



TODD ROKITA
SECRETARY OF STATE

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STATE OF INDIANA

January 21, 2010

To: Indiana Secretary of State, Todd Rokita

Fr: Jerold Bonnet, General Counsel

Re: Prohibiting the use of Political Data in Redistricting

Summary:

No authority can be found in support of the assertion that redistricting bodies must utilize political data in order to assure compliance with the Voting Rights Act (VRA) or U.S. Supreme Court case law. The likelihood that Indiana might inadvertently violate the VRA is less if the state adopted legislation requiring adherence to traditional redistricting principles and prohibiting the use of political data in the redistricting process.

Issue:

Do provisions of the Voting Rights Act¹ (VRA) or U.S. Supreme Court holdings require the use of political data to assure compliance with the Constitution or the VRA, and thus serve to prevent the Indiana General Assembly from adopting legislation prohibiting the use of political data in redistricting?

¹ Pub. L. No. 89-110, 79 Stat 473 (1965) (codified as amended at 42 U.S.C. §§1971, 1973 to 1973bb-1 (2006).

Rules:

In *Miller v. Johnson* the Supreme Court acknowledged that: “redistricting in most cases will implicate a political calculus in which various interests compete for recognition...”² An Equal Protection claim **will** stand however, when a plaintiff shows that: “the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests...”³ In *Shaw v. Reno*⁴ and *Miller v. Johnson*, the Court rejected arguments made by North Carolina and Georgia, that the state’s interest in complying with the VRA was compelling enough to warrant subordination of traditional districting principles in favor of creating special interest districts. In its invalidation of those states’ gerrymandered redistricting plans, The Court demonstrated that even U.S. Justice Department precertification of minority-majority districts does not inoculate against strict scrutiny or assure judicial approval. The Court also held in *Abrams v. Johnson*⁵ and *Shaw v. Hunt*⁶ that redistricting plans prepared under principles associated with geography, compactness and established political subdivisions are **more likely** to survive judicial review than plans based on political or racial objectives.

In *Peterson v. Borst*,⁷ a politically divided Indianapolis city-county council was unable to agree on a redistricting plan. Pursuant to local ordinance, the Marion County Superior court, sitting *en banc*, voted along party lines, to approve a partisan redistricting plan. The Indiana Supreme Court held that the manner in which the county court approved the plan demonstrated an obvious lack of judicial neutrality. The Court said “we are not aware of any Indiana state court decisions involving partisan redistricting disputes. Thus we write on a clean slate.”⁸ The Court held that in the interest of judicial

² 515 U.S. 900, 914 (1995).

³ *Id.*, at 916.

⁴ 509 U.S. 630 (1993).

⁵ 512 U.S. 74 (1977).

⁶ 517 U.S. 899 (1996).

⁷ 786 N.E. 2d 668 (2003).

⁸ *Id.*, at 671.

neutrality, judges must reject political considerations of any kind. The Court proceeded to commission and approve a redistricting plan relying **only** on the principles of equality, contiguity and compactness, without utilizing political data such as voting history or incumbent addresses. The Indiana Supreme Court demonstrated that politically neutral redistricting plans are possible, fair to all concerned, and presumptively compliant with state and federal law.

In *Gaffney v. Cummings*⁹, a federal district court made findings that Connecticut's 1971 House of Representatives redistricting plan subordinated the principle of nearly equal population to obvious "partisan political structuring". The District Court invalidated the plan, holding that political restructuring was not a legitimate state objective justifying the population deviation. On review, the Supreme Court reversed and reinstated the plan. The chief holding in *Gaffney* is that less than precisely equal population deviation does not alone, establish a *prima facie* Equal Protection Clause claim **not** that states are required to pursue political objectives when redistricting.

Analysis:

Since 1965, the U.S. Supreme Court has repeatedly held that states which articulate and consistently follow traditional redistricting principles are more likely to avoid judicial review or (usually fatal) strict scrutiny, than those that do not.¹⁰

Though the traditional redistricting principles are not found in Indiana's constitution or statutes, the Indiana Supreme Court has recognized the appeal and fairness of politically neutral redistricting. Given the success of politically neutral city-county council districts in Indianapolis, *Peterson v. Borst* can be taken as controlling authority for the adoption of traditional redistricting principles in Indiana as well as the presumptive legality of prohibiting the use of political data in redistricting.

The U.S. Supreme Court has long recognized that redistricting is the provenance of the states.¹¹ In *Gaffney*, Justice White acknowledged that though political

⁹ 412 U.S. 735 (1973).

¹⁰ *Miller v. Johnson*, *supra* note 2; *Shaw v. Reno*, *supra* note 4; *Abrams v. Johnson*, *supra* note 5; *Shaw v. Hunt*, *supra* note 6.

¹¹ *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

considerations and use of political data is to be expected, federal judicial review of state redistricting is not warranted unless an Equal Protection Clause violation has been shown. Casual observers have interpreted dicta in *Gaffney* as a Supreme Court prescription for the use of political data to comply with the VRA. However, use of political data for the propose of assuring compliance with the VRA was neither the issue nor the holding in *Gaffney*. Though the Court affirmed (in dicta) that states *may* use political data in redistricting, *Gaffney* did not hold that states must use political data to assure a plan is compliant with the VRA.

Conclusion:

In its review of Equal Protection standards and the VRA, the Supreme Court has affirmed that states' discretion in redistricting includes taking political factors into account. However, since the enactment of the VRA, the Court has held that states which adopt and consistently follow traditional redistricting principles, including compactness, contiguity and maintaining communities of interest, are more likely to see their plans upheld on judicial review than those which do not. On review, neither the VRA nor Supreme Court jurisprudence require that states rely on political data to comply with the VRA. There is also precedent from the Indiana Supreme Court for the rejection of political data in redistricting and the creation of redistricting plans through the application of traditional redistricting criteria. Thus, there is no precedent in the VRA, Supreme Court jurisprudence or state law, that Indiana would not be free to adopt legislation prohibiting the use of political data for partisan purposes in redistricting. However, because the VRA is subject to revision by Congress, and Supreme Court interpretation of redistricting law tends to evolve over time, it would seem appropriate that redistricting bodies be allowed *non-partisan* use of political or demographic data at such time(s) as the VRA or Supreme Court would specifically direct.

References

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9. Watson, P. (2009). *How to draw redistricting plans that will stand up in court*. Presentation at the National Redistricting Seminar, June 12, 2009, San Francisco, CA. National Conference of State Legislatures. Washington D.C.

Attachment 1.

Districting Principles for 2000s Plans (in addition to population equality) (National Conference of State Legislatures)

	Compact	Contiguous	Preserve Political Subdivisions	Preserve Communities of Interest	Preserve Cores of Prior Districts	Protect Incumbents	Voting Rights Act
Alabama	C, L	C, L	C, L	C, L	C, L		C, L
Alaska	L	L	L	L			
Arkansas			C, L		C, L	YC, YL	C, L
Arizona	C, L	C, L	C, L	C, L		NC, NL	C, L
California	L	L	L	L		NL	L
Colorado	L		L	L			L
Connecticut		L	L				
Delaware		L				NL	
Florida		L					
Georgia		C, L	C, L		C, L	YC, YL	C, L
Hawaii	L	L	L	L		NL	
Idaho	C, L	C, L	C, L	C, L		NC, NL	C, L
Illinois	L	L					
Indiana		L					
Iowa	C, L	C, L	C, L			NC, NL	C, L
Kansas	C, L	C, L	C, L	C, L	L	NL	L
Kentucky		C	C	C	C		C
Louisiana		L	L		L		
Maine	L	L	L				
Maryland	L	C, L	L		YC, YL	YC, YL	C, L
Massachusetts		L	L				

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Districting Principles for 2000s Plans (page 2 of 3)

	Compact	Contiguous	Preserve Political Subdivisions	Preserve Communities of Interest	Preserve Cores of Prior Districts	Protect Incumbents	Voting Rights Act
Michigan	L	L	L				
Minnesota	C, L	C, L	C, L	C, L			C, L
Mississippi	L	C, L	L				C, L
Missouri	C, L	C, L	L	L	L		L
Montana	L	L	L			NL	L
Nebraska	C, L	C, L	C, L			NC, NL	C, L
Nevada	C, L	L	C, L	L			C, L
New Hampshire		L	L				
New Jersey	L	C, L	L		C		C
New Mexico	C, L	C, L	C, L	C, L	YC, YL	YC, YL	C, L
New York	L	L	L				
North Carolina		C, L	C, L		C	YC	C, L
North Dakota	L	L	L				
Ohio	L	L	L				
Oklahoma	L	L	L	L			
Oregon		C, L	C, L	C, L		NC, NL	C, L
Pennsylvania	L	L	L				
Rhode Island	L						
South Carolina	C, L	C, L	C, L	C, L	C, L	YC, YL	C, L
South Dakota	L	L	L	L			L
Tennessee		L	L				L
Texas		L	L				C, L
Utah	C, L	C, L					
Vermont	L	L	L	L		YL	
Virginia	C, L	C, L	L	L		YL	L
Washington	C, L	C, L	C, L	C, L		NL	
West Virginia	C, L	C, L	C, L				

Attachment 1.

Districting Principles for 2000s Plans
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	Compact	Contiguous	Preserve Political Subdivisions	Preserve Communities of Interest	Preserve Cotes of Prior Districts	Protect Incumbents	Voting Rights Act
Wisconsin	L	L	L				
Wyoming	C, L	C, L	C, L	L		NL	L

Key:

- C = Required in congressional plans
- L = Required in legislative plans
- NC = Prohibited in congressional plans
- NL = Prohibited in legislative plans
- YC = Allowed in congressional plans
- YL = Allowed in legislative plans

Note: A few states used additional districting principles, such as “convenience” (Minnesota), “understandability to the voter” (Hawaii, Kansas, Nebraska), and “preservation of politically competitive districts” (Colorado).

Source: NCSL, 2009