

# Drawing the Line 2011

## Redistricting in Virginia

Number 1

August 2010

### *Process, Population, and Law*

*Mary Spain, Senior Attorney*

Redistricting in 2011 will be a new experience for more than half of the General Assembly. Only 59 of 140 members took part in the 2001 special redistricting session – two-thirds or 26 members of the present Senate and one-third or 33 members of the present House.<sup>1</sup>

This first issue of *Drawing the Line 2011* offers some background on redistricting in Virginia and covers a number of questions. How does the redistricting process work in Virginia? What is a possible schedule for redistricting? What do we know now about Virginia's population? What legal standards apply to redistricting plans? Later issues will report on any changes in the redistricting timeline and primary schedule, the official 2010 census population numbers for the present Virginia Senate, House of Delegates, and congressional districts, the plans adopted by the General Assembly, and the steps taken to comply with the Voting Rights Act.

### *I. Virginia's Redistricting Process*

#### A. The Process

The process begins in Article II, Section 6, of the Virginia Constitution (for complete text, see page 2). That provision makes several key points:

- The General Assembly establishes the congressional, Senate, and House of Delegates districts.
- The districts must be drawn in the year following the census -- in 2011.
- Redistricting laws take effect immediately without the emergency clause or four-fifths vote usually required under Article IV, Section 13 of the Virginia Constitution. The intent is to accomplish redistricting in time for the November 2011 election of the Senate and House of Delegates.
- The districts are to be drawn to meet certain standards governing contiguity, compactness, and equal population.

The legislature in Virginia, as in most states, draws congressional and state legislative district lines.<sup>2</sup> In final form, a redistricting plan is a bill: introduced by a member; considered in committee; passed by both houses; and signed, returned for amendment, or vetoed by the Governor.<sup>3</sup>

A redistricting plan can originate with the Committee on Privileges and Elections, an individual member of the General Assembly, or another interested individual or group. Before any plan can become law, it must be



Virginia Division of Legislative Services

converted to bill form and introduced by a member. Each bill is usually accompanied by maps and statistical reports that show district populations and other information.

The fact that Virginia must redistrict in 2011 and that both the Virginia Senate and House of Delegates stand for election in 2011 forces Virginia to follow a tight timetable to be ready for the November 2011 election. Virginia is one of only four states that will be holding state legislative elections in 2011 (Virginia plus Louisiana, Mississippi, and New Jersey).

Since Virginia is subject to § 5 of the Voting Rights Act,<sup>4</sup> a redistricting plan cannot be put into effect or used to conduct an election until it has been submitted to and precleared by the Department of Justice or, alternatively, by the District Court of the District of Columbia. The need to allow time for the preclearance process further constrains the timetable for redistricting.

#### B. A Possible Timetable for Redistricting

The chart that follows sets out the timetable followed by the General Assembly leading up to and including the 2001 redistricting and a comparable timetable for the 2011 redistricting showing actions to date. This timeline does not include court cases related to the 2001 redistricting.<sup>5</sup>

#### Article II, Section 6. Apportionment.

Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 2011 and every ten years thereafter.

Any such decennial reapportionment law shall take effect immediately and not be subject to the limitations contained in Article IV, Section 13, of this Constitution.

The districts delineated in the decennial reapportionment law shall be implemented for the November general election for the United States House of Representatives, Senate, or House of Delegates, respectively, that is held immediately prior to the expiration of the term being served in the year that the reapportionment law is required to be enacted. A member in office at the time that a decennial redistricting law is enacted shall complete his term of office and shall continue to represent the district from which he was elected for the duration of such term of office so long as he does not move his residence from the district from which he was elected. Any vacancy occurring during such term shall be filled from the same district that elected the member whose vacancy is being filled.

**Table 1**  
**Timeline for Redistricting 2001 and 2011**

| 2001         | 2011         | Activities   |
|--------------|--------------|--|
| 1997 -- 1999 | 2007 -- 2009 | Preparations are made for census 2000 and census 2010. The Division of Legislative Services (DLS) works with the Census Bureau to identify Virginia's precinct boundaries so that Virginia will receive maps and population numbers for each precinct. Localities and precincts are the basic building blocks for new congressional, Senate, and House of Delegates districts. Census blocks may be used when a precinct is split. |

|               |               |   |
|---------------|---------------|---|
| 1998 Session  | 2008 Session  | Legislation passes to freeze precinct lines and complement the Census Bureau program to provide population numbers for precincts. Va. Code § 24.2-309.2 freezes precincts from 2/1/09 to 5/15/11. <sup>6</sup>  |
| 1999 Session  | 2009 Session  | Funds are appropriated to DLS for the acquisition of hardware and software and for training in preparation for redistricting.   |
| 1999          | 2009          | DLS works with localities and the Census Bureau to identify features that serve as precinct and current legislative district boundaries and will serve as block boundaries with population counts for each block.   |
| 1999          | 2009          | DLS researches and begins the process to acquire redistricting hardware and software.   |
| 1999 -- 2000  | 2009 -- 2010  | DLS staff trains for redistricting through NCSL programs and seminars and through hardware and software training.   |
| 2000 Session  | 2010 Session  | In 2000, the General Assembly (GA) passed two bills related to redistricting. HB 1536, Ch. 886, 2000 Acts of Assembly, authorized the State Board of Elections to reschedule the 2001 June primary to a Tuesday not later than 9/11/01 as necessary to complete the redistricting and preclearance process. HB 1486, Ch. 884, 2000 Acts of Assembly, required that redistricting be based on the Census Bureau's actual population data and not statistically adjusted data. Ultimately the Bureau decided not to produce adjusted data for redistricting. This requirement is carried forward in present Va. Code § 24.2-304.1. No adjusted numbers are expected for the 2010 census.<br>The 2010 GA considered but did not pass legislation to provide for a delayed 2011 primary. SB 463 (2010). |
| April 1, 2000 | April 1, 2010 | Census Day  |
| Nov. 2000     | Nov. 2010     | DLS staff prepares a <i>Guide to Local Redistricting</i> for 2011 as was done for 1991 and 2001 for distribution to localities.   |
| Fall 2000     | Fall 2010     | Census Bureau releases geographic data -- the census geography including districts, localities, precincts, and census blocks. DLS staff reviews the geography.  |
| Dec. 2000     | Dec. 2010     | In 2000, the Joint Reapportionment Committee <sup>7</sup> authorized DLS to purchase small area population estimates that served as the basis for House and Senate district estimates for 2000. These district population estimates were made available in a DLS publication "Drawing the Line 2001" and on the DLS redistricting website. <sup>8</sup><br>Estimates for the House, Senate, and congressional districts are shown on pages 8-13.  |
| Dec. 31, 2000 | Dec. 31, 2010 | Census Bureau reports official population for each state to the President of the United States for apportioning the 435 seats in the House of Representatives.  |

|                        |                      |   |
|------------------------|----------------------|---|
| 2001 Session           | 2011 Session         | The 2001 Regular Session convened 1/10/01 and ended 2/24/01 without acting on redistricting matters.<br>The 2011 Regular Session will convene 1/12/11 and adjourn 2/26/11 if it meets for 46 days. The 2011 reconvened session would then meet 4/6/11.  |
| Feb. through Apr. 2001 |                      | Joint panels of the House and Senate Committees on Privileges and Elections held 16 public hearings throughout Virginia in 2001.<br>Plans for public hearings in 2010 and 2011 are underway. See box on page 16 for list of public hearings.  |
| 2001 Special Session   | 2011 Special Session | In 2001, the GA convened a special session for redistricting on 2/24/01 and immediately recessed it until 4/5/01 to allow for the receipt of the census data. The special session met periodically in 2001 to act on redistricting matters.   |
| Mar. 8, 2001           | Feb./Mar. 2011       | In 2001, Virginia received the census redistricting data on March 8 and used the month of March to develop redistricting plans.<br>In 2011, Virginia may receive the redistricting data early in February.  |
| Apr. 3, 2001           |                      | The House Committee on Privileges and Elections adopted a committee resolution setting out the criteria to be followed for redrawing the House districts. The Senate Committee on Privileges and Elections adopted a committee resolution setting out identical criteria to be followed for redrawing the Senate districts. See the box on page 5 for the text of the resolutions.<br>SB 1, a Senate redistricting plan, was introduced 4/3/01. |
| Apr. 5, 2001           |                      | The 2001 special redistricting session met 4/5/01. HB 1, a House of Delegate redistricting plan, was introduced 4/5/01.   |
| Apr. 18, 2001          |                      | The General Assembly passed both HB 1 and SB 1.   |
| Apr. 21, 2001          |                      | The Governor signed both bills without offering any amendments.   |
| May 2, 2001            |                      | The Attorney General's Office submitted HB 1 to the Department of Justice for preclearance under § 5 of the Voting Rights Act.  |
| May 11, 2001           |                      | The Attorney General's Office submitted SB 1 to the Department of Justice for preclearance under § 5 of the Voting Rights Act.  |
| June 15, 2001          |                      | Date of letter from Department of Justice stating there is no objection to HB 1 -- 44 days after submission.  |
| June 27, 2001          |                      | HB 18, a congressional redistricting plan, was introduced 6/27/01.  |
| July 9, 2001           |                      | Date of letter from Department of Justice stating there is no objection to SB 1 -- 59 days after submission.  |
| July 10, 2001          |                      | The General Assembly passed HB 18.  |
| July 19, 2001          |                      | The Governor signed HB 18 without offering any amendments.  |

|               |  |   |
|---------------|--|---|
| Aug. 17, 2001 |  | The Attorney General's Office submitted HB 18 to the Department of Justice for preclearance under § 5 of the Voting Rights Act. |
| Aug. 21, 2001 |  | Delayed primary date.   |
| Oct. 16, 2001 |  | Date of letter from Department of Justice stating there is no objection to HB 18 -- 60 days after submission.                   |
| Nov. 6, 2001  |  | General election for House of Delegates, Governor, Lieutenant Governor, and Attorney General.                                   |
| Nov. 5, 2002  |  | General election for U.S. House and Senate.   |
| Nov. 4, 2003  |  | General election for House of Delegate and Senate of Virginia.  |

**ADOPTED**

April 3, 2001

**HOUSE COMMITTEE ON PRIVILEGES AND ELECTIONS**

**COMMITTEE RESOLUTION NO. 1**

**SENATE COMMITTEE ON PRIVILEGES AND ELECTIONS**

**COMMITTEE RESOLUTION NO. 1<sup>1</sup>**

**RESOLVED**, That after consideration of legal requirements and public policy objectives, informed by public comment, the House Committee on Privileges and Elections adopts the following criteria for the redrawing of Virginia's House of Delegates districts:

**I. Population Equality**

The population of legislative districts shall be determined solely according to the enumeration established by the 2000 federal census. The population of each district shall be as nearly equal to the population of every other district as practicable. Population deviations in House of Delegates districts should be within plus-or-minus two percent.

**II. Voting Rights Act**

Districts shall be drawn in accordance with the laws of the United States and the Commonwealth of Virginia including compliance with protections against the unwarranted retrogression or dilution of racial or ethnic minority voting strength. Nothing in these guidelines shall be construed to require or permit any districting policy or action that is contrary to the United States Constitution or the Voting Rights Act of 1965.

**III. Contiguity and Compactness**

Districts shall be comprised of contiguous territory including adjoining insular territory. Contiguity by water is sufficient. Districts shall be contiguous and compact in accordance with the Constitution of Virginia as interpreted by the Virginia Supreme Court in the recent case of *Jamerson v. Womack*, 244 Va. 506 (1992).

**IV. Single-Member Districts**

All districts shall be single-member districts.

**V. Communities of Interest**

Districts shall be based on legislative consideration of the varied factors that can create or contribute to communities of interest. These factors may include, among others, economic factors, social factors, cultural factors, geographic features, governmental jurisdictions and service delivery areas, political beliefs, voting trends, and incumbency considerations. Public comment has been invited, has been and continues to be received, and will be considered. It is inevitable that some interests will be advanced more than others by the choice of particular district configurations. The discernment, weighing, and balancing of the varied factors that contribute to communities of interest is an intensely political process best carried out by elected representatives of the people. Local government jurisdiction and precinct lines may reflect communities of interest to be balanced, but they are entitled to no greater weight as a matter of state policy than other identifiable communities of interest.

**VI. Priority**

All of the foregoing criteria shall be considered in the districting process, but population equality among districts and compliance with federal and state constitutional requirements and the Voting Rights Act of 1965 shall be given priority in the event of conflict among the criteria. Where the application of any of the foregoing criteria may cause a violation of applicable federal or state law, there may be such deviation from the criteria as is necessary, but no more than is necessary, to avoid such violation.

<sup>1</sup>The Senate Committee's resolution is identical except for its references to the Senate Committee and Senate districts.

## *II. Shifts in Population and District Estimates*

As of July 1, 2009, Virginia's population was estimated by the Census Bureau to be 7,882,590 compared to its April 1, 2000, population of 7,079,030. The growth rate in Virginia is 11.4 percent compared to 9.1 percent for the United States.<sup>9</sup>

As the tables<sup>10</sup> on the next page show, growth is not uniform across the Commonwealth, and these shifts in population trigger the need to redistrict.

These estimates and projections give numbers for the state and its counties and cities but not for the precincts and census blocks that serve as the building blocks

used in redistricting. That detailed information will be provided by the Census Bureau and is described in the next part.

The major trend in Virginia has been the move to metropolitan areas, which accounts for 93.5 percent of the population growth since 2000. As noted by the University of Virginia and Weldon Cooper Center, by July 2009, more than 85.7 percent of Virginia's population lived in a metropolitan area. Rural and small-town Virginia population has been shrinking.<sup>11</sup>

Estimates of the 2009 populations for House, Senate, and congressional districts are now available and shown in the tables on pages 8-13. These estimates reflect an estimated state total population of 7,891,065.<sup>12</sup>

**Table 2**  
**Fastest-Growing Localities Since  
 2000**

|                       |       |
|-----------------------|-------|
| Loudoun County        | 75.8% |
| King George County    | 42.2  |
| Culpeper County       | 39.9  |
| Prince William County | 37.8  |
| Manassas Park City    | 36.3  |
| Stafford County       | 36.2  |
| Spotsylvania County   | 34.8  |
| Fluvanna County       | 32.9  |
| New Kent County       | 32.6  |
| James City County     | 32.4  |

**Table 3**  
**Largest Numerical Increases  
 Since 2000**

|                       |         |
|-----------------------|---------|
| Loudoun County        | 128,514 |
| Prince William County | 106,121 |
| Fairfax County        | 66,724  |
| Chesterfield County   | 47,691  |
| Henrico County        | 34,190  |
| Stafford County       | 33,446  |
| Spotsylvania County   | 31,414  |
| Arlington County      | 22,585  |
| Chesapeake City       | 20,776  |
| Suffolk City          | 19,329  |

**Table 4**  
**Localities Losing Population  
 Since 2000**

| Counties    | Cities       |
|-------------|--------------|
| Alleghany   | Bedford      |
| Bath        | Covington    |
| Brunswick   | Danville     |
| Buchanan    | Galax        |
| Grayson     | Hampton      |
| Halifax     | Martinsville |
| Henry       | Petersburg   |
| Highland    | Portsmouth   |
| Mecklenburg | Radford      |
| Pulaski     | Roanoke      |
| Smyth       | Staunton     |
| Sussex      |              |
| Tazewell    |              |
| Wise        |              |

**Table 5: Senate Districts  
Estimated 2009 Population—Ideal District 197,277**

| <b>Senate District</b> | <b>Estimated Total Population</b> | <b>% Deviation from estimated ideal</b> | <b>Number difference from estimated ideal</b> |
|------------------------|-----------------------------------|---|---|
| 1                      | 179,757                           | -8.9%                                   | -17,520                                       |
| 2                      | 179517                            | -9.0%                                   | -17,760                                       |
| 3                      | 209370                            | 6.1%                                    | 12,093  |
| 4                      | 210883                            | 6.9%                                    | 13,606  |
| 5                      | 177154                            | -10.2%                                  | -20,123                                       |
| 6                      | 178431                            | -9.6%                                   | -18,846                                       |
| 7                      | 176339                            | -10.6%                                  | -20,938                                       |
| 8                      | 176601                            | -10.5%                                  | -20,676                                       |
| 9                      | 193421                            | -2.0%                                   | -3,856  |
| 10                     | 199222                            | 1.0%                                    | 1,945   |
| 11                     | 205543                            | 4.2%                                    | 8,266   |
| 12                     | 202085                            | 2.4%                                    | 4,808   |
| 13                     | 198223                            | 0.5%                                    | 946   |
| 14                     | 199150                            | 0.9%                                    | 1,873   |
| 15                     | 191285                            | -3.0%                                   | -5,992  |
| 16                     | 182369                            | -7.6%                                   | -14,908                                       |
| 17                     | 235401                            | 19.3%                                   | 38,124  |
| 18                     | 179761                            | -8.9%                                   | -17,516                                       |
| 19                     | 183937                            | -6.8%                                   | -13,340                                       |
| 20                     | 179842                            | -8.8%                                   | -17,435                                       |
| 21                     | 182202                            | -7.6%                                   | -15,075                                       |
| 22                     | 192082                            | -2.6%                                   | -5,195  |
| 23                     | 197705                            | 0.2%                                    | 428   |
| 24                     | 198832                            | 0.8%                                    | 1,555   |
| 25                     | 187704                            | -4.9%                                   | -9,573  |
| 26                     | 198134                            | 0.4%                                    | 857   |
| 27                     | 224264                            | 13.7%                                   | 26,987  |
| 28                     | 226324                            | 14.7%                                   | 29,047  |
| 29                     | 255835                            | 29.7%                                   | 58,558  |

**Table 5 (con't): Senate Districts  
Estimated 2009 Population—Ideal District 197,277**

| Senate District | Estimated Total Population | % Deviation from estimated ideal | Number difference from estimated ideal |
|-----------------|----------------------------|----------------------------------|--|
| 30              | 196588                     | -0.3%                            | -689                                   |
| 31              | 188293                     | -4.6%                            | -8,984                                 |
| 32              | 184926                     | -6.3%                            | -12,351                                |
| 33              | 302342                     | 53.3%                            | 105,065                                |
| 34              | 181280                     | -8.1%                            | -15,997                                |
| 35              | 185573                     | -5.9%                            | -11,704                                |
| 36              | 206969                     | 4.9%                             | 9,692                                  |
| 37              | 192102                     | -2.6%                            | -5,175                                 |
| 38              | 177301                     | -10.1%                           | -19,976                                |
| 39              | 191494                     | -2.9%                            | -5,783                                 |
| 40              | 182824                     | -7.3%                            | -14,453                                |

**Table 6: Congressional Districts  
Estimated 2009 Population—Ideal District 717,370**

| Congressional District | Estimated Total Population | % Deviation from estimated ideal | Number difference from estimated ideal |
|------------------------|----------------------------|----------------------------------|--|
| 1                      | 783,510                    | 9.2%                             | 66,140                                 |
| 2                      | 660156                     | -8.0%                            | -57,214                                |
| 3                      | 656855                     | -8.4%                            | -60,515                                |
| 4                      | 738057                     | 2.9%                             | 20,687                                 |
| 5                      | 678488                     | -5.4%                            | -38,882                                |
| 6                      | 693927                     | -3.3%                            | -23,443                                |
| 7                      | 753866                     | 5.1%                             | 36,496                                 |
| 8                      | 684340                     | -4.6%                            | -33,030                                |
| 9                      | 649926                     | -9.4%                            | -67,444                                |
| 10                     | 850337                     | 18.5%                            | 132,967                                |
| 11                     | 741603                     | 3.4%                             | 24,233                                 |

**Table 7: House of Delegates Districts  
Estimated 2009 Population—Ideal District 78,911**

| <b>House District</b> | <b>Estimated Total Population</b> | <b>% Deviation from estimated ideal</b> | <b>Number difference from estimated ideal</b> |
|-----------------------|-----------------------------------|---|---|
| 1                     | 72,396                            | -8.3%                                   | -6,515  |
| 2                     | 69,064                            | -12.5%                                  | -9,847  |
| 3                     | 66,560                            | -15.7%                                  | -12,351                                       |
| 4                     | 72,606                            | -8.0%                                   | -6,305  |
| 5                     | 69,884                            | -11.4%                                  | -9,027  |
| 6                     | 72,664                            | -7.9%                                   | -6,247  |
| 7                     | 75,574                            | -4.2%                                   | -3,337  |
| 8                     | 73,651                            | -6.7%                                   | -5,260  |
| 9                     | 78,538                            | -0.5%                                   | -373  |
| 10                    | 71,143                            | -9.8%                                   | -7,768  |
| 11                    | 69,650                            | -11.7%                                  | -9,261  |
| 12                    | 68,780                            | -12.8%                                  | -10,131                                       |
| 13                    | 146,923                           | 86.2%                                   | 68,012  |
| 14                    | 67,193                            | -14.8%                                  | -11,718                                       |
| 15                    | 78,740                            | -0.2%                                   | -171  |
| 16                    | 69,497                            | -11.9%                                  | -9,414  |
| 17                    | 74,608                            | -5.5%                                   | -4,303  |
| 18                    | 85,112                            | 7.9%                                    | 6,201   |
| 19                    | 79,107                            | 0.2%                                    | 196   |
| 20                    | 75,491                            | -4.3%                                   | -3,420  |
| 21                    | 75,216                            | -4.7%                                   | -3,695  |
| 22                    | 75,690                            | -4.1%                                   | -3,221  |
| 23                    | 77,373                            | -1.9%                                   | -1,538  |
| 24                    | 73,251                            | -7.2%                                   | -5,660  |
| 25                    | 82,280                            | 4.3%                                    | 3,369   |
| 26                    | 79,543                            | 0.8%                                    | 632   |
| 27                    | 85,286                            | 8.1%                                    | 6,375   |
| 28                    | 92,557                            | 17.3%                                   | 13,646  |
| 29                    | 86,053                            | 9.1%                                    | 7,142   |
| 30                    | 92,381                            | 17.1%                                   | 13,470  |

**Table 7 (con't): House of Delegates Districts  
Estimated 2009 Population—Ideal District 78,911**

| House District | Estimated Total Population | % Deviation from estimated ideal | Number difference from estimated ideal |
|----------------|----------------------------|----------------------------------|--|
| 31             | 87545                      | 10.9%                            | 8,634                                  |
| 32             | 126811                     | 60.7%                            | 47,900                                 |
| 33             | 112063                     | 42.0%                            | 33,152                                 |
| 34             | 71702                      | -9.1%                            | -7,209                                 |
| 35             | 78086                      | -1.0%                            | -825                                   |
| 36             | 73573                      | -6.8%                            | -5,338                                 |
| 37             | 73073                      | -7.4%                            | -5,838                                 |
| 38             | 73844                      | -6.4%                            | -5,067                                 |
| 39             | 75421                      | -4.4%                            | -3,490                                 |
| 40             | 77551                      | -1.7%                            | -1,360                                 |
| 41             | 70393                      | -10.8%                           | -8,518                                 |
| 42             | 75228                      | -4.7%                            | -3,683                                 |
| 43             | 73892                      | -6.4%                            | -5,019                                 |
| 44             | 73977                      | -6.3%                            | -4,934                                 |
| 45             | 76632                      | -2.9%                            | -2,279                                 |
| 46             | 75938                      | -3.8%                            | -2,973                                 |
| 47             | 74408                      | -5.7%                            | -4,503                                 |
| 48             | 80077                      | 1.5%                             | 1,166                                  |
| 49             | 77640                      | -1.6%                            | -1,271                                 |
| 50             | 80381                      | 1.9%                             | 1,470                                  |
| 51             | 76327                      | -3.3%                            | -2,584                                 |
| 52             | 95774                      | 21.4%                            | 16,863                                 |
| 53             | 76138                      | -3.5%                            | -2,773                                 |
| 54             | 100587                     | 27.5%                            | 21,676                                 |
| 55             | 82154                      | 4.1%                             | 3,243                                  |
| 56             | 91895                      | 16.5%                            | 12,984                                 |
| 57             | 74282                      | -5.9%                            | -4,629                                 |
| 58             | 83780                      | 6.2%                             | 4,869                                  |
| 59             | 78709                      | -0.3%                            | -202                                   |
| 60             | 71092                      | -9.9%                            | -7,819                                 |

**Table 7 (con't): House of Delegates Districts  
Estimated 2009 Population—Ideal District 78,911**

| House District | Estimated Total Population | % Deviation from estimated ideal | Number difference from estimated ideal |
|----------------|----------------------------|----------------------------------|--|
| 61             | 72617                      | -8.0%                            | -6,294                                 |
| 62             | 78470                      | -0.6%                            | -441                                   |
| 63             | 71245                      | -9.7%                            | -7,666                                 |
| 64             | 85333                      | 8.1%                             | 6,422                                  |
| 65             | 88909                      | 12.7%                            | 9,998                                  |
| 66             | 86219                      | 9.3%                             | 7,308                                  |
| 67             | 86050                      | 9.0%                             | 7,139                                  |
| 68             | 74062                      | -6.1%                            | -4,849                                 |
| 69             | 69453                      | -12.0%                           | -9,458                                 |
| 70             | 75844                      | -3.9%                            | -3,067                                 |
| 71             | 71535                      | -9.3%                            | -7,376                                 |
| 72             | 79705                      | 1.0%                             | 794                                    |
| 73             | 73836                      | -6.4%                            | -5,075                                 |
| 74             | 77018                      | -2.4%                            | -1,893                                 |
| 75             | 71502                      | -9.4%                            | -7,409                                 |
| 76             | 90832                      | 15.1%                            | 11,921                                 |
| 77             | 76768                      | -2.7%                            | -2,143                                 |
| 78             | 82293                      | 4.3%                             | 3,382                                  |
| 79             | 77204                      | -2.2%                            | -1,707                                 |
| 80             | 70689                      | -10.4%                           | -8,222                                 |
| 81             | 75976                      | -3.7%                            | -2,935                                 |
| 82             | 71030                      | -10.0%                           | -7,881                                 |
| 83             | 72161                      | -8.6%                            | -6,750                                 |
| 84             | 77980                      | -1.2%                            | -931                                   |
| 85             | 73427                      | -6.9%                            | -5,484                                 |
| 86             | 86876                      | 10.1%                            | 7,965                                  |
| 87             | 72133                      | -8.6%                            | -6,778                                 |
| 88             | 92261                      | 16.9%                            | 13,350                                 |
| 89             | 71329                      | -9.6%                            | -7,582                                 |
| 90             | 72020                      | -8.7%                            | -6,891                                 |

**Table 7 (con't): House of Delegates Districts  
Estimated 2009 Population—Ideal District 78,911**

| House District | Estimated Total Population | % Deviation from estimated ideal | Number difference from estimated ideal |
|----------------|----------------------------|----------------------------------|--|
| 91             | 73543                      | -6.8%                            | -5,368                                 |
| 92             | 71035                      | -10.0%                           | -7,876                                 |
| 93             | 73713                      | -6.6%                            | -5,198                                 |
| 94             | 70151                      | -11.1%                           | -8,760                                 |
| 95             | 69224                      | -12.3%                           | -9,687                                 |
| 96             | 87165                      | 10.5%                            | 8,254                                  |
| 97             | 87471                      | 10.8%                            | 8,560                                  |
| 98             | 78097                      | -1.0%                            | -814                                   |
| 99             | 82966                      | 5.1%                             | 4,055                                  |
| 100            | 77139                      | -2.2%                            | -1,772                                 |

### *III. The 2010 Census*

#### A. Background

April 1, 2010, was the official census day for the twenty-third decennial census or count of the United States' population. The Census Bureau, a part of the United States Department of Commerce, conducts the census and has been working during 2010 to compile the reports it will issue on the country's April 1, 2010, population.

By December 31, 2010, the Census Bureau will issue its first report to the President of the United States—the official population for each of the 50 states for the purpose of apportioning seats in the House of Representatives. In January 2011, states will be informed officially of the number of congressional seats assigned to each state. Experts predict that Virginia will continue to have 11 congressional seats.

The United States Supreme Court ruled in 1999 that the federal Census Act (13 U.S.C. § 1 *et seq.*) prohibits the use of sta-

tistically adjusted numbers to apportion the congressional seats among the states.<sup>13</sup> The numbers released December 31, 2010, will be total state population numbers without any breakdown to the locality, precinct, or census block levels.<sup>14</sup>

#### B. Redistricting Data—Maps and Population Counts

The first detailed report produced by the Census Bureau (Bureau) will be the information needed by the states and localities to redraw the boundaries of congressional, state legislative, and local election districts. Under current federal law, the Bureau must report this redistricting data to the 50 states by April 1, 2011. Congress passed this law in 1975 (Pub. L. 94-171) so that the states would be able to redistrict as promptly as possible after the decennial census. The Census Bureau has stated that Virginia will have priority for the delivery of the redistricting data because of its tight timetable to redistrict in time for 2011 House of Delegates, Senate, and local elections. Vir-

ginia received the data on February 25, 1981, January 22, 1991, and March 8, 2001, and the Bureau has indicated that it will be early in February 2011 when the 2010 census data is released to Virginia.

There are two basic pieces of information needed to redraw election district lines: maps and population data. The Census Bureau will provide both items. A major development for the 2000 census was the use of the Internet to distribute both maps and data, and data will be released on the Internet in 2011.

**Maps.** The Census Bureau has created a digital database it calls MAF/TIGER<sup>15</sup> that supports mapping functions. It does not contain statistical reports. The MAF/TIGER files are an updated version of the map files used in redistricting in 1991 and 2001. The Bureau has been editing and updating these files continuously.

The Bureau has reported that the 2010 MAF/TIGER files will be available on the Internet in the form of shapefiles in the last quarter of 2010. These files will contain the numbered census blocks to match the numbered census blocks for which population numbers are given. These maps are expected to be the most detailed ever. Census maps for 2000 showed approximately 210,000 blocks. At least as many blocks are expected for 2010.

These files contain a digital database of geographic features for the entire United States—features such as streets, highways, railroads, rivers, political boundaries, census statistical boundaries, and more. The database contains information about these features such as their location in latitude and longitude, the name, the type of feature, address ranges for most streets, the geographic relationship to other features, and other related information.

These files are not graphic images of maps. They contain shapefiles. To use these data, a user must have mapping or Geographic Information System (GIS) software that can import the files. The General Assembly will be using such a GIS system for redistricting in 2011 based on standard GIS technology and a redistricting application.

**Geographic units.** There are a number of geographic units that will be shown on the census maps:

- Counties and cities.
- VTDs or voting districts—these are the precincts as they were frozen on February 1, 2009. Each precinct will be coded with a six-digit number representing the census locality code and the State Board of Elections precinct code. For example, Accomack County's Chincoteague Precinct will be coded as 001101. The code for Accomack County is 001 and the Chincoteague Precinct is number 101.<sup>16</sup>
- Minor civil divisions—these will be county magisterial or election districts.
- Census tracts—these are census statistical areas averaging about 4,000 people. The tracts tend to remain the same from one census to the next.
- Census block groups—these are sets of census blocks within a tract and identified by the same first digit.
- Census blocks—these are the smallest census geographic areas. A block may be as small as one city block defined by four streets or as large as several square miles in rural areas. The average population for a block nationwide is 100 people.
- State legislative and congressional districts.

**Data for each geographic unit.** The Census Bureau will publish population statistics for each geographic unit described above down to the level of each census block. The Census 2010 Redistricting Data Summary File will provide the population counts down to the block level and are expected to be available on the Internet and on DVD in February 2011.

**Total population and voting age population.** The Bureau reports the total and voting age population numbers for each racial category listed below and for persons of Hispanic/Non-Hispanic origin.

**Racial categories and multirace responses.** Detailed information will be provided in the 2010 census on multiple racial categories as was true in 2001. There are six broad race categories. Census responders can check any or all with the result that there are 63 race fields in the Pub. L. 94-171 data to cover every possible combination. These 63 fields are doubled once to show total and voting age populations and doubled again to show the non-Hispanic or Latino fields -- a total of 252 possible fields. The inclusion of detailed racial data reflects concerns of persons wishing to report multi-racial heritage and efforts to comply with the requirements of the Voting Rights Act. In the 2000 census, 6.8 million persons responded they were of two or more races and 93 percent of those persons reported only two races.<sup>17</sup>

In developing redistricting plans and reports, it will be necessary to aggregate and allocate these multirace numbers to a manageable number. The Statistical Policy Office of the OMB issued Bulletin 00-02 on March 9, 2000. One approach suggested by the OMB Bulletin would be to consolidate the information as follows:

- Report each of the six single race categories: African-American or Black, American Indian and Alaska Native, Asian, Native Hawaiian and Other Pacific Islander, White, and other race.
- Allocate any combination of white and one other race category to the minority race category.
- If any combination of minority race categories is greater than one percent of the population, allocate that number to the most populous minority race category in the combination.

- Report one number for the balance of multiple minority race categories.

The addition of these four categories will equal 100 percent of the total population. This approach reduces the 63 items of racial data to a more manageable 12 plus items. The Department of Justice also issued guidance on this issue in 2001 that in most instances it will analyze only eight categories of race data.<sup>18</sup>

#### C. Residence and Special Categories

Questions always arise about who should be counted and where they should be assigned. Citizens living and working overseas fall in two categories. First, U.S. military and federal government civilian employees and their dependents are counted at their "state of record" and are added to their state's total population for apportioning congressional seats, but not assigned to specific localities or blocks within that state. Second, civilian citizens living overseas are not counted.

The census assigns persons to their "usual" residence on April 1, 2010, where they live and sleep most of the time. A person in a hospital for a limited stay is counted at his home, but a person living in a nursing home is counted at the nursing home.

Military personnel living in a barracks are counted at the barracks but military personnel living off base are counted at their off-base home. Military personnel assigned to a vessel are counted at their onshore residence if they sleep and live there most of the time but may be counted at the vessel's homeport if they are deployed at sea.

Students in college living away from home are most typically counted at their place of residence at the school.

Persons in prisons or other correctional facilities are counted at the facility.

The Census Bureau has stated that it will release data on group quarters in May 2011 -- earlier than in the past.<sup>19</sup> However, this information will arrive relatively late in the Virginia redistricting process. States are reviewing their options for considering the group quarters data.<sup>20</sup> Virginia has enacted legislation that allows a locality to exclude from the population used in local redistricting the population of a state adult correctional facility if that population exceeds 12 percent of the locality's decennial census population.<sup>21</sup>

***Public Hearing Schedule announced by Senator Janet D. Howell, Chair, for the Redistricting Subcommittee of the Senate Committee on Privileges and Elections***

Schedule of Redistricting Public Hearings

Wednesday, **October 27th** - 7 p.m., Natural Science Center, Virginia Western Community College (Roanoke)

Thursday, **November 4th** - 7 p.m., Herndon Town Council Chambers (Herndon)

Thursday, **December 2nd** - 7 p.m., The Forum, Building A, Tidewater Community College (Portsmouth)

Friday, **December 17th** - 11 a.m., Senate Room B, General Assembly Building (Richmond)

***Public Hearing Schedule announced by Delegate Mark L. Cole, Chairman, for the Redistricting Subcommittee of the House Committee on Privileges and Elections***

Schedule of Redistricting Public Hearings

Wednesday, **September 8th** - 7 pm, Natural Science Center, Virginia Western Community College (Roanoke)

Wednesday, **September 22nd** - 7 pm, Roper Performing Arts Center, Tidewater Community College (Norfolk)

Tuesday, **October 5th** - 7 pm, Mason Hall, George Mason University (Fairfax)

Monday, **October 18th** - 7 pm, Regional Center for Advanced Technology and Training, Danville Community College (Danville)

Monday, **December 6th** - 7 pm, University Hall, University of Mary Washington (Stafford Campus)

Friday, **December 17th** - 10 am, 9th Floor Appropriations Room, General Assembly Building (time approximate, after Governor's remarks to the money committees) (Richmond)

See Subcommittee information and news release on the LIS meeting website: <http://leg1.state.va.us/cgi-bin/legp504.exe?111+oth+MTG>

## **IV. Legal Issues**

### A. Equal Population

**Ideal districts and deviations from the ideal.** The "one person/one vote" standard determines whether population shifts will require changes in existing districts. The legal standards governing permissible population deviations have remained relatively constant during the past two decades.

The starting point for measuring the inequality among districts is the ideal district, the total state population divided by the number of districts. Using the estimated 2009 state population of 7,891,065, the ideal district size would be:

Congressional (11 districts) 717,370

State Senate (40 districts) 197,277

House of Delegates (100 districts) 78,911

The way to measure how far a plan departs from the ideal involves looking at each individual district and at the overall plan. An individual **district deviation** can be stated as an absolute number or a percentage. Usually the inequality or deviation is expressed in percentage terms. For example, assume a 78,911 ideal House district size, a district with 80,000 population would have 1,089 too many people or a +1.38% district deviation (the difference between the actual district and the ideal district populations divided by the ideal district population.)

The deviation for an overall plan is most often expressed either:

(i) in terms of the **deviation range**—the range from the largest plus (+) deviation to the largest minus (-) deviation—a +5% to -5% deviation range; or

(ii) in terms of the **total or overall deviation**—the sum of the largest plus (+) deviation and the largest minus (-) deviation, ignoring the plus and minus signs—a 10% total or overall deviation.

Other measures of deviations in a plan are designed to show how many districts are clustered near the ideal district size, such as the mean or average district deviations.

**Congressional districts—strict equality.** Congressional districts must be drawn with virtually equal populations. In a series of cases, the Supreme Court has interpreted Article I, Section 2 of the United States Constitution as prohibiting inequalities among the congressional districts within a state, and it has applied a strict standard of equality through the past three decades.

In *Karcher v. Daggett*,<sup>22</sup> the Supreme Court held in 1983 that no matter how small the deviations among the districts in a congressional plan, the plan could be challenged if any other plan had smaller deviations and the state could not show a rational justification for the deviation. The Court overturned a New Jersey congressional plan with an overall deviation range of .6984% after plaintiffs showed a plan had been filed with an overall deviation range of .4514%. The Court rejected the defendants' justification for the deviations on the ground that it was not uniformly applied statewide.

In *Abrams v. Johnson*,<sup>23</sup> the Supreme Court upheld a federal district court drawn plan for Georgia's congressional districts with an overall range of 0.35% and an average deviation of 0.11%. In its five-to-four decision, the Supreme Court allowed the deviation despite appellant's objections. The Court noted that the difference between the district court's 0.11% average deviation and the proffered comparison plan's 0.04%

deviation equaled only 328 people and that six years of population changes had occurred since the census.

During the 1990s, more than half of the congressional plans drawn by the states had an overall deviation that rounded to 0.00%. After the 2000 census, 33 states including Virginia drew plans with an overall deviation that rounded to 0.00% and 16 states had plans with a deviation of only one person.<sup>24</sup>

**State legislative districts—the 10% standard.** A less stringent standard applies to state legislative districts. In its interpretation of the requirements of the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court has required states to draw legislative districts that are substantially equal in population.

Speaking for a unanimous Court in 1993, Justice O'Connor confirmed that a less than 10% total deviation in a state legislative plan is presumptively acceptable and quoted from a past opinion that:

[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. Our decisions have established as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a *prima facie* case of discrimination and therefore must be justified by the State.<sup>25</sup>

However, case law suggests that state legislatures should draw state legislative district plans with the goal of substantial population equality among districts and a less than +5% to -5% deviation range. Two cases after 2000 saw plans with an overall deviation of less than 10 percent struck down when alternative plans with lesser deviations were available.<sup>26</sup> There is no guarantee that a state legislative district plan with a less than 10% overall deviation can withstand challenges by a plaintiff with a plan that has a lesser deviation and that satisfies other legitimate redistricting criteria such as compactness. The criteria adopted by the Committees on Privileges and Elections in 2001 set a +2% to -2% deviation range. The plans adopted in 2001 met this standard.

Looking at the estimated 2009 population numbers shown in the charts on pages 8-13, the number of persons reflected in a +2% to -2% deviation range (i) for an ideal House of Delegates district of 78,911 is +1,596 to -1,596 and (ii) for an ideal Senate district of 197,277 is +3,958 to -3,958.

#### B. Compactness and Contiguity

Article II, Section 6, of the Virginia Constitution provides that election districts "shall be composed of contiguous and compact territory." In 1992, the Virginia Supreme Court reviewed the "contiguous and compact territory" requirement in a challenge to two Senate districts created by the 1991 General Assembly.

In a five-to-two decision, the Court upheld the districts and ruled that the compactness requirement applies only to the shape of a district and not to the content of the district. The Court advised that combining different communities of interest (such as urban and rural communities) in a district was a policy matter and not a factor

to be weighed in applying compactness requirements. The Court gave "proper deference to the wide discretion accorded the General Assembly in its value judgment of the relative degree of compactness required when reconciling the multiple concerns of apportionment."<sup>27</sup>

The Court referred to the resolution setting out criteria to be applied in redistricting that the Senate Committee on Privileges and Elections had adopted in 1991. With respect to compactness, that resolution stated: "Districts shall be reasonably compact. Irregular district shapes may be justified because the district line follows a political subdivision boundary or significant geographic feature."

Compactness is a well-recognized traditional redistricting criterion. Bizarrely shaped districts may flag a problem. Justice Stevens noted that "Drastic departures from compactness are a signal that something may be amiss."<sup>28</sup> There are several statistical methods to measure the comparative compactness of districts. These measures may produce different results and are offered by expert witnesses in litigation. The courts have not agreed on one single measure of compactness and have often relied on the appearance of a district—a visual or "eyeball" evaluation.<sup>29</sup>

The contiguity requirement means that a district must be composed of one geographic area and not two or more separate pieces. The lower court in the *Jamerson* case ruled that an intervening body of water or wetlands will not defeat contiguity. Buggs Island Lake connected two parts of Senate District 18.<sup>30</sup>

### C. Compliance with the Voting Rights Act—§ 2

**Section 2.** All states are subject to § 2 of the Voting Rights Act as amended in 1982.<sup>31</sup> Section 2 prohibits any state from imposing a voting qualification or procedure that results in the denial or abridgment of the right to vote on account of race, color or status as a member of a language minority group. The plaintiff in a § 2 case may establish a violation of § 2:

. if based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected] class of citizens . . . 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.

Minority group members filing a § 2 challenge do not need to prove an intent to discriminate. The legal standard under § 2 to prove a violation is based on a "results" test. The court determines, based on the "totality of the circumstances," whether the plaintiffs have an equal opportunity "to participate in the political process and to elect representatives of their choice."

***Thornburg v. Gingles.*** In 1986, the Supreme Court upheld the 1982 amendments to § 2 and the "results" test.<sup>32</sup> The Court's opinion stressed the fact-intensive nature of a § 2 case. *Gingles* spelled out three "preconditions" to a § 2 claim:

... the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.

... the minority group must be able to show that it is politically cohesive . . . [that it has] . . . distinctive minority group interests.

. . . the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed . . . usually to defeat the minority's preferred candidate.<sup>33</sup>

The Court upheld the lower court's ruling that the multimember districts being challenged violated § 2 with the exception of one district in which black candidates had been elected in proportion to their population during several past elections.

Once a plaintiff meets the three *Gingles*' preconditions, the court will still examine other facts and the "totality of the circumstances." Other facts reviewed by the courts include:

- Election successes by minority candidates and minority-preferred candidates.
- Racially polarized voting patterns.
- The use of potentially dilutive mechanisms such as at-large districts or staggered terms.
- Racial appeals in campaigns.
- Candidate selection procedures.
- A past history of official discrimination.
- Continuing adverse effects on minority groups of past discrimination.
- Responsiveness of elected officials to minority concerns.
- The policies justifying the challenged law or practice.

**Majority-minority districts; influence districts.** The cases do not specify an exact percentage required to constitute a majority-minority district as required in a *Gingles*' analysis. The courts conduct a fact-specific inquiry and weigh the facts concerning total population, voting age population, and other factors. No single percentage can be said to be the number needed to create a majority-minority district.

A district with a minority population of less than a 50 percent may be an "influence" district in which the minority can impact the outcome of an election. The Supreme Court in 2006 ruled in one case that preservation or creation of an influence district does not trigger § 2 protections.<sup>34</sup>

**Summary.** Redistricting plans that are precleared under § 5 can still be challenged under § 2 of the Voting Rights Act. Plaintiffs in § 2 cases have the burden to prove the violation. The trial involves a fact-intensive inquiry. This litigation can be costly and complex.

#### D. Compliance with the Voting Rights Act—§ 5

**Section 5 preclearance.** This provision of the Voting Rights Act<sup>35</sup> covers only certain jurisdictions that have been determined to have a history of past discriminatory practices. Virginia and all of its political subdivisions are covered by § 5 with the exception of a number of localities that have "bailed out" of § 5 coverage.<sup>36</sup>

Under § 5, Virginia cannot implement any redistricting plan or other change in voting laws and practices until the plan or change is "precleared."

The State must submit the change to the Department of Justice (or alternatively to the District Court for the District of

Columbia) and obtain a ruling that the plan meets § 5 standards. In most instances, a covered jurisdiction files its submission with the Department of Justice, rather than filing suit with the district court, to save time and money. If the Department of Justice denies preclearance, the jurisdiction may still file suit for a declaratory judgment and seek preclearance in the district court.

**Preclearance standard—retrogression.** The legal standard to show compliance with § 5 is proof that the plan or change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."

With respect to the "effect" of a change, the Supreme Court has enunciated a "non-retrogression" standard. In *Beer v. United States*, the Court upheld preclearance of a redistricting plan for New Orleans that increased from one to two the number of African-American majority districts. The Department of Justice had denied preclearance and the District of Columbia District Court subsequently precleared the plan. The Supreme Court stated that ". . . the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."<sup>37</sup>

In *City of Lockhart v. United States*, the Court broadened the retrogression standard to cover a plan that did not offer any improvement in minority voting strength. The Supreme Court held: "Since the new plan did not increase the degree of discrimination against blacks, it was entitled to § 5 preclearance. . . . Although there may have been no improvement in [minority] voting strength, there has been no retrogression either."<sup>38</sup>

During the 1991 round of redistricting, the Department of Justice (Department) refused to preclear a number of plans, citing the possible violation of § 2 standards and the possibility of creating additional majority-minority districts. Before 1998, Department regulations provided that a plan must comply with § 2 to gain § 5 preclearance. The Department has repealed that regulation in light of Supreme Court rulings.

In 1997, the Supreme Court held that the Department of Justice had exceeded its § 5 authority by denying preclearance on the grounds of a § 2 violation.<sup>39</sup> Later a closely divided Court held that both the purpose and effect prongs of § 5 were subject to a retrogression test. Justice Scalia wrote for the five-member majority and described the "limited meaning that we have said preclearance has in the vote-dilution context":

It does *not* represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilutive than what it replaces, and therefore cannot be stopped in advance under the extraordinary burden-shifting procedures of § 5, but must be attacked through the normal means of a § 2 action.<sup>40</sup>

**A comparative analysis—the benchmark or baseline to judge retrogression.** The determination whether retrogression has occurred requires a comparative analysis. The new plan must be compared to the existing plan. The state must look at the existing plan and its 2010 census population data. Then it compares that plan to the new plan and its 2010 census population data. There are several comparisons involved:

- Does the new plan have the same number or more majority-minority districts?
- Is the minority percentage in each new district greater or less than the minority percentage in each existing district?
- How has the population shifted among the districts?
- How has the racial population shifted among the districts?
- Does the election history of the state indicate that the percentage needed to create an effective majority-minority district in 2011 may be greater or less than that required in 2001?

The retrogression standard sounds simple, but its application to concrete redistricting plans may present some very hard questions in the coming round of redistricting.

#### *E. Shaw v. Reno—New Law on Race-Based Redistricting*

**Shaw v. Reno.**<sup>41</sup> Prior to 1993, the concept of racial gerrymandering surfaced in cases of discrimination against minority groups. Examples of impermissible racial gerrymandering under the federal constitution or § 2 of the Voting Rights Act included "packing" minority voters into one minority-populated district to prevent them from having an effective voice in more than one district; or "cracking" a concentration of minority voters into several districts to prevent their effective control of one district. Challenges to "packing" and "cracking" will continue to be part of the racial gerrymandering picture but only a part of that picture.

In 1993, the Supreme Court held that plaintiffs could challenge the North Carolina congressional plan as an impermissible racial gerrymander under the Equal Protection Clause of the Fourteenth Amendment. The *Shaw* plaintiffs were residents of the challenged district but did not sue as members of a minority or

protected class. Racial gerrymandering took on a whole new meaning.

In a five-to-four decision, the Court observed that the redistricting plan in question was racially neutral on its face, but so "bizarre" that it was "unexplainable on grounds other than race." The Court explained that "the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling government interest."<sup>42</sup>

In a series of cases since 1993, the Supreme Court has spoken to a number of the questions raised by *Shaw*.

**Standing.** To challenge a race-based redistricting plan, the plaintiff must be a resident of the challenged district or demonstrate a special harm caused to him by the redistricting.

Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action.<sup>43</sup>

**Race may be considered.** The Court has recognized that race may be considered in the redistricting process and that the Voting Rights Act requires consideration of race. In 1993 in *Shaw*, the Court indicated that race-conscious redistricting is not necessarily unconstitutional.

[T]his Court never has held that race-conscious state decision making is impermissible in *all* circumstances. . . . . redistricting differs from other kinds of state decision making in that the legislature always is *aware* of race when it draws district lines, just as it

is aware of . . . a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible discrimination.<sup>44</sup>

**Race cannot predominate.** In a *Shaw* challenge, plaintiffs have the burden to prove race predominated in the legislature's actions.

The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race. The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines."<sup>45</sup>

Examples of evidence used to show that race predominated have included the shape of the district, the configuration of the computer system used to draw plans, statements made by the jurisdiction in preclearance submissions, and testimony of participants in the redistricting process.

**Strict scrutiny and plans narrowly tailored to serve a compelling state interest.** If a plaintiff shows that race predominated in the drawing of a district, the plan will be subject to strict scrutiny and the defendant must show that the plan was narrowly drawn to serve a compelling state interest.

The Supreme Court discussed both the strict scrutiny test and what constitutes a compelling State interest in *Bush v. Vera*.<sup>46</sup> The Court upheld the lower court's decision to invalidate three Texas congressional districts, applied the strict scrutiny standard, and rejected the State's proffered compelling reasons for its actions. Those reasons included compliance with the Voting Rights Act, politics, and incumbency protection.

The record for developing a redistricting plan must show how the jurisdiction balances "traditional redistricting criteria" and the need to comply with the Voting Rights Act.

#### F. Traditional Redistricting Criteria

Post-*Shaw* case law has recognized a number of "traditional redistricting criteria." These racially neutral criteria should be balanced with considerations of racial fairness and Voting Rights Act compliance. The record of the redistricting process should show that real consideration was given to these criteria—to the extent that racial considerations do not predominate the redistricting process. Courts have recognized a number of traditional criteria:

- Population equality.
- Compactness.
- Contiguity.
- Avoidance of splits of political subdivisions and precincts.
- Preservation of communities of interest.
- Preservation of the basic shape of existing districts.
- Protection of incumbents and avoidance of the pairing of incumbents.
- Political fairness or competitiveness.
- Voter convenience and effective administration of elections.

Political issues and competitiveness will be part of the mix in considering traditional redistricting criteria, but challenges based on political gerrymandering are unlikely. The Supreme Court ruled in *Bandmer v. Davis*<sup>47</sup> that political gerrymandering can be challenged in court. However, the Court set a very high burden of proof for plaintiffs to show a substantial long-term negative effect on the plaintiff's political party. No plan has been overturned to date on grounds of political gerrymandering. In *Republican Party of Virginia v. Wilder*,<sup>48</sup> plaintiffs claimed that the pairing of 15 Republican and one independent incumbent members in eight districts constituted impermissible political gerrymandering. The district court refused to enjoin the 1991 House of Delegates election, and plaintiffs did not pursue the case after the 1991 election.

#### G. Balancing Competing Legal Requirements

In 2011 states will want to consider traditional redistricting requirements. Race can be considered in conjunction with traditional criteria, but cannot predominate redistricting deliberations.

Jurisdictions covered by § 5 of the Voting Rights Act will carry the burden to show that the position of minority voters has

not "retrogressed" under the new redistricting plan.

Some factors to bear in mind:

The redistricting process should incorporate consideration of multiple factors.

Traditional criteria such as compactness and respect for local and precinct boundaries and communities of interest should be given substantial weight in drawing and discussing plans, designing reports on the plans, and designing the computer programs used to develop plans. Racial demographics can be considered but only as one aspect of the process.

The submission of a plan for § 5 preclearance should demonstrate the consideration of both traditional redistricting criteria and racial demographics. Submission requirements emphasize racial factors, but submission documentation can be used for more than § 5 preclearance purposes. As part of the redistricting record, the submission may become evidence in post-Shaw litigation. Further details on the regulations, now under review, for submission requirements will be covered in a later issue of *Drawing the Line 2011*.

## Notes

<sup>1</sup>While only 19 members of the 2001 Senate had served in the 1991 redistricting session, 26 present Senate members served in 2001. There has been more turnover in the House where 43 members of the 2001 House had served in the 1991 redistricting session compared to only 33 present House members who served in 2001. Nine members of the present Senate and 12 members of the present House served in the 1991 redistricting session.

<sup>2</sup>In every year since (and in many years before) the 2001 special redistricting session, measures have been introduced to modify the General Assembly's role, to establish either an independent redistricting commission by a constitutional amendment or an advisory redistricting commission by a statute, or to study the redistricting process. All attempts failed. See, for example, in the 2010 Session, SBs 173, 296, and 626; HBs 179, 323, 638, and 835; and HJR 113. Since 2001 more than 40 constitutional amendments were offered to turn redistricting work over to an independent commission; 30 bills were introduced to create an advisory redistricting commission; and over a dozen resolutions were proposed to study the redistricting process.

<sup>3</sup>See, for example, HB 1, 2001 Special Session, Ch. 1, 2001 Special Session Acts of Assembly: <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=012&typ=bil&val=hb1>

<sup>4</sup>Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006).

<sup>5</sup>Information about the 2001 redistricting

process, timetable, and court cases is available through the DLS redistricting homepage for "Redistricting in Virginia": <http://dlsgis.state.va.us/> Information about the 2011 redistricting process is also available through that website.

<sup>6</sup>Va. Code § 24.2-309.1 enacted in Ch. 368, 1998 Acts of Assembly, froze precincts from September 1, 1998 to June 1, 2001. Section 24.2-309.2 was enacted in Ch. 112, 2008 Acts of Assembly.

<sup>7</sup>The Joint Reapportionment Committee is composed of eight members: three members of the Senate Committee on Privileges and Elections appointed by the Committee chair and five members of the House Committee on Privileges and Elections appointed by the Committee chair. See, Va. Code §§ 30-263 through 30-265. Its members are: Senators Janet C. Howell, Stephen H. Martin, and R. Creigh Deeds, and Delegates David B. Albo, Robert B. Bell III, Rosalyn R. Dance, Johnny S. Joannou, and S. Chris Jones.

<sup>8</sup><http://dlsgis.state.va.us/Ref/draw1.pdf>

<sup>9</sup>Virginia QuickFacts, U.S. Census Bureau, April 22, 2010. <http://quickfacts.census.gov/qfd/states/51000.html>

<sup>10</sup>See information from the Weldon Cooper Center for Public Service, Data Table and University of Virginia Press Release, January 27, 2010. <http://www.coopercenter.org/demographics/data>

<sup>11</sup>Weldon Cooper Center for Public Service, Data Table and University of Virginia Press Release, January 27, 2010.

<http://www.coopercenter.org/demographics/data>

<sup>12</sup>Estimates are based on information from ESRI, Environmental Systems Research Institute, Inc. Redlands, CA. See, <http://www.esri.com/library/whitepapers/pdfs/demographic-update-methodology-2009.pdf>.

**Note:** There is a slight difference in the estimated numbers from ESRI and the Weldon Cooper Center of 8,475 for the state total 2009 estimated population.

<sup>13</sup>*Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999).

<sup>14</sup>The total population for Virginia released December 31, 2010, will be greater than the state's total population for redistricting because the congressional apportionment numbers include overseas personnel that are allocated to the state but not allocated to specific counties, cities, and census blocks in the state.

<sup>15</sup>MAF/TIGER stands for the Census Bureau's Master Address File/Topologically Integrated Geographic Encoding and Referencing database of geographic information.

<sup>16</sup>In 2001 an asterisk after the VTD code indicated that the precinct was a "true" or actual precinct as opposed to a "pseudo" precinct. In that year approximately one-third of the 2,196 precincts did not meet Census Bureau requirements that precinct and block boundaries follow identifiable physical features and were identified as "pseudo" precincts. The work done in

preparation for the 2010 Census allowed DLS to add precinct boundaries to the census maps, and there should be very few, if any, "pseudo" precincts. **Note:** Localities should carefully review the census maps to verify that the precincts described in local ordinances and used to conduct elections are accurately represented on the census maps.

<sup>17</sup>*Redistricting Law 2010*, National Conference of State Legislatures, 21 (2009).

<sup>18</sup>"Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act," 42 U.S.C. 1973c." 66 Fed. Reg. 5412.

<sup>19</sup>Prepared Statement of Robert M. Groves, Director, U.S. Census Bureau, *2010 Census: Enumerating People Living in Group Quarters*. Before the Subcommittee on Information Policy, Census and National Archives, Committee on Oversight and Government Reform, United States House of Representatives New York, NY, 2/11/2010. [www.ogc.doc.gov/ogc/legreg/testimon/111s/Groves022210.doc](http://www.ogc.doc.gov/ogc/legreg/testimon/111s/Groves022210.doc)

<sup>20</sup>See, e.g., Ch. 66, Maryland Acts, April 13, 2010, the No Representation Without Population Act. Maryland became the first state to count prisoners "at their last known residence before incarceration."

[http://mlis.state.md.us/2010rs/chapters\\_noln/Ch\\_66\\_sb0400T.pdf](http://mlis.state.md.us/2010rs/chapters_noln/Ch_66_sb0400T.pdf)

<sup>21</sup>Va. Code § 24.2-304.1.

<sup>22</sup>462 U.S. 725 (1983).

<sup>23</sup>521 U.S. (1997).

<sup>24</sup>*Redistricting Law 2010*, National Conference of State Legislatures, 47-48 (2009).

<sup>25</sup>*Voinovich v. Quilter*, 507 U.S. 146, 161.

<sup>26</sup>*Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd sub nom. Millsaps v. Langsdon*, 510 U.S. 1160 (1994) (mem.). *Hulme v. Madison County*, 188 F. Supp. 634 (N.D. Ill. 1991).

<sup>27</sup>*Jamerson v. Womack*, 244 Va. 506, 517.

<sup>28</sup>*Karcher v. Daggett*, 462 U.S. 725, 758 (1983) (Stevens, J., concurring).

<sup>29</sup>Compactness also is a factor in evaluating claims of vote dilution under § 2 of the Voting Rights Act, and it is also a "traditional redistricting criteria" relevant in racial gerrymandering cases.

<sup>30</sup>*Jamerson v. Womack*, Case HB-880, Circuit Court, City of Richmond (1992).

<sup>31</sup>42 U.S.C. §1973 (a) and (b) (2006).

<sup>32</sup>478 U.S. 30 (1986).

<sup>33</sup>*Ibid.* at 50-51. Citations omitted.

<sup>34</sup>*League of Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). See, also, *Bartlett v. Strickland*, No. 07-689 (U.S. Mar. 9, 2009).

<sup>35</sup>42 U.S.C. § 1973c (2006).

<sup>36</sup>A number of Virginia localities have "bailed out" from § 5 coverage: the cities of Fairfax, Harrisonburg, Salem, and Winchester; the counties of Amherst, Augusta, Botetourt, Clarke, Essex, Frederick, Greene, Middlesex, Page, Roanoke, Rockingham, Shenandoah, Warren, and Washington.

<sup>37</sup>425 U.S. 130 (1976).

<sup>38</sup>460 U.S. 125, 134-35 (1983).

<sup>39</sup>*Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997).

<sup>40</sup>*Reno v. Bossier Parish School Board*, 529 U.S. 320 (2000).

<sup>41</sup>509 U.S. 630 (1993).

<sup>42</sup>509 U.S. 633-34.

<sup>43</sup>*United States v. Hays*, 515 U.S. 737, 744-45. (1995).

<sup>44</sup>509 U.S. at 642 and 646.

<sup>45</sup>*Miller v. Johnson*, 515 U.S. 900, 916 (1995) (citations omitted).

<sup>46</sup>517 U.S. 952 (1996).

<sup>47</sup>478 U.S. 109 (1986).

<sup>48</sup>774 F. Supp. 400 (WD Va. 1991).

*Drawing the Line* 2011 reports periodically on significant developments in the 2011 redistricting process in Virginia.

© 2010 Division of Legislative Services. Published in Richmond, Virginia, by the Division of Legislative Services, an agency of the General Assembly of Virginia.

**Division of Legislative Services**  
910 Capitol Street, 2nd Floor  
Richmond, Virginia 23219  
(804) 786-3591

E.M. Miller, Jr. Director  
R.J. Austin, Manager, Special Projects  
Mindy Tanner, Editor and Publisher



**Virginia Division of Legislative Services**