



Supreme Court of Wisconsin

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A. John Voelker
Director of State Courts

David R. Schanker
Clerk of Supreme Court

September 17, 2008

To: Interested Persons

Re: *In the matter of the adoption of procedures for original action case involving state legislative redistricting*, Rules File No. 02-03

Greetings,

On November 25, 2003, this court appointed a committee to review this court's opinion in Case No. 02-0057-OA, Jensen v. Wisconsin Elections Bd., 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537, to review the history of state legislative redistricting in Wisconsin, and redistricting rules and procedures in other jurisdictions, including federal and state courts. The court authorized the committee, upon completion of its review, to propose procedural rules in the event an original action involving redistricting litigation was filed and accepted.

The committee's appointment resulted from the original action petition filed in this court in the Jensen case by Assembly Speaker Scott R. Jensen and Senate Minority Leader Mary E. Panzer, representing Assembly and Senate Republicans, seeking this court's involvement due to a legislative impasse. The original action petition filed in Jensen sought a declaration that the existing legislative districts were constitutionally invalid due to population shifts documented by the 2000 census. The petition requested this court to enjoin the Wisconsin Elections Board from conducting the 2002 elections using the existing districts.

Although the court found that the petition filed in the Jensen case warranted this court's original jurisdiction, it determined this court lacked procedures for redistricting litigation in the event of a legislative impasse resulting in a petition for an original action. The court's decision in the Jensen case said that this court's existing original jurisdiction procedures would have to be substantially modified to accommodate the case's requirements. Id. at ¶20. It explained that a "procedure would have to be devised and implemented, encompassing, at a minimum, deadlines for the development and submission of proposed plans, some form of fact-finding (if not a full-scale trial), legal briefing, public hearing, and decision." Id.

The Jensen decision stated, in part: "...to assure the availability of a forum in this court for future redistricting disputes, we will initiate rulemaking proceedings regarding procedures for original jurisdiction in redistricting cases." The timing of the request for the court to take original jurisdiction did not permit the court to exercise its original jurisdiction in a way to do substantial justice, and the dispute was ultimately resolved in federal court, where a case was already pending.

The Jensen decision indicated new procedures could include "provisions governing factfinding (by a commission or panel of special masters or otherwise); opportunity for public hearing and comment

September 17, 2008

Page 2

on proposed redistricting plans; established timetables for the factfinder, the public and the court to act; and if possible, measures by which to avoid the sort of federal-state court 'forum shopping' conflict presented [in this case]." Consequently, this court voted to convene a committee to study and draft procedural rules that govern state legislative redistricting litigation in Wisconsin.

The committee filed its initial report with the court in September 2007, which was distributed to interested parties and is available on the court's website. See http://wicourts.gov/supreme/petitions_audio.htm. The committee has now filed a supplemental memorandum, which supplements information in the committee's initial proposal and was drafted in response to public comment and questions asked by various justices during an open administrative conference held April 8, 2008. The committee's supplemental memorandum will also be available on the court's website. The supplemental memorandum addresses details of the committee's original proposal, which outlined procedures that could be implemented if:

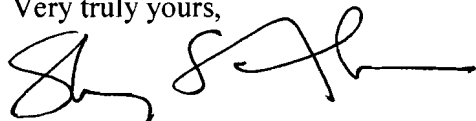
- 1) the Legislature is at an impasse in attempting to redraw legislative and congressional district boundaries; and
- 2) a party files a lawsuit asking the court to take original jurisdiction; and
- 3) the court agrees to grant the case; and
- 4) the court approves the procedures.

We are now sending the supplemental memorandum out for public comment. Following the receipt of comments, the court will decide how to proceed further. For example, the court may propose changes to the report. The court may schedule and conduct a public hearing on the memorandum (as drafted or with suggested changes) and may hold an open administrative conference to discuss this matter in the coming months.

You are invited to provide a written comment to this report by December 31, 2008. Please feel free to pass this report and invitation to comment to whomever you think might be interested.

Written comments should be directed to Susan Gray, c/o Office of the Director of State Courts, P.O. Box 1688, Madison, WI 53701-1688 (telephone: 608-266-6708) (email: susan.gray@wicourts.gov). A courtesy electronic copy of your response would be appreciated. Also, if you have specific questions or inquiries regarding this matter, they may also be directed to Susan Gray.

Very truly yours,



Shirley S. Abrahamson
Chief Justice

SSA/ck/skg
Enclosure

cc: Justice Ann Walsh Bradley
Justice N. Patrick Crooks
Justice David T. Prosser, Jr.
Justice Patience Drake Roggensack
Justice Annette Kingsland Ziegler
Justice Michael J. Gableman

Memorandum

To: Wisconsin Supreme Court

From: Redistricting Committee

R. Booth Fowler, Political Science (Emeritus) – UW-Madison
Donald Kotecki, Survey Research Center – St. Norbert College
Kenneth Mayer, Political Science – UW – Madison (co-chair)
Ed Miller, Political Science – UW-Stevens Point (co-chair)
Peter Rofes, Law School – Marquette University

Date: September 12, 2008

Subject: Responses to Issues Raised at Court's Conference on April 8, 2008

The Redistricting Committee, appointed by the Wisconsin Supreme Court, filed a Report in September, 2007, suggesting procedures to the Court for handling redistricting by the Court *if the Wisconsin Legislature and the governor fail to agree on a redistricting plan (s)* for congressional or state legislative districts following the Census's decennial release of population data and the *Supreme Court decides to accept original jurisdiction in the matter*. Following the submission of the committee's Report, the Supreme Court published the plan on its Website, inviting comments. Subsequent to receiving several responses, including those from both major political parties, the Supreme Court held a conference. At the conference, the Redistricting Committee was asked to review its recommendations in light of the submissions and to clarify several issues. The discussion below represents that response. An article by Nathaniel Persily, published in *The George Washington Law Review*, elaborates on many of the points in the court redistricting process we suggested, including an evaluation of some options.¹ We have enclosed a copy of Persily's law review article.

- 1. Selection of Court of Appeals Judges to serve on the Panel of Referees Chosen for Redistricting.** In the original draft of our Report, we recommended that judges be selected from each district in order of seniority on the district's bench to serve on the Panel of Referees Chosen For Redistricting (Panel). If a judge declined to serve, the judge next in seniority would serve. We proposed this as a neutral method of selection. However, in the Committee's backup plan if no justice on one of the courts could serve, we recommended random selection from the reserve judge pool in that district. Based upon the input received by the Supreme Court and submissions to the Court on our Report, we believe it is reasonable to extend the *random selection* system to the *initial selection* of the judge from each district. This would maintain the geographic distribution and the neutral selection principles we recommended. It would also eliminate knowledge of the specific composition of the panel early in the legislative process to avoid legislators using that knowledge as a basis for deadlocking the process. The Supreme Court's adopted process should not discourage the Wisconsin Legislature from drawing the districts since the lawmaking body is the principal redistricting institution. The judiciary's roles are to act as a backup process to draw districts if a legislative impasse should occur and to review plans for constitutional and discriminatory issues.

2. **Consolidation of Dates.** Two dates for the initiation of the Panel process are in our document—December 1 for the filing of action and briefs and after January 1 (or phased on or after January 2) for the action of the Panel. A submission to the Supreme Court in reaction to the Report thought the inclusion of two different dates was in error. However, one was intended to be the beginning date for input to the Panel while the second the beginning of review by the Panel, following the Supreme Court’s acceptance of original jurisdiction. Nonetheless, given potential confusion, it is reasonable to consolidate the two dates and indicate that both briefs and Panel’s review can start anytime after January 1 and the Supreme Court acceptance of original jurisdiction. Further, the January 2 date can also specify when each district must have randomly selected the judge to serve on the Panel.

3. **Existing Districts as Starting Point.** A question was raised in a few submissions regarding why the report recommends that the Panel begin its redistricting effort with the existing districts rather than just totally redraw the state’s legislative and/or congressional districts if the legislature fails to develop a plan (s). The Redistricting Committee stresses that redistricting is primarily a legislative and not a court function. However *in absence of a statute creating a backup mechanism* for redistricting if the legislative process is deadlocked, the precedent is that the job falls to the judicial branch. Thus, the intent of the process proposed is NOT to substitute the court’s judgment for that of the legislature, rather it is simply to make marginal alterations in the existing districts to ensure that districts meet the U.S. Supreme Court’s requirement that districts be equal in population. This we view as a more neutral approach and one that also minimizes the Panel’s work than having the Panel draw new legislative and congressional district maps, ignoring existing districts.

The Redistricting Committee is not proposing any additional criteria for the division of the state into districts from those specified in the Wisconsin *Constitution*. (Article IV §§3, 4, and 5) and the Federal Voting Rights Act.

4. **Case Filed and Panel following Rules of Civil Procedures.** A further question raised was how the Panel would conduct business. The Redistricting Report notes that before the Panel can act, a case must be filed and accepted. In this situation as in others, courts cannot act unless a real dispute is filed. The Supreme Court will have to decide whether to accept original jurisdiction in such a case. If the Supreme Court decides against accepting jurisdiction, it is likely that Wisconsin’s redistricting plan (s) will be developed by the Federal Court as it did in 1992 and 2002. Additionally, although the draft report is silent on the operation of the Panel, the intention is that it will act like a court, applying the regular rules of Civil Procedures. This is similar to procedures used by the Federal Court in considering Wisconsin redistricting in 2001. (*Arrington, et al., v. Elections Board*) and the Special Masters in the California case in 1992 (*Wilson v. Eu, et al. and the California Assembly, et al.*)²

5. **Legislature Technical Services Bureau.** The Supreme Court requested that we inform it on possible charge backs to the Court of the Legislative Technical Services Bureau (LTSB), acting as staff assistance. Information from the LTSB is that there will not be a charge back to the Court. With modern computer software, the Legislative Technical Services Bureau can provide the Court with alternative redistricting maps using a short time line.

Contingent upon approval by legislative leaders, LTSB will provide technical support to the Panel, setting up hardware and software, and providing some training in its use. The LTSB will also be willing to provide ongoing support, assisting with the task of drawing maps although the task of evaluating the maps, especially ensuring that there is no regression in minority voting power, is a bit trickier and would rely on the Panel's judgment.

It will not take long to create a map. More time is needed to evaluate several alternative maps that might be created. The process could take 2 weeks, or it might take longer, depending on what it takes to get agreement from the Panel on a map. There is precedent for LTSB involvement as they assisted the 3-member federal courts that drew the maps in 2002 and 1992.

The Panel could decide to use other groups, such as the University of Wisconsin-Extension's Population Lab or UW's Land Information Computer Graphics Facility, to provide technical support or other consultants to evaluate the maps drawn. However, if the Panel decides to use a private firm to assist it, the cost could be significant as these firms commonly charge \$150/person hour.

6. **Other States and their Judiciary.** At the judicial conference, the Wisconsin Supreme Court requested summary information on other states. This information is attached. Both Minnesota and California used judges to constitute a judicial panel to do redistricting when there was a legislative impasse. Minnesota used sitting judges while California used retired judges. [The judicial panel drew the California districts after the 1990 Census. In 2001, the Legislature was able to draw the map. Proposition 77, considered in 2005, to permanently set up a judicial panel to draw districts was defeated by the voters. An initiative, creating a Citizen Redistricting Committee to redistrict the state, will be before the California electorate in November 2008]. In Minnesota, the Chief Justice of the Supreme Court appointed five judges to serve on their special redistricting panel. The Panel used the Rules of Civil Procedures, modified to meet their mandates and timeline. A summary of other state court actions can be found in the Appendix to this memo.

Outline for the Establishment of Wisconsin Supreme Court Rules

1. Prior to January 2 following the year in which the Census Bureau provides population data for redistricting (e.g. 2012), each Court of Appeals district shall select one of its members by lot. If the judge selected declines to serve, then a second lot shall be conducted to select a judge. If no Court of Appeals judge from a district is available to serve, then the district Court of Appeals will randomly select a judge from that district's reserve judge pool. If none is available to serve then the random selection will be from those judges eligible to be part of the reserve pool. If neither a reserve judge nor those eligible to part of the reserve pool is available, then the district's representative on the Panel will be randomly selected from among reserve circuit court judges in that district.

A fifth judge will be selected randomly for the Panel from a state-wide pool of reserve Court of Appeals judges. If none is available, then the selection will come from a random selection of those eligible to be in the reserve pool. If no reserve judge or those eligible to be a reserve appeals court judge is able to serve, then the fifth member will be randomly selected from a state-wide pool of reserve circuit court judges.

2. If the legislature fails to enact either a congressional or state legislative redistricting plan and a case is filed challenging the constitutionality of the existing district arrangement, which has been accepted by the Supreme Court based upon its original jurisdiction, the Panel will accept briefs from parties to the case and amicus briefs from other parties on or after January 2 of the year following the year that the U.S Census provides population data to be used in districting. Material submitted must be relevant, legible, and as concise as practicable. The Panel shall first determine whether the existing districts violate population equality and/or minority voting rights. If there is an affirmative finding that a violation has occurred, the Panel shall draft a redistricting plan. In its consideration, the Panel shall follow regular rules of Civil Procedure. On April 16 by 3:00 pm, the Panel's proposed plan shall be available on the Web. Individuals and groups will have 7 days to comment. If the legislature fails to enact a redistricting plan by May 1 of that year, then a legislative impasse will be affirmed by the Panel and the Panel's plan will be submitted to the Supreme Court.

The Supreme Court will then review the plan and decide on adopting, modifying, or rejecting the Panel's plan (s). The Supreme Court's decision will be made by May 15.

In developing a plan, the Panel shall begin with the currently drawn districts and make modifications in accordance with the Wisconsin Constitution's requirements (Article IV §§3, 4, and 5). The Panel shall also ensure that the map(s) do not violate Federal Voting Rights Act requirements.

3. The Report recommended that the Panel be precluded from using election returns in drawing the maps, except to ensure that the Voting Rights Act is not

violated. However, we have reconsidered this stricture and conclude that this may be difficult and that the Panel should not be restricted in what evidence can be used. Our goal of encouraging neutrality would more appropriately be implemented by relying on Panel's adherence to judicial ethics' impartiality obligation. We noted that in the 2001 California redistricting case, where Special Masters (who were retired judges) were appointed by the California Supreme Court, partisan data was not used either in drawing the districts or in reviewing the proposed districts for either fairness or competitiveness. The Special Masters indicated that they had no instructions from the Supreme Court to evaluate districts for competitiveness and to evaluate using some "fairness" test would be incomplete and "offer conflicting guidelines as to future electoral behavior."

4. The Panel will be able to request help in drawing the map(s) from the State Legislative Technical Services Bureau (LTSB) or any other unit it feels would be useful to its work.

Contingent upon approval by Legislative leaders, LTSB will provide technical support to the Panel, setting up hardware and software, and providing some training in its use. The LTSB will also be willing to provide ongoing support, assisting with the task of drawing maps although the task of evaluating the maps, especially ensuring that there is no regression in minority voting power, is a bit trickier and would rely on the Panel judgment.

It will not take long to create a map. More time is needed to evaluate several alternative maps that might be created. The process could take 2 weeks, or it might take longer, depending on what it takes to get agreement from the panel on a map. There is precedent for LTSB involvement as they assisted the 3-member federal courts that drew the maps in 2002 and 1992.

Redistricting Action Procedure

When a redistricting action is filed in the Wisconsin Supreme Court in anticipation of, or following, a legislative deadlock, and the Supreme Court, accepts original jurisdiction, the Supreme Court shall appoint a panel of judges of the Wisconsin Court of Appeals to act as a Panel of Referees Chosen for Redistricting (Panel) to devise new legislative or congressional districts. The Panel shall be composed of five members with one selected from each of the four Courts of Appeal and one from the Court of Appeals reserve judge panel. If one of these groups cannot find a judge to serve, a secondary pool is provided for in the Report.

The senior judge of the Special Panel will act as chair. The Panel will have the authority to call upon the services of non-partisan outside experts, such as the Legislature Technical Services Bureau (LTSB), and will provide an opportunity for public comment on the proposed draft prior to its promulgation.

Scheduling Conference

The Panel of Referees Chosen for Redistricting (Panel) will hold a scheduling conference within 10 days of the filing of the action and acceptance by the Wisconsin's Supreme Court as an original action.. At the scheduling conference, the Panel will:

- Determine Guidelines for Motions
- Set deadlines for submission of materials;
- Determine the form and extent of discovery and set time limits for completion;
- Define the issues and determine if they can be simplified;
- Determine the necessity or desirability of amending the pleadings;
- Determine whether parties can reach stipulations of fact or agree to the identity or authenticity of documents;
- Determine the time limits and other regulations to govern briefing;
- Set a date for a hearing;
- Consider any other matters to aid in disposition.

Following the scheduling conference, the Special Panel will file a scheduling order with the Supreme Court.

Hearing

The Panel shall conduct the hearing as the trial of a civil action to the court. Except as otherwise provided herein or by the Panel, the rules of civil procedure and evidence shall be followed. The Panel shall obtain the services of a court reporter to make a verbatim record of the proceedings, as provided in SCR 71.01 to 71.03.

On **April 16** by 3:00 p.m., the Panel shall file with the Supreme Court (and post to the Web) a preliminary report setting forth new district lines.

Public Comment

Following the filing of the preliminary report, there will be a period of 7 days during which the Panel will accept public comment on the proposed redistricting.

Following the expiration of the 7-day public comment period, the Panel shall file its final report with the Supreme Court on May 1 if the legislature has not enacted a redistricting plan..

Appeal

Within 5 days after the Panel files its final report, any party may file objections with the Supreme Court. The Court reviews the report and any objections filed and may adopt, reject, or modify the report's findings and recommendations. The Supreme Court's decision will be made by May 1 and the map (s) will be considered those for the upcoming legislative elections. If an appeal, based upon statutory or constitutional grounds, is then filed, the case proceeds as a civil appeal to the Supreme Court.

Anticipated Timeline

March 1	U.S. Census figures released
Sept. 2	Local governments complete redistricting (per §§ 59.10(3)(b); 5.15(1)(b))
Jan. 2	First day Supreme Court will accept filings on redistricting
Jan. 2 or After	Panel begins process after the Supreme Court has accepted original jurisdiction
Apr. 1	Deadline for Briefs
Apr. 16	Preliminary Report filed with the Supreme Court and posted to the Web
April 16-23	Public Comment Period on Panel's Report
May 1	Deadline for Panel's Final Report
May 1	Date impasse would be declared if legislature has not acted
May 15	Date Supreme Court must accept, reject, or modify Panel's plan (s)

June 1	First day election nomination papers circulated
July 10	Deadline for nominations
July 17	Deadline for State Elections Board to notify County Clerks of list of candidates for September primary

Notes

¹ Nathan Persily. 2005. "When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans." *The George Washington Law Review*. 73: (5/6): 1131-1165 (August).

² For the Special Masters Report on California Redistricting see <http://igs.berkeley.edu/library/reapp90-report/final-I.html>; <http://igs.berkeley.edu/library/reapp90-report/final-II.html>; <http://igs.berkeley.edu/library/reapp90-report/final-III.html> and <http://igs.berkeley.edu/library/reapp90-report/final-IV.html>

APPENDIX

Relevant State Court actions regarding redistricting for the 2000 Census^{2,2}

I. State Courts creating their own plans

Maine	The Maine Supreme Court created a congressional plan following the legislature's failure to do so.	<i>In re Apportionment of the State Senate and US Congressional Districts</i> , 2003 ME 86 (July 2, 2003)
Minnesota	The Minnesota Supreme Court appointed a Special Redistricting Panel composed of Minnesota judges to release a plan if the legislature failed to do so, which it did on March 29, 2002.	<i>Zachman, et al. V Kiffmeyer</i> , No. C0-01-160 (Minn. Spec. Redis. Panel Mar. 19, 2002)
New Mexico	A New Mexico district court created a plan after the governor vetoed a legislative plan. The plan was a combination of two submitted plans.	<i>Jepsen v. Vigil-Giron</i> , No. D0101 CV 2001 02177 (1 st Jud. Dist. Santa Fe Co. Jan. 24, 2002)

North Carolina	A Superior Court Judge created a plan to supplant the unconstitutional plans of both the House and Senate. His plan is upheld on multiple appeals.	<i>Stephenson v Bartlett</i> , No. 94PA02-2 (N.C. July 16, 2003)
Oklahoma	A state district court drew the congressional districts after the legislature failed to do so.	<i>Alexander v. Taylor</i> , No. 97836 (Okla. June 25, 2002).

II. State Courts appointing an Expert to create a plan

Idaho	The first two plans were sent back to the legislatively appointed commission. The third commission plan was upheld on the Special Master's recommendation.	<i>Smith v Idaho Commission on Redistricting</i> , 136 Idaho 542, 38 P.3d 121 (Idaho Nov. 29, 2001); <i>Bingham County v Comm'n for Reapportionment</i> , 137 Idaho 870, 55 P.3d 863 (Idaho Mar. 1, 2002); <i>Bonneville County v Yursa</i> 2005 Opinion No 138 (Idaho Dec. 28, 2005)
Maryland	The court followed the Special Master's objection and used technical consultants to build a new plan	<i>In the Matter of Legislative Districting of the State</i> Misc No 19 Sept Term 2001 (Md. App. Mar. 1, 2002); <i>In the Matter of Legislative Redistricting of the State</i> , Misc. Nos. 19, 20, 22, 23, 24, 25, 26, 27, 28.29, 30, 31, 32, 33, 34, September Term 2001 (Md. App. Aug. 26, 2002)

New Hampshire	The New Hampshire Supreme Court set a statutory filing period; upon the legislature's failure to meet this, the court hired an expert to create an acceptable plan.	<i>Below v. Gardner</i> , No. 2002-0243, 148 N.H. 1 (N.H. June 24, 2002) <i>Burling v. Chandler</i> , No. 2002-0210, 148 N.H. 143 (N.H. July 26, 2002)
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III. State Courts rejecting redistricting plans and sending them back to commissions

Alaska	<i>In re 2001 Redistricting Cases v. Redistricting Board</i> , No. 3AN-01-8914CI (3 rd Dist. Anchorage, Feb. 1, 2002)
Arizona	<i>Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission</i> , No. CV 2002-004380, and <i>Ricarte v. Arizona Independent Redistricting Commission</i> , No. CV 2002-004882 (Superior Court, Maricopa Co., Jan. 16, 2004), <i>aff'd in part, rev'd in part, & remanded</i> , No. 1CA-CV 04-0061 (Az. App. Oct. 18, 2005)
Colorado	<i>In re Reapportionment of the Colorado General Assembly</i> , No. 01SA386 (Colo. Jan. 28, 2002)

Other

Pennsylvania	Political Gerrymandering claims found non-justiciable.	<i>Vieth v. Pennsylvania</i> , No. 1:CV-01-2439, 241 F. Supp.2d 478 (M.D. Pa. Jan. 24, 2003), <i>aff'd sub nom. Vieth v. Jubelirer</i> , No. 02-1580 (U.S. Apr. 28, 2004)
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1. Compiled by Wyatt Stoffa, 10 June 2008. Summer Intern to the Commissioners of the Wisconsin Supreme Court.
2. See <http://www.senate.mn/departments/scr/redsum2000/resum2000.htm#NY> and <http://www.csg.org/pubs/Documents/BOS2005-LegislativeRedistricting.pdf>