

INTERIM JOINT COMMITTEE ON STATE GOVERNMENT

Minutes of the 1st Meeting of the 2021 Interim

June 15, 2021

Call to Order and Roll Call

The first meeting of the Interim Joint Committee on State Government was held on Tuesday, June 15, 2021, at 1:00 PM, in Room 149 of the Capitol Annex. Senator Robby Mills, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Robby Mills, Co-Chair; Kevin D. Bratcher, Co-Chair; Senators Ralph Alvarado, Denise Harper Angel, Morgan McGarvey, Michael J. Nemes, Wil Schroder, Adrienne Southworth, Brandon J. Storm, Damon Thayer, and Phillip Wheeler; Representatives John Blanton, Adam Bowling, McKenzie Cantrell, Jennifer Decker, Jim DuPlessis, Joseph M. Fischer, Kelly Flood, Jim Gooch Jr., Derrick Graham, Richard Heath, Samara Heavrin, Mary Beth Imes, DJ Johnson, Matthew Koch, Derek Lewis, Scott Lewis, Savannah Maddox, Patti Minter, Kimberly Poore Moser, Jason Nemes, Attica Scott, Tom Smith, Pamela Stevenson, Nancy Tate, James Tipton, Ken Upchurch, Russell Webber, and Buddy Wheatley.

Guests: Wendy Underhill and Ben Williams, National Conference of State Legislatures.

LRC Staff: Alisha Miller, Daniel Carter, Michael Callan, and Peggy Sciantarelli.

Redistricting – Legal Environment

Guest speakers from the National Conference of State Legislatures (NCSL) were Wendy Underhill, Director, Elections and Redistricting, and Ben Williams, Policy Specialist, Elections and Redistricting. Their testimony included a slide show presentation, outlined in two parts: Part I (Census) and Part II (Redistricting).

Ms. Underhill reviewed Part I of the presentation. She discussed the role of the Census and its importance in relation to funding, apportionment in Congress, redistricting, and the crafting of policies for the people of Kentucky. Based on the Census, \$15.8 billion in federal funds has been distributed to Kentucky annually for the last 10 years. There are two releases of data in the year following the census. The first data release, which has already arrived, provides total population counts for all 50 states, governing how many seats each state will receive in Congress for the next decade. Growth trends of prior decades continue, with states in the South and West growing at the expense of states in the Midwest

and Northeast. The second data release will provide demographic information and the details of population growth within the states. It is expected by August 16. The Census Bureau has said it will release detailed data on September 30 but will release the data on August 16 in a different format. This has raised the question in some states whether the August 16 release can be considered the official release from the Census Bureau. On September 30, the bureau will send data to the states in a more easily interpretable fashion.

Reapportionment for 2021 shows that Kentucky neither gained nor lost a seat in Congress. Population growth in Texas, North Carolina, Florida, Oregon, Montana, and Colorado will result in added congressional seats in those states. Texas is the only state that gained two additional seats in Congress. New York, Illinois, Ohio, Pennsylvania, California, Michigan, and West Virginia will lose a seat.

National population has grown 7.4 percent since 2010—the lowest growth rate since the Great Depression. All states but three saw population growth this decade, with population shrinking in Illinois, Mississippi, and West Virginia. Kentucky population grew by 3.7 percent (slow growth) between 2010 and 2020.

The May 17, 2022, primary date in Kentucky is tied for eighth earliest in the nation. Kentucky's deadline for completing redistricting is in 2022.

No two censuses have been managed exactly the same. In the 1920s, Congress never reapportioned itself. The 1960 census was the first in which the census form was sent by mail, but enumerators picked up the completed forms from residences. Legal requirements have changed. NCSL helped get P.L. 94-171 enacted by Congress in 1975. The 2020 census for this decade is different because of its delays and the fact that there will be two releases of data. This was the first year there was an online option, which was more successful than the Census Bureau had anticipated. People were also counted by mail, phone, and in-person. About 500,000 people are hired as Census enumerators to knock on doors. People are also counted by imputation.

The 2020 Census experienced delays due to the pandemic, fires, floods, and policy changes. There was also a decision to use a new system for avoiding release of private information. Delays result in less time being available for redistricting. Filing deadlines, residency requirements, and elections are also affected. To date, some states are addressing delays by asking the courts for relief (California, Oregon, and Michigan); altering legal deadlines (New Jersey and New York); altering filing deadlines or primary election dates (Wisconsin and North Carolina); extending legislative sessions (Arkansas and Indiana); or by turning redistricting into a “two-step” process that would use the best data currently available to redistrict on schedule, with the understanding that amendments will need to be made once the P.L. 94-171 data is available (Oklahoma and Illinois).

Concluding her part of the presentation, Ms. Underhill spoke about concerns and uncertainty regarding the quality of the 2020 census data and the possibility that there was an undercount due to the pandemic. A federal lawsuit was filed in Ohio on the ground that the Census Bureau has not met its statutory deadline. Alabama sued in federal court on the same ground, also alleging that the use of differential privacy is unconstitutional. Two separate federal lawsuits were filed in Illinois challenging the state's use of alternative data for redistricting.

Senator Thayer thanked Ms. Underhill for her overview. In response to her statement that Kentucky has a November filing deadline, he explained that Kentucky's filing deadline is the first Friday after the first Tuesday in January, although candidates may begin filing in November.

Senator Thayer said that in order to properly accomplish redistricting for the General Assembly's constituents—while conforming with the spirit and letter of the 14th Amendment to the U.S. Constitution—a special legislative session will be needed during the fourth quarter of 2021. The Governor has been made aware of the need for a special session. Without a special session, when the General Assembly convenes in January, it will need to pass a bill to temporarily move the filing deadline back to late January or February. The filing deadline had previously been moved from late January to early January.

Senator Thayer said there is a huge population shift occurring in the Commonwealth, and the General Assembly will face some difficult decisions. Redistricting will likely result in fewer Senate and House districts in eastern and western Kentucky. He noted that filing for office can begin in early November but that the districts will not be yet established unless the Governor calls a special session.

Senator Thayer discussed the rules and law governing the splitting of counties in congressional and state redistricting. Based on population trends, he estimated that redistricting of the state Senate will probably add Boone and Warren counties to the number of counties that are currently split—Fayette, Jefferson, and Kenton. He again emphasized the need for a special redistricting session in the fourth quarter of 2021, in advance of the 2022 Regular Session, during which a new budget will have to be enacted. He also expressed appreciation to Senator Mills for devoting the committee's first interim meeting to discussion of redistricting.

Senator Alvarado recognized in the audience Mr. Mick Bullock, Director of Public Affairs in NCSL's Washington, D.C. office. He commended NCSL for its assistance and resources and said that Kentucky is looking forward to hosting the Legislative Summit in Louisville in 2024.

Representative Bratcher asked about differential privacy, which is an issue in a federal lawsuit in Alabama. Ms. Underhill said there is a federal law that requires

respondents' information to be kept private. She then discussed at length how the Census Bureau has changed its approach to the privacy question over the decades.

Representative Bratcher said he recalled reading that after California raised objections to data that would cause that state to lose two congressional seats instead of one, the Census Bureau had subsequently revised the data. Ms. Underhill said she had not heard that, and she questions it. She said the Census Bureau has released only one set of data so far—for state population.

Responding to a question from Representative Flood regarding community involvement, Ms. Underhill said that holding public hearings for redistricting is common practice. Whether Kentucky needs to do it is strictly a decision to be made in Kentucky. It is not required but may be something to consider if it is felt that there is public interest.

Representative Nemes said that judicial district maps will also need to be redrawn. Supreme Court and Court of Appeals districts have not been redrawn for more than three decades. Trial court redistricting is also needed. He noted that he was the lawyer for House Republicans when 2012 district maps were deemed unconstitutional by the Kentucky Supreme Court.

Representative Nemes said he has met with members of the League of Women Voters and welcomes their input regarding redistricting. He went on to say that racial diversity is important to him and other members of the House majority party. They believe that in the past there should have been more minority majority districts—in Louisville in particular—and would like to maximize the number of minority majority districts. When he asked about best practices relevant to creation of those districts, Mr. Williams explained at length how Section 2 of the Voting Rights Act and the 14th Amendment of the Constitution might apply.

Senator Thayer agreed with Representative Nemes that it is time to enact judicial redistricting, which will likely involve massive changes. He also clarified that the aforementioned 2012 map ruled unconstitutional by the Supreme Court was for House districts. Senator Thayer repeated his hope that, when the time is right, the Governor will call a special session on redistricting. He said that public comment is warranted and is expected when legislative and congressional districts are redrawn but that the General Assembly is clearly imbued with sole discretion to draw the maps. They will be drawn under statutory and constitutional guidelines. Senator Mills said that judicial redistricting will also be a topic of discussion for the committee during the interim.

Mr. Williams reviewed Part II of the NCSL presentation. He discussed federal and state laws and principles relating to redistricting. He explained that racial gerrymandering is one of the key doctrines of federal law related to redistricting. A racial gerrymander is a legal claim emerging from the 14th Amendment to the U.S. Constitution, and it was first

recognized by the Supreme Court in the 1993 case *Shaw v. Reno*. The racial gerrymandering claim has evolved over time and has changed every decade. Partisan gerrymandering—which seeks to arrange electoral districts to benefit the political party that controls drawing the map—has been a major focus of the U.S. Supreme Court this decade. Claims are based on the 1st and 14th Amendments to the U.S. Constitution. In 2019, these cases were deemed no longer judicable in federal courts, but theories from federal cases have successfully been used in state courts.

The Equal Protection Clause, part of the 14th Amendment to the U.S. Constitution, governs the “one person, one vote” principle, which requires equal weight of votes for legislators and members of Congress. Its application varies, depending on district type, with different types of deviation applied to congressional districts and state legislative districts.

Section 2 of the federal Voting Rights Act (VRA) prohibits vote dilution nationwide. The burden of proof is discriminatory effect. Plaintiffs do not need to prove discriminatory intent. A 1986 case, *Thornburg v. Gingles*, set three preconditions or principles for application of Section 2: that the minority group is sufficiently large and geographically compact to constitute a numerical majority; that the minority group is politically cohesive; and that white voters act as a block to defeat the minority group’s candidate of choice. The second and third principles are referred to as racial polarization. If *Gingles* preconditions are satisfied, the court then considers the Senate Factors—named for a 1982 U.S. Senate committee report that accompanied 1982 VRA legislation.

Section 5 is another commonly cited section of the VRA, which requires states to get preclearance from the federal court or the Department of Justice in Washington D.C. in order to change voting law, which includes redistricting plans. In *Shelby County v. Holder*, a landmark 2013 decision of the U.S. Supreme Court, the coverage formula which determined the jurisdictions covered by Section 5 were struck down for being unconstitutional. For all intents and purposes, Section 5 is no longer valid law. However, in theory, Congress could reenact Section 4 of the VRA, the coverage formula for Section 5. There are bills currently in Congress to do that, but the prospect of passage does not seem good.

Free and Equal elections clause provisions are included in 30 state constitutions—to require elections to be some combination of free, equal, and fair. Kentucky Constitution Section 6 states that all elections shall be free and equal. In 2018, the Pennsylvania Supreme Court struck down the state’s entire congressional redistricting plan for being an unconstitutional partisan gerrymander under state law, because its “free and equal” provision had within it a prohibition from excessive partisanship in redistricting. There is a doctrine of the U.S. Supreme Court called the Adequate and Independent State Grounds doctrine—that is, if there are adequate and independent state grounds for interpreting a state’s own constitution and there is no federal analog, the U.S. Supreme Court considers

it to be outside its jurisdiction to interpret a state law. As a result, the U.S. Supreme Court did not intervene in the Pennsylvania case. Later that year, a North Carolina case was filed under the same legal argument, and the North Carolina panel of judges struck down the state's entire congressional redistricting plan for violating that state's "free and equal" clause. That was not appealed to the North Carolina Supreme Court and was not sent to the U.S. Supreme Court. There are 36 state constitutions that could have claims similar to what occurred in Pennsylvania and North Carolina. This is one area in which NCSL expects to see significantly more litigation this decade. It is a large and unique area of the law that has emerged.

Mr. Williams discussed two Kentucky-specific cases. *Fischer v. State Board of Elections* (1994), which held that legislative redistricting must not split more counties than necessary to comply with the "one person, one vote" principle. *Legislative Research Comm'n v. Fischer* (2012), when applying the 1994 case, struck down legislative redistricting plans for (i) failing to minimize county splits, and (ii) having a population deviation greater than +/- 5 percent, despite the overall range being 10 percent.

Mr. Williams said the only federal criteria for congressional districts is that they be single member districts. District compactness is a common traditional state principle in 40 states. There are a myriad of ways to measure compactness, but two common ones are Polsby-Popper and Reock. Contiguity is the most common state principle (all 50 states). The general rule is that someone must be able to go to every part of a district without leaving it. Contiguity becomes an issue only when there are noncontiguous locality boundaries or bodies of water. "Preserving political subdivisions" is a common traditional principle in 45 states. There is no agreed-upon definition of "preserving communities of interest," which is a common traditional principle in 25 states. "Preserving cores of prior districts" is a somewhat infrequent traditional principle (10 states) that is usually permitted but not required. Arizona is one of the states that explicitly rejects this principle. Emerging state principles include prohibition on favoring or disfavoring an incumbent, candidate, or party (17 states); prohibition on using partisan data (5 states); competitiveness (5 states); and proportionality (2 states).

Concluding his presentation, Mr. Williams said that the NCSL publication "Redistricting Law 2020" is an excellent resource and is available upon request, free of charge. Also, registration is open for NCSL's final redistricting seminar, to be held July 14-16 in Salt Lake City.

Representative Wheatley said that his personal experience with NCSL has been fantastic and that the webinars have been very helpful. He asked about the origin of the emerging principles. Mr. Williams said they have emerged through changes in state laws or state constitutions; some have been included as part of shifts to commission systems. They are termed emerging because if you look back through the amalgam of American history you would not see them. They tend to emerge from 1970 and beyond.

Representative Wheatley asked whether there have been any legal cases or declarations relating to the emerging “free and equal” clause in state constitutions, for the purpose of establishing that concept prior to the redrawing of districts. Mr. Williams said he is not aware of any such cases, but it is possible that local cases may be filed this decade in various states.

Representative Nemes said he believes at least two Kentucky county boundaries meet in a point. He asked whether federal law addresses point contiguity. Mr. Williams said there is not a lot in federal law. The issue would be entirely up to state interpretation, and some state courts have held that point contiguity is not permissible. In general, if it is not expressly prohibited under state law, it is permissible.

Senator Mills advised that committee members who have questions are welcome to e-mail Ms. Underhill and Mr. Williams. He also announced that the committee’s meeting materials link on the LRC website includes correspondence from the Kentucky League of Women Voters regarding their redistricting concerns.

There was no further business, and the meeting was adjourned at 2:17 p.m.