

# PA TIMES

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## The Line Must be Drawn Somewhere

*Alan J. Bojorquez*

While the 2000 Census has many uses, one of particular interest to public administrators is redistricting.

Redistricting is the process of re-drawing election district boundaries. The lines that divide communities also allocate money and power. Whether drawn initially by legislative bodies or ultimately by the courts, these lines will have a dramatic impact on public administration for years to come.

Although state and local governments go through this process every 10 years, there will be significant differences this time around. The legal environment has become much more complex. Following the 1990 Census, at least 41 states experienced redistricting litigation. The likelihood of such litigation is even greater.

### **The Politics of Sampling**

To what extent redistricting is necessary will be determined by the numbers reported by the Census Bureau. With more than 270 million people to count, errors are inevitable. It is estimated that the 1990 census missed 4.7 million people. The undercount does not occur uniformly across geographic or demographic groups. It is greatest among children and renters, and for African-Americans it is six times that for Anglos and the undercount for Hispanics is seven times that for Anglos.

Seeking greater accuracy, the Census Bureau has developed a methodology for statistical sampling that is highly controversial. The undercount occurs most heavily in populations that traditionally vote Democratic. Thus, it is widely perceived that reducing the undercount will be beneficial to the Democrats and detrimental to Republicans. In 1999, Republicans achieved a partial victory when the Supreme Court determined that sampling may not be used for Congressional apportionment.

So, for Congressional apportionment, the Bureau is planning to provide numbers that do not rely on sampling. However, the Bureau is also planning to prepare a set of adjusted numbers that use sampling. Therefore, state and local policy makers must make the political decision of which set of numbers to use for state and local redistricting. It is important to note that the Bureau is under the direction of the Secretary of Commerce and policies may change with a change in administration.

### **One Person, One Vote**

Post-census redistricting is often necessary because election districts for officials serving in a representative capacity must achieve population equity within reasonable limits. For local governments, a variance of 10 percent between

the largest and smallest district is generally considered de minimus. The need to satisfy one person, one vote may explain many boundary irregularities.

### **Retrogression Under Section 5**

For "covered jurisdictions," which include most of the South, Southwest, parts of New York City, Alaska, California, Florida, Michigan, New Hampshire and South Dakota, nearly every change in a voting practice or procedure requires preclearance by the U.S. Department of Justice (DOJ) pursuant to section 5 of the Voting Rights Act. The purpose is to establish that the change does not have a retrogressive purpose or effect. Essentially, a governmental body may not go backward in the way it treats minority voters.

Section 5 requires the government to obtain approval of a change before it can be utilized. Changes that are implemented without having been precleared are subject to suit by the United States or any interested citizen.

### **Vote Dilution Under Section 2**

Section 2 of the Voting Rights Act is much broader than section 5. Section 2 makes it illegal for a governmental entity to deny equal access to the electoral process on account of race, color or language minority status. It is the basis for challenging redistricting plans that allegedly dilute the minority vote. In 1982, Congress amended Section 2 to eliminate the requirement that plaintiffs prove a discriminatory intent. Now, discriminatory results are enough. Section 2 cases involve the question of whether the plan gives members of minority groups an "equal opportunity to participate in the political process and elect the representatives of their choice." The amendment unleashed a wave of successful suits challenging local at-large elections and resulted in the creation of many single member districts and increases in the number of Black and Hispanic elected officials.

### **Racial Gerrymandering**

In 1991, the primary legal issue facing the redistricting authority was whether the plan was in compliance with sections 2 and 5. In 1993, the Supreme Court recognized a new cause of action through which persons of any race can challenge plans as being based on unconstitutional uses of race. *Shaw v. Reno* was brought by a group of white citizens challenging congressional districts. The plaintiffs in *Shaw* claimed that redistricting on the basis of race violated a constitutional right to participate in a "color-blind" election process. The Court rejected that proposition. However, the Court held that an effort to "separate voters into different districts on the basis of race" raises constitutional concerns. Under the 14th Amendment, race is a suspect category; thus, those districting plans based on race will be subject to strict scrutiny review—a legal standard that is very difficult to satisfy. The district will survive only if it is proven to be "necessary" and "narrowly tailored" to satisfy a "compelling" government interest.

When adopting a redistricting plan, governmental entities almost always make decisions with some consideration of race. Thus, this change in the law will make it extremely difficult to comply with the Voting Rights Act. Fortunately, the Supreme Court has provided some guidance:

- It is permissible to be aware of race and to consider issues of race.
- Race, however, may not be the predominant factor.
- Districts are not per se unconstitutional but may be evidence that race was the predominant factor.
- If race was the predominant consideration, the districts are subject to strict scrutiny.
- Compliance with section 2 is a compelling governmental interest.
- The Court is willing to assume that compliance with section 5 is a compelling interest.
- Compliance with section 5 does not mean doing whatever the DOJ required for preclearance.

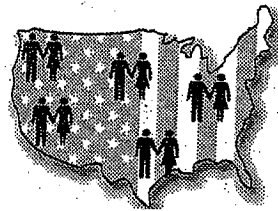
### **Walking the Line**

To minimize liability, governmental bodies should carefully establish processes and criteria for adopting redistricting plans. Here are some pointers:

- Know the law.
- Adopt criteria for evaluating proposed plans. Criteria might include:
  - a. using easily identifiable geographic boundaries;
  - b. avoiding splitting neighborhoods and communities of interest;
  - c. using whole voting precincts;
  - d. using existing districts (where possible);
  - e. drawing districts that are relatively equal and do not exceed a ten percent population deviation;
  - f. drawing districts that are compact and contiguous;
  - g. keeping existing office-holders in their districts; and
  - h. narrowly tailoring the plan to avoid retrogression for minorities.
- Encourage and structure public participation throughout the process.
- Evaluate your compliance throughout the process.

Redistricting in 2001 will be substantially different than in 1991. Previously, all the legal pressure came from the Voting Rights Act. Now *Shaw v. Reno* provides pressure from precisely the opposite direction. Almost everything the governmental body does to comply with one of its legal obligations makes it more likely that it will violate the other. Thus, a governmental body must walk a legal tightrope. Although there is little that can be done to avoid being sued altogether, steps can be taken to reduce the likelihood that any resulting lawsuits will be successful.

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