WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE July 23, 2021

TO Members, Joint Corporations, Elections and Political Subdivisions Committee

FROM Josh Anderson, Senior Staff Attorney

SUBJECT Redistricting Questions

INTRODUCTION

This memo will provide information on some questions that were raised by discussions of the Joint Corporations, Elections and Political Subdivisions Committee (Committee) at its June meeting. The primary question surrounds the concept of "one person, one vote" and its impact on redistricting requirements.

ONE PERSON, ONE VOTE

First, it is important to note that there are two different types of issues related to population equality in redistricting: congressional districts and state legislative districts. While population equality is required for congressional districts under Article 1, Section 2 of the United States Constitution, Wyoming has only one congressional district and the makeup of that district will not be determined by the Committee.

What will be determined by the Committee are the state legislative districts. In a series of legal cases beginning in the 1960's the courts, and in particular the United States Supreme Court, found that state legislative districts were required to be substantially equal in population under the equal protection clause.

"We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." Reynolds v. Sims, 377 U.S. 533, 568 (1964).

The Court in Reynolds specifically considered whether the senate of a state could be determined by county boundaries similar to the allocation of two U.S. Senators to each state despite substantial population deviations between the states. The Court stated that unlike an entire State, "Political subdivisions of States -- counties, cities, or whatever -- never were and never have been considered as sovereign entities." Id. at 575. The Court then went on to say that "Since we find the so-called federal analogy inapposite to a consideration of the constitutional validity of state legislative apportionment schemes, we necessarily hold that the Equal Protection Clause requires both houses of a state legislature to be apportioned on a population basis." Id. at 575-576.

Finally, the Court in Reynolds recognized that while the equal protection clause required state legislatures to be apportioned on a population basis, it was not as strict as the population requirements for congressional

districts "So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible..." Id. at 579.

10% Standard

Following the Reynolds decision, by the 1970's the courts had settled on a baseline test of ten percent deviation for determining whether state redistricting met the requirement for apportionment on a population basis. The ten percent deviation is calculated as a deviation of plus or minus five percent from the ideal district population size.

One of the early cases that identified the ten percent standard provided that "The maximum population deviations of 16.5% in the Senate districts and 19.3% in the House districts can hardly be characterized as *de minimis;* they substantially exceed the 'under-10%' deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionments." Connor v. Finch, 431 U.S. 407, 418 (1977). The Court there noted that while keeping political subdivisions whole could be used as a rationale for deviations in population, it will not justify large disparities "The policy of maintaining the inviolability of county lines in such circumstances, if strictly adhered to, must inevitably collide with the basic equal protection standard of one person, one vote." Id. at 419.

The courts have noted that while the 10% standard is not an absolute rule, it changes the presumption of whether the state redistricting plan is constitutional. This was made clear in a recent Supreme Court decision:

> When drawing state and local legislative districts, jurisdictions are permitted to deviate somewhat from perfect population equality to accommodate traditional districting objectives, among them, preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness. Where the maximum population deviation between the largest and smallest district is less than 10%, the Court has held, a state or local legislative map presumptively complies with the one-person, one-vote rule. Maximum deviations above 10% are presumptively impermissible.

Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016). It is important to note here that in most instances legislative enactments are presumed to be constitutional and it is up to the party challenging the law to show why the law is unconstitutional. However, in the case of redistricting, if a plan is enacted by the legislature with a greater than 10% deviation that presumption is changed, the law is presumed to be unconstitutional and it would be up to the legislature to show why the plan is constitutional.

As noted in the Evenwel case, there are some reasons why a legislature is permitted to deviate from strict population equality in setting state legislative districts "preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness." Id. In some cases, Courts have allowed states to go beyond the 10% deviation for those reasons.

The Supreme Court held that a plan in Virginia that had a 16.4% deviation was constitutional. "We hold that the legislature's plan for apportionment of the House of Delegates may reasonably be said to advance the rational state policy of respecting the boundaries of political subdivisions. The remaining inquiry is whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits. We conclude that they do not." Mahan v. Howell, 410 U.S. 315, 328 (1973). However, the Court also appeared to indicate that 16 percent may be close to the maximum amount of deviation that would be permitted while also indicating that the holding was based in part of the specific facts of the case. "The 16-odd percent maximum deviation that the District Court found to exist in the legislative plan for the

LEGISLATIVE SERVICE OFFICE • 200 West 24th Street • Cheyenne, Wyoming 82002
TELEPHONE (307)777-7881 • FAX (307)777-5466 • E-MAIL lso@wyoleg.gov • WEBSITE www.wyoleg.gov

reapportionment of the House is substantially less than the percentage deviations that have been found invalid in the previous decisions of this Court. While this percentage may well approach tolerable limits, we do not believe it exceeds them." Id. at 329.

While the Mahan case is an example of a case where a state can exceed the 10% standard for the rational policy of recognizing political subdivisions, a more recent case highlights the limitations of that rationale. A plan in Tennessee with a deviation of 13.9% with the stated interest of keeping counties whole was invalidated because the plaintiffs were able to demonstrate a plan with less variance that split fewer counties: "Any upward deviation from a total population variance of 10% must be justified by a rational state interest, such as to comply with the state's prohibition on splitting counties or to prevent the dilution of minority voting strength. Plaintiffs have demonstrated that it is possible to construct a plan that has a population variance of less than 10%, splits only 27 counties." Rural W. Tenn. African-American Affairs Council v. McWherter, 836 F. Supp 447, 452 (W.D. Tenn. 1993).

In the 2010 redistricting cycle, Kentucky's plan exceeded the 10% standard with deviations of around 11%[1]. The Kentucky Supreme Court held that the plan violated the Kentucky Constitution, which it had also interpreted with a requirement of no more than plus or minus 5% deviation. "Other plans in the record achieve greater population equality than House Bill 1 while dividing the fewest number of counties. The existence of alternative conforming plans is not sufficient to establish that House Bill 1 is unconstitutional. But their existence does show that the greater population inequality in the present plan is not a necessary consequence of pursuing county integrity. So the population deviations of 5.38 percent and 5.52 percent in House Bill 1 cannot reasonably be said to advance the policy of maintaining county integrity." Legislative Research Commission v. Fischer, 366 S.W.3d 905, 915-916 (KY 2012).

Applicability in Wyoming

In 1991 a case was decided in Wyoming related to "one person, one vote" which followed many of the decisions discussed above. As noted by the District Court in that case, the 1991 Wyoming redistricting plan resulted in an 83% deviation for the House plan and a 58% deviation for the Senate plan. The District Court stated that "the Court has repeatedly emphasized that the latitude granted to state legislative reapportionment plans by Reynolds is limited. Only those minor variations which are based on legitimate considerations incident to the effectuation of a rational state policy demonstrate substantial compliance with

[1] According to NCSL data, three other states exceeded the 10% deviation in the 2010 cycle. Hawaii, Ohio, and Vermont. Hawaii appears to be unique due to consisting of different islands and the requirement of having contiguous districts that do not cross island boundaries. For Ohio, there was a challenge to their plan in the case of Wilson v. Kaisch, 134 Ohio St. 3d 221 (Ohio 2012) and the plan was upheld. The actual deviation of the Ohio redistricting plan was not directly discussed in the case and the Court found that the plaintiffs had not carried their burden to overturn the presumption of constitutionality. Staff at the Ohio Legislature stated that the Ohio State Constitution at the time of the 2010 redistricting required counties to be kept whole if the deviation was less than 20%, but noted that the Constitution had since been amended to remove that provision and it would not apply in the current cycle. The Vermont plan from the 2010 redistricting cycle was not subject to a lawsuit. The Vermont plan was challenged in 1992 when the state had a similar deviation. The Vermont Supreme Court upheld the plan at that time in part because the petitioners failed to raise the issue of the deviation and in part because the plan suggested by the petitioners would have had a higher deviation of more than 20% which the court found would be unconstitutional. "[T]he United States Supreme Court has indicated that an overall deviation of 16.4% approaches tolerable limits. We have rejected an overall deviation of 25.3% for Senate districts. More important, the Legislature's burden is to maintain 'equality of representation . . . as nearly as it is practicable.' An overall deviation of 21.8%, under the circumstances facing the Legislature, was inconsistent with that command. In re Reapportionment of Towns of Hartland, Windsor & W. Windsor, 160 Vt. 9, 46 (VT 1993).

LEGISLATIVE SERVICE OFFICE • 200 West 24th Street • Cheyenne, Wyoming 82002
TELEPHONE (307)777-7881 • **FAX** (307)777-5466 • **E-MAIL** lso@wyoleg.gov • **WEBSITE** www.wyoleg.gov

the goal of population equality. Gorin v. Karpan, 775 F.Supp. 1430, 1437 (D. Wyo. 1991) (Internal quotation marks omitted, emphasis in original.)[2]

The Court in Gorin went on to state that the percent of deviation in Wyoming's plan made the plan facially invalid: "Wyoming's population deviation in both the Senate (58%) and the House (83%) greatly exceeds those previously found unacceptable by the Court. We conclude, therefore, that the Wyoming 1991 Reapportionment Act is facially unconstitutional simply because the population inequality created by the Act exceeds tolerable equal protection limits. Id. at 1440. In response to the argument that the plan was intended to keep counties whole, the Court stated that "While there can be little doubt that many Wyoming counties possess a sense of identity, a sense of neighborhood and a sense of community interests, the bottom line is that citizens and not governmental units or regional interests are entitled to elect lawmakers." Id. at 1442.

The Court in Gorin held both the Senate and House plans unconstitutional, and also held that "Wyoming Const. art. III, § 3**,** which constitutes each county an election district and requires that each county be represented by at least one representative, is inconsistent with the application of the 'one person, one vote' principle under circumstances as they presently exist in Wyoming. Consequently, the Wyoming State Legislature may disregard this provision when reapportioning either the Senate or the House of Representatives." Id. at 1445.

It is also important here to discuss the remedy in the Gorin case, as noted by the Court the remedy was to direct the legislature to reapportion the state by preparing a new plan. However, the Court also noted that the alternative was to have the Court draw a new plan. "Moreover, it is important for the legislature to realize that if the court is forced to reapportion, the applicable standard is much stricter. The latitude in court-ordered plans for departure from the Reynolds standards in order to maintain county lines is considerably narrower than that accorded apportionments devised by state legislatures, and . . . the burden of articulating special reasons for following such a policy in the face of substantial population inequalities is correspondingly higher." Id. at 1446.

In response to the Gorin decision, the Wyoming Legislature reapportioned the state in 1992 with an overall population deviation of less than ten percent. The Court had retained jurisdiction over the case and upheld the plan stating "The ten percent de minimis rule provides the state need only justify relative population deviation ranges greater than 10%. As we stated in our earlier opinion, 'an apportionment plan creating a maximum population deviation less than 10% is considered to be 'minor,' and therefore may not substantially dilute the weight of individual votes so as to deny individuals fair and effective representation.'" Gorin v. Karpan, 788 F.Supp. 1199, 1201 (D. Wyo 1992). The Court noted that the Wyoming Legislature had complied with its primary directive which was "Without exception, the legislature must make substantial population equality its overriding objective." Id. at 1200.

OTHER QUESTIONS

Legislative Privilege

Recently, lawsuits related to redistricting plans have increased. It was reported at the NCSL conference on redistricting that from the approximately 200 plans that were adopted in the 2010 redistricting cycle, there were approximately 400 lawsuits filed. One of the trends that was identified in that cycle was an increasing

[2] As an example, if one Senate district was allocated to each county in Wyoming, using 2020 population estimates Niobrara County would be more than 90% less than the ideal population while Laramie County would be more than 290% over the ideal population for a total deviation of 388.33%. Using 23 seats, the ideal population for each district would be 25,319. As noted above, this example was generated using estimated data and will be updated following the State's receipt of final data.

LEGISLATIVE SERVICE OFFICE • 200 West 24th Street • Cheyenne, Wyoming 82002
TELEPHONE (307)777-7881 • FAX (307)777-5466 • E-MAIL lso@wyoleg.gov • WEBSITE www.wyoleg.gov

willingness of courts to "pierce" legislative privilege and require the production of documents that legislators and staff may have assumed would be privileged from disclosure.

A 2003 case out of New York identified a test that courts have since used to determine whether to allow disclosure:

> Whether the privilege that the legislator-defendants seek to assert is characterized as a legislative or a deliberative process privilege, it is, at best, one which is qualified. Accordingly, in deciding whether and to what extent the privilege should be honored, the Court must balance the extent to which production of the information sought would chill the New York State Legislature's deliberations concerning such important matters as redistricting against any other factors favoring disclosure. Among the factors that a court should consider in arriving at such a determination are: (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

Rodriguez v. Pataki, 280 F.Supp.2d 89, 100-101 (S.D.N.Y. 2003). Other Courts have followed a similar analysis.

In addition to a constitutional legislative privilege which was discussed in the Pataki case, and which can be found in Article 3, Section 16 of the Wyoming Constitution, certain communications between legislators and legislative staff are specified as confidential under W.S. 28-8-116. However, it is still important to consider the recent cases related to legislative privilege and to assume that if a redistricting plan is challenged the court is more likely to look to make information public compared to other types of cases where the privilege is asserted.

Inmate Data Reallocation

At the June meeting of the Committee there was a brief discussion of the issue of inmate data reallocation. Traditionally, inmates are counted as population in the area where they are incarcerated, and most states still follow that practice. However, eleven states have now adopted some form of inmate data allocation. Under that process, inmates are reallocated back to the district where the inmate resided immediately prior to incarceration. There are different procedures that are used if the residence of the inmate is not known or was out-of-state. For example, in California, an inmate with an unknown or out-of-state residence is excluded from the population data. However, in Colorado an inmate with an unknown or out-of-state residence is counted at the facility where the inmate is incarcerated. Connecticut specifies that an inmate with a life sentence is counted at the facility where incarcerated.

The justification for inmate data reallocation is that it avoids population clusters that would not have occurred except for the location of a correctional facility in the area.

Maryland and New York were the only states with inmate data reallocation during the 2010 redistricting cycle. Most of the other eleven will be effective for the 2020 redistricting cycle, although Illinois was adopted in 2021 legislative session and will not be effective until the 2030 redistricting cycle.

One of the issues that states have reported in preparing for the 2020 redistricting cycle is making sure that the reports required from the department of corrections are specific enough to allow the inmates to be reallocated into the correct census blocks. However, California noted that if the data only specified a city

LEGISLATIVE SERVICE OFFICE • 200 West 24th Street • Cheyenne, Wyoming 82002
TELEPHONE (307)777-7881 • FAX (307)777-5466 • E-MAIL lso@wyoleg.gov • WEBSITE www.wyoleg.gov

or county of residence, the inmate would be randomly assigned to a census block within the appropriate city or county.

CONCLUSION

As discussed above, one of the biggest issues related to redistricting is whether the redistricting plan violates the equal protection clause by infringing on the concept of "one person, one vote". Equal protection applies to the State under the Federal Constitution which means that state redistricting plans can potentially be challenged in state and Federal Court. A population deviation of less than ten percent is presumed to be constitutional (however it could still be subject to legal challenge), while a deviation of more than ten percent is presumed to be unconstitutional in violation of the equal protection clause. This analysis was previously used to invalidate a redistricting plan in Wyoming with a variance of up to 83%, while the Court found that the revised plan with a variance of less than 10% was constitutional.

Should you have further questions or need any additional details regarding this information, please advise.

LEGISLATIVE SERVICE OFFICE • 200 West 24th Street • Cheyenne, Wyoming 82002
TELEPHONE (307)777-7881 • **FAX** (307)777-5466 • **E-MAIL** lso@wyoleg.gov • **WEBSITE** www.wyoleg.gov