Memorandum

R-130-2698

To: Lizz Lewis, Policy Aide
House Majority Caucus

From: Emily E. Wendel, Staff Attorney EEW

Date: December 20, 2013

Subject: Redistricting questions

You recently asked several questions related to redistricting. Specifically, you asked:

- Whether Ohio's current criteria for drawing General Assembly districts may be used to draw congressional districts;
- How the federal Voting Rights Act applies to state redistricting requirements, and whether that act requires Ohio to adopt majority-minority districts; and
- What authority the state or federal courts have to act if the body responsible for redistricting fails to adopt district maps by the applicable deadline.

Briefly, while the Ohio Constitution's current district population criteria could not be used to draw congressional districts, the Constitution's remaining criteria concerning compactness, contiguity, and the preservation of political subdivisions might be applied to the congressional redistricting process, so long as the resulting districts were sufficiently equal in population. The Voting Rights Act applies to federal, state, and local redistricting processes, and prohibits district plans that dilute minority voting power. However, no judicial decisions currently require Ohio to adopt majority-minority congressional or General Assembly districts. Finally, if a redistricting body failed to adopt district maps, the Ohio Supreme Court or a federal court might draw those districts on behalf of the state.

Federal laws affecting redistricting

Population requirements

The U.S. Supreme Court has ruled that Article I, Section 2 of the U.S. Constitution, which governs the apportionment of congressional representatives,

requires "absolute population equality [to] be the paramount objective of apportionment." Congressional districts must be as equal in population as practicable.[1]

The Ohio Constitution, on the other hand, currently permits General Assembly districts to vary by up to 5% above or below the ideal population.[2] However, while state legislative district plans may have a wider population variance between districts than congressional district plans, the U.S. Supreme Court has stated that the Equal Protection Clause of the Fourteenth Amendment requires state legislative districts to have substantial equality of population.[3]

Voting Rights Act of 1965

Minority vote dilution

The federal Voting Rights Act of 1965 (VRA) prohibits any state or political subdivision from imposing a voting qualification or a standard, practice, or procedure that results in a denial or abridgment of the right to vote on account of race, color, or status as a member of a language minority group.[4] Under the VRA, a congressional, state, or local district plan must not dilute minority voting strength. In applying this law, the courts have, for example, overturned certain district plans that pack minority voters into a limited number of districts, that fracture minority voting strength by dividing minority voters into a large number of districts, or that elect officials on an at-large basis instead of by ward.[5]

The U.S. Supreme Court has stated three preconditions that a minority group must meet in order to prove that a district plan dilutes minority voting power in violation of the VRA. The group must show all of the following:

- The group is sufficiently large and geographically compact to constitute a majority in a single-member district;
- The group is politically cohesive; and
- In the absence of special circumstances, bloc voting by the majority usually defeats the group's preferred candidate.

If those preconditions are met, the court then must examine the totality of the circumstances to determine whether a district map violates the VRA.[6]

---

[1] *Karcher v. Daggett*, 462 U.S. 725, 732 (1983).

[2] Ohio Const., art. XI, secs. 3 and 4.

[3] *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

[4] 42 U.S.C. 1973.

[5] National Conference of State Legislatures, *Redistricting Law 2010* (2009) at 54-55.

[6] *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

Majority-minority districts

In order to remedy a case of minority vote dilution, a court may require the adoption of majority-minority districts (that is, districts in which a majority of the population are members of a particular minority group). For example, in 2008, the city of Euclid created two majority-minority city council districts in response to a federal court ruling that the city's system of electing at-large council members, rather than electing members to represent particular wards, prevented African-Americans from electing their preferred candidates.[7]

Currently, no court has expressly required Ohio to create majority-minority congressional or General Assembly districts. In 1993, the U.S. Supreme Court ruled that while Ohio was not required to create majority-minority districts because its districts did not violate the VRA, Ohio and other jurisdictions may do so voluntarily.[8]

However, voluntarily created majority-minority districts sometimes are challenged as unconstitutional racial gerrymandering. The U.S. Supreme Court has held that race-conscious district drawing is not always unconstitutional. But, if race was the predominant factor used in the redistricting and traditional, race-neutral redistricting principles, such as compactness and the preservation of political subdivisions, were subordinated to race, the government's actions in creating those districts must be narrowly tailored to achieve a compelling governmental interest. The goal of remedying past discrimination or a VRA violation may justify the creation of majority-minority districts.[9]

Other criteria

Provided that a congressional district plan complies with the requirements described above, federal law does not mandate any other district criteria that a state must use in drawing a congressional district map. For the reasons described above, the Ohio Constitution's current General Assembly district population requirements would not pass constitutional muster if they were applied to a congressional district plan. But, the remaining district criteria concerning compactness, contiguity, and the preservation of whole political subdivisions could be applied to a congressional redistricting process, as long as the resulting districts satisfied the constitutional population equality requirement. Our office is not able to predict whether those criteria could produce congressional districts with sufficiently equal populations.

Judicial authority to draw district maps

If the body responsible for redistricting failed to approve district maps before an election was to be held based on those districts, a court likely would have the authority

---

[7] *United States v. City of Euclid*, 580 F. Supp.2d 584 (N.D. Ohio 2008).

[8] *Voinovich v. Quilter*, 507 U.S. 146 (1993).

[9] *Bush v. Vera*, 517 U.S. 952 (1996) and *Shaw v. Hunt*, 517 U.S. 899 (1996).

to draw those maps. The Ohio Constitution does not appear to contemplate the possibility of the Apportionment Board or the General Assembly failing to adopt district plans. Since the Ohio Constitution does not explicitly prohibit the Ohio Supreme Court from drawing districts in such a case, and since redistricting must occur in order to achieve the equality of voting power that the U.S. Constitution requires, the court might find that it had implicit authority to create district maps if the Apportionment Board or the General Assembly did not do so.

Similarly, and regardless of any provision of the Ohio Constitution to the contrary, if a federal court found that Ohio's failure to adopt new congressional or General Assembly districts violated the U.S. Constitution, the court might draw those districts. Federal courts have drawn congressional and state legislative district maps in other states when the responsible body failed to do so.[10]

I hope this information has been helpful. If you have any questions about these matters, please call me at (614) 387-1124.

R2698-130.docx/sle

[10] See, e.g., *Essex v. Kobach*, 874 F. Supp.2d 1069 (D. Kan. 2012) and *Favors v. Cuomo*, 2012 U.S. Dist. LEXIS 36910 (E.D.N.Y. 2012).