LEGAL ISSUES FOR REDISTRICTING IN INDIANA

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The primary goal of any redistricting effort is to avoid a successful legal challenge following the completion of the process. Most legal challenges to redistricting plans are based on the alleged failure to adequately address the key redistricting issues of population equality, minority vote dilution, reverse discrimination, traditional and statutory redistricting criteria and public access to the redistricting process. These materials briefly address the key legal issues which must be addressed in Indiana redistricting efforts that will take place following the 2010 decennial census.

I. Population Equality

A. One person, one vote

The U.S. Supreme Court has found that the equal protection clause of the 14th Amendment embodies a "one person, one vote principle" which "requires that a State make an honest and good faith effort to construct [election] districts... [which are] as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). In attempting to implement the one person, one vote standard courts and commentators have come up with several measures of population deviation.

B. Population deviation

The most common measure of population deviation is known as "total population deviation." In order to determine the total population deviation for a particular redistricting plan, the population of the "ideal" district is determined. An "ideal" district is an equally apportioned district. Therefore, the ideal district size for a County Council district is arrived at by dividing the total population of the County by 4, the number of single member districts to be created.

Once an ideal district size is established, the number of people that have actually been placed in a district pursuant to the electoral plan in question is subtracted from the ideal to arrive at a "variance" or "deviation" from the ideal. A variance from the ideal is then calculated for each proposed district.

The variance for a proposed district will be a positive number if there are more people in the proposed district than the ideal; in such a case the proposed district is said to be "underrepresented." The variance for a proposed district will be a negative number if there are less people in the proposed district than the ideal; in that case the proposed district is said to be "overrepresented." The appropriate calculation is expressed in the formula (X minus ideal) where X equals the population of the proposed district and the "ideal" refers to the ideal district size. Next, the variance or deviation for each separate proposed district may be converted to a percentage by dividing the variance by the ideal.

The total deviation (also known as the "maximum deviation") is simply the sum of the percentage deviations from equal population of the largest and smallest districts. The total deviation is calculated by eliminating the negative sign from the percentage variance of the most

overrepresented district and by adding this number to the percentage variance of the most underrepresented district.

C. Beware the 10% rule

The Supreme Court has been particularly strict in requiring absolute population equality in cases involving redistricting of Congressional districts. However, the Court has shown more deference to local considerations in evaluating state and local redistricting plans under the one person, one vote principle. Therefore, an analysis of Supreme Court decisions on the topic of population equality has led some commentators to conclude that total deviations at or under 10% are constitutionally acceptable. This is an overly simplistic analysis, however, that has gotten some entities of local government into trouble.

D. "Good faith" requirement

The case of *Vigo County Republican Central Committee v. Vigo County*, 834 F.Supp. 1080 (S.D.Ind. 1993), illustrates that under the right circumstances a total variance well under 10% can result in a finding of a constitutional violation. In the *Vigo County* case the County Commissioners responded to a lawsuit challenging their 37% total deviation districting plan by adopting a new plan with only an 8.41% total deviation. Later, the Vigo County Commissioners adopted a districting ordinance that had only a 3.8% deviation. The federal district court, however, found each of these plans unconstitutional because the Vigo County Commissioners had not engaged in a "*good faith* effort" to achieve population equality. *Vigo County*, 834 F.Supp. at 1085.

The problem with the Vigo County approach was that the County Commissioners (or perhaps their counsel) had focused solely on crafting a plan that contained a population deviation

of less than 10%. In doing so, the Commissioners had apparently ignored other districting factors, such as compactness, contiguity and respect for township boundaries, and instructed their districting expert to simply construct a plan with less than a 10% total deviation. The court determined that the Commissioners had demonstrated a concern for achieving only minimal compliance with the 10% rule and no real concern with achieving population equality as "nearly as practicable" between districts.

The evidence before the court was that the Vigo County Commissioners had rejected a districting plan submitted by the plaintiffs which contained a total deviation of only .41%. The court ultimately accepted the plaintiffs' alternative plan as evidence that the Commissioners could have come up with a plan containing greater population equality had the Commissioners made real population equality a goal.

E. Justification of variances

The Supreme Court has recognized that even in drawing Congressional districts, deviations in population between districts may sometimes be justified on the basis of "[a]ny number of consistently applied legislative policies ... including, for instance, *making districts compact*, respecting *municipal boundaries*, preserving the *cores of prior districts*, and *avoiding contests between incumbent Representatives*." *Karcher*, 462 U.S. at 740 (emphasis added); *see Abrams v. Johnson*, 117 S.Ct. 1925, 1940 (1997). In another representative case, a federal district court recognized a number of objective non-constitutional criteria (that were not required to be considered by state law) that could justify deviations from absolute population equality including *compactness* and *contiguity*, respecting *political boundaries* and preserving *communities of interest*. *Carstens v. Lamm*, 543 F.Supp. 68 (D.Colo. 1982). A deviation from

population equality can be justified by reference to a legitimate state interest, so long as the "deviation is not greater than is necessary to serve such state interests." *Vigo County*, 834 F.Supp. at 1086.

In short, the best and safest districting practice is to justify any significant population deviations in a redistricting plan with objective consistently applied criteria such as preserving or enhancing compactness, contiguity, communities of interest, the cores of prior districts, and/or geographic, municipal or precinct boundaries.

II. Minority Vote Dilution

A. Results test

In 1982, Section II of the Voting Rights Act was amended to provide that a Voting Rights Act violation could be found if the "totality of the circumstances" indicates that a challenged voting practice results in "less [electoral and participatory] opportunity [for the members of the minority group] than [for] other members of the electorate." 42 U.S.C. § 1973(b). Thus, the 1982 amendment to the Act sets forth what has come to be called the "results test" for establishing Voting Rights Act violations.

Adoption of the results test means that Voting Rights Act plaintiffs no longer need rely solely upon proof of *discriminatory legislative intent* in order to prevail. They may also prevail if they prove that the challenged practice results in *discrimination in practice*, i.e., "less opportunity than other members of the electorate" to participate and elect "on account of race or color." 42 U.S.C. § 1973(b).

Pursuant to the results test, members of a minority group have often brought suit where that minority group has not achieved electoral results that roughly reflect the percentage of

minority members in the population. The theory of such lawsuits is generally that the responsible governmental entity has unfairly drawn the districts in such a way that non-minority voters dilute the value of the votes of minority voters.

B. Gingles preconditions

In the 1986 case of *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court announced a three part threshold test for analyzing vote dilution claims. The *Gingles* test has the following elements:

> **(1)** ***Majority in a single member district*** – "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . "
>
> **(2)** ***Political cohesiveness of the minority group*** – "the minority group must be able to show that it is politically cohesive . . . "
>
> **(3)** ***White bloc voting*** – "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances, such as the minority candidate running unopposed - . . . to defeat *the minority's preferred candidate*."

Gingles, 478 U.S. at 50-51 (emphasis added); *see Voinovich v. Ouilter*, 113 S.Ct. 1149 (1993) (applying *Gingles* test to the creation of single member districts).

C. Totality of the circumstances

Proof of the *Gingles* preconditions by a plaintiff does not mandate a finding of vote dilution in violation of the Voting Rights Act. The next step a court must follow is to analyze the "totality of the circumstances" to determine whether the electoral and political processes are

equally open to the minority group. Factors to be considered include: past discrimination in the jurisdiction, the extent to which voting in elections is racially polarized, the effects of past discrimination on current efforts by the minority group to access the political process and the extent to which members of the minority group have been elected to public office in the jurisdiction.

D. The defense of proportionality

Many issues pertaining to correct application of the *Gingles* preconditions and the totality of the circumstances inquiry remain in dispute. However, the Supreme Court's decision in *Johnson v. De Grandy*, 512 U.S. 997 (1994), suggests that it will be difficult for a plaintiff to prevail in a vote dilution case where there exist a number of districts in which the minority population constitutes a voting majority that is proportionate to the minority groups' share of the overall population in the district.

In the *De Grandy* case the Court upheld a redistricting plan of the Florida legislature which created 9 majority Hispanic districts out of a total of 20 districts in the Dade County area. The plaintiffs established that 11 Hispanic districts could have been created. However, the Court observed that Hispanics would be a voting majority in 45 percent of the districts and constituted 47 percent of the voting age population in the area. Because there was substantial proportionality the Court concluded that a vote dilution claim had not been established.

The *De Grandy* decision was preceded by the ruling of the Seventh Circuit Court of Appeals in *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2334 (1993). In *Baird* the Seventh Circuit employed reasoning similar to that later relied upon by the Supreme Court to conclude that no Voting Rights Act violation had been

shown where the black population constituted 21% of the population in Marion County, Indiana and 7 majority-minority districts created under the challenged districting plan constituted 24% of the entire number of seats on the City-County Council.

III. Reverse Discrimination

The intersection of a number of factors, including: the 1982 Voting Rights Act amendments, the Supreme Court's 1980s vote dilution cases, and advances in computer mapping technology, resulted in a spate of unusually shaped districts throughout the country following the 1990 census. In 1992 a group of plaintiffs challenged North Carolina's 12th Congressional District as a "racial gerrymander." In essence, the plaintiffs contended that the use of race as a factor in drawing districts violated the equal protection clause of the 14th Amendment thereby discriminating against white voters.

By 1993, the case involving North Carolina's 12th District had reached the Supreme Court. In that case the Court determined that **"district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause** regardless of the motivations underlying their adoption." *Shaw v. Reno*, 113 S.Ct. 2816, 2826 (1993). In reaching this conclusion the Court relied heavily upon the bizarre shape of the 12th District which in places closely followed the contours of Interstate 85. In *Shaw v. Reno* the Court did not conclude that the 12th District was unconstitutional, but, rather sent the case back to the District Court to determine whether race was the predominant factor in drawing the district lines and, if so, whether there was a sufficient justification for the reliance on race. Nevertheless, the *Shaw v. Reno* case resulted in a firestorm of litigation that ultimately resulted in redistricting

plans being struck down by courts in at least 8 states. The idea that a racial gerrymander can be unconstitutional has come to be known as the *Shaw* doctrine.

Since 1993, the Supreme Court has repeatedly reconsidered the *Shaw* doctrine and its limits. In 1995, the Court invalidated a Georgia redistricting plan on the ground that race had been "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 115 S.Ct. 2475, 2488 (1995). The Court ruled that the test for an impermissible racial gerrymander is met where "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Id.*

There is apt to be much more litigation under the *Shaw* doctrine and, due to the division on the Supreme Court in this area, the law could change rapidly. However, the most recent decisions of the Supreme Court reflect that race can be taken into consideration in the redistricting process and that majority-minority districts are likely to be found unconstitutional only in circumstances where there is strong evidence that race predominated over any other traditional districting criteria.

IV. Traditional and Statutory Redistricting Criteria

Frequently, a specific statute or group of statutes applies to the redistricting of a particular office. For example, Ind. Code § 36-2-2-4 applies to the creation of County Commissioner districts and Ind. Code § 36-2-3-4 applies to drawing County Council districts. Prior to embarking on the redistricting process such statutes must be carefully analyzed in light of the relevant case law to obtain guidance about how to create the most legally defensible redistricting plan.

A. Contiguity

Many redistricting statutes require "contiguity," which simply means that each district must be composed entirely of adjoining territory. Generally, a district lacks contiguity only when a portion of the district is separated from the remainder of the district by another district. For instance, an intervening river will not cause the part of a district on one side of the river to be non-contiguous to territory on the other side of the river.

B. Compactness

"Compactness" is also a frequent element found in redistricting statutes. The term refers to how widely dispersed a district is in terms of geographic area and geometric shape. There are a number of statistical measures of compactness that can be performed with the assistance of computer technology. The compactness requirement is expressed in varying ways in Indiana statutes. For instance, the County Commissioner redistricting statute requires that County Commissioners draw districts that are "reasonably compact," Ind. Code § 36-2-2-4(a), a formulation that would appear to permit a fair amount of latitude in measuring compactness. On the other hand, the same statute requires that districts drawn for Lake and St. Joseph counties "be compact, subject only to natural boundary lines (such as railroads, major highways, rivers, creeks, parks, and major industrial complexes." Ind. Code § 36-2-2-4(d)(l). Thus, if you were drawing County Commissioner districts for Lake or St. Joseph counties you would have to pay more close attention to compactness measures than in a redistricting situation in which the statute requires districts that are only "reasonably compact."

C. Communities of interest

One court has defined "communities of interest" as "distinctive units which share common concerns with respect to one or more identifiable features such as geography, demography, ethnicity, culture, socio-economic status or trade." *Carstens*, 543 F.Supp. at 91. That court was of the opinion that "a plan which provides fair and effective representation for the people . . . must identify and respect the most important communities of interest within the state." *Id.* A number of other courts have approved the use of "communities of interest" as a valid, objective consideration in districting. *See, e.g., De Grandy v. Wetherell,* 794 F.Supp. 1076 (N.D.Fla. 1992); *see also Hastert v. State Board of Elections*, 777 F.Supp. 634, 660 (N.D.Ill. 1991) (legislative body is most appropriate body to consider communities of interest).

A requirement to maintain "communities of interest" is not found in any Indiana statute. Nevertheless, in a specific case a documented intent to respect defined communities of interest may justify some deviation from statutory and/or constitutional requirements for population equality or compactness.

D. Preserving precincts

Many Indiana redistricting statutes prohibit the splitting of precincts. *See, e.g.*, Ind. Code § 36-2-2-4(a). Nevertheless, if precinct populations are so disproportionate that it is not possible to achieve relative population equality among districts without splitting precincts, it is possible that the constitutional "one man, one vote" principle could override the statutory mandate to not split precincts.

E. Equality of population

In addition to being a constitutional requirement for redistricting, population equality is also frequently set forth as a statutory requirement. In such instances, the statutory description of population equality must be carefully reviewed and compared to the standards set forth in case law to determine whether the statute may be interpreted to require more strict adherence to absolute population equality than federal courts have generally been willing to impose under the U.S. Constitution.

V. Public Access

A showing that the redistricting process is not open to all citizens alike could lead to a finding that the Voting Rights Act has been violated. In the foundational case of *White v. Regester* , 412 U.S. 755, 766 (1973), the Court observed that, "[t]he plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not **equally open to participation** by the group in question."

In addition, plaintiffs have sometimes tried to raise due process challenges to apportionment proceedings contending that the proceedings denied them fair notice or an opportunity to be heard. *See, e.g., Avens v. Wright*, 320 F.Supp. 677 (1970); *People ex rel. Burris v. Ryan*, 588 N.E.2d 1033, 1042 (Ill. 1992) (Bilandic, J., dissenting) ("when the establishment of legislative districts is accomplished in an arbitrary manner, the right of Illinois citizens to due process of law is violated") *cert, denied*, 5 U.S. 973 (1992); *see also Garcia v. Gueua*, 744 F.2d 1159 (5th Cir. 1984) (right to vote is abridged if person does not have prior notice that election is to take place) *cert, denied*, 471 U.S. 1065 (1985); *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970) (discussing due process in context of access to spot on ballot).

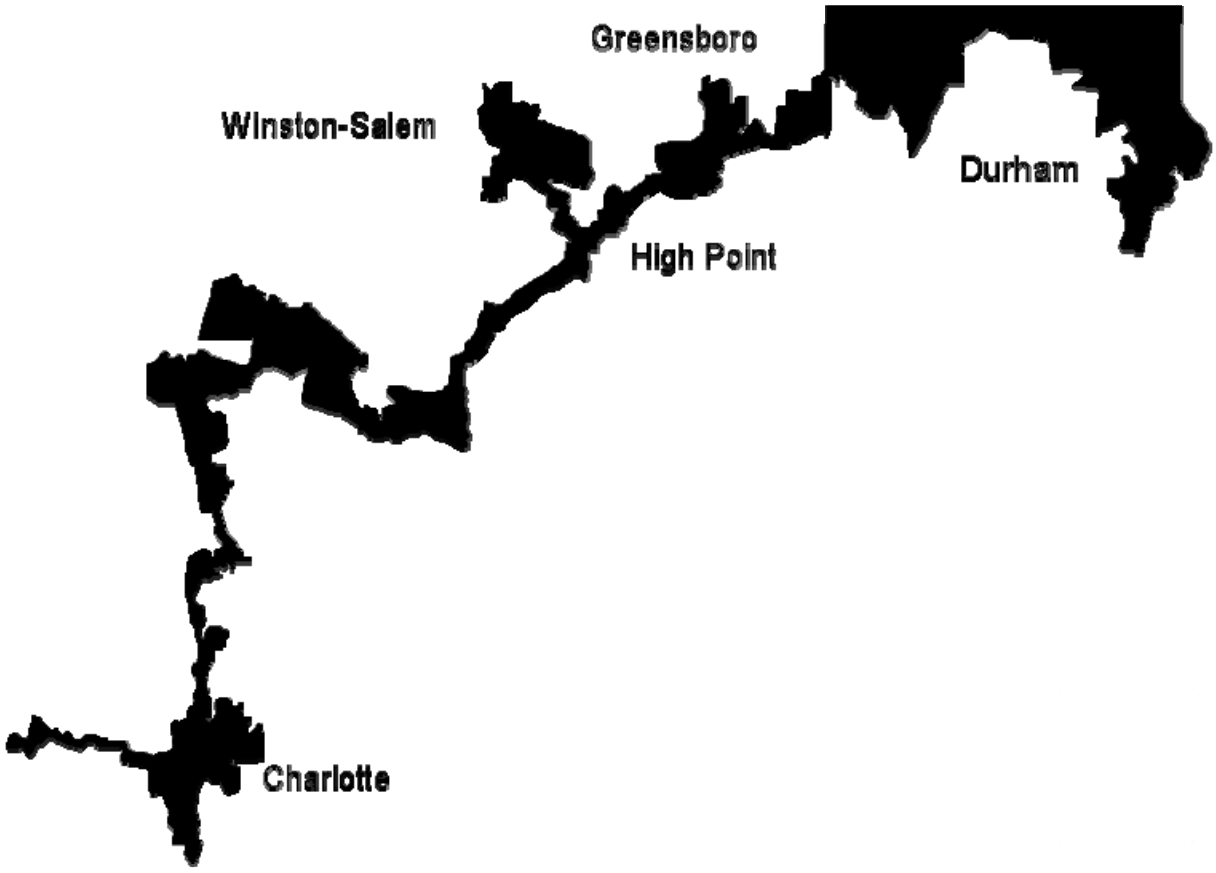
Significant public access issues also arise under state law access statutes such as the Indiana Open Door Law and the Indiana Public Records Law. Therefore, care should be taken that the redistricting process is open and accessible to the public and the public records and open door laws should be thoroughly reviewed in preparation for the redistricting process.

VI. Conclusion

The vast number of past lawsuits contesting redistricting plans makes clear that no redistricting plan is immune from legal challenge. However, with proper planning and knowledge of, and adherence to, the applicable legal standards local governmental officials can greatly minimize the risk of a successful legal challenge and thereby discourage prospective plaintiffs from filing such a challenge.

THE SUPREME COURT AT WORK:

METAMORPHOSIS OF NORTH CAROLINA'S 12TH CONGRESSIONAL DISTRICT



Congressional District 12 – 1992

Congressional District 12 – 1997

Congressional District 12 – 1998