



Redistricting Virginia

With the collection of the 2010 census numbers finished, the Virginia General Assembly is turning its attention to redrawing Virginia's legislative boundaries before the 2011 election cycle. Beginning this fall, members of the General Assembly will hold meetings around Virginia to discuss the redistricting process and to gain local input. The General Assembly is tasked with a number of legal and political considerations that must be weighed as legislative boundaries are redrawn. In an effort to alert local governments to these important concerns, this article discusses the redistricting process and the legal thicket that the General Assembly must navigate when redrawing boundaries. Although the legal aspects of redistricting can be daunting, well-informed local governments can have a meaningful voice in the redistricting process and preserve their interests.

Overview and timeline of the redistricting process

Because Virginia holds statewide elections in November 2011, the General Assembly must move quickly so that the new boundaries will be ready. Thus, the redistricting timetable will be tight. The end goal is a redistricting bill passed by both houses of the General Assembly and signed by Gov. Bob McDonnell. Additionally, because Virginia is subject to Section 5 of the federal Civil Rights Act, the 2011 redistricting plan must go through the preclearance process and be approved by the Department of Justice or the U.S. District Court for the District of Columbia.¹ In developing the legislative boundaries, the General Assembly will use population data from the 2010 census. In 2009, the U.S. Census Bureau reported a growth rate of 11.4 percent in Virginia.² Population growth, however, is not uniform throughout the Commonwealth. It is concentrated in metropolitan areas.³ The result of that growth pattern is a concentration of more legislative districts in metropolitan areas, larger and fewer districts in rural areas and increased juggling of the legal redistricting standards.

While the 2010 census count was finished on April 1, 2010, finalization of the census numbers is a year-long process. The U.S. Census Bureau will release geographic data, including districts, localities, precincts and census blocks in fall 2010. On Dec. 31, 2010, the Census Bureau

will report the official population numbers for each state to President Obama. The official population numbers and census maps, however, will not be released to Virginia until early 2011. Once the General Assembly receives the official numbers, then the members can divide the legislative districts. Because Virginia is subject to Section 5 of the Voting Rights Act and has to submit all redistricting plans to the Department of Justice for preclearance, the General Assembly must agree quickly on redistricting legislation. In 2001, it took the Department of Justice 44 days to approve the House of Delegate's redistricting plan, 59 days to approve the Senate redistricting plan and 60 days to approve Virginia's congressional redistricting plan. Because primaries are held in August, the General Assembly must work quickly to avoid a delay in primary elections. In 2001, the governor signed the General Assembly redistricting plans on April 21 and the congressional redistricting plan on July 19.⁴

During the redistricting process, members of the General Assembly try to gain input from local governments and citizens. In that vein, there are a handful of meetings around Virginia where concerns will be heard by House and Senate members of the Redistricting Subcommittees of the Committees on Privileges and Elections for each respective body. The following meetings are scheduled (this list does not include past meetings):

House Redistricting Subcommittee

- Tuesday, Oct. 5 – 7 p.m., Mason Hall, George Mason University
- Monday, Oct. 18 – 7 p.m., Regional Center for Advanced Technology and Training, Danville Community College
- Monday, Dec. 6 – 7 p.m., University Hall, University of Mary Washington
- (Stafford Campus)
- Friday, Dec. 17 – 10 a.m., 9th Floor Appropriations Room, General Assembly
- Building (time approximate, after governor's remarks to the money committees)

Senate Redistricting Subcommittee

- Wednesday, Oct. 27 – 7 p.m., Natural Science Center, Virginia Western Community College, 3102 Colonial Ave., S.W., Roanoke
- Thursday, Nov. 4 – 7 p.m., Herndon Town Council Chambers, 765 Lynn Street, Herndon
- Wednesday, Dec. 2 – 7 p.m., The Forum, Building A, Tidewater Community College, 120 Campus Drive, Portsmouth
- Friday, Dec. 17 – 11 a.m., Senate Room B, General Assembly Building, Capitol Square, Richmond

The legal thicket of redistricting

Redistricting law is complex and intricate, much too complex and intricate for a detailed treatment in this article. The U.S. Constitution, the federal Voting Rights Act, U.S. Supreme Court precedent, the Virginia Constitution and Virginia judicial precedent all play key roles in the redistricting process. Among other considerations, the General Assembly must carefully construct each legislative district to have roughly equal population and must watch for considerations such as minority voting strength, communities of interest, and political subdivisions.

Additionally, compliance with Section 2 and Section 5 of the Voting Rights Act requires particularly close attention, as many factors contribute to whether a redistricting plan will be approved by the Department of Justice. Taking into account this complexity, the following summary aims to give a rough overview of redistricting law in Virginia.

The one person, one vote standard

The one person, one vote requirement is rooted in the concept of equality, that each person's vote should count equally in all elections. Article I, section 2 of the U.S. Constitution, which requires that U.S. representatives be apportioned to states according to population, is the foundation of the one person, one vote standard. The one person, one vote standard applies to state political districts through the Equal Protection Clause of the 14th Amendment.⁵ Even with roots in the U.S. Constitution, however, the operation of the one person, one vote standard in Virginia relies heavily on U.S. Supreme Court precedent and the Virginia Constitution. In the 1960s, the U.S. Supreme Court applied the U.S. constitutional standard to state⁶ and local legislative districts.⁷ Additionally, the Virginia Constitution has two sections incorporating the

one person, one vote standard. Article II, section 6 applies the standard to state legislative districts and Article VII, section 5 applies the standard to local districts, both sections indicate that districts should be constructed so “as to give, as nearly as practicable, representation in proportion to the population of the district.”⁸

The one person, one vote standard, while perhaps the most fundamental legal requirement of redistricting, is not without caveats. First of all, it is impossible to construct legislative districts that are exactly equal in population. The U.S. Supreme Court has recognized this difficulty and has provided guidance on acceptable population deviations. For congressional districts, any deviation must be minimal and is closely scrutinized.⁹ State and local districts, on the other hand, have more freedom to deviate from exact population equality. In fact, the Supreme Court has upheld deviations of up to ten percent for state and local districts.¹⁰ A deviation of ten percent or less, however, does not guarantee validity. Instead, according to the Fourth Circuit Court of Appeals, the ten percent threshold is merely the point at which the burden of proof shifts.¹¹ If the deviation is greater than 10 percent then the state must justify the districting plan with a rational and reasonable state concern.¹²

There are several acceptable justifications for a state to have population deviations greater than 10 percent. The most general standard is that the deviations must be justified by a “legitimate consideration . . . of a rational state policy.”¹³ One such policy is a state's desire to maintain political subdivision boundaries and avoid locality splits. Virginia, for instance, utilized that reasoning in enacting a deviation of 16.4 percent that was upheld by the U.S. Supreme Court.¹⁴ In addition to keeping political subdivisions and localities intact, courts consider state constitutional requirements to be a sufficient justification for greater than 10 percent deviations.¹⁵

Compactness, contiguity and clearly observable boundaries

In addition to population equality, the Virginia Constitution requires consideration of the compactness and contiguity of voting districts.¹⁶ The question of compactness is only one of geography, not communities of interests.¹⁷ Challenges to districts under the contiguity and compactness requirements are upheld if the legislative decision is fairly debatable, meaning that the evidence “would lead objective and reasonable people to reach different conclusions.”¹⁸ Both the compactness and the contiguity

standards take into account the topography of the Commonwealth and the boundaries of political subdivisions.¹⁹ In practice the compactness and contiguity standards are not especially stringent. For example, a district separated by a body of water may be found sufficiently contiguous even if there is not a direct route connecting two sections of the district without travel through another district.²⁰ However, if the connection is unreasonable or unduly burdensome or dubious, then the district may be struck down.²¹ Notably, districts that are merely irregular do not defeat compactness or contiguity

The last constitutional or statutory redistricting requirement is that legislative districts have clearly observable boundaries.²² Such boundaries can be roads, highways, rivers and streams or any other natural or constructed feature that appears on official maps used for redistricting.

Incumbency protection

In some situations the protection of incumbents is considered a legitimate redistricting concern. Incumbency protection is a natural consequence of political leaders drawing legislative boundaries. There are two types of incumbency protection: (1) protecting current incumbents from challengers; and (2) preventing incumbents from having to run against each other. While the first method of incumbency protection is frowned upon, the second method is a legitimate concern according to the U.S. Supreme Court.²³

Communities of interest and maintaining political subdivisions

Protecting communities of interest and maintaining political subdivision boundaries are the last good governance criterion. As an historical matter, political subdivisions of states (*e.g.*, cities and counties) were considered the most important factor when drawing legislative districts. That changed, however, when the U.S. Supreme Court required that legislative districts meet population equality standards in the 1960s. The population equality principle required that cities with massive populations be split into multiple districts, and at the same time, that cities and towns with minimal populations be combined into single districts.

This division of cities and combination of smaller towns meant that legislatures could become more creative when drawing legislative boundaries. Without the

objective criteria of political boundaries, legislators could either combine groups with similar interests or break those groups apart, depending on the goal of a particular legislature. Such decisions by legislators would then carry consequences for local governments. Most notably, if the General Assembly breaks up a city or town and includes pieces in multiple legislative districts, then the elected representatives of those districts may be less responsive to the unified concerns of the locality. Indeed, many times localities share similar interest, whether education, economic development or public transportation, and when those localities are split into multiple legislative districts it becomes more difficult to advance their interests at the state level.

Communities of interest are groups of people who share common interests and can consist of any number of common threads, including economic, social, or educational commonalities. A common race or heritage can create a community of interest, but such considerations cannot be the only factor in the redistricting decision. If race is considered, then it may only be considered so long as there are other common threads of interests within the community.²⁴

Section 2 of the federal Voting Rights Act

Section 2 of the Voting Rights Act of 1965, which was amended in 1982, prohibits any state from imposing any qualification or procedure that interferes with the right to vote of any individual based on race, color or minority status.²⁵ Courts use a totality of the circumstances test to determine whether a violation has occurred.²⁶ A plaintiff must show that members of a protected class have less opportunity to participate meaningfully in the political process than other members of society. The totality of the circumstances test does not require intent to discriminate; rather, the plaintiff must only show that the districting actually results in discrimination.²⁷ The U.S. Supreme Court, in *Thornburg v. Gingles*, identified three preconditions to any successful section 2 claim: (1) sufficiently large and geographically compact minority group so as to constitute a majority/minority district; (2) political cohesiveness of the minority group; (3) white majority group that votes as a group to the extent that the minority groups preferred candidate typically loses, absent special circumstances.²⁸ If the plaintiff meets the *Gingles*'s test, then courts will consider many factors, including *inter alia*, the election successes of minorities, voting patterns, mechanisms designed to dilute minority voting strength, race-based campaign-

ing and past discrimination. There is no set percentage of minority voting strength that guarantees validity under the Voting Rights Act. However, merely creating a district that increases minority voting strength without creating a majority minority district, a so-called influence district, is not subject to section 2 protections.²⁹

Section 5 of the federal Voting Rights Act

Section 5 requires certain jurisdictions, including Virginia and many of its political subdivisions, to preclear all districting plans and voting law changes with the Department of Justice or the U.S. District Court for the District of Columbia.³⁰ All of Virginia's political subdivisions were originally subject to Section 5, but many localities have "bailed out" via a mechanism created to emancipate jurisdictions from section 5 constraints if those jurisdictions have been free from discrimination for five years.³¹ Generally, a jurisdiction subject to section 5 files its districting or voting law change with the Department of Justice, which saves time and money. If the Justice Department rejects the submission, then the jurisdiction may still seek preclearance from the U.S. district court.

The test for preclearance is a retrogression analysis, the change must have neither the purpose nor effect of "denying or abridging the right to vote on account of race or color."³² The retrogression analysis means that a voting change in a section 5 jurisdiction will not be valid if it places minorities in a worse position than before when exercising their electoral rights. Furthermore, a section 5 jurisdiction's redistricting can pass the retrogression test even if it is neutral as to minority voting strength.³³ A plan does not have to comply with section 2 to be precleared under section 5.

So how does a retrogression analysis work? The Department of Justice or district court will compare the new and existing plan to the 2010 census information for the following: (1) number of majority-minority districts; (2) comparative percentage of minorities in each district; (3) population shifts; and (4) state election history. If the minority group's voting strength is diluted by the redistricting then the Department of Justice or district court will not issue preclearance.

Racial gerrymandering

Political gerrymandering – the practice of drawing boundaries to unfairly benefit one political party – is discouraged, but unfortunately, the U.S. Supreme Court has been unable to find a consensus on how to deal with the problem. In a series of cases over the last 25 years, the court has tried to find a consensus standard by which to judge political gerrymandering cases, but that effort has yielded little fruit.³⁴ So although political gerrymandering is frowned upon, as a practical matter, it is very difficult to bring a successful action. Challenges to racial gerrymandering are brought under the Equal Protection Clause of the 14th Amendment. In 1993, the Supreme Court considered *Shaw v. Reno*, where the court held that although race may be considered when districting, any districting plan that does consider race is subject to strict scrutiny and "must be narrowly tailored to achieve a compelling government interest."³⁵ A plaintiff seeking to challenge redistricting on Equal Protection grounds must prove that race was the predominant consideration in the redistricting decision. If the plaintiff proves race predominated, then the plan will only be valid if narrowly tailored and designed to serve a compelling state interest. Although compliance with the Voting Rights Act may contribute to a compelling state interest, the Supreme Court held that reasoning, coupled with politics and incumbency protection, were insufficient to uphold three Texas congressional districts.³⁶

Conclusion

Local governments should get involved and stay involved with the redistricting process to ensure that their interests are heard. There are two ways in which local government interests can be couched in order to be considered in the redistricting process. Local governments can push to have redistricting ensure that their locality is included within a single district, or conversely for large localities, split into multiple districts that contain majorities of that localities' residents. Additionally, if there are sub-groups within cities and counties that have similar stakes on many issues, then localities can push for those groups to be considered a community of interest for the purposes of redistricting and thus kept together.

Endnotes

- 1 This process is discussed *infra*.
- 2 Mary Spain, Drawing the Line 2011: Redistricting in Virginia, Virginia Division of Legislative Services, Aug. 2010, at 6, available at <http://dlsgis.state.va.us/Ref/2011Draw1.pdf>.
- 3 *Id.*
- 4 See generally *id.* HB 18, though not explicitly deemed emergency legislation, was passed during the 2001 special session and became effective upon the governor's signature.
- 5 See *Baker v. Carr*, 369 U.S. 186 (1962) (the Supreme Court held that legislative apportionment was a justiciable issue and that district courts could fashion relief from the Equal Protection Clause of the 14th Amendment).
- 6 *Reynolds v. Sims*, 377 U.S. 533 (1964).
- 7 *Avery v. Midland County*, 390 U.S. 474 (1968).
- 8 Va. Const. art. II, § 6 & art. VII § 5.
- 9 *Abrams v. Johnson*, 521 U.S. 74, 98 (1997) (citing *Westberry v. Sanders*, 376 U.S. 1, 7-8 (1964)).
- 10 See *Connor v. Finch*, 431 U.S. 407, 418 (1977) (the Court invalidated districts with deviations of over 15 percent).
- 11 *Daly v. Hunt*, 93 F.3d 1212, 1217-18 (4th Cir. 1996).
- 12 *Id.*
- 13 *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).
- 14 *Mahan v. Howell*, 410 U.S. 315 (1973).
- 15 *Marylanders for Fair Rep., Inc. v. Schaefer*, 849 F. Supp. 1022, 1053-56 (D. Md. 1973).
- 16 Va. Const. art. II § 6 & art. VII § 5.
- 17 *Jamerson v. Womack*, 423 S.E.2d 180 (Va. 1992).
- 18 *Wilkins v. West*, 571 S.E.2d 100, 108 (Va. 2002).
- 19 Carter Glass IV, Legislative Redistricting & Voting Rights Act Preclearance, in *Handbook of Virginia Local Government Law*, at 7 (2009).
- 20 *Id.*
- 21 *Id.*
- 22 Va. Code § 24.2-305.
- 23 *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *Bush v. Vera*, 517 U.S. 952, 964 (1996).
- 24 *Miller v. Johnson*, 515 U.S. 900, 920 (1995).
- 25 42 U.S.C.A § 1971 *et seq.*
- 26 *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986).
- 27 *Id.* at 44.
- 28 *Id.* at 50-51.
- 29 *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).
- 30 42 U.S.C. § 1973c.
- 31 See *id.* § 1973b(a). See United States Department of Justice, Civil Rights Division, Section 4 of the Voting Rights Act, http://www.justice.gov/crt/voting/misc/sec_4.php (detailing cities and counties in Virginia that have “bailed-out”).
- 32 *Id.* § 1973c.
- 33 *City of Lockhart v. United States*, 460 U.S. 125 (1983).
- 34 See generally *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006); *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986).
- 35 509 U.S. 630 (1993).
- 36 *Bush v. Vera*, 517 U.S. 952 (1996).

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