HOW TO DRAW REDISTRICTING PLANS

THAT WILL STAND UP IN COURT

Peter S. Wattson
Senate Counsel
State of Minnesota

National Conference of State Legislatures

REAPPORTIONMENT TASK FORCE

NCSL Annual Meeting
Nashville, Tennessee
August 8, 1990

CONTENTS

I. Introduction

The purpose of this paper is to acquaint you with the major federal cases that will govern the way you draw your legislative and congressional redistricting plans following the 1990 census, so that you may learn how to draw redistricting plans that will stand up in court.

But, before I get into the cases, I think it is important to clarify some terms I will be using and to explain how the redistricting process works.

A. Reapportionment and Redistricting

"Reapportionment" is the process of re-dividing a given number of seats in a legislative body among established districts, usually in accordance with an established plan or formula. The number and boundaries of the districts do not change, but the number of members per district does.

"Redistricting" is the process of changing the boundaries of legislative districts. The number of members per district does not change, but the districts' boundaries do.

The relationship between reapportionment and redistricting can most easily be seen by examining the United States House of Representatives. Every ten years the 435 seats in the House of Representatives are reapportioned among the 50 states in accordance with the latest federal census. As the population of some states grows faster than that of others, Congressional seats move from the slow-growing states to the fast-growing ones. Then, within each of the states that is entitled to more than one representative, the boundaries of the congressional districts are redrawn to make their populations equal. The state is redistricted to accommodate its reapportionment of Congressmen.

Reapportionment, in the narrow sense in which I will be using it here, is not a partisan political process. It is a mathematical one. The decennial reapportionment of the United States House of Representatives is carried out in accordance with a statutory formula established back in 1941. It is not subject to partisan manipulation, except in determining who gets counted in the census.

Redistricting, on the other hand, is highly partisan. This is because, in redrawing district boundaries, the drafter has such wide discretion in deciding where the boundaries will run. Creative drafting can give one party a significant advantage in elections, as I shall explain in a moment.

B. Gerrymandering

The process of drawing districts with odd shapes to create an unfair partisan advantage is called "gerrymandering."

Like "reapportionment," the term "gerrymandering" has become so popular that it has lost its original precision and is often used to describe any technique by which a political party attempts to give itself an unfair advantage.

Used in its narrow sense, to refer only to the practice of creating districts that look like monsters, there are basically just two techniques – packing and fracturing. How do they work?

1. Packing

"Packing" is drawing district boundary lines so that the members of the minority are concentrated, or "packed," into as few districts as possible. They become a super majority in the packed districts – 70, 80, or 90 percent. They can elect representatives from those districts, but their votes in excess of a simple majority are not available to help elect representatives in other districts, so they can not elect representatives in proportion to their numbers in the state as a whole.

2. Fracturing

"Fracturing" is drawing district lines so that the minority population is broken up. Members of the minority are spread among as many districts as possible, keeping them a minority in every district, rather than permitting them to concentrate their strength enough to elect representatives in some districts.

C. The Facts of Life

1. Creating a Gerrymander

It is a fact of life in redistricting that the district lines are always going to be drawn by the majority in power, and that the majority will always be tempted to draw the lines in such a way as to enhance their prospects for victory at the next election.

If the supporters of the minority party were distributed evenly throughout the state, there would be no need to gerrymander. In a state where the minority party had 49 percent of the vote, they would lose every seat.

But I suspect that political minorities are not evenly distributed in any state, so the persons drawing the redistricting plan try to determine where they are, and draw

their districts accordingly: first packing as many of them into as few districts as possible and then, where they can't be packed, fracturing them into as many districts as possible. It is this process of drawing the district lines to first pack and then fracture the minority that creates the dragon-like districts called gerrymanders.

2. The Need for Limits

The more freedom the majority has to determine where the district boundary lines will go, the greater the temptation to gerrymander. Equal-population requirements, disfavor of multimember districts, and minority representation requirements are all attempts by the federal courts to restrain the majority from taking unfair advantage of their majority position when drawing redistricting plans.

II. Draw Districts of Equal Population

A. Use Official Census Bureau Population Counts

1. Alternative Population Counts

The first requirement for any redistricting plan to stand up in court is to provide districts of substantially equal population. But how do you know the population? The obvious way is to use official Census Bureau population counts from the 1990 census.

Now, it is true that some legislatures have chosen to use data other than the Census Bureau's population counts to draw their districts and have had their plans upheld by federal courts. For example, back in 1966, Hawaii used the number of registered voters, rather than the census of population, to draw its legislative districts, and had its plan upheld by the United States Supreme Court in the case of *Burns v. Richardson*, 384 U.S. 73. But there the court found that the results based on registered voters were not substantially different from the results based on the total population count.

A state may conduct its own census on which to base its redistricting plans. For example, a 1979 Kansas legislative redistricting plan based on the state's 1978 agricultural census was upheld by a federal district court in the case of *Bacon v. Carlin*, 575 F.Supp. 763 (D. Kan. 1983), *aff'd* 466 U.S. 966 (1984). And in 1986, a Massachusetts legislative redistricting plan based on a state census was upheld by a federal district court in the case of *McGovern v. Connolly*, 637 F.Supp. 111 (D. Mass 1986).

Late in the decade, a federal court may find that local government estimates are a more accurate reflection of current population than old census counts and thus are an acceptable basis for developing redistricting plans before the next census. *Garza v.*

County of Los Angeles, Findings of Fact and Conclusions of Law, No. CV 88-5143 KN (Ex) (C.D. Cal. June 4, 1990).

But generally, the federal courts will not simply accept an alternative basis used by the states. Rather, they will first check to see whether the districts are of substantially equal population based on Census Bureau figures. If they are not, the courts will strike them down.

So if you want your plans to stand up in court, the easiest way is use official Census Bureau population counts.

2. Adjustment for Undercount

Unfortunately, there may be more than one set of "official Census Bureau population counts" for 1990. In response to a suit by the City of New York and other plaintiffs that sought to compel the Census Bureau to adjust the population data to account for people the Bureau failed to count, the Bureau agreed on July 17, 1989, to make a fresh determination "with an open mind" whether there should be a statistical adjustment for an undercount or overcount in the 1990 census. Stipulation and Order, *City of New York v. United States Department of Commerce*, No. 88 Civ. 3474 (JMcL) (S.D.N.Y.). The Bureau agreed to conduct a post enumeration survey (PES) of at least 150,000 households to use as the basis for such an adjustment. The Bureau agreed that, by July 15, 1991, it would either publish adjusted population data or its reasons for not making the adjustment. Any population data published before then, such as the state totals published December 31, 1990, and the block totals published April 1, 1991, would have to contain a warning that they were subject to correction by July 15. Guidelines the Bureau will follow in deciding whether to make an adjustment were published in the Federal Register on March 15, 1990, and were immediately challenged by the plaintiffs as being biased against an adjustment. The federal district court in New York upheld the guidelines on June 7, 1990. Memorandum and Order, *City of New York v. United States Department of Commerce*, No. 88 Civ. 3474 (JMcL) (S.D.N.Y.).

3. Exclusion of Undocumented Aliens

Pennsylvania and other states have sought to require the Census Bureau to exclude undocumented aliens from the population counts used to apportion the members of Congress among the states. To date, these efforts have not been successful.

4. Inclusion of Overseas Military Personnel

The Department of Defense will conduct a survey of its overseas military and civilian employees and their dependents to determine their state of residence during the last six months before going overseas. These overseas military personnel will be allocated to the states for purposes of apportioning the House of Representatives, but will not be included in the April 1, 1991, block counts given to the states for use in redistricting.

B. Congressional Plans

1. "As Nearly Equal in Population As Practicable"

Once you know the population, how equal do the districts have to be? First, you must understand that the federal courts use two different standards for judging redistricting plans -- one for congressional plans and a different one for legislative plans.

The standard for congressional plans is based on Article I, Section 2, of the United States Constitution, which says:

> Representatives . . . shall be apportioned among the several states . . . according to their respective numbers . . . .

The standard for congressional plans is strict indeed. In the 1964 case of *Wesberry v. Sanders*, 376 U.S. 1, the United States Supreme Court articulated that standard as "as nearly equal in population as practicable."

Notice the choice of words. The Court did not say "as nearly equal as *practical*." The *American Heritage Dictionary* defines "practicable" as "capable of being . . . done . . . ." It notes that something "practical" is not only capable of being done, but "also sensible and worthwhile." It illustrates the difference between the two by pointing out that "It might be *practicable* to transport children to school by balloon, but it would not be *practical*."

How does a court measure the degree of population inequality in a redistricting plan? Let me give you an example. Let's say we have a state with a population of 1,000,000, and that it is entitled to elect ten representatives in Congress. (That is not a realistic number, but it is easier to work with.) The "ideal" district population would be 100,000. Let's say the legislature draws a redistricting plan that has five districts with a population of 90,000 and five districts with a population of 110,000. The "deviations" of the districts would be 10,000 minus and 10,000 plus, or minus 10 percent and plus 10 percent. The "average deviation" from the ideal would be 10,000 or 10 percent. And the "overall range" would be 20,000, or 20 percent. Most courts have used what statisticians call the "overall range" to measure the population inequality of the districts

before them, though they have usually referred to it by other names, such as "maximum deviation" or "total deviation."

In 1983, in *Karcher v. Daggett*, 462 U.S. 725, the United States Supreme Court struck down a congressional redistricting plan drawn by the New Jersey Legislature that had an overall range of less than one percent. To be precise, .6984 percent, or 3,674 people. The plaintiffs showed that at least one other plan before the Legislature had an overall range less than the plan enacted by the Legislature, thus carrying their burden of proving that the population differences could have been reduced or eliminated by a good-faith effort to draw districts of equal population.

In the 1980's, three-judge federal courts drawing their own redistricting plans achieved near mathematical equality. For example, in Minnesota the court-drawn plan had an overall range of 46 people (.0145 percent), *LaComb v. Growe*, 541 F.Supp. 145 (D. Minn. 1982) *aff'd sub nom. Orwoll v. LaComb*, 456 U.S. 966 (1982) (Appendix A, unpublished) (In its opinion, the Court tells only the *sum* of all the deviations, 76 people, and refers to it as the "total population deviation".), and in Colorado the court-drawn plan had an overall range of *ten* people (.0020 percent), *Carstens v. Lamm*, 543 F.Supp. 68, 99 (D. Colo. 1982).

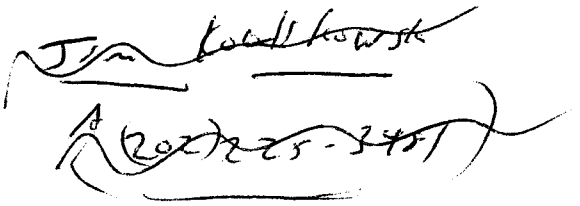
With the improvements in the census and in the computer technology used to draw redistricting plans after the 1990 census, the degree of population equality that is "practicable" will be even greater than that achieved in the 1980's.

If you can't draw congressional districts that are mathematically equal in population, don't assume that others can't. Assume that you risk having your plan challenged in court and replaced by another with a lower overall range.

2. Unless Necessary to Achieve "Some Legitimate State Objective"

Even if a challenger is able to draw a congressional plan with a lower overall range than yours, you may still be able to save your plan if you can show that each significant deviation from the ideal was necessary to achieve "some legitimate state objective." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). As Justice Brennan, writing for the 5-4 majority in *Karcher v. Daggett*, said:

> Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives . . . . The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general



> assertions . . . . By necessity, whether deviations are justified requires case-by-case attention to these factors.

462 U.S. at 740-41.

So, if you intend to rely on these "legitimate state objectives" to justify *any* degree of population inequality in a congressional plan, you would be well advised to articulate those objectives in advance, follow them consistently, and be prepared to show that you could not have achieved those objectives *in each district* with districts that had a smaller deviation from the ideal.

C. Legislative Plans

1. An Overall Range of Less than Ten Percent

Fortunately for those of you who will be drawing redistricting plans after the 1990 census, the Supreme Court has adopted a less exacting standard for legislative plans. It is not based on the Apportionment Clause of Article I, Section 2, which governs congressional plans. Rather, it is based on the Equal Protection Clause of the 14th Amendment.

As Chief Justice Earl Warren observed in the 1964 case of *Reynolds v. Sims*, 377 U.S. 533, "mathematical nicety is not a constitutional requisite" when drawing legislative plans. All that is necessary is that they achieve "substantial equality of population among the various districts." *Id.* at 569.

"Substantial equality of population" has come to mean that a legislative plan will not be thrown out for inequality of population if its overall range is less than ten percent.

The ten-percent standard was first articulated in a dissenting opinion written by Justice Brennan in the cases of *Gaffney v. Cummings*, 412 U.S. 735, and *White v. Regester*, 412 U.S. 755, in 1973. In later cases the Court majority has endorsed and followed the rule Justice Brennan's dissent accused them of establishing. *See, e.g., Chapman v. Meier*, 420 U.S. 1 (1975); *Connor v. Finch*, 431 U.S. 407 (1977); *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983).

2. Unless Necessary to Achieve Some "Rational State Policy"

The Supreme Court in *Reynolds v. Sims* had anticipated that some deviations from population equality in legislative plans might be justified if they were "based on legitimate considerations incident to the effectuation of a rational state policy . . . ." 377 U.S. 533, 579 (1964). So far, the only "rational state policy" that has served to

justify an overall range of more than ten percent in a legislative plan has been respecting the boundaries of political subdivisions. And that has happened in only two cases: *Mahan v. Howell*, 410 U.S. 315 (1973); and *Brown v. Thomson*, 462 U.S. 835 (1983).

In *Mahan v. Howell*, the Supreme Court upheld a legislative redistricting plan enacted by the Virginia General Assembly that had an overall range among House districts of about 16 percent. The Court took note of the General Assembly's constitutional authority to enact legislation dealing with particular political subdivisions, and found that this legislative function was a significant and a substantial aspect of the Assembly's powers and practices, and thus justified an attempt to preserve political subdivision boundaries in drawing House districts.

Brown v. Thomson, 462 U.S. 835 (1983), upholding a legislative plan with an overall range of 89 percent, was decided by the Supreme Court on the same day that it decided *Karcher v. Daggett*, 462 U.S. 725 (1983), where it threw out a congressional plan with an overall range of less than one percent. Reconciling these two cases is not easy. Nevertheless, I shall try.

First, as I have noted, the constitutional standard for legislative plans is different from the standard for congressional plans.

Second, it is important to understand that in *Brown v. Thomson* the Court was faced with a *reapportionment* plan rather than with a *redistricting* plan. The members of the Wyoming House of Representatives were being *reapportioned* among Wyoming's counties, rather than having new districts created for them. Because the boundaries of the districts were not being changed, the opportunities for partisan mischief were far reduced.

Third, Wyoming put forward a "rational state policy" to justify an overall range of more than ten percent, and the Court endorsed it. Writing for the Court, Justice Powell concluded that Wyoming's constitutional policy -- followed since statehood -- of using counties as representative districts and insuring that each county had at least one representative, was supported by substantial and legitimate state concerns, and had been applied in a manner free from any taint of arbitrariness or discrimination. He also found that the population deviations were no greater than necessary to preserve counties as representative districts, and that there was no evidence of a built-in bias tending to favor particular interests or geographical areas. 462 U.S. at 843-46.

But Wyoming's policy of affording representation to political subdivisions may have been less important to the result than was the peculiar posture in which the case was presented to the Court. The appellants chose not to challenge the 89 percent overall range of the plan, but rather to challenge only the effect of giving the smallest

county a representative. Justice O'Connor, joined by Justice Stevens, concurred in the result but emphasized that it was only because the challenge was so narrowly drawn that she had voted to reject it. 462 U.S. at 850. The Court reaffirmed this narrow view of its holding in *Brown* by later citing it as authority for the statement that "no case of ours has indicated that a deviation of some 78% could ever be justified." *Board of Estimate v. Morris*, 109 S.Ct. 1433, 1442 (1989).

There may not be any other "rational state policies" that will justify a legislature in exceeding the ten-percent standard. But with the multitude of plans that are likely to be submitted to you for your consideration, you may wish to adopt other policies to govern plans that are within the ten-percent overall range.

Three-judge courts, who are called upon to draw redistricting plans when legislatures do not, often have adopted criteria for the parties to follow in submitting proposed plans to the court. These criteria are not required by the federal constitution, and have not been used to justify exceeding the ten-percent standard, but they have helped the three-judge courts to show the Supreme Court that they were fair in adopting their plans. These criteria often have included:

(1) districts must be composed of contiguous territory; *Carstens v. Lamm*, 543 F.Supp. 68, 87-88 (D. Colo. 1982); *Shayer v. Kirkpatrick*, 541 F.Supp. 922, 931 (W.D. Mo. 1982) *aff'd sub nom. Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982); *LaComb v. Growe*, 541 F.Supp. 145, 148 (D. Minn. 1982);

(2) districts must be compact; *e.g.*, *Carstens v. Lamm*, 543 F.Supp. at 87-88; *Shayer v. Kirkpatrick*, 541 F.Supp. at 931; *LaComb v. Growe, supra*; *South Carolina State Conference of Branches of the National Association for the Advancement of Colored People v. Riley*, 533 F.Supp 1178, 1181 (D. S.C. 1982); *Dunnell v. Austin*, 344 F.Supp. 210 (E.D. Mich. 1972); *David v. Cahill*, 342 F.Supp. 463 (D. N.J. 1972); *Preisler v. Secretary of State*, 341 F.Supp. 1158 (W.D. Mo. 1972); *Skolnick v. State Electoral Board*, 336 F.Supp. 839, 843 (N.D. Ill. 1971); *Citizens Committee for Fair Congressional Redistricting, Inc. v. Tawes*, 253 F.Supp. 731, 734 (D. Md. 1966) *aff'd sub nom. Alton v. Tawes*, 384 U.S. 315 (1966); and

(3) districts should attempt to preserve communities of interest; *e.g.*, *Carstens v. Lamm*, 543 F.Supp. at 91-93; *Shayer v. Kirkpatrick*, 541 F.Supp. at 934; *LaComb v. Growe, supra*; *Riley*, 533 F.Supp. at 1181; *Dunnell v. Austin*, 344 F.Supp. at 216; *Tawes*, 253 F.Supp. at 735; *Skolnick*, 336 F.Supp. at 845-46.

As of 1983, the constitutions of 27 states required districts to be composed of contiguous territory, and the constitutions of 21 states required that districts be compact. *Karcher v. Daggett*, 462 U.S. 725, 756 n. 18 (1983) (Stevens, J., concurring).

III. Don't Discriminate Against Racial or Language Minorities

The Voting Rights Act

A. Section 2

1. Discriminatory Intent, or Discriminatory Effect?

Assuming that you are prepared to meet equal population requirements, you will also want to make sure you do not discriminate against minorities.

In a democracy, "power to the people" means the power to vote. Section 2 of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973 (Supp. 1989)[1], attempts to secure this political power for racial and language minorities by prohibiting states and political subdivisions from imposing or applying voting qualifications; prerequisites to voting; or standards, practices, or procedures to deny or abridge the right to vote on account of race or color or because a person is a member of a language minority group.

Section 2 has been used to attack reapportionment and redistricting plans on the ground that they discriminated against Blacks or Hispanics and abridged their right to vote by diluting the voting strength of their population in the State.

Until the United States Supreme Court case of *City of Mobile v. Bolden*, 446 U.S. 55, in 1980, the courts generally considered whether a particular redistricting plan had the *effect* of diluting the voting strength of the Black population. In *Bolden*, Black residents of Mobile, Alabama, charged that the city's practice of electing commissioners at-large diluted minority voting strength. The Supreme Court, however, refused to

---

[1] § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

throw out the at-large plan. The Court interpreted section 2 as applying only to actions *intended* to discriminate against Blacks, and since the plaintiffs had failed to prove that it was adopted with an *intent* to discriminate against Blacks, the Court concluded that the plan did not violate section 2.

Congress quickly rejected the Court's interpretation by amending section 2. Pub.L. 97-205, § 3, June 29, 1982, 96 Stat. 134. As enacted, it had prohibited conduct "to deny or abridge" the rights of racial and language minorities. 42 U.S.C.A. § 1973 (1981). The 1982 amendments changed that to prohibit conduct "that results in a denial or abridgement" of those rights. 42 U.S.C.A. § 1973 (Supp. 1988). Congress also decided to codify the pre-*Bolden* case law by adding:

> A violation of [section 2] is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [section 2] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C.A. § 1973 (b) (Supp. 1988).

2. How Do You Prove a Discriminatory Effect?

The 1982 amendments to section 2 were first considered by the Supreme Court in the 1986 case of *Thornburg v. Gingles*, 478 U.S. 30, which challenged legislative redistricting plans in North Carolina. At issue were one multimember Senate district, one single-member Senate district, and five multimember House districts. Justice Brennan's majority opinion upheld the constitutionality of section 2, as amended, and discussed the "objective factors" a court must consider in determining the "totality of the circumstances" surrounding an alleged violation of section 2. They included the following:

(1) the extent of the history of official discrimination touching on the class participation in the democratic process;

(2) racially polarized voting;

(3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single-shot provisions, or other voting practices that enhance the opportunity for discrimination;

(4) denial of access to the candidate slating process for members of the class;

(5) the extent to which the members of the minority group bear the effects of discrimination in areas like education, employment and health which hinder effective participation;

(6) whether political campaigns have been characterized by racial appeals;

(7) the extent to which members of the protected class have been elected;

(8) whether there is a significant lack of responsiveness by elected officials to the particularized needs of the group;

(9) and whether the policy underlying the use of the voting qualification, standard, practice, or procedure is tenuous.

478 U.S. at 36-37.

The Court held that a minority group challenging a redistricting plan must prove at least three things:

1) that the minority is sufficiently large and geographically compact to constitute a majority in a single-member district;

2) that it is politically cohesive; and

3) that, in the absence of special circumstances, bloc voting by the white majority usually defeats the minority's preferred candidate.

478 U.S. at 50-51.

The Court threw out all of the challenged multimember districts, except one where Black candidates had sometimes managed to get elected.

The three factors listed by the Court really boil down to only two issues: 1) do you have a minority population that could elect a representative if given an ideal district? and 2) if so, how successful have they been in the past?

a. Could the Minority Population Have Elected A Representative, If Given an Ideal District?

To answer the first question, you will need to know the approximate population of your ideal district. Next, you will need to know what racial and language minorities in your state are sufficiently numerous to make a majority in an ideal district. And third, you need to know where they live, so that you can determine whether they are sufficiently compact to constitute a majority in a given district.

The 1990 census will give you counts of three groups of racial minorities: Blacks; American Indians, Eskimos, and Aleuts; and Asian and Pacific Islanders. It will give you counts of one language minority: Hispanics. Counts of any other racial or language minorities of special concern in your state, or part of your state, you will have to get for yourselves.

b. How Successful Have They Been?

If you have a minority population that could elect a representative if given an ideal district, you will need to review how successful they have been in the past. You will need to determine whether they have voted as a bloc, and whether their candidates have normally been defeated by whites voting as a bloc. You will need to examine information on voter registration and election returns. You may be able to get it from your Secretary of State or other state election official, or you may have to gather it yourselves. As the Justice Department's rules put it: "Information with respect to elections held during the last ten years will normally be sufficient." 28 C.F.R. § 51.28.

3. How Do You Create a District the Minority Has a Fair Chance to Win?

If you have a minority population that could elect a representative if given an ideal district, but bloc voting by whites has prevented members of the minority from being elected in the past, you will have to create a district that the minority has a fair chance to win. To do that, they will need an effective voting majority in the district. How much of a majority is that?

Under section 2, that depends on "the totality of the circumstances." In other words, there is no fixed rule that applies to all cases.

The Supreme Court, in the case of *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 164 (1977), upheld a determination by the Justice Department that a 65 percent nonwhite population majority was required to achieve a nonwhite majority of eligible voters in certain legislative districts in New York City.

And the Court of Appeals for the Seventh Circuit, in the case of *Ketchum v. Byrne*, 740 F.2d 1398 (1984), endorsed the use of a 65 percent Black population majority to achieve an effective voting majority in the absence of empirical evidence that some other figure was more appropriate.

Ketchum involved the redistricting of city council wards in the City of Chicago after the 1980 census. The Court of Appeals found that "minority groups generally have a younger population and, consequently, a larger proportion of individuals who are ineligible to vote," and that therefore, voting age population was a more appropriate measure of their voting strength than was total population. Further, because the voting age population of Blacks usually has lower rates of voter registration and voter turn-out, the district court should have considered the use of a super-majority, such as 65 percent of total population or 60 percent of voting age population when attempting to draw districts the Blacks could win. The Court of Appeals noted that:

> [J]udicial experience can provide a reliable guide to action where empirical data is ambiguous or not determinative and that a guideline of 65% of total population (or its equivalent) has achieved general acceptance in redistricting jurisprudence.
>
> . . . This figure is derived by augmenting a simple majority with an additional 5% for young population, 5% for low voter registration and 5% for low voter turn-out . . . .

Id. at 1415.

But the Court of Appeals in *Ketchum* also noted that "The 65% figure . . . should be reconsidered regularly to reflect new information and new statistical data," *id.* at 1416, and that "provision of majorities exceeding 65%-70% may result in packing." *Id.* at 1418.

On the other hand, the Court of Appeals for the First Circuit upheld a redistricting plan for the City of Boston where, of two districts where Blacks were a majority, one district had a Black population of 82.1 percent. *Latino Political Action Committee v. City of Boston*, 784 F.2d 409 (1st Cir. 1986). The Court found that this packing of Black voters did not discriminate against Blacks because there was only a moderate degree of racial polarization. As the Court said, "[T]he *less* cohesive the bloc, the *more* "packing" needed to assure . . . a Black representative (though, of course, the less polarized the voting, the less the need to seek that assurance.)" *Id.* at 414. And, the Black population was so distributed that, even if fewer Blacks were put into these two districts, there were not enough Blacks to create a third district with an effective Black majority. *Id.*

So, if you face a charge of a section 2 violation, you had better be prepared with empirical data show what is "reasonable and fair" under "the totality of the circumstances," because your plan may be invalidated for putting either too few or too many members of a minority group into a given district.

B. Section 5

While section 2 of the Voting Rights Act applies throughout the United States, section 5[2] applies only to certain covered jurisdictions, which are listed in Appendix B of NCSL's new book *Reapportionment Law: The 1990's*. If you're covered, you know it, because all of your election law changes since 1965, and not just your redistricting plans, have had to be cleared, before they take effect, by either the United States Department of Justice or the United States District Court for the District of Columbia.

Section 5 preclearance of a redistricting plan will be denied if the Justice Department or the Court concludes that the plan fails to meet the no "retrogression" test, first set forth in *Beer v. United States*, 425 U.S. 130 (1976), and reaffirmed in *City of Lockhart v. U.S.*, 460 U.S. 125 (1985). Simply stated, the test means that a plan will not be precleared if it makes the members of a racial or language minority worse off than they were before. One measure of whether they will be worse off than before is whether they are likely to be able to elect fewer minority representatives than before.

Beer was a challenge to the 1971 redistricting of the city council seats for the City of New Orleans. Since 1954, two of the seven council members had been elected at-large; five others had been elected from single-member wards last redrawn in 1961. Even though Blacks were 45 percent of the population and 35 percent of the registered voters in the city as a whole, Blacks were not a majority of the registered voters in any of the wards, and were a majority of the population in only one ward. No ward had ever elected a council member who was Black. Under the 1971 redistricting plan, one ward was created where Blacks were a majority of both the population and of the registered voters, and one ward was created where Blacks were a majority of the population but a minority of the registered voters. The Supreme Court held that the plan was entitled to preclearance since it enhanced, rather than diminished, Blacks' electoral power.

To defend against a charge that your plan will make members of a racial or language minority group worse off than they were before, you will want to have at least a ten-year history of the success of the minority at electing representatives.

---

[2] 42 U.S.C.A. § 1973c (1981).

But, just because your plan doesn't make racial or language minorities any worse off than they were before, and therefore gets precleared by the Justice Department, don't think that you are immune from a challenge under section 2. The Justice Department has said that it will be applying the stricter standards of section 2 to the plans it reviews, notwithstanding the retrogression test employed by the courts for preclearance, and that "Section 5 preclearance will not immunize any change from later challenge by the United States under amended Section 2." Supplemental Information, 52 Fed. Reg. 487 (1987).

IV. Don't Go Overboard with Gerrymandering

A. Gerrymandering is Now a Justiciable Issue

The Voting Rights Act does not apply to conduct that has the effect of diluting the voting strength of partisan minorities, such as Republicans in some states and Democrats in others. Partisan minorities must look for protection to the Equal Protection Clause of the 14th Amendment.

Modern technology, while making it practicable to draw districts that are mathematically equal, has also allowed the majority to draw districts that pack and fracture the partisan minority in such a way as to minimize the possibility of their ever becoming a majority.

While the federal courts have not yet developed criteria for judging whether a gerrymandered redistricting plan is so unfair as to deny a partisan minority the equal protection of the laws, the Supreme Court has held, in *Davis v. Bandemer*, 478 U.S. 109 (1986), that partisan gerrymandering is now a justiciable issue. What this means is that you must be prepared to defend an action in federal court challenging your redistricting plans on the ground that they unconstitutionally discriminate against the partisan minority.

Davis v. Bandemer involved a legislative redistricting plan adopted by the Indiana Legislature in 1981. Republicans controlled both houses. Before the 1982 election, several Indiana Democrats attacked the plan in federal court for denying them, as Democrats, the equal protection of the laws.

The plan had an overall range of 1.15 percent for the Senate districts and 1.05 percent for the House districts, well within equal-population requirements. The plan's treatment of racial and language minorities met the no-retrogression test of the Voting Rights Act.

The Senate was all single-member districts, but the House included 9 double-member districts and 7 triple-member districts, in addition to 61 that were single-

member. The lower court found the multimember districts were "suspect in terms of compactness." Many of the districts were "unwieldy shapes." County and city lines were not consistently followed, although township lines generally were. Various House districts combined urban and suburban or rural voters with dissimilar interests. Democrats were packed into districts with large Democratic majorities, and fractured into districts where Republicans had a safe but not excessive majority. The Speaker of the House testified that the purpose of the multimember districts was "to save as many incumbent Republicans as possible."

At the 1982 election, held under the challenged plan, Democratic candidates for the Senate received 53.1 percent of the vote statewide and won 13 of the 25 seats up for election. (Twenty-five other Senate seats were not up for election.) Democratic candidates for the House received 51.9 percent of the vote statewide, but won only 43 of 100 seats. In two groups of multimember House districts, Democratic candidates received 46.6 percent of the vote, but won only 3 of 21 seats.

The Supreme Court, in an opinion by Justice White, held that the issue of fair representation for Indiana Democrats was justiciable, but that the Democrats had failed to prove that the plan denied them fair representation. The Court denied that the Constitution "requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be," since, if the vote in all districts were proportional to the vote statewide, the minority would win no seats at all. Further, if districts were drawn to give each party its proportional share of safe seats, the minority in each district would go unrepresented. Justice White concluded that:

> [A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.
>
> . . . Rather, unconstitutional discrimination occurs only when *the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.* (Emphasis added.)
>
> . . . Such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

478 U.S. at 132-33.

But merely showing that the minority is likely to lose elections held under the plan is not enough. As the Court pointed out, "the power to influence the political process is not limited to winning elections . . . . We cannot presume . . . , without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters [who did not vote for him or her]." 478 U.S. at 132.

B. Can It Be Proved?

How do the members of a major political party prove that they do not have "a fair chance to influence the political process?"

When California Republicans attacked the partisan gerrymander enacted by the Democratic legislature to govern congressional redistricting, the Supreme Court this January summarily affirmed the decision of a three-judge court dismissing the suit on the ground that the Republicans had failed to show that they had been denied a fair chance to influence the political process. *Badham v. March Fong Eu*, 694 F.Supp. 664 (N.D. Cal. 1988), *aff'd*, 109 S.Ct. 829 (1989). As the lower court said:

> Specifically, there are no factual allegations regarding California Republicans' role in 'the political process as a whole.' [citation omitted] There are no allegations that California Republicans have been 'shut out' of the political process, nor are there allegations that anyone has ever interfered with Republican registration, organizing, voting, fundraising, or campaigning. Republicans remain free to speak out on issues of public concern; plaintiffs do not allege that there are, or have ever been, any impediments to their full participation in the 'uninhibited, robust, and wide-open' public debate on which our political system relies. [citation omitted]

694 F.Supp. at 670.

Further, the Court took judicial notice that Republicans held 40 percent of the congressional seats and had a Republican governor and United States senator.

> Given also the fact that a recent former Republican governor of California has for seven years been President of the United States, we see the fulcrum of political power to be such as to belie any attempt of plaintiffs to claim that they are bereft of the ability to exercise potent power in 'the political process as a whole' because of the paralysis of an unfair gerrymander.

694 F.Supp. at 672.

In a democracy, the majority does not need to have the leaders of the opposition shot, or jailed, or banished from the country, or even silenced. They do not need to shut the minority out of the political process – they simply out vote them.

If the members of the majority party in your state are prepared to let the minority party participate fully in the process of drawing redistricting plans, and simply out vote them when necessary, your state should be prepared to withstand a challenge that the plans unconstitutionally discriminate against the partisan minority.

So long as you don't go overboard, or, more correctly, so long as you don't throw the minority overboard, you may continue to gerrymander and still have your redistricting plans stand up in court.

TABLE OF AUTHORITIES

Cases:

United States Constitution: