

MEMORANDUM

TO: Members, 2011 Redistricting Advisory Committee

FROM: Whitney E. Evers, Assistant County Attorney

RE: Redistricting Legal Principles

DATE: April 7, 2011

A. Introduction

The purpose of this memorandum is to provide you with a brief summary of the legal issues in the redistricting process. A more in-depth analysis of these issues will be presented at a future meeting. It is important to remember throughout this process that any potential legal challenge to an Orange County district will require the courts to review the evidence and legal principles applied by this advisory committee in making its recommendations. Likewise, the final approval by the Board of County Commissioners will be scrutinized by the Court, as well as the potential litigants.

B. One Person, One Vote

The general concept of redistricting is the often quoted saying "one person, one vote." In refining that expression the court has had to distinguish between cases involving congressional districts and those involving state or local districts.

The first of many landmark decisions in the voting rights arena was *Baker v. Carr*, 369 U.S. 186 (1962) which held that state legislative districting cases could be reviewed by the courts. The Court added that not only could the cases be reviewed by the courts, but they could also fashion a relief whenever there were constitutional violations. However, the Supreme Court did not provide any specific standards or criteria for judicial review of state cases until two years later in *Reynolds v. Sims*, 377 U.S. 533 (1964).

In *Reynolds v. Sims*, the Supreme Court held that "the overriding objective must be substantial equality of population among the various districts." The Court also

distinguished that there are more state legislative seats to be divided than congressional seats, and therefore, the same standards would not be applied to state redistricting principles. The amount of permissible variation between districts was not addressed in this decision.

C. Maximum Deviation

The ideal population is the total population of the county or state divided by the number of sets or districts. For example, in Orange County, the 2010 census showed that the total population is 1,145,956. Therefore, for purposes of the County Commissioners' districts the ideal population is equal to 190,993 or roughly 191,000 per district.

The key is to compare the difference among the different districts. The term "maximum deviation" has developed as the standard for evaluating state legislative districts. The easiest way to calculate "maximum deviation" is to compare two districts, the one with the greatest population and the one with the lowest population. The term maximum deviation, which has also been referred to as "overall range," "deviation," and "total variance" is the difference between those two districts divided by the ideal population.

In June 1973, the Supreme Court provided further clarification as to what range of population variations were permissible with regards to "maximum deviation." In deciding a Connecticut case and a Texas case, and also in subsequent opinions, the Court has held that the maximum deviation which does not subject a legislative plan to further judicial scrutiny is 10 percent (+/- 5%). In essence, the population in the districts for Orange County should range from 181,443 to 200,543 per district.

In certain instances the courts have upheld districts that exceed the maximum deviation; however, those cases have been subjected to considerable judicial scrutiny. With the development of software and other computer modules and the increasing accuracy of census data, justifying exceeding the prescribed deviations has become increasingly difficult.

D. Minority Districts

Having established the approximate number of individuals in the district, the next question to ask is who will comprise the district. To offset the impact of racial gerrymandering, defined as the "deliberate and arbitrary distortion of boundaries for

racial purposes” courts have allowed for and sometimes mandated the creation of minority districts. *Shaw v. Reno*, 509 U.S. 630, 640 (1993).

In discussing minority districts, there are three classes of minority-based districts. The type of district is determined by the percentage of individuals who belong to that particular minority classification. Majority-minority districts are districts in which the majority of the population is African-American, Hispanic, Asian or Native American. Effective minority districts contain a minority population in numbers sufficient for that population to elect a candidate of its choice. Influence districts are districts in which the minority community is not large enough to elect a candidate of its choice, but is large enough to elect a candidate who will be responsive to the interests and concerns of that minority community.

With the exception of majority-minority districts, in which the U.S. Supreme Court has said the minority group must make up 50% or more of the voting age population, the percentage of the population that qualifies in each category is not specific and varies drastically from case to case. *Bartlett v. Strickland*, 129 S.Ct. 1231 (2009). Voting patterns are often analyzed and scrutinized to consider the effectiveness of the minority district. More importantly, the Supreme Court has held that race-based redistricting is impermissible and has rejected, as unconstitutional, plans in which race is the predominant factor.

E. Traditional Redistricting Principles

Traditional redistricting principles should be considered important criteria for this advisory committee to consider because they establish that the plan was adopted for reasons that typically withstand judicial challenges. They can also be substantiated in future litigation by tangible evidence in the record such as testimony at public hearings or discussion recorded in the committee’s minutes.

Since 1993, seven factors have been judicially recognized as traditional redistricting principles:

1. Compactness
2. Contiguousness
3. Preservation of counties and other political subdivisions
4. Preservation of communities of interest

5. Preservation of cores of prior districts
6. Protection of incumbents
7. Compliance with Section 2 of the Voting Rights Act

The first three categories are considered objective principles that are measured by geographical or natural boundaries. Compactness is best described rather than explained. The courts have concluded that a legislative body designing the districts does not need to show that it drew the most compact district possible. However, compactness does have to be one of its primary goals. Districts need not be in any recognizable geometric shape, but the districts should contain citizens who can relate to each other and should avoid “bizarre” configurations.

The Florida Supreme Court in adopting a definition of “contiguous districts” has declared:

“We agree with the view expressed in *Mader v. Crowell*, 498 F.Supp. 226, 229 (M.D. Tenn. 1980) that a ‘district lacks contiguity only when a part is isolated from the rest of the territory of another district.’ *Webster’s* defines contiguous as: ‘being in actual contact: touching along a boundary or at a point.’ *Webster’s Collegiate Dictionary*, 245 (1973). We adopt that definition, except that we agree with the law expressed in *Jaffrey v. McGough* . . . that lands that mutually touch only at a common corner or right angle cannot be regarded as ‘contiguous’ within the proper meaning of the word when applying it in establishing house or senate districts.” *In Re Apportionment Law, Senate Joint Resolution 1E*, 414 So.2d 1040 (Fla. 1982) at p. 1051.

Additionally, the Florida Supreme Court has held that:

“...Contiguity does not require convenience and ease of travel, or travel by terrestrial rather than marine forms of transportation...The presence in a district of a body of water without a connecting bridge, even if it necessitates land travel outside the district in order to reach other parts of the district, does not violate this Court’s standard for determining contiguity under the Florida Constitution.” *In Re Constitutionality of House Joint Resolution 25E*, 863 So. 2d 1176 (Fla. 2003) at p. 1179.

The preservation of counties and other political subdivisions can also be easily distinguished. This includes using county, city, or town boundaries as boundaries for districts.

Categories four and five, preservation of communities of interest and preservation of cores of prior districts are more subjective categories that are often used to justify a particular district's shape. Oftentimes in litigation, other statistical data is used to support these nebulous boundaries, such as the use of demographic studies or socioeconomic studies.

Incumbency has been preserved by the courts and continues to be a major consideration in the adoption of any redistricting plan. As the function of the Redistricting Advisory Committee is to make recommendations, the approval of the districts by the Board of County Commissioners is a requisite.

Section 2 of the Voting Rights Act prohibits any state or political subdivision from imposing any voting qualification, standard, practice or procedure that results in the denial of a citizen's right to vote on the basis of race, color, or status as a member of a language minority group. Further discussion of the implications of Section 2 of the Voting Rights Act will be addressed in a later committee meeting.

F. Conclusion

The development of voting rights case law has established some guiding principles that should be used throughout the redistricting process. Generally, a redistricting plan will be challenged successfully in court when the maximum deviation exceeds ten percent or if the districts have been designed with race as a predominant factor.

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