IN THE SUPREME COURT OF WISCONSIN

Rules Petition 20-03

In re: Petition to Amend Rule of Appellate Procedure 809.70
(Relating to Original Actions)

COMMENTS OF THE PEOPLE'S MAPS COMMISSION

(to the June 2, 2020 Petition from Scott Jensen and the Wisconsin Institute for Law and Liberty)

INTRODUCTION

The People's Maps Commission (the "Commission") respectfully submits that the Court should deny Rules Petition 20-03 (the "Petition"). As explained more fully below, the requested changes to Rule of Appellate Procedure 809.70 would create more problems than they purport to solve and would drag this Court into the very time-consuming partisan process it previously decided to avoid.

Notably absent from the Petition is an acknowledgement that the Court previously considered whether to amend Rule 809.70 for redistricting actions and declined to do so. As a result of Mr. Jensen's unsuccessful effort to use the Court's original-action jurisdiction under Rule 809.70 to litigate redistricting in *Jensen v. Wisconsin Elections Board*, the Court set up a process to study whether to amend Rule 809.70 with respect to redistricting. *Jensen v. Wisconsin Elections Board*, 2002 WI 13, ¶ 24, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam). That process resulted in a thorough, six-year study overseen by this Court, focusing on the same question presented here: whether the Court should amend its original-action rule to handle redistricting matters differently than every

other type of case and controversy that arises in Wisconsin's three-tiered court system.[1] At the conclusion of the study, the Court decided by Order No. 02-03 entered January 30, 2009 (with present Justices Roggensack [now C.J.] and Ziegler in the majority) not to amend Rule 809.70 as to redistricting, specifically choosing "not to invoke the Court's rule-making authority and not to entertain a rules petition from the committee for the adoption of procedures in the event an action is filed in a state court involving state legislative redistricting."[2] While the petitioners may disagree with that outcome, the Court's past study and decision should not be ignored, and its decision should not be revisited so soon absent a compelling showing of changed circumstances and good cause.

If the Court is inclined to revisit its previous decision and amend the rule, it should adopt and follow the nonpartisan recommendations made as part of the above-referenced 2002-08 study, rather than accept the unstudied approach now suggested by Petitioners. The nonpartisan work of the People's Maps Commission would fit well within the process recommended in the prior study and could easily be incorporated into that process by the panel of Court of Appeals judges the study recommended be used to oversee any districting disputes.

I. THE VIEWS OF THE PEOPLE'S MAPS COMMISSION SHOULD CARRY WEIGHT ON THE QUESTIONS BEFORE THE COURT.

The People's Maps Commission was created by Executive Order #66 on January 27, 2020 pursuant to Wis. Stat. § 14.019. The Commission is a nonpartisan body attached

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[1] The Commission calls the Court's attention to the report and supplemental report prepared by the nonpartisan experts on appellate procedure selected by the Court to study whether Rule 809.70 should be amended to include special provisions as to redistricting matters, as well as to the series of public hearings and recorded open court conferences the Court held over several years on the question. *See* app. Exhibit A.

[2] For the Court's convenience, a copy of that decision is in the attached appendix as Exhibit B.

to the Department of Administration. The Commission was created for the reasons succinctly summarized in the recitals to the executive order[3] which include the prevention of voter disenfranchisement through equitable and accurate districting maps.

As stated in the executive order, the core objective of the Commission is to carry out the overwhelming preference among Wisconsin voters that the districting maps that must be drawn following release of the 2020 census be prepared by a nonpartisan committee or commission.[4] When the executive order was issued early this year, 50 counties in the state, containing approximately 78% of the state's population, had already passed county-wide resolutions and/or referenda demanding that voting maps be prepared by a nonpartisan body such as the Commission. *See* app. Exhibit C. Since then, additional counties have voted in favor of the nonpartisan process, pushing the total to 55 counties.[5]

To ensure the nonpartisan nature, quality, diversity and broad geographic representation of the Committee, and to avoid any contention that either political party selected the members of the Commission for partisan advantage, the selection of the Commission was made independently by three highly respected, former state appellate jurists known for their legal experience and integrity: Janine Geske (former justice of the Supreme Court, appointed by Republican Governor Tommy Thompson); Joseph Troy (former Outagamie County Circuit Court judge where he served as the chief judge for the state's circuit court judges, and later served on the Court of Appeals, including a term as the presiding judge of his district), and Paul Higginbotham (former municipal judge,

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3 A true and correct copy of Executive Order #66 is in the attached appendix as Exhibit C.

4 Polling by the Marquette Law School reflects that over 70% of the state's voters want the new maps to be drawn by a nonpartisan body. App. Exhibit C at 1.

5 Attached in the appendix as Exhibit D is a true and correct copy of a chart prepared by Fair Maps Wisconsin showing the current totals for those resolutions and referenda.

circuit court judge, Court of Appeals judge and adjunct professor at the UW Law School). This panel of former jurists selected the members of the Commission consistent with the guidance in the executive order that:

> Commission members may not be elected officials, public officials, lobbyists, or political party officials. Commission membership shall include: members from each of Wisconsin's eight congressional districts; members from communities of interest; and experts in nonpartisan redistricting.

App. Exhibit C, p. 2, para. 1.

The profiles of the selected members and information about their public meetings and other work on the Commission to date may be reviewed on the Commission website.[6] The Commission is working hard to lay the foundation to be ready to move forward as quickly as possible with developing an equitable and accurate districting plan once the completed census is released. Once complete, the Governor will present the nonpartisan maps to the Legislature for consideration.

II. THE PETITIONERS' PROPOSED RULE CHANGES HAVE MULTIPLE FLAWS.

A. Petitioners' proposed rule changes would have this Court automatically exercise original-action jurisdiction before there is an actual justiciable case or controversy.

Petitioners' proposed new subsection (4) to Rule 809.70 would provide that "A petition for an original action under this section may be filed and is ripe any time after the U.S. Census Bureau delivers apportionment counts to the President and Congress as required by law." Petitioners are, in essence, asking this Court to declare "ripeness" by rule before there is any actual dispute. Normally, a matter is not "ripe" for judicial action before there is an actual justiciable case or controversy. *Olson v. Town of Cottage Grove*,

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6 The Commission website is available at: www.wisconsin.gov/peoplesmaps.

2008 WI 51, ¶¶ 29, 43, 309 Wis. 2d 365, 749 N.W.2d 211. Petitioners are also asking the Court to declare in advance—without benefit of facts or context as to any specific dispute—that it will take control of the redistricting process from the outset and not allow the process specified in Wisconsin's Constitution and statutes to first play out. This asks the Court to act inconsistently with its own characterization of its jurisdiction for original actions. *See Wis. Legislature v. Palm*, 2020 WI 42, ¶ 10, 391 Wis. 2d 497, 942 N.W.2d 900 (citing *Petition of Heil*, 230 Wis. 428, 436, 284 N.W. 42, 45 (1939) ("[T]he purpose of the constitution was, 'To make this court . . . a court of last resort on all judicial questions under the constitution and laws of the state.'")).

Petitioners' proposal rests on their speculation that, because the Governor presently is from a different political party than the one that presently holds the majority in the Legislature, it is so "likely" that there will be a future dispute between the two branches about redistricting that the Court should declare that possibility to be a "ripe" controversy before it ever occurs.[7] Courts historically have avoided taking premature jurisdiction of matters based solely on the supposition that the parties involved are "likely" to fail to agree. *Olson*, 2008 WI 51, ¶¶ 28-30, 43.

Petitioners presuppose that the Legislature and Governor will refuse to work cooperatively and that the Commission's nonpartisan districting work product will be

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[7] Petitioners' focus on the present posture of our state's government being sharply "divided" (with different political parties controlling the executive and legislative branches) as the justification for declaring immediate "ripeness" in advance as to any and all matters that might possibly arise about redistricting. Thus, the rule would be superfluous or even legally inappropriate when, as periodically happens, both branches of government are controlled by the same political party. The Commission submits that it is inappropriate to change a long-standing rule of appellate procedure based on election outcomes.

disregarded. This presupposition is inappropriate and should not be adopted by the Court in the form of the proposed rule change.

On the contrary, the Commission hopes to be heard by the Legislature and expects that its work will aid in the improvement of the process and end product, regardless of whether its maps are adopted in their entirety. That opportunity should be embraced and encouraged rather than circumvented through changing a rule of appellate procedure.

B. Petitioners' proposed rule changes would inappropriately make the Court responsible for proposing its own redistricting plan.

Petitioners' proposed new subsections (5)(f)-(i) to Rule 809.70 would obligate the Court to propose a redistricting plan for consideration of the parties and the public that, following a hearing, it would approve and order be used for the next decade. This approach is problematic in several respects.

First, the Legislature, not the Court, is the political body responsible for enacting such plans, subject to the review and veto authority of the Governor. Wis. Const. art. VI, § 3. Petitioners point to no legal basis for shifting this critical constitutional responsibility to the Court. It is particularly inappropriate to effect such a major transfer of authority through the means of changing an appellate procedural rule.

Second, for all the reasons described in the careful six-year study of Rule 809.70 discussed above, this Court is not well equipped to engage in the type of time-consuming, fact development process required to prepare appropriate maps. As outlined further, *infra* section III, bodies such as the Legislature and the Commission are much better suited to spend the necessary time holding hearings, taking testimony, working with GIS mapping experts, and marshaling evidence that is required to prepare equitable and legal districting maps. Requiring the Court to prepare its own redistricting plan—rather than deciding

actual disputes about a plan— would place an enormously time consuming and inappropriately political burden on the Court.

Third, if the Court itself authors the plan, the question arises about who the appropriate arbiter is for disputes about the Court's plan. This issue was emphasized in the prior report to the Court about Rule 809.70:

> Although the Wisconsin Supreme Court may exercise original jurisdiction in a matter of state-wide importance like redistricting, from a pragmatic standpoint is not the best forum to engage in fact finding and draw the districts. Moreover, given that whatever districting plan is devised may be subject to legal challenge, if the Court had drawn the plan there would be no forum for review.

App. Exhibit A at 6.

Finally, drawing the Court into the task of authoring the redistricting plan would create the controversial appearance of it playing a partisan political role. Concerns about interjecting the Court into an inherently partisan process were expressed by some of the justices who ultimately voted against changing the rule, as evidenced by the recordings of the open administrative hearings the Court held in considering whether to amend Rule 809.70 with respect to redistricting.[8]

C. Petitioners' proposed subsection (5)(a) incorrectly describes the legislative process for enacting a new districting plan.

Petitioners' proposed new subsection (5)(a) refers in two places to when "the Legislature has *adopted* a new districting plan" (emphasis added). The actual required process the Legislature should follow, and always has to date followed, is to "enact" a

[8] *See* Hearings of Wisconsin Supreme Court Open Administrative Conference: April 2008, available at https://wiseye.org/2008/04/08/supreme-court-rules-hearing-and-open-administrative-conference-part-3-of-4/, and January 2009, available at https://wiseye.org/2009/01/22/supreme-court-open-administrative-conference-3/.

districting plan following open hearings and the well-developed processes for legislative enactments.

It would be unprecedented and improper for the Legislature to "adopt" (rather than "enact") a districting plan by joint resolution because that process would close out the public and avoid consideration of the Commission's work product. Under the Presentment Clause of the Wisconsin Constitution Article V, §10 at subsection 1(a), any "enacted" districting map would need to be presented to the Governor for approval or veto. While petitioners' word choice may have been inadvertent, the difference is too important to ignore. Should the court decide to adopt any portion of the proposal, the term should be corrected to avoid any suggestion that the Court was impliedly authorizing the Legislature to avoid the required "enactment" process.

D. Petitioners' proposed rule changes inappropriately seek to amplify the partisan nature of the proceedings.

By granting automatic advance intervention standing "as of right" to only political parties and partisan elected bodies, while making all other parties (including those which normally participate in such proceedings) have to move for permission to participate, Petitioner's proposal automatically inserts partisan bodies into proceedings where they do not belong. In fact, despite ample litigation around past redistricting, the Commission has been unable to identify a case where the political parties the Petitioners propose to include in all future redistricting original actions "as a matter of right" were intervenors. Political parties did not participate in the prior original action case commenced by Mr. Jensen. *See generally Jensen*, 2002 WI 13.

Petitioners evidently felt the need to add certain parties at the outset—regardless of their possible interest or lack of interest in the proceeding—to address the issue of

their proposal seeking to start these original actions before there is any actual justiciable case or controversy. Until there is an actual dispute, it is impossible to meaningfully ascertain who is aggrieved or interested. Petitioners' proposal puts the proverbial cart before the horse.

Consistent with voters' preference, efforts should be geared toward making the process less partisan, not more. The Commission maintains that the proposed rule changes should be rejected in full, consistent with this Court's January 30, 2009, decision. If, however, the Court were to decide to include some or all of the proposed changes, it should add the Commission to the list in proposed subsection (5)(b) of the parties allowed to participate "as of right". The Commission is devoting enormous amounts of time and effort to carry out the voters' mandate for a nonpartisan body to craft the districting maps for the people of this state. If there is a proceeding, the Commission should be guaranteed a voice.

III. THE COMMISSION AND LEGISLATURE ARE BEST POSITIONED TO ENGAGE IN THE TYPE OF FACT-INTENSIVE PROCESS REQUIRED FOR DRAWING DISTRICTING MAPS AND SHOULD BE ALLOWED TO COMPLETE THEIR WORK PRIOR TO THE COURT ADDRESSING ANY DISPUTES THAT ARISE ABOUT THE MAPS.

When this Court previously appointed the committee to study and make recommendations about possible changes to Rule 809.70 "for future redistricting disputes," it noted that the "[c]omponents of a new procedure could include: provisions governing factfinding by a commission or panel of special masters . . . [and] opportunity for public hearing and comment on proposed redistricting plans." *Jensen*, 2002 WI 13, ¶ 24.

In its ensuing report, the committee recommended using a panel of Wisconsin Court of Appeals judges drawn one from each of that court's four districts because that arrangement would have two main advantages "over alternative arrangements: Neutrality [and] Geographic Balance." App. Exhibit A at 7-8. The committee went on to note the advantage of having a body that is neutral on partisan issues draft the redistricting map, with the Court only stepping in later if needed: "By having a panel independent of the Wisconsin Supreme Court draft the redistricting map, the Wisconsin Supreme Court would then be an appropriate forum to review challenges to the resulting district map." *Id.* at 8.

The Commission was created to fulfill these same three critical criteria: neutrality from partisan bias, geographic balance, and independence from the Court. As described above, *supra*, section I, the Commission members were chosen from each of the state's eight congressional districts by three highly respected retired state judges. These judges selected the Commission members from across the state on an independent basis free from partisan influence by any political party.

The Commission is precisely the type of factfinding commission or panel that this Court previously envisioned in *Jensen*. Indeed, it has already begun holding public hearings across the state and is otherwise preparing to tackle the time-consuming and fact-intensive process of preparing non-partisan maps.

There is no need for this Court to preemptively jump into that same fact-intensive effort through the process being proposed by petitioners for the Court to take evidence, use referees and/or circuit courts, and import "any of the rules set forth in Chapters 802-804 governing cases in the circuit courts." *See* Petitioners' proposed new subsections

(5)(c)-(e). The Court should not supplant the Commission through changing a longstanding rule of appellate procedure. Instead, the Court should encourage petitioners and the leaders of both major political parties to work with the Commission. If the political process has been exhausted, a subsequent reviewing court will benefit from the Commission's completed non-partisan maps as an alternative option. There is no reason for this Court to be the body that prepares the maps in the first instance as proposed by Petitioners.

CONCLUSION

The People's Maps Commission respectfully requests that the Court not adopt the rule changes proposed by Petitioners.

Dated: November 30, 2020.

Attorneys for The People's Maps Commission,
(attached to the Wisconsin Department of Administration)

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Appendix – Exhibits

Exhibit A

September 24, 2007 cover letter from the Wisconsin Supreme Court with attached report from the Wisconsin Redistricting Committee the Court appointed to study possible rules changes for original-action redistricting litigation before the Court; September 17, 2008 cover letter from the Wisconsin Supreme Court with the committee's September 2008 supplemental memo to its draft proposal

Exhibit B

The Court's decision (filed January 30, 2009 as No. 02-03) "In the matter of the adoption of procedures for original action cases involving state legislative redistricting"

Exhibit C

Executive Order #66 (dated January 27, 2020) establishing the "People's Maps Commission"

Exhibit D

Current map (as of November 2020) depicting Wisconsin counties backing Fair Maps; courtesy of the Wisconsin Democracy Campaign (https://www.wisdc.org/)

EXHIBIT A

Supreme Court of Wisconsin

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Annette K. Ziegler
Justices

A. John Voelker
Director of State Courts

David R. Schanker
Clerk of Supreme Court

September 24, 2007

To: Interested Persons
(See attached list)

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

Greetings,

On February 26, 2003, this court voted to convene a committee to study and draft procedural rules that govern state legislative redistricting litigation in Wisconsin. On November 25, 2003, this court appointed a committee to review this court's opinion in Case. No. 02-0057-OA, Jensen et al. v. Wisconsin Elections Bd., et. al, 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537, as well as to review the history of state legislative redistricting in Wisconsin, rules and procedures of other jurisdictions, including federal and state courts, and propose procedural court rules.

The committee has filed its report with the court, a copy of which is enclosed. This report has not yet been reviewed by the court.

We are now sending the report out for 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 report (as drafted or with suggested changes) and hold an open administrative conference to discuss this matter in the coming months.

You are invited to provide a written comment to this report within 40 days of the date of this letter, if at all possible. 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/skg
Encl.
cc: Justice Ann Walsh Bradley
Justice N. Patrick Crooks
Justice David T. Prosser, Jr.
Justice Patience D. Roggensack
Justice Louis B. Butler, Jr.
Justice Annette K. Ziegler

P R O P O S E D D R A F T

(September 21, 2007)

The Courts and Redistricting in Wisconsin: A Proposal
Wisconsin Supreme Court: Redistricting Committee

Introduction

This report to the Wisconsin Supreme Court consists of the following parts:

1. Background
2. Redistricting in Wisconsin
3. Principles of Redistricting
4. Development A Process for Court Consideration Following Legislative Impasse
5. Court Procedures following Legislative Impasse: A Recommendation
6. The Proposed Process and Time Line
7. Appendix

Background

The Chief Justice of the Wisconsin Supreme Court, Shirley Abrahamson, has asked us to draft procedural rules, setting out the process for how Wisconsin state courts should handle litigation that may arise during state legislative and congressional redistricting. If the Wisconsin Legislature *does not enact a redistricting plan* following the decennial census and *a lawsuit challenging the existing districting is filed*, courts are called upon to develop a districting map that provides for districts equal in population.

Because of a series of landmark U.S. Supreme Court decisions issued in the 1960s, states must redraw congressional and state legislative district lines after each census in order to ensure that districts have equal populations and to account for changes in congressional apportionment.[1] The next round of redistricting will take place in 2011-2012 after the 2010 decennial census conducted by the federal government.[2] The requirement of population equality means that whatever districts exist in 2010 will be, almost by presumption, unconstitutional as soon as the new census data are issued. Population increases, declines, and shifts will inevitably render district populations unequal.

Redistricting is an inherently political process, one which defines the nature of representative government. All of the stakeholders – political parties, incumbent legislators, civil rights coalitions, interest groups, watchdog organizations, labor unions,

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[1] *Baker v. Carr* 369 U.S. 186 (1962); *Reynolds v. Sims* 377 U.S. 533 (1964); *Wesberry v. Sanders* 376 U.S. 1 (1964). Later decisions imposed a requirement of nearly absolute population equality for congressional districts, *Karcher v. Daggett* 462 U.S. 725 (1983). Larger population deviations are permitted for state legislative districts, *Mahon v. Howell* 404 U.S. 1201 (1971).

[2] Throughout this report, we use the term "legislative redistricting" to refer to the drawing of state legislative districts. "Congressional redistricting" refers to the drawing of U.S. House districts. "Reapportionment" refers to the allocation of congressional representatives to each state.

even individual voters – seek to draw districts in a way that helps their allies and puts their opponents at a disadvantage. The increasing sophistication of computer programs and Geographic Information Systems (GIS) makes it an easy task to draw alternative redistricting plans. The legal guidelines for redistricting – allowable population deviations, compactness, respect for political subdivisions and communities of interest, partisan fairness – are often ambiguous, and it is not clear how they should be applied, or whether they should apply at all. Criticisms of the process abound: incumbents draw safe districts that make them unbeatable; parties try to maximize the number of seats they are sure to win, and because of the inability of the Legislature to agree upon a plan, the courts are left with the task of drawing maps.[3] We do not address the merits of alternative redistricting processes, as these are issues for the Legislature and the electorate to address.

Lawsuits have become a routine part of the redistricting process, in part because courts become involved when state legislatures or commissions are unable to come to agreement on redistricting plans, but also because litigants raise objections to whatever plans are implemented. According to the National Conference of State Legislatures, in the most recent round there were 150 lawsuits filed in 40 states challenging redistricting plans.[4] At times there are multiple lawsuits filed simultaneously in state and federal court with plaintiffs often choosing whatever venue they think will be most sympathetic to their claims.

Most recently the issue has arisen of whether the Legislature can revise districting maps more than once in a decade. This was the situation in Colorado and Texas where a redistricted legislature revised the legislative maps to gain further partisan advantage. Colorado's second redistricting was a modification of a court drawn plan, a practice that had been done in Wisconsin. Colorado's redistricting was found unconstitutional by their state Supreme Court on the basis of a provision in their state constitution which was interpreted to mean that only one redistricting was permitted in a decade.[5] This decision could have implications for Wisconsin because the Wisconsin state Legislature has revised districting drawn by the Wisconsin Supreme Court. Whether this is applied to Wisconsin will depend on whether Wisconsin's Supreme Court interprets a similar Wisconsin Constitutional provision as the Colorado court did in their Constitution.[6] A further challenge to a second redistricting is the Texas case in which the U.S. Supreme Court affirmed the Texas redistricting, declaring that it did not violate the U.S.

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[3] Partisan redistricting – in which a party holding a legislative majority draws district lines to maximize the number of seats it controls – has a long history in Wisconsin.. Theobald's authoritative account of Wisconsin's experience cited an account of the redistricting after the 1890 census: "the Democrats were in power and made the existing apportionment so as to get out of it as many Democratic districts as possible. Previous Republican legislatures had set the example. . ." H. Rupert Theobald, *Equal Representation: A Study of Legislative and Congressional Apportionment in Wisconsin*, Reprint from the 1970 *Blue Book*, p. 28.

[4] See http://www.ncsl.org/programs/legman/elect/law-article.htm, last visited June 30, 2005.

[5] *Salazar v. Davidson* 79 P. 3rd 1221,1231 (2003)

[6] See *State ex rel. Thomson v. Zimmerman* 262 Wis. 644 (1953) where the Court held a one-apportionment per federal census based upon the Wisconsin Constitution.

Constitution (*Henderson v. Perry)*[7] Therefore, if the Wisconsin Supreme Court does not negate a legislative revision to the Court drawn maps based upon a state constitutional provision, it would reasonable to expect legislative revisions in a Court determined districting.

Redistricting in Wisconsin

In Wisconsin, legislative redistricting is the responsibility of the state Legislature,[8] which must complete this process by the end of the first session after the census. Plans must be approved by a majority of both the Senate and Assembly, and are subject to a gubernatorial veto.[9] Plans are also subject to legal challenge on the basis of either state or federal constitutional or statutory objections.[10]

But redistricting *must* occur: if the state government fails to enact a plan, it cannot conduct an election using the existing districts (because population shifts have almost certainly created unconstitutional population inequalities). At the same time, if the existing districts are invalid, there must be some way to create a new districting plan, even if the Legislature is deadlocked. Doing nothing is simply not an option.[11]

It is at this point – after a legislative deadlock – that the third branch of government, the judiciary, becomes involved. If the political branches of government cannot act, it necessarily falls to judges to create a plan.

As a practical matter, we think that litigation after the 2010 census is likely. Although the Wisconsin Legislature has usually been able to draw congressional district lines without much ado, the legislative redistricting process has proven nearly impossible. The last time the Legislature completed the redistricting process without substantial judicial intervention was 1931. Federal judges drew state legislative districts in each of the past three rounds (1980s, 1990s, 2000s); the State Supreme Court drew the lines in the 1960s, and threatened to do so again in the 1970s, when a judicially imposed deadline finally prompted a stalled Legislature to broker a deal.[12]

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[7] *Henderson v. Perry* 548 U.S._____ 126 S.Ct. 2594 (2006)

[8] "the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." Article IV §3.

[9] *State ex rel. Reynolds v. Zimmerman* 22 Wis. 2d. 544 (1964)

[10] See http://www.ncsl.org/programs/legman/elect/law-article.htm, last visited June 30, 2005.

[11] Before the "reapportionment revolution," doing nothing was, by contrast, common. States sometimes redrew districts after the census, but often did not. Wisconsin did not modify its legislative or congressional districts after the 1940 census. Tennessee, whose unequal districts were at the center of the 1962 case *Baker v. Carr*, had not redrawn state legislative districts since 1901.

[12] A. Clark Hagensick, "Wisconsin," in *Reapportionment Politics: The History of Redistricting in the 50 States*, Leroy Hardy, Alan Heslop, and Stuart Anderson eds. (Beverly Hills: Sage Publications, 1981) recounts the events of the 1960s and 1970s. The primary cause of legislative deadlock was divided government. Judicial legislative plans were implemented by the State Supreme Court in *State ex rel. Reynolds v Zimmerman* 22 Wis. 2d 544, 126 N.W. 2d 551 (1964),

Principles of Redistricting

Redistricting, following the decennial census, is primarily the task of the state Legislature (Wisconsin Constitution, Art. IV, §3), required to adjust districts so that they are equal in population, a U.S. Supreme Court mandate since the 1960s. (*Baker v. Carr*, *Reynolds v. Sims*, *Wesberry v. Sanders*) Although some justified population deviation is allowed for state legislative districts (*Mahan v. Howell*), congressional districts must be precisely equal in population (*Wells v. Rockefeller*).[13] In 2002 court drawn state legislative districts in Wisconsin, the population deviation was 1.4% for the Assembly districts and 1% for the Senate districts.

Prior to the equal-population decisions of the 1960s, many states did not redraw their districts to account for population shifts resulting in inequality in representation. In Wisconsin the failure of the Legislature to redistrict after the 1940 census meant that considerable population shift was not reflected in the apportionment of the Legislature. In 1951 the Legislature did rectify the 20 year redistricting hiatus, redrawing the districts based upon population (the Rosenberry Act). An attempt in 1953 to include a non-population area factor in drawing Senate districts was invalidated by the state Supreme Court.[14] For congressional districts, Wisconsin went from 1931 to 1963 without redrawing their boundaries with the largest and smallest districts varying by about 30 percent from the district population average. [15]

Besides population equality, districts must be drawn in accordance with the Wisconsin Constitutional requirements. (Wisconsin Constitution, Article IV, §§3, 4 and 5). Further, the U.S. Supreme Court has stated that districts drawn cannot discriminate against a minority and must be consistent with the Voting Rights Act.. Within these parameters, the Legislature typically considers political impact in drawing districts. Conflict over political outcome is hard to avoid in drawing districts. Although the U.S. Supreme Court has nullified redrawn districts because of racial impacts and lack of population equality, it has never done so on the basis of political gerrymandering. Although at one time the U.S. Supreme Court indicated that the impact of redistricting on political parties was judiciable, more recently it has pulled back from that position. In *Vieth v. Jubelirer* (2004) four justices wrote that there were no "judicially discoverable

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and by three judge federal panels in *Wisconsin State AFL-CIO et al. v. State Elections Boar, et al.*, 543 F. Supp. 630 (E.d. Wisconsin, 1982); *Prosser et al. v. State Elections Board et al.*, 793 F. Supp. 859(W.D. Wisconsin 1992); *Baumgart et al. v. Wendleberger et al.* (E.D. Wisconsin, 2002). In the 1950s, the State Supreme Court invalidated a 1953 constitutional amendment requiring that the state Senate be apportioned on the basis of population and land area, *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W. 2d 416 (1953). No redistricting occurred in the 1940s.

[13] *Mahon v. Howell* 404 U.S. 1201 (1971); *Wells v. Rockefeller* 394 U.S. 542 (1969)

[14] A. Clarke Hagensick, "Wisconsin" in L.Hardy, A. Heslop, and S. Anderson, eds. *Reapportionment Politics*. Beverley Hills: Sage Publications, 1981. *State ex rel. Thomson v. Zimmerman* 264 Wis. 644 (1953).

[15] Hagensick, p. 351.

and manageable standards" for the adjudication of claims of a partisan gerrymander.[16] However, Justice Kennedy supported the majority in the case but wrote that it was possible that a legitimate standard could be proposed in a subsequent case. The reality is that the major forces behind redistricting are partisan and protection of incumbents. A few states, such as Iowa, have attempted to turn the task over to a non-partisan commission. However, removing the partisan elements is difficult.

The Court's primary role has been to protect voting rights in reviewing the Legislature's districting plans. Since the 1960s courts have reviewed districting to ensure that they meet the one person, one vote criterion and that minorities are protected, especially as specified in the federal 1965 Voting Rights Act. Cases have been easier to bring under this act since the 1982 amendments, eliminating the need to prove intent. Criteria for bringing redistricting discrimination cases were specified in *Thornburg v. Gingles* (large minority, political cohesive minority, and bloc voting by white majority usually defeated minority's preferred candidate).[17] However, the Court may be called upon to draw the districts itself if the Legislature is at an impasse. Failure to do this would leave a malapportioned system in place. In drawing the districts, the Court needs to avoid being involved prematurely and foreclosing legislative action. At the same time, the Court needs sufficient lead time prior to the next election to allow input of involved parties and to draw the districts.

Developing A Process for Court Consideration Following Legislative Impasse

Our goal is to untangle this process, by drafting clear rules that define the conditions in which plaintiffs can turn to the courts for relief and when they may initiate legal proceedings, and by establishing the process that the Court will use in drawing district lines in the event that the state Legislature is unable to do so.

We make three claims that are the foundation for this report. The first is that the state Legislature is the proper forum for redistricting because of an explicit constitutional assignment and because of the political nature of the process. As the branch of government most closely tied to the public, the Legislature is in the best position to make the necessary judgments.[18] The second is that when the Legislature cannot enact a redistricting plan in time for the next election cycle, and where court intervention is necessary, the Wisconsin Supreme Court has the authority to hear cases under original jurisdiction. The third is that since redistricting is fundamentally a state responsibility, the state courts are the appropriate forum for these actions. The U.S. Supreme Court has recognized the primacy of state courts in redistricting, and under most conditions federal judges will defer to state actions that are already under way, or when a state has

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[16] *Vieth v. Jubelirer* 541 U.S. 267 (2004)

[17] *Thornburg v. Gingles* 478 U.S. 30 (1986)

[18] This does not mean that we necessarily endorse an explicitly partisan process, in which legislators draw lines themselves. The legislature is free to create alternative processes, such as nonpartisan commissions, independent agencies, or special committees. The key is that the legislature is the primary arena for making these decisions.

established a clear procedure for resolving legislative impasses. In the most recent affirmation of this principle, a unanimous Supreme Court held that federal courts should defer to state processes: "Absent evidence that . . . state branches will fail to timely perform that [redistricting] duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it."[19]

The guidelines we propose would apply only when the state Legislature has been unable to complete the redistricting process in a timely fashion. If the Legislature does enact a valid plan, or has a reasonable prospect of doing so in time to allow local governments to fulfill their election administration functions, then the courts need not get involved. Moreover, we do not address the issue of lawsuits challenging a legislatively enacted plan, as might be filed under section 2 of the Voting Rights Act.

Court Procedure following Legislative Impasse: a Recommendation

Although the Wisconsin Supreme Court may exercise original jurisdiction in a matter of state-wide importance like redistricting, from a pragmatic standpoint it is not the best forum to engage in fact finding and draw the districts.[20] Moreover, given that whatever districting plan is devised may be subject to legal challenge, if the Supreme Court had drawn the plan there would be no forum for review.

We propose that in the event that the Legislature has failed to act (under bright-line circumstances that we outline below) and a case challenging the existing legislative districting is filed that a panel of Appeals Court judges be appointed to devise new legislative or congressional districts. In its work the Special Court will use the current districting as a starting point, making adjustment to meet the equal population criteria (Wisconsin Constitution, Article IV §3). In doing this, the Special Court shall make sure that the other constitutional criteria specified in the Wisconsin Constitution, Article IV §§ 4 and 5 and the Federal Voting Rights Act are met .

The panel would consist of 5 members, comprised as follows:

(a) the presiding judge of each of the four Appeals Court districts as of January 1, 2012. If the presiding judge of any Court recuses herself/himself, or is otherwise unable to serve, the next most-senior member of that Court will serve. If no Court of Appeals judge from that district is able to serve, a reserve court of appeals judge will be selected randomly from that district's reserve judge pool first. If none are available, then among those judges eligible to be part of the reserve pool. If no reserve Court of Appeals judge or those eligible to be a reserve court judge is able to serve from that Court of Appeals district, then the panel's member will be selected randomly from among the reserve circuit court judges in that district.

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[19] *Growe v. Emison*, 507 U.S. 25 (1992), 34.

[20] As an appellate court, the Supreme Court does not make initial findings of fact or hear testimony. The Wisconsin Constitution provides for the Supreme Court's original jurisdiction in Article VII §3 (2).

(b) the fifth member of the panel will be randomly selected 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 court judge is able to serve, then the fifth member will be selected from a state-wide pool of reserve circuit court judges.

The Special Court shall have the authority to draw new district lines, based upon a delegation of authority by the Wisconsin Supreme Court. In drawing a new map or maps, the Special Court shall use the existing map as a baseline and make changes according to traditional redistricting criteria. These include population equality, contiguity, compactness, respect for political subdivisions and communities of interest, and adherence to Voting Rights Act requirements. The Special Court shall consider election returns and voting data only insofar as necessary to insure that a proposed map does not create undue partisan bias.

This Special Court has advantages over alternative arrangements.

Neutrality: We have noted the inherent partisan and political nature of the redistricting process. When the Legislature draws district lines, it is inevitable that political considerations enter in to their decisions. Even if the public or watchdog groups oppose the way that politicians draw maps, the pressure they bring is itself part of the political process. To date, the Supreme Court has deemed the partisan disputes arising out of redistricting a nonjusticiable "political question," and has refused to overturn redistricting plans based on standards of political fairness.[21]

Judges have a different role in our government. They are charged with the duty of interpreting constitutional and legal language, and of adjudicating legal disputes. While judges may have a particular ideological stance or viewpoint about the proper methods of judicial interpretation, the expectation is that they will be neutral in political disputes. We expect the canons of judicial ethics and the judges' oaths to uphold the law to minimize the partisan nature of their duties.

We do not claim that this Special Court will be perfectly neutral – indeed, given the nature of the redistricting process, we doubt that it is possible to devise a process that will satisfy all of the stakeholders.[22] But a panel of experienced judges, selected automatically, is the best of the possible alternatives to legislative processes.

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[21] In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), a four member plurality held that partisan gerrymandering presented a nonjusticiable question. A four member dissent argued that the question should be resolved by the courts. Justice Kennedy voted with the majority, but wrote a concurring opinion concluded that there may be some instances in which partisan bias could be so extreme as to warrant judicial intervention.

[22] It is entirely possible, moreover, that even a perfectly neutral process can produce a map that has a political bias.

Geographic Balance: Wisconsin is not a homogeneous state, as it consists of large urban areas, exurbs and suburbs, medium size cities and suburbs, farmland, rural areas, small towns. Some parts of the state are strongly Republican, others reliably Democratic. Moreover, redistricting involves making decisions about communities of interest and representation, all of which assume a familiarity with the geographic and demographic characteristics of the state. By bringing in judges from across the state, we assure a broad range of experience and help insure that no one region or set of concerns will have a disproportionate effect.

By providing an automatic selection system, a biased selection process is avoided as is venue shopping by litigants. Additionally, the composition of the Special Court is geographically distributed, comprising five members, which is preferred to three in an earlier experience of Minnesota. Judges in the Appeals Courts have experience considering appeals and many have served in the more fact finding role as a circuit court judge.

The senior judge of the Special Court will act as chair. If two or more have equal seniority, the Special Court will select the chair from among them. The panel will function as a court. This Special Court will be able to call upon the services of non-partisan outside experts, such as the University of Wisconsin Applied Population Laboratory and Legislative Technology Services Bureau, and any other expertise that they wish to utilize. The Special Court will provide an opportunity for public comment on the proposed draft prior to its promulgation.

The Wisconsin Supreme Court has a second role in redistricting beyond its jurisdiction of redistricting congressional and state legislative seats in event of a legislative impasse. This role is to review redistricting to ensure that the resultant maps meet constitutional and statutory requirements, if any party with standing brings an action. This latter function is noted here but is not the focus of the redistricting rules being suggested for the court by this committee. However, this review function needs to be considered in establishing a mechanism for the court to draw districts. By having a panel independent of the Wisconsin Supreme Court draft the redistricting map, the Wisconsin Supreme Court would then be an appropriate form to review challenges to the resulting district map. Thus the maps draw by the Special Court shall be considered as binding. However, litigants may file for a review by the Wisconsin Supreme Court, which shall provide appellate review of the maps drawn.

We anticipate that federal courts will defer to this state-level process.[23]

The Proposed Process and Time Line

In determining a reasonable date, which if the Legislature hasn't acted and a lawsuit has been filed an impasse will be declared, the Court needs to consider the first date on which the Legislature may consider redistricting, the reasonable period for the Legislature to act, and the date at which the task must be completed to allow candidates

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[23] *Growe v. Emison* 507 U.S. 25 (1993)

to file their nomination papers. In reviewing the time line, the Redistricting Committee incorporated dates specified in the Wisconsin Statutes and time estimates by County Clerks that they need to complete local redistricting and the time they need to prepare the ballots for the next election.[24]

Wisconsin Statutes (§59.10(3)(b);§5:15 (1)(b)) requires local governments to complete their redistricting prior to legislative action, allowing a 180 day period to do it. From the Redistricting Committee's survey, the latest date county clerks said was needed to finish the local level redistricting plan is September. Therefore, when the U.S Census Bureau provides the population figures on **March 1**, local government could be expected to have completed their task 180 days later, **September 2.** The Legislature may want to consider amending this law to allow the Legislature to begin consideration of redistricting prior to the completion of local government districts. Litigation,, challenging the failure of the legislature to draw a redistricting plan, shall be in order on or after **January 2**. (For 2012, the date is Monday, January 2, 2012)

According to state law, the earliest day that nomination papers can be circulated is June 1 with the deadline for nominations specified as the 2nd Tuesday in July, which for 2012 is July 10, 2012. (Wisconsin Statutes §10.78 (1) and (2)). The next week--3rd Tuesday in July—the State Elections Board is required to notify the County Clerks of the list of candidates for the September primary (Wisconsin Statutes §10.06(h)). Therefore, in order to give candidates sufficient time to prepare nominations papers, the Redistricting Committee recommends that the Court consider the **1st Tuesday in May (May 1, 2012)** as the date that an impasse would be declared if the Legislature had not acted. On that date the plan developed by the Special Court would be declared the districting plan for the state for either the congressional districts or the state legislative districts or both. In establishing a firm date, the Legislature is informed of the date that the plans—state Legislature and congressional-- need to be in place and disputes over whether an impasse has occurred are avoided. The draft plan shall be available on the Web by 3:00 pm April 16. Individuals and groups will have 10 days to respond. On the 2nd **Tuesday in May**, the State Elections Board sends a notice to the County Clerk notifying them of the September primary and the November general election (Wisconsin Statutes §10.72 (1)).

In order to give the Court sufficient time to receive input and draw the districts prior to **1st Tuesday in May (May 1, 2012)**, it will begin the process any time after **January 1 (2012)** if the Legislature has not developed its own plan for either the congressional districts, state legislative districts, or both. This would give the Legislature four months to act before Court consideration and give the Court four months to consider districts prior to the impasse date. To avoid premature filing of actions in the Court, the Court will accept filings anytime after **December 1 (2011).** It is important to avoid Court action that could impede the Legislature, the primary locus for redistricting. The Court shall widely permit briefs, which must be filed with the Court by **April 1** to give the Court time to review them. Material submitted must be relevant, legible, and as concise

[24] The Committee sought input from County Clerks on their time line for local government reapportionment. A copy of the survey sent to the clerks appears in the Appendix to this report.

as practicable The Court shall decide who among the filers shall be permitted to make oral arguments.

The maps drawn by the Special Court will be considered binding as the districts under which elections will be conducted. Litigants may appeal the decision (s) of the Special Court to the Wisconsin Supreme Court, which shall exercise appellant jurisdiction.

Wisconsin Redistricting Committee

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

Appendix

Wisconsin Redistricting Committee

R. Booth Folwer, Political Science (Emeritus) – UW-Madison
Donald Kotecki, Survey Research Center – St. Norbert College
Kenneth Mayer, Polical Science – UW – Madison (co-chair)
Ed Miller, Political Science – UW Stevens Point (co-chair)
Juliet Brodie, Law School – University of Wisconsin
Peter Rofes, Law School – Marquette University
Ron Weber, Political Science – UW - Milwaukee

2005 WISCONSIN SUPREME COURT REDISTRICTING SURVEY

The Wisconsin Supreme Court has appointed a committee to make recommendations to it regarding procedures that they would use if the 2010 redistricting involves the courts. To assist us in our task, we would appreciate it if you could answer a few questions for us. We are conducting this survey of Wisconsin County Clerks to determine county experiences with redistricting. If necessary please consult your files to assist in completing this questionnaire.

Q1. To begin with, did you receive population data by the statutory deadline of April 2, 2001?

☐ Yes **(Continue to Q1a)** ☐ No **(Skip to Q2)**

Q1a. If no, when did you receive it?
(Check only one)

☐ January	☐ March	☐ May
☐ February	☐ April	☐ June

Q2. When were the redistricting plans completed for your county and municipalities?

Month _____ Year _____

Q3. When do you believe would be the earliest date that your locality could have completed the redistricting process?

Month _____ Year _____

Q4. Which agency or organization drew the redistricting plans? **(Check all that apply)**

☐ A unit of city government (Please specify)

_____

☐ A committee of the city or county council
☐ A special committee or unit established for the purpose of redrawing the lines
☐ Some other unit (Please briefly describe)

_____

Q5. Did any of the redistricting efforts run into an impasse – that is, a dispute over the creation of wards and/or districts that delayed the final decision?

☐ Yes **(Continue to Q5a)** ☐ No **(Skip to Q6)**

Q5a. What was the main contributing factor that caused the impasse?

_____

_____

Q5b. How did you resolve the impasse to meet the 60-day (120-day) turn-around deadline? (Does your county have an established process for resolving disputes, or did you use ad hoc measures?)

_____

Q6. Was any county or city plan challenged in Court?

☐ Yes **(Continue to Q6a)** ☐ No **(Skip to Q7)**

Q6a. What was the name of the case (if there was a decision), and were the plans revised in response to a court challenge?

_____

_____

Q7. In your opinion, what is the number of days before the primary that would be the latest you could receive final state legislative districts, and still have sufficient time to prepare for the September primary election? **(Check one only)**

☐ 30 days	☐ 75 days	☐ 130 days
☐ 45 days	☐ 100 days	
☐ 60 days	☐ 115 days	

Q8. Overall, what recommendations can you offer to better facilitate the redistricting process?

Q9. What is your current position and title?

_____

Please contact Donald Kotecki, Director, St. Norbert College Survey Center (1-877-214-7183) or Julie Rich, Wisconsin Supreme Court (1-608-266-1880) if you have any questions or concerns about this study.

January 20, 2005

Dear County Clerks:

The Wisconsin Supreme Court has appointed a committee to study and draft procedural court rules that will govern state legislative redistricting litigation in Wisconsin. To assist the committee in its task, the committee members are seeking your input so that they will understand the practices at the county and city levels since local redistricting must be completed prior to redistricting at the state level.

The enclosed questionnaire was drafted by Donald Kotecki, Director of the St. Norbert College Survey Center, based upon issues raised by the Redistricting Committee. The St. Norbert Survey Center will tabulate the results. I would appreciate it if you could complete the questionnaire, returning it in the stamped self-addressed envelope included. If you have any questions, please direct them to Donald Kotecki (1-877-214-7183) or Julie Rich, Supreme Court Commissioner (1-608-266-7442).

Sincerely yours,

Shirley S. Abrahamson
Chief Justice

Results of the Survey

Friday, May 27, 2005

Q1: Did you receive population data by the statutory deadline of April 2, 2001?
All yes

Q2: When were the redistricting plans complete for your county and municipalities?

Small: September 2001
Small: October 2001
Small: August 2001
Medium: June 2001
Medium: Sept. 18, 2001
Medium: June 2001
Large: September 2001

Q3: When do you believe would be the earliest date that your locality could have completed the redistricting process?

Small: September 2001
Small: August 2001
Small: August 2001
Medium: June 2001
Medium: Sept. 1, 2001
Medium: June 2001
Large: September or October 2001

Q4: Which agency or organization drew the redistricting plans?

Small: A special committee or unit established for the purpose of drawing the lines
Small: A special committee or unit established for the purpose of drawing the lines
Small: A redistricting committee chaired by the county board chairman
Medium: A special committee of unit established for the purpose of drawing the lines
Medium: A committee of the city or county council; the North Central Wisconsin Regional Planning Commission
Medium: A special committee or unit established for the purpose of drawing the lines
Large: A committee of the city or county council; a County Planning Commission and Board of Supervisors committee

Q5: Did any of the redistricting efforts run into an impasse?

Small: No
Small: No
Small: No

Medium: No
Medium: Yes

Q5a: What was the main contributing factor that caused the impasse?
Town board / county board dispute

Q5b: How did you resolve the impasse?
The county board adopted the plan they chose

Medium: No
Large: No

Q6: Was any county or city plan challenged in court?

Small: No
Small: No
Small: No
Medium: No
Medium: Yes

Q6a: Name of case/decision: Town of Woodruff v. Oneida County; county plan was upheld

Medium: No
Large: No

Q7: In your opinion, what is the number of days before the primary that would be the latest you could receive final state legislative districts, and still have sufficient time to prepare for the September primary election?

Small: 100 days
Small: 45 days
Small: 130 days
Medium: 130 days
Medium: 75 days
Medium: 130 days
Large: 130 days

Q8: Overall, what recommendations can you offer to better facilitate the redistricting process?

Small: None
Small: Draw the lines more straight and uniform
Small: Keep the county all in one district to avoid the expense of additional ballots and poll-workers
Medium: none
Medium: Better town, city and county communication and cooperation
Medium: Fewer splits; overall
Large: The county board decides on redistricting when the outcome affects them -- thinks redistricting should be handled by an impartial body not directly affected by the

outcome, such as the courts. Otherwise, is personally OK with the process.

Q9: Position and title:

Small: County clerk
Small: County clerk
Small: County clerk
Medium: County clerk; consulted with Land Information
Medium: County clerk
Medium: County clerk
Large: County senior planner; consulted with county clerk

Supreme Court of Wisconsin

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

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

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 groups, 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.	*In re Apportionment of the State Senate and US Congressional Districts*, 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.	*Zachman, et al. V Kiffmeyer*, 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.	*Jepsen v. Vigil-Giron*, No. D0101 CV 2001 02177 (1st 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.	*Stephenson v Bartlett*, No. 94PA02-2 (N.C. July 16, 2003)
Oklahoma	A state district court drew the congressional districts after the legislature failed to do so.	*Alexander v. Taylor*, 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.	*Smith v Idaho Commission on Redistricting,* 136 Idaho 542, 38 P.3d 121 (Idaho Nov. 29, 2001); *Bingham County v Comm'n for Reapportionment,* 137 Idaho 870, 55 P.3d 863 (Idaho Mar. 1, 2002); Bonneville County v Ysursa 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	*In the Matter of Legislative Districting of the State* Misc No 19 Sept Term 2001 (Md. App. Mar. 1, 2002); *In the Matter of Legislative Redistricting of the State*, 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.	*Below v. Gardner*, No. 2002-0243, 148 N.H. 1 (N.H. June 24, 2002) *Burling v. Chandler*, No. 2002-0210, 148 N.H. 143 (N.H. July 26, 2002)

III. State Courts rejecting redistricting plans and sending them back to commissions

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

Other

Pennsylvania	Political Gerrymandering claims found non-justiciable.	*Vieth v. Pennsylvania*, No. 1:CV-01-2439, 241 F. Supp.2d 478 (M.D. Pa. Jan. 24, 2003), *aff'd sub nom. Vieth v. Jubelirer*, No. 02-1580 (U.S. Apr. 28, 2004)

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

EXHIBIT B

SUPREME COURT OF WISCONSIN

No. 02-03

In the matter of the adoption of procedures for original action cases involving state legislative redistricting

FILED

JAN 30, 2009

David R. Schanker
Clerk of Supreme Court
Madison, WI

On November 25, 2003, this court appointed a committee to review the opinion in Case No. 02-0057-OA, Jensen v. Wisconsin Elections Bd., 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537. The court directed that committee to review Wisconsin state legislative redistricting history, redistricting rules and procedures in other jurisdictions, and to propose procedural rules in the event that due to legislative impasse, an original action challenging existing districts would be filed and accepted.

The committee filed its initial report with the court in September 2007. The court received comments from interested persons. On April 8, 2008, the court held an open administrative conference to discuss the report and comments received. It requested the committee to prepare a supplemental memorandum, which the committee filed on September 12, 2008. The court invited comments and scheduled two open administrative conferences to discuss the matter further. The conferences were set for January 22, 2009, and February 20, 2009.

At the January 22, 2009, open administrative conference, the court discussed the committee's report, supplemental memorandum, and comments it received. The majority of the court voted in favor of a motion not to invoke the court's rule-making authority and not to entertain a rules petition from the committee for the adoption of procedures in the event an action is filed in a state court involving state legislative redistricting.[1] The entire court expressed its appreciation and thanked the committee for its work over the years. The court discharged the committee of further duties in this matter. Therefore,

IT IS ORDERED the matter of the adoption of procedures for original action cases involving state legislative redistricting is hereby dismissed. No further action will be taken.

IT IS FURTHER ORDERED that the open administrative conference scheduled for February 20, 2009, to discuss this matter is hereby cancelled.

Dated at Madison, Wisconsin, this 30th day of January, 2009.

BY THE COURT:

David R. Schanker
Clerk of Supreme Court

[1] Chief Justice Abrahamson, Justice Bradley, and Justice Crooks dissented.

EXHIBIT C

The State of Wisconsin

OFFICE OF THE GOVERNOR

EXECUTIVE ORDER #66

Relating to Creating the People's Maps Commission

WHEREAS, the Wisconsin Constitution requires new legislative and congressional district maps to be drawn following the federal census. The Constitution further requires the maps to be presented to the Governor for approval or veto;

WHEREAS, partisan gerrymandering disenfranchises voters, disproportionately undermines minority populations, and ultimately weakens our democracy by making it difficult to hold elected officials accountable;

WHEREAS, the maps created by 2011 Wisconsin Act 43 are some of the most gerrymandered, extreme maps in the United States;

WHEREAS, it is inevitable that in every redistricting, some voters will be moved from one district to another, but as a result of the maps created by 2011 Wisconsin Act 43, approximately 50 times more voters were moved to new districts than was necessary;

WHEREAS, the maps created by 2011 Wisconsin Act 43 were drafted in secret by private attorneys at taxpayer expense, passed with almost no public input, and resulted in years of litigation, costing taxpayers millions of dollars in legal fees;

WHEREAS, the people of Wisconsin – from Democrats to Independents to Republicans, and people in between and beyond – overwhelmingly reject this approach to redistricting;

WHEREAS, according to a Marquette Law School poll, more than 70 percent of voters prefer redistricting done by a nonpartisan commission;

WHEREAS, 50 of Wisconsin's 72 counties, which contain approximately 78 percent of Wisconsin's population, have passed resolutions or referenda supporting nonpartisan redistricting;

WHEREAS, to prevent partisan gerrymandering, states across the country are looking to these types of committees to assist the state in drawing fair electoral maps;

WHEREAS, to ensure the integrity of the process and the fairness of the maps, Wisconsin must look to the people, not politicians, to assist in drawing maps that fairly and accurately represent our state and its diverse population; and

WHEREAS, for a nonpartisan redistricting commission to be successful, it must rely on nonpartisan experts for guidance and provide a transparent and participatory process.

NOW, THEREFORE, I, TONY EVERS, Governor of the State of Wisconsin, by the authority vested in me by the Constitution and the laws of the State, specifically Section 14.019 of the Wisconsin Statutes, hereby order the following:

1. There is created the People's Maps Commission (Commission). Commission members may not be elected officials, public officials, lobbyists, or political party officials. Commission membership shall include: members from each of Wisconsin's eight congressional districts; members from communities of interest; and experts in nonpartisan redistricting.

2. The Commission shall hold at least one hearing in each of Wisconsin's eight congressional districts. The hearings shall provide information on the redistricting process and gather testimony and evidence from members of the public.

3. As soon as practicably possible after the 2020 Census data is made available to the State of Wisconsin, the Commission shall prepare proposed maps for the Legislature to consider. The proposed maps shall, whenever possible:

    a. Be free from partisan bias and partisan advantage;

    b. Avoid diluting or diminishing minority votes, including through the practices of "packing" or "cracking";

    c. Be compact and contiguous;

    d. Avoid splitting wards and municipalities;

    e. Retain the core population in each district;

    f. Maintain traditional communities of interest; and

    g. Prevent voter disenfranchisement.

4. The Commission shall be attached to the Department of Administration.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great seal of the State of Wisconsin to be affixed. Done at the Capitol in the City of Madison this twenty-seventh day of January in the year of two thousand twenty.

TONY EVERS
Governor

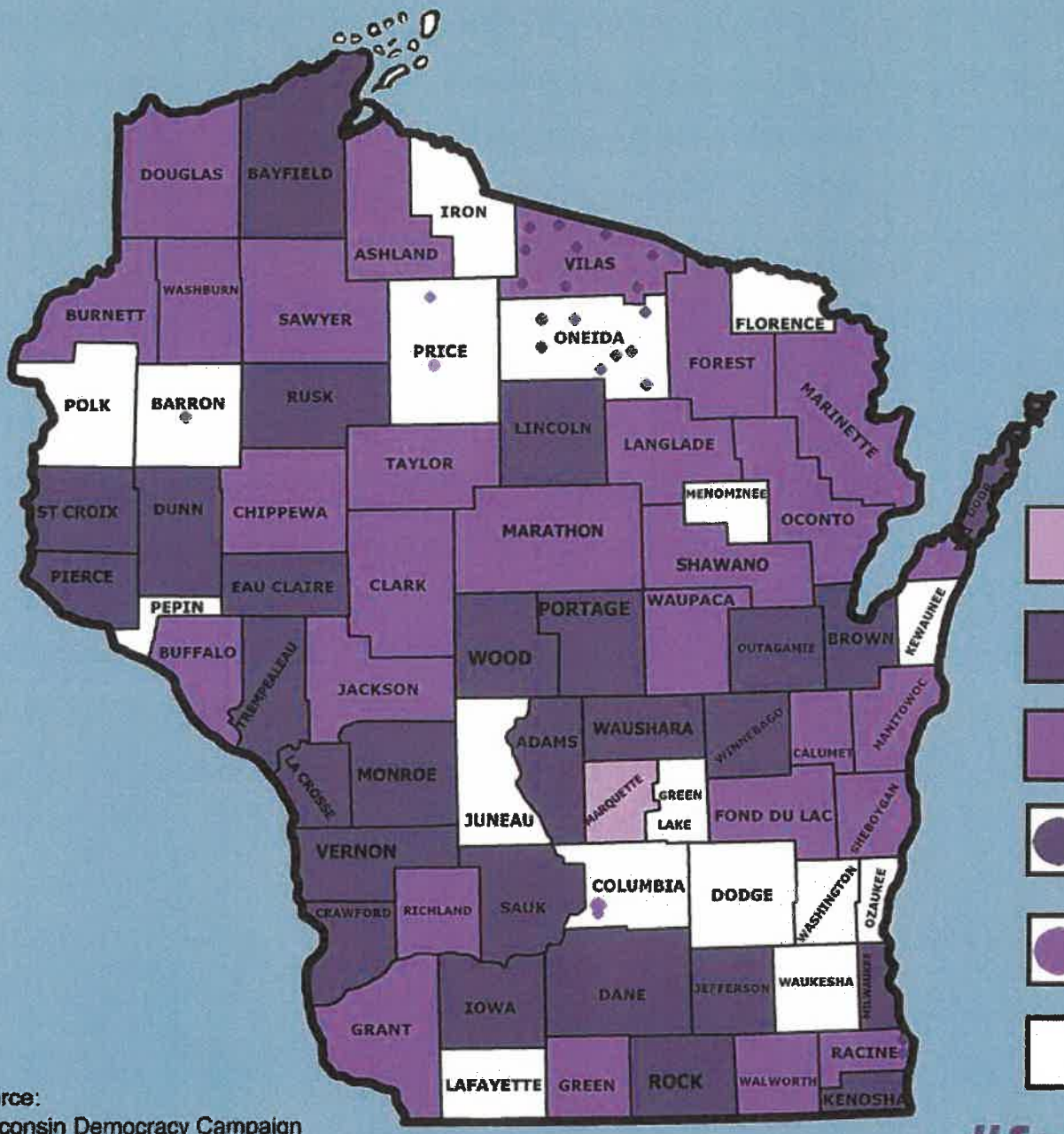
By the Governor:

DOUGLAS LA FOLLETTE
Secretary of State

EXHIBIT D

55 COUNTIES BACK FAIR MAPS

54 COUNTIES HAVE PASSED RESOLUTIONS AND 28 COUNTIES REFERENDUMS



Source:
Wisconsin Democracy Campaign
http://www.wisdc.org

#fairmaps