

NEW YORK STATE SENATE
PUBLIC MEETING ON REDISTRICTING
DECEMBER 14, 2010

*Presentation of John H. Snyder
on behalf of the Election Law Committee of the
Association of the Bar of the City of New York*

Senator Dilan, Dr. Flateau, on behalf of my colleagues on the Election Law Committee of the Association of the Bar of the City of New York ("Election Law Committee"), I want to thank you for organizing this public hearing, and for providing a forum for discussion of the upcoming redistricting process in the State of New York.

The Election Law Committee can proudly claim some of New York's leading state and national election lawyers among its past and present members. The Committee studies issues, produces reports and testimony, and generally addresses major law and policy issues related to elections.

We have extensively studied New York's redistricting process. In fact, I note that much of what I will say today is discussed in greater detail in the Election Law Committee's March 2007 report entitled "A Proposed New York State Constitutional Amendment to Emancipate Redistricting from Partisan Gerrymanders: Partisanship Channeled for Fair Line-Drawing Committee on Election Law," available on the City Bar Association's website.¹

¹ See www.nycbar.org/pdf/report/redistricting_report03071.pdf

From the Election Law Committee's perspective, the current redistricting process has resulted in cycle after cycle of redistricting that reflects the interests of individual legislators in their own electoral self-preservation, rather than true representative democracy. Historically, the majority party in each house of the Legislature has effectively made an agreement with that of the other house, whereby each majority designs a plan to shield itself from electoral challenge in its own house, and approves the other's self-serving plan with little or no question. Under the current system of redistricting, as practiced during the last three decades of generally divided partisan control of the Legislature, individual legislators find themselves more beholden to their leaders for re-election than to their constituents. This form of incumbency protection produces noncompetitive elections, permanent legislative deadlock, and a Legislature unresponsive to the will and interests of the voters.

Because you have not sought suggestions at this time for large-scale reform, I limit my remarks to those topics for which you have sought guidance — the criteria to be used in the redistricting process. However, I encourage those interested in more structural reform to consider the Election Law Committee's proposed amendment to the State Constitution. The proposal includes the requirement that the four legislative leaders [i.e., the temporary president of the senate, the minority leader of the senate, the speaker of the assembly, and the minority leader of the assembly] appoint two commissioners each, their best

advocates, to a redistricting commission that would develop a map using a process that would force a last-best-offer arbitration.

Population Equality.

The Election Law Committee recommends thorough study on the effect that tightening the permissible difference in population between the most and least populous senate or assembly districts (i.e., the “range” or the “total or maximum deviation”) would have on minority group representation. Our tentative recommendation, assuming that further study reveals that such a shift would have no negative consequences for minority group representation, is that the difference not exceed 2% of the mean population for all districts. Although this 2% standard is more strict than the rule for state legislatures that the U.S. Supreme Court has erected in enforcing the Equal Protection Clause of the 14th Amendment, a more narrow standard would serve to prevent a cumulative population deviation, aggregating small deviations in many districts, that may skew the apportionment in favor of one region over another. In addition, the possibility of keeping a significantly larger number of counties and county subdivisions intact, within a 4%-5% total deviation, should also be studied.

Contiguous Territory.

The Committee recommends maintaining the requirement set forth in the State Constitution that districts consist of contiguous territory, meaning “not territory near by, in the neighborhood or locality of, but territory touching, adjoining and connected, as distinguished from territory separated by other

territory,” but that any definition of contiguity employed preclude districts consisting of parts entirely separated by the territory of another district of the same body, whether such territory be land or water, populated or unpopulated. However, under our recommendation, we would not require that land masses be connected by bridges, tunnels, or regularly scheduled ferry services. Ultimately, we would favor a constitutional amendment to resolve certain ambiguities in the definition of “contiguous,” in order to bring clarity to the process.

Fair Representation of Minority Groups.

Minority voting rights, as protected by the 14th and 15th Amendments and the Voting Rights Act, stand above state redistricting rules under the Supremacy Clause. We therefore propose that a legally permissible criterion protecting minority voting rights be placed ‘side-by-side,’ so to speak, with certain traditional districting criteria such as the population equality standard, and contiguity. While our recommendation would not be criteria that require the maximization of districts designed to give minority voters the ability to elect candidates of choice, it would be one that, consistent with the requirements of federal law, allows the exercise of discretion as to what is fair and reasonable.

State Constitutional Border Requirements.

Preservation of local political subdivisions within legislative and congressional districts constrains partisan gerrymandering and provides a basis for coherent representation of citizens with common interests. As a general matter, the Committee has recommended that the preservation of political

subdivisions take precedence over compactness. Counties, towns, cities, and villages, like the state itself, frequently have irregular shapes. They also have different populations, and an aggregation of contiguous subdivisions, with the appropriate population for a district, is likely to be even more irregular in shape than the individual units. If compactness were given priority, the rules for keeping local subdivisions intact would lose all meaning.

Recognizing that there currently exist state constitutional rules governing border requirements, the Committee supports as a policy matter, the principles of: dividing the more populous counties when a choice must be made, eliminating existing favoritism to towns over cities (and applying the principle mentioned above, which is when a choice has to be made, dividing the more populous unit), and eliminating the 'block-on-border' and 'town-on-border' rules.

Compactness.

The state constitution contains a compactness requirement, which the Committee supports. However, the Committee believes that compactness measures should be applied comparatively, using average numerical measures, to plans as a whole, not to individual districts. There are several reasons. Every numerical measure of compactness will produce anomalous results in some circumstances. The average score for a whole plan is less likely to be distorted by such an anomaly than the score for a single district. There will sometimes be a trade-off between the compactness of one district, and the compactness of other

districts in the same plan. The different populations and shapes of local government subdivisions, and even of different parts of the state (e.g., Long Island vs. upstate), make it easier to fashion compact districts in some places than in others. In particular places, a less than maximally compact district may further substantive representation goals, such as fair representation for minority groups, preservation of communities of interest, and convenience of election administration. This should be acceptable, if the average measures for the plan as a whole show it to be as compact as comparable plans. The Committee's Report provides a detailed description of several objective means of calculating compactness, as well as a discussion of certain simplistic measures that are misleading and should be avoided.

Communities of Interest.

The Committee notes that communities of actual shared interest may be indicated by geographic factors other than county, county subdivision, and village boundaries. School districts and New York City community board districts may reasonably be considered. Census Designated Places may also be used. In most of the state, only incorporated places – cities and villages – are Census Designated Places. In Nassau and Suffolk counties, however, the Long Island Regional Planning Council has prevailed on the Census Bureau to designate as Places, not only the cities and villages, but the many unincorporated hamlets that most Long Islanders think of as their village of residence. In Long Island it would make good sense to try to keep Census Designated Places intact.

Existing Districts.

The Committee recommends that any criterion designed to protect incumbents should be subordinate to all other principles, i.e., the population equality standard, contiguity, minority representation, preservation of local government units, compactness, etc. Each of these other principles should be applied de novo to the new demographic facts that currently exist to avoid preserving current gerrymanders designed to protect incumbents. In sum, incumbency protection should be considered only to the degree that it does not compromise superior principles.

Size of State Senate.

The floating number of Senate districts is a historical artifact that no longer serves any purpose, and merely creates ambiguity and opportunities for manipulation. Accordingly, the Committee has recommended that the size of the Senate be finally fixed at its current size of 62 members.

Public Access, Transparency, Outreach, and Hearings.

While the Committee strongly recommends the maintenance, and publication, of a political database, it has not yet developed specific recommendations on how to promote transparency and public access to the redistricting process. When such recommendations are developed, they will be shared and available to interested parties.

Prisoner Census Count Law.

The Committee had recommended, although there was some division, that prisoners should be attributed to their permanent home addresses for redistricting purposes if possible. Now that this is policy is New York law, we can expect to further delve into issues of implementation.

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In conclusion, we are pleased to offer the above recommendations, but expect that we will continue to have much to say on the topic of redistricting. Thank you for your attention and for holding these timely hearings.