Approved VKS 4-29-89
Date

MINUTES OF THE HOUSE COMMITTEE ON LEGISLATIVE, JUDICIAL AND CONGRESSIONAL APPORTIONMENT

The meeting was called to order by Representative Vince Snowbarger at
Chairperson

11:30 a.m./p.m. on January 18, 1989 in room 526-S of the Capitol.

All members were present except: Representative Grotewiel.

Committee staff present: Mary Galligan, Legislative Research
Raney Gilliland, Legislative Research
Fred Carman, Revisor of Statutes
Arden Ensley, Revisor of Statutes
Robert Coldsnow, Legislative Counsel
Marian Holeman, Committee Secretary

Conferees appearing before the committee:

The meeting was called to order by Chairman Snowbarger.

The Chairman turned the meeting over to Bob Coldsnow, Legislative Counsel. Mr. Coldsnow presented "Reapportionment Law Highlights," (Attachment 1) "Political Gerrymandering," (Attachment 2) and "Timeline," (Attachment 3).

Mr. Coldsnow has an 88-page document on apportionment law available in his office, Room 449-N, State Capitol Building.

Mary Galligan and Raney Gilliland worked this past week end to develop color coded maps of metropolitan areas. These may be seen in Legislative Research, 545-N.

The Committee will begin public hearings next Tuesday, January 24, 1989. The meetings will be held in 313-S, 12:00 noon to 1:30 p.m.

The meeting adjourned at 12:25.

GUEST LIST

COMMITTEE: HOUSE LEGISLATIVE, JUDICIAL AND CONGRESSIONAL APPORTIONMENT DATE 1-18-89

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
R. W. Apple	Washington	Post
Lou Boccardi	New York City	AP
GARY Haden	Topeka	
Ruth Wilkin	Topeka	LWV
Jim Hebberle	Topeka	Observer

Reapportionment Law
Highlights

Equal Representation:

The cases applying the one man-one vote principle now seem to indicate the deviation standard is:

1. Under 10% overall deviation is considered *de minimis* and requires no justification by the state. Burden on plaintiff challenging the plan.

2. Over 10% and up to 16% plans have been upheld where state could justify the plan based on legitimate considerations incident to giving effect to a rational state policy. Burden on the state to uphold the plan. As of 1988 the only "rational state policy" accepted has been affording representation to political subdivisions. [Cases of "apportionment."]

3. Over 16%. Except in a Wyoming case (which had a very unique posture before the Court) no deviations over 16% have been acceptable.

The Supreme Court has, at least in dicta in *Karcher v. Daggett*, said that other state policies besides affording representation to political subdivisions may be used to justify a variance from equal population.

> Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives . . . The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors. 462 U.S. 725, 740-41 (1983).

Since *Karcher v. Daggett* was a congressional redistricting case, where strict equality of population is required, these additional "rational state policies" would presumably apply with even greater force in a legislative redistricting case.

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Attachment 1

Voting Rights Act §2, 1982 Amendments:

Reacting to the U.S. Supreme Court's 1980 *Bolden* decision which held plaintiffs had to prove a discriminatory intent to support a claim of a Voting Rights Act violation, Congress in 1982 amended the Act to provide for an "effects" test. Now a violation of §2 is established if:

> Based on the totality of circumstances, it is shown that the political process leading to nomination or election in the State or political subdivision are not equally open to participation by members of . . . [a racial, color or language minority class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected . . . is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. 42 U.S.C. §1973(b) (1982).

The U.S. Supreme Court first interpreted the 1982 Act in 1986 in *Thornburg v. Gingles*, a case involving a North Carolina reapportionment plan. The Court enumerated a number of objective factors (12) to be used as a basis to assess the impact of the contested structure or practice. In addition to the review of objective factors the Court developed a new three-part test a minority group must meet in order to establish a vote dilution claim under §2. 478 U.S. 30.

Political Gerrymandering:

(See separate memo.)

Constitutional Criteria:

Ks. Const. Art. 2, §2 provides that members of the legislature shall be elected from single-member districts. The Reapportionment Article (Art. 10) is silent as to any criteria or guidelines.

Criteria Recognized by Kansas Courts:

1. Substantial equality of population "as close an approximation to perfect exactness as possible." *Harris v. Shanahan*, 192 Kan. 183, 205 (1963); *Harris v. Anderson*, 194 Kan. 302, 304 (1965) [The 1979 Ks.Sup.Ct. Cases acknowledged the existence then of the *de minimis* deviation principle.]

2. Compact and contiguous as possible. *Harris v. Shanahan, supra* (1963); *Long v. Docking*, 282 F.Supp. 256 (1968).

3. Recognizing existing political subdivisions; but, population equality of districts controls. *Harris v. Anderson, supra* (1965); *Harris v. Anderson*, 196 Kan. 450 (1966); *Long v. Docking, supra* (1968); In re HB 2620, 225 Kan. 827 (1979); In re SB 220, 225 Kan. 628 (1979).

4. Districts should contain a population and area as similar as may be in its economical, political and cultural interests, as determined in the legislature's discretion. *Harris v. Shanahan, supra* (1963); also *Harris v. Shanahan*, 192 Kan. 629 (1964) [2d Case].

[Note: U.S. District Court for District of Kansas noted that the Kansas Supreme Court has in some respects added to and supplemented the requirements for a valid legislative apportionment as enunciated by the United States Supreme Court. *Winter v. Docking*, 356 F.Supp. 88 (1973).]

1979 Kansas Legislative Redistricting:
Criteria or Guidelines:

1. Equal in population as nearly as practicable. Deviations not to exceed plus or minus 5% except in unusual circumstances.

2. Districts should be easily identifiable and understandable by voters.

3. 1978 Kansas Agricultural Census was the data base. [Note: For 1989 see Ks. Const. Art. 10, §1(a) and L. 1987, Ch. 61.]

4. Districts should be as compact as possible and contiguous.

5. Integrity and priority of existing political subdivisions should be preserved so far as practicable.

6. There should be recognition of similarities of interest; and, social and economic interests common to the population of the area which are probable subjects of legislative action (generally termed a "community of interests") should be considered.

7. Districts will not be intentionally drawn to protect or defeat an incumbent legislator.

Note: The Senate had an additional criteria: "Consideration was given to growth and population trends where such trends seemed to have a valid historical basis. Such considerations being used to implement other criteria or guidelines, primarily with respect to integrity of existing political subdivisions.

Constitutional Time-Line:

The Constitution provides the possibility for the Legislature to develop two redistricting plans. The first plan will be presented to the Supreme Court by the Attorney General

within 15 days of publication. The Court has 30 days to enter judgement. If that plan is rejected by the Court, the Legislature has 15 days to adopt a new plan. The second plan would be presented to the Court by the Attorney General upon enactment. The Court would have ten days to enter judgement. If that plan is rejected by the Court, the Legislature has 15 days to enact a third plan in compliance with the mandate of the Court. That third redistricting plan would be the Court's plan.

1979 Time-Line and Procedure, SB 220:

2/13/79	Bill passed.
2/14/79	Governor signed bill.
2/17/79	Bill published in "official state paper." (a daily publication)
3/5/79	Attorney General files petition presenting bill to Court (3/4 was a Sunday)
3/7/79	Clerk of Court publishes notice of hearing and for presentations of written "views."
3/16/79	Final day for submission of written views and notifying Clerk of Court of intention to appear at hearing.
3/19/79	Hearing date.
4/5/79	Supreme Court files its opinion on bill.

A similar time-line format was followed for 1979 HB 2620. The Bill was passed March 7, 1979 and signed by the Governor March 16, 1979, and published March 21, 1979. The hearing before the Kansas Supreme Court was held April 19, 1979 and the Court's opinion filed May 5, 1979.

[Compare to the time-lines on p. 2 of the Memorandum "Reapportionment Activities Time-Line."]

Differences on the Senate Bill are result of legislature immediately presenting Bill to Governor and Governor signing day after passage and Secretary of State publishing within three days. (Kansas Register is only published once per week with a deadline a few days before publication date.) The Attorney General and the Court took their maximum time allotted by the Constitution.

Prepared by Legislative Counsel
January 17, 1989

Political Gerrymandering

Until June 30, 1986 the courts considered issues of political gerrymandering to be "political questions" and nonjusticiable--things to be left to the legislative branch. On that date the U. S. Supreme Court in *Davis v. Bandemer* said "we find . . . political gerrymandering to be justiciable." The Court reversed the lower court's decision that a political gerrymandering had been proven. No direct guidelines were established to guide in determining whether a political gerrymander existed. The Court saying, as it did in 1962 in *Baker v. Carr,* that the Court was confident the trial courts were perfectly capable of devising standards and guidelines for determining such issues.

The plurality in *Bandemer* held that to make a prima facie case of an equal protection violation requires a threshold showing of discriminatory vote dilution. The plurality also said unconstitutional vote dilution occurs in such cases only when (1) there is the existence of a discriminatory intent against an identifiable political group, and (2) there consistently is an actual discriminatory effect on that identifiable political group over a period of time with a strong indication of lack of political power and denial of fair representation. If these are found to exist, then the legislation would be examined for valid underpinnings.

In *Bandemer* Justice Powell (concurring and dissenting), joined by Justice Stevens, reiterated factors Justice Stevens set out in *Karcher* which he felt properly should guide legislators who redistrict and judges who test redistricting plans. Recognizing the merit of an unconstitutional political gerrymandering claim turns on whether the boundaries of

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voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends Justice Powell would make such determinations by reference to these factors:

1. The shapes of the voting districts.
2. Observing established political subdivison boundaries.
3. The nature of the legislative procedures by which the redistricting law was adopted.
4. Legislative history reflecting contemporaneous goals.

To make out a case of unconstitutional political gerrymandering the plaintiff, according to Justice Powell, should be required to offer proof concerning these factors, which bear directly on the fairness of a redistricting plan, as well as evidence concerning population disparities and statistics tending to show vote dilution. No one factor should be dispositive. 478 U.S. at 173.

While rejecting Justice Powell's approach the plurality explicitly recognized the factors set out by Justice Powell may be relevant to an equal protection claim. The plurality seems to caution that the various factors set out by Justice Powell must be differentiated in proving the elements of a constitutional claim. At least in *Bandemer*, each factor standing alone would not be enough to prove the claim itself. The plurality felt failure to differentiate the factors disguised the essential conclusion of Justice Powell's opinion, which the plurality said was that disproportionate election results alone are a sufficient effect to support a finding of a constitutional violation. 478 U.S. at 141-142.

Prepared by Legislative Counsel
January 17, 1989

I. Plan No. 1 (completed by end of veto session)

February 15	--	Plan No. 1 through both houses
February 25	--	Plan No. 1 presented to Governor
March 7	--	Plan No. 1 published
March 22	--	Attorney General files petition with the Supreme Court
April 21	--	Supreme Court enters favorable judgement
		Adjournment

II. Plan No. 1 (completed by early June)

March 28	--	Plan No. 1 through both houses
April 7	--	Plan No. 1 submitted to the Governor
April 17	--	Plan No. 1 published
May 3	--	Attorney General files petition with the Supreme Court
June 2	--	Supreme Court enters favorable judgement
		Sine die adjournment

III. 2 plans completed by early June

February 12	--	Plan No. 1 through both houses
February 22	--	Plan No. 1 presented to Governor
March 4	--	Plan No. 1 signed by Governor
March 19	--	Attorney General presents Plan No. 1 to Supreme Court
April 18	--	Supreme Court rejects Plan No. 1
May 3	--	Plan No. 2 through both houses
May 13	--	Plan No. 2 presented to Governor
May 23	--	Attorney General presents Plan No. 2 to Supreme Court
June 2	--	Court accepts Plan No. 2
		Sine die adjournment

Please note that different assumptions regarding first adjournment, the length of the preveto session break, and the length of the veto session could alter the time-line considerably. In addition, assuming less than the maximum amount of time for each of the steps could also make a significant difference. In any event, the Legislature would have more time to consider and pass the bills if sine die adjournment were later in the year.

Kansas Legislative Research Department
and Legislative Counsel
November 21, 1988

timeline.mkg/aem

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