only for these areas of the state which differed from the Republicans’ plan.)

(Figure 2.5 about here)

On the Senate side, aides working under the direction of (white) Democratic senator Wayne Townsend began work on a senate districting plan preferred by Democrats. These maps (shown in Figures 2.6, 2.7 and 2.8) were a political football. They exposed a racial divide among senate Democrats when it became impossible for them to agree on a single “Democratic” plan. Figure 2.6 covers only the “Republican” areas of the state where “Democrats” aren’t going to win anyway. Figures 2.7 and 2.8, are of the two largest counties where most of the “Democratic”
votes are and where a Democratic party nomination for state legislative office may be worth something. On January 18, 1982—six days after filing of the Bandemer complaint—the Senate convened to consider non-substantive changes to the senate plan it had passed in 1981. At that time the Democrats offered their plans, which were routinely voted down by the Republican majority.

*The Original Complaint*

Due, in part, to the necessity of first getting another case dismissed in Marion County Court, the Democrats were eight months delayed in filing their suit. When they did so they stated their grievances mostly in terms of the Republicans’ discriminatory use of MMDs in their house plan; and unnecessary fragmentation of counties in their senate plan. Six of their seven plaintiffs were from MMDs. Plaintiffs Bandemer, Badili and Pearson were from the city of Fort Wayne where they alleged an urban concentration of Democrats that would certainly have constituted a majority in an urban, single-member district, had been split between and submerged in two 3-member districts dominated by suburban and rural Republicans (see Allen County inset, Figure 2.1). This would be an example of the classic partisan gerrymander technique known as “splitting” or “cracking.”6 Plaintiff Womack was from rural Adams County near Fort Wayne. Plaintiff O’Rea was a black Democrat from HD 49 in Indianapolis (see Marion County inset, Figure 2.1). Plaintiff Higbee was from heavily Republican Hendricks County, just west of Indianapolis. Plaintiff Richards was from rural, southwestern Greene County—a county divided among “four” senate districts (see inset, Figure 2.2).

Two of the complaint’s eight counts alleged violation of the equal protection clause of the Fourteenth Amendment. A third alleged violation of Section 1983 of the Federal Civil Rights Act. The remaining five alleged State of Indiana constitutional violations, one of them being a provision prohibiting unnecessary fragmentation of counties in the creation of senate districts. In
addition to the specific harms alleged by its plaintiffs, the most significant feature of the original complaint was its prayer—what remedy the courts were being asked to impose. This brief prayer is reproduced in its entirety as Appendix A-1. It will be seen that this prayer specifies no remedy at all. It merely asks the courts to declare the plans unconstitutional and leaves it to the courts to find a remedy.

The Long Road to Trial

The Republican (“State of Indiana”) Defendants responded by arguing the Plaintiffs’ claims were foreclosed by the Supreme Court’s rulings in *Whitcomb v. Chavis* and *City of Mobile v. Bolden*—cases in which multimember districts had been upheld. Plaintiffs argued that their case differed from *Chavis* and *Bolden* in that the current Indiana MMDs did not respect county lines; were inconsistently mixed with SMDs; were not jurisdiction-wide; and were not historically based. In their response Defendants cited *Gaffney v. Cummings* and *White v. Regester* to refute Plaintiffs’ argument that excessive fragmentation of counties in creating senate districts violated the state constitution. They pointed to district court-drawn plans at the time of the *Chavis* litigation that fragmented some counties several times, and yet were approved by the Supreme Court.

On March 1, District Judge Noland held a pre-trial conference with the attorneys at which was told the “entire plaintiffs’ case” could be presented “on the order of one day.” Plaintiffs’ lead counsel Ted Boehm summarized it by attacking the house plan’s mixing MMDs and SMDs “solely for the purpose of disadvantaging a political minority.” He said that Defendants “rely on numerical equality, but they have breached every other known standard and have gone too far.” He said the case didn’t have any justification of the type that was found in *Whitcomb v. Chavis*. “That, in a nutshell, is what the case is about.” He added that county lines had been “disregarded” in drawing SDs and concluded that “you could bring the existing [house] plan into conformity
with our requirements, rather easily, by breaking up the existing MMDs” mentioning, for the first time, that “any rational plan” would nest two HDs in each SD.

On April 8, Plaintiffs filed an amended complaint, and on April 19 there was oral argument on the motion to dismiss, which was denied on May 3. Depositions got under way in July when Plaintiffs’ attorneys questioned the Republican House and Senate leaders. They continued in September and October with the questioning of officials of MOR and Republican legislative staffers who had worked on the plans. Though Defendants had made no discovery requests during the summer, they requested information on the Plaintiffs’ proposed expert witness in October. This was to be Gordon G. Henderson, a political scientist from Earlham College who had been a consultant/expert witness in several previous districting cases.

Despite all this preparation, 1982 ended with no trial having taken place, but only more written argument going back and forth. On November 2, the first elections under the Bandemer plans took place. In a national resurgence from 1980, the Democratic Party gained 25 congressional seats as its aggregate congressional vote went from 50.4 percent to 55.3 percent (see Appendix B). In Indiana the aggregate vote for Democratic House candidates experienced a parallel swing from 46.52 percent to 51.64 percent. This swing enabled them to increase their seats in the 100-member Indiana house from 37 to 43.

For the first six months of 1983 there was no activity on the case. Then, on June 30, the U.S. Supreme Court handed down its decision in *Karcher v. Daggett* with its possibly historic concurring opinion by Justice Stevens. In that concurrence Stevens opined that the real issue in the case appeared to be partisan gerrymandering by the Democrat-controlled New Jersey legislature; but since such a constitutional violation had not been alleged, he could only rule on the basis of what had been alleged: population deviations that could not be justified in terms of “a consistently applied state legislative policy.” In an *obiter dictum* that immediately caught the
attention of reformers, he proceeded to lay out an equal protection rationale for holding partisan gerrymandering unconstitutional, and went on to enunciate criteria by which districting plans alleged to be partisan gerrymanders could be judged. Here was the first unambiguous signal that plaintiffs making such claims might have at least one vote on the U.S. Supreme Court.

Activity on the case resumed. On July 27 the Defendants’ lead counsel William M. Evans subjected Dreyer to a rigorous deposition. Dreyer was made to explain the significance of some 32 maps he had drawn; and of demographic and political analyses he had performed on the various plans over the preceding months. At the trial to come Plaintiffs’ attorneys did not attempt to qualify him as an expert witness, but he was clearly their de facto expert. A magna cum laude graduate in economics from Oberlin College (1962) he received a Harvard law degree (1965); then served in the Peace Corps, and worked in the 1968 presidential campaign of Senator Eugene McCarthy. During the 1970s he worked as a fiscal analyst for Democrats in the Indiana General Assembly, served on the staff of U.S. Senator Birch Bayh, and worked in the campaigns of several Indiana Democratic politicians.

On September 15 the Court set October 12 as the first day of trial. On October 11, Plaintiffs submitted a pre-trial brief that drew heavily on the Stevens concurrence. The stage was set.

Notes

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3 U.S. District Court S.D. Indiana Cause No. IP-82-56-C: Plaintiffs’ Complaint of 12 January, 1982, pg. 3.
5 Plaintiffs’ Post-Trial Brief, pg. 16 quoting Bosma deposition at pg. 110.
6 This technique will be discussed in Chapter 13.
7 403 U.S. 124 (1971).
8 446 U.S. 55 (1980).