ORIGINAL

2 to 1

99
3/6/02

FILED
HARRISBURG
MAR 0 5 2002
MARY E. D'ANDREA, CLERK
Per
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, et al, Plaintiffs,

v.

THE COMMONWEALTH OF PENNSYLVANIA, et al. Defendants.

No. 1:CV-01-2439
(Judge Rambo)

PRESIDING OFFICERS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO DIVIDE MARCH 11-12 HEARING

INTRODUCTION

After this Court's ruling on Defendants' motions to dismiss, one claim remains – whether Act 1 violates the one-person, one-vote principle of U.S. CONST. art. I, §2, as identified by U.S. Supreme Court in *Wesberry v. Sanders*, 376 U.S. 1 (1964). Plaintiffs ask this Court to divide the scheduled March 11-12 hearing into two phases, which they describe as –

> a first phase in which Plaintiffs bear the burden of proving that a map with smaller population deviations could have been drawn and a second phase in which Defendants bear the burden of proving that the larger deviations in the map are justified as necessary to adhere to some specific, legitimate, and consistently applied districting criterion.

Plaintiffs' Memorandum at 1.

While it is correct that the legal standard applicable to claims of violation of the one-person, one-vote principle is a two-prong, shifting burden standard,

[enacted] Feldman Plan." 462 U.S. at 738. In response to an objection that "the alternative plans considered by the District Court [i.e., the other plans before the Legislature] were not comparable to the Feldman Plan because their political characters differed profoundly," the Court responded:

> We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives as long as those objectives were consistent with a good-faith effort to achieve population equality at the same time. Nevertheless, the claim that political considerations require population differences among congressional districts belongs more properly to the second level of judicial inquiry in these cases, ... in which the State bears the burden of justifying the differences with particularity.
>
> In any event, it was unnecessary for the District Court to rest its finding on the existence of alternative plans with radically different political effects. As in *Kirkpatrick*, 'resort to the simple device of transferring entire political subdivisions of known population between contiguous districts would have produced districts much closer to numerical equality.' 394 U.S. [ ] at 532. Starting with the Feldman Plan itself and the census data available to the legislature at the time it was enacted, ... one can reduce the maximum population deviation of the plan merely by shifting a handful of municipalities from one district to another... . Thus the District Court did not err in finding that the plaintiffs had met their burden of showing that the Feldman Plan did not come as nearly as practicable to population equality.

Id. at 739. The Court ended its discussion of the first prong by stressing that

> By itself, the foregoing discussion does not establish that the Feldman Plan is unconstitutional. Rather, appellees' success in proving that the Feldman Plan was not the product of a good-faith effort to achieve population equality means *only* that the burden shifted to the State to prove that the population deviations in its plan were necessary to achieve some legitimate state objective.

Id. at 740 (emphasis added).

The Court continued by explaining the nature of the second prong, i.e., how a State could justify the population deviations of its duly-enacted plan:

> White v. Weiser demonstrates that we are willing to defer to state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts. 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. As long as the criteria are

> nondiscriminatory , these are all legitimate objectives that on a proper showing could justify minor population deviations. 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.

Id. at 740-41 (citations omitted). The Court concluded by explaining:

> 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.

Id. The Court then explained why it concluded "[t]he District Court properly found that appellants did not justify the population deviations." *Id.* at 742. The Court pointed out that the only justification "emphasized" was "preserving the voting strength of racial minority groups." *Karcher*, 462 U.S. at 742. This justification was insufficient because it did not justify all the deviations:

> Under the Feldman Plan, the largest districts are the Fourth and Ninth Districts, and the smallest are the Third and Sixth. None of these districts borders on the Tenth, and only one – the Fourth – is even mentioned in appellants' discussions of preserving minority voting strength. Nowhere do appellants suggest that the large population of the Fourth District was necessary to preserve minority voting strength; in fact, the deviation between the Fourth District and other districts has the effect of diluting the votes of all residents of that district, including members of racial minorities, as compared with other districts with fewer minority voters. The record is completely silent on the relationship between preserving minority voting strength and the small populations of the Third and Sixth Districts. Therefore the District Court's findings easily pass the 'clearly erroneous' test.

Id. at 743-44.

II. DEFERENCE TO LEGISLATIVE JUDGMENT

As noted in *Karcher*, when a court is faced with a challenge to a duly-enacted congressional redistricting statute, and the possibility of remedial action, it "must defer to the legislative judgment the plan[] reflect[s]." *Upham v. Seamon*, reh'g denied, 456 v.s. 938 (1982) 456 U.S. 37, 41 (1982) (reversing a court-ordered plan that failed to give proper deference). In the context of the instant case, where the alleged maximum population deviation (19 people) is miniscule, the policies

embodied in the location and shape of the districts in Act 1 are entitled to significant deference. The high degree of deference to be accorded to the legislative goals of a duly-enacted congressional redistricting plan is apparent from the Supreme Court's rationale in *Upham*.

In support of its decision in *Upham*, the Court relied on *White v. Weiser*, 412 U.S. 783 (1973) (one-person, one-vote case), and *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (one-person, one-vote case). To avoid any misunderstanding, a major portion of the Court's discussion of these two cases and its analysis follow:

> The relevant principles that govern federal district courts in reapportionment cases are well established:
>
> > 'From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.' We have adhered to the view that state legislatures have 'primary jurisdiction' over legislative apportionment. Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans. a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.' ' *White v. Weiser*, 412 U.S. [783,] 794-795 [(1973)] (citations omitted).
>
> Weiser itself presents a good example of when such an intrusion is not necessary. We held there that the District Court erred when, in choosing between two possible court-ordered plans, it failed to choose that plan which most closely approximated the state-proposed plan. The only limits on judicial deference to state apportionment policy, we held, were the substantive constitutional and statutory standards to which such state plans are subject.
>
> We reached a similar conclusion in *Whitcomb v. Chavis*, 403 U.S. 124, 160-161 (1971), in which we held that the District Court erred in fashioning a court-ordered plan that rejected state policy choices more than was necessary to meet the specific constitutional violations involved. Indeed, our decision in *Whitcomb* directly conflicts with the

> lower court's order in this case. Specifically, we indicated that the District Court should not have rejected all multimember districts in the State, absent a finding that those multimember districts were unconstitutional. *Ibid.* We reached this conclusion despite the fact that we had previously held that 'when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multimember districts as a general matter.' *Connor v Johnson*, 402 U.S. 690, 692 (1971).
>
> . . . .
>
> Whenever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problems of 'reconciling the requirements of the Constitution with the goals of state political policy.' Connor v. Finch, [431 U.S. 407] at 414 [(1977)]. An appropriate reconciliation of these two goals can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect. Thus, in the absence of a finding that the Dallas County reapportionment plan offended either the Constitution or the Voting Rights Act, the District Court was not free, and certainly was not required, to disregard the political program of the Texas State Legislature.

Id. at 41-43.

III. RELEVANT 3-JUDGE COURT DECISIONS

Three decisions in which a congressional redistricting statute was challenged as violating the one-person, one-vote principle inform the application of the *Karcher* prongs and offer guidance for proceeding with the hearing in this case – *State of Kansas v. Graves*, 796 F. Supp. 468 (1992) (D. Kan.1992); *Stone v. Hechler*, 782 F. Supp. 1116 (N.D. W.Va. 1992); *Anne Arundel County Republican Central Committee v. State Advisory Bd. of Election Law*, 781 F. Supp. 394 (D. Md. 1991), *aff'd*, 504 O.S. 938 (1992).

In *State of Kansas*, the Legislative Coordinating Counsel of the State of Kansas was permitted to intervene to defend the duly-enacted congressional redistricting plan because the Attorney General was challenging its constitutionality on the basis of the one-person, one-vote principle and the Secretary of State, the defendant, was aligned with the Attorney General. Under the 1990 census, the congressional seats allocated to Kansas had dropped from five

to four. The duly-enacted plan, referred to as SB 767, established congressional districts with a maximum population deviation of 0.94%.

The court, citing *White v. Weiser*, began its analysis by pointing out:

> When, as here, the legislature has enacted and the governor has signed into law a redistricting plan, a federal court should defer to the plan if it is constitutionally acceptable, and if unacceptable, intrude upon state policy no more than necessary. Thus, deference to a decision made by the state legislative and executive branches in this area, which is so necessarily political, is an important linchpin of judicial review.

796 F. Supp. at 470 (citation omitted). Ultimately, the court found the duly-enacted plan unconstitutional because "the device of 'transferring entire political subdivisions of known population between contiguous districts would ... produce districts much closer to numerical equality'" and the deviations were not justified. *Id.* at 473. In reaching its decision, the court did not differentiate its *Karcher* analysis by prong. However, the court's consideration of remedy shows that both prongs were addressed.

First, the court noted: "Karcher says that if population differences among districts can be reduced or eliminated altogether by 'the simple device of transferring entire political subdivisions of known population between contiguous districts,' then that should be done." *Id.* at 471 (quoting *Karcher*, 462 U.S. at 739). After noting the guidelines adopted for redistricting, the court concluded that the population deviation was "too great to survive the Supreme Court's [] formulation in Karcher, unless keeping counties wholly within a single district, as the legislature wished to do, is sufficient justification for the deviation." *Id.* at 472. The court, after reviewing case law concerning county boundaries, concluded it was not. The court then proceeded to look at the alternative plans before it:

> Of the plans presented to us for consideration that preserve county lines only three have a maximum population deviation of less than 0.34 percent. Those plans are so at variance in configuration with the S.B. 767 plan ultimately adopted by the legislature that we rejected them.

> One plan presented to us achieved almost perfect population equality among districts by following the configuration of S.B. 767 except for cutting county lines in two places .... With these slight changes the maximum deviation is reduced to 0.01 percent [69 people]. ...
>
> ... The plan honors the lines drawn in S.B. 767, as passed by the legislature and signed into law by the governor, except for moving four townships. Adoption of this plan would come the closest possible to deferring to the legislative will and intruding upon state policy as little as possible, emphasized as our duty in *White*, ... while meeting the constitutional standard enunciated in the Supreme Court cases.

Id. at 743.

In *Stone*, the court faced a challenge to a duly-enacted congressional redistricting plan on the basis that the maximum deviation of 556 people between the most and least populous districts violated the one-person, one-vote principle. Under the 1990 Census, the congressional seats allocated to West Virginia were reduced from 4 to 3. The court separately addressed each *Karcher* prong. With respect to the first prong, the court explained:

> Under Karcher, plaintiffs satisfy their burden under the first prong if they demonstrate that the population deviations among the congressional districts under West Va. Code §1-2-3 [the duly-enacted plan] could have been reduced or eliminated *by the adoption of a different plan that was before the Legislature when it enacted West Va. Code §1-2-3*. Because seventeen other plans with a lower overall variance were before the Legislature during its regular and special session, the Court concludes that Stone has satisfied his burden.

Id. at 1126 (emphasis added).

Moving to the second prong, the court began by noting that the "State relies upon two legitimate goals to justify the population variances in West Va. Code §1-2-3: preserving the cores of previous districts and maintaining district compactness. This Court therefore must determine whether these goals justify the population variations in West Va. Code §1-2-3 and whether the goals and the manner in which they are achieved satisfy Karcher." *Id.* With respect to preserving cores, the court commented:

> The Supreme Court, while stating that preserving cores of prior districts is a legitimate goal that may justify population variances, has not stated what constitutes a district core. That Court, in counseling deference to state legislative bodies, however, has made it clear that 'redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt.' Wise v. Lipscomb, 437 U.S. 535, 538 (1978).
>
> We think that principle has application here. There is merit to the arguments of both Stone and the State concerning how to reduce the concept of "core" to definitional practicability. The State Legislature, however, considered both arguments and chose the one now advanced by the State in this litigation, that preserving district cores means keeping as many of the current congressional districts intact as possible.
>
> If the Legislature's reasoning suffered from a fundamental flaw or was unsubstantiated by any factual support, we would be slow in deferring to its judgment. We have found, however, that there is a reasonable factual basis for its conclusion that Plan II [the duly-enacted plan] better preserves the cores of prior districts than any of the sixteen viable Plans and we cannot say that its reasoning is grounded other than on pursuing a policy which in the Legislature's judgment would benefit its constituency.

Id. at 1126-27. With respect to compactness, the court concluded:

> ... We think it has been adequately demonstrated that each legislative body kept the concept of compactness as a principal goal of its redistricting efforts and did this primarily in pursuit of fulfilling its State constitutional obligations. The fact that there were other Plans that would be deemed more compact that [sic] Plan II under the three tests employed by the experts does not detract from the Legislature's effort. In the legislative view, the districts in Plan II were compact under the West Virginia Constitution, and in weighing that and as the legislature viewed the requirement other legitimate legislative goals it was acting preeminently in a role reserved to a state legislature by the United States Supreme Court.

Id. at 1127 (citation omitted). The court concluded: "the State has met its burden of showing legitimate justification for the variances by demonstrating that the Legislature in designing and enacting Plan II was guided in large part by its pursuit of the legitimate State goals of preserving as many of the cores of prior districts as possible and in obtaining the greatest degree of compactness practicable that is also consistent with its goal of preserving the cores of previous districts." *Id.*

In *Anne Arundel County*, the court was faced with a one-person, one-vote challenge to a duly-enacted congressional redistricting plan with a maximum

population deviation of 10 people and an average deviation of 2.75 people. According to the court, "[t]he plaintiffs allege that the Maryland General Assembly failed to make a good-faith effort to achieve numerical equality among the eight new congressional districts, and, in fact, that H.B. 10 [the duly-enacted plan] was adopted with the discriminatory intent to 'deprive the plaintiffs of an opportunity to effectively participate in the political process,' in violation of their rights under Article 1, §2 of the United States Constitution." *Id.* at 395.

With respect to the first prong, the court summarily concluded that because there was a plan before the legislature, H.B. 22, "with a smaller numerical deviation from absolute equality [average deviation of 2.49 people], plaintiffs have proved that H.B. 10's deviations did not result from an unavoidable good faith effort to achieve population equality." *Id.* at 396. Moving to the second prong, the court commented: "It is under Karcher's second prong that we now consider the relatively insignificant mathematical deviations in this case. We note that the amount and degree of justification which the State must establish is roughly equatable to the deviation itself. In that light, we consider the aims of the State of Maryland which have caused it to enact the particular congressional redistricting plan before us." *Id.* at 397. The court discussed the justifications:

> Both in the evidence presented and in oral argument, the State has set forth several convincing, consistent, and legitimate justifications for the numerical deviations within H.B. 10. These include: (1) keeping intact the three major regions that surround the center of the state ..., (2) creating a minority voting district, and (3) recognizing incumbent representation with its attendant seniority, in the House of Representatives. ... We conclude that these justifications, which the State alleges are properly within the ambit of a state legislature's redistricting latitude and designed to achieve legitimate state goals, are sufficient to warrant the very small numerical variance among the congressional districts seen here. The analysis mandated by the Supreme Court cases applying Art. I, §2 is, therefore, satisfied.

Id.

After reaching its decision the court addressed the position advanced by the dissent that "any redistricting plan that was in any way affected by considerations that could be labeled 'political'" was unconstitutional. *Id.* The court explained its disagreement with the dissent:

> In this case, this Court defers to Maryland's legislature. The evidence, as the dissent states, shows that the General Assembly, inter alia, aimed to give Congressman Hoyer, a congressman with high ranking and importance in the federal House of Representatives, a 'safe seat,' to provide the majority black population in an area of Prince George's and Montgomery counties with a chance to choose a representative without requiring that person to run against a strong incumbent such as Congressman Hoyer, and to provide certain opportunities for Congresswoman Bently and Congressman Cardin. ... The reelection of incumbents as such was not listed specifically by Justice Brennan in Karcher as an example of an affirmative legislative justification sufficient to meet Karcher's second prong, though recognized in White v. Weiser. Neither is the establishment of a majority black district listed specifically in Karcher, but 'preserving the strength of racial minority groups' is discussed. These aims, however, are clearly within Karcher's ambit. While Justice Brennan there concluded that the District Court's finding of a lack of causal connection between racial voting aims and the redistricting plan at issue was not 'clearly erroneous,' the sense of Karcher strongly suggests that if, as here, such a causal connection does exist, such aims can constitute an appropriate Karcher second-prong basis.
>
> We also note that the 'neutral criteria' redistricting called for by the dissent would in no way ensure maintenance of the territorial integrity of Anne Arundel County, which is what brought on this suit in the first place. Rather, adoption of the dissent's position would potentially subject every congressional district in the United States to novel constitutional scrutiny. Furthermore, to mandate that a legislature reapportion with regard merely to 'neutral criteria' (except for the dictates of the Voting Act and the Fifteenth Amendment) is to give the legislature, in practice, no guidance at all. Indeed, it virtually guarantees that a federal court, in a sort of judicial receivership, will ultimately conduct redistricting – a process the Supreme Court has consistently recognized as political.

Id. at 398-99 (citations omitted).

IV. *MORRIS V. BOARD OF ESTIMATE* IS INAPPOSITE

Plaintiffs suggest that "[o]ther courts have recognized this [bifurcation structure] as an appropriate way to handle *Karcher* claims." Plaintiffs' Memorandum at 4. Plaintiffs offer as an example, however, only *Morris v. Board*

of Estimate, which is composed of two reported decisions, one at 592 F. Supp. 1462 (E.D.N.Y. 1984) ("*Morris I*"), and one at 647 F. Supp. 1463 (E.D.N.Y. 1986), *aff'd.* 831 F.2d 384 (2nd Cir. 1987) ("*Morris II*"). *Morris* is inapposite to this case, as discussed below.

Morris did not involve a congressional redistricting plan. It did not even involve a redistricting plan. Rather, the challenge was that the "allocation of one vote to each Borough President, as members of the [New York City Board of Estimate], contravened the 'one person, one vote' rule of the United States Supreme Court because of the widely disparate populations each Borough President represented." *Morris II,* 647 F. Supp. at 1464. The challenge had initially been dismissed after the court concluded that the Board was not subject to the one-person, one-vote principle. *Morris I*, 592 F. Supp. at 1464. The Second Circuit reversed. On remand, "the parties stipulated that the proceedings should be bifurcated. In the first stage, the most suitable mathematical measure would be identified and superimposed over the Board's electoral scheme to ascertain the malapportionment. If more than a minor deviation were disclosed, the Supreme Court approved policies and interests served by the Board would be discerned in the second stage to settle the variance's acceptability." *Id.*

The Board had eight members. Five were the Borough Presidents of Brooklyn, Queens, Manhatten, Bronx and Staten Island, each of whom had one vote. The other three members were the Mayor, Comptroller and City Council President, considered "at large" members, each of whom had two votes. *See id.* at 1464-65. The population of the boroughs varied considerably, from Staten Island with 352,121 people to Brooklyn with 2,230,936. *Id.* The mixture of "at large" and "district" members with the difference in number of votes raised a potentially complex issue with respect to whether there was any vote dilution at all. The *Morris I* decision addresses this issue and concludes there is a 132.9% maximum

deviation, which must be justified. *Karcher*, which was decided after the remand, caused the district court to recognize that the range of interests that could justify a deviation had been broadened. *See Morris I*, 592 F. Supp. at 1475. For the second phase, the district court directed the parties to address justifications and "explore the alleged meaningful participation by the lesser populated boroughs in Board affairs under its present structure." *Id.* at 1476. The district court then directed "the parties to begin conferring by September 14, 1984" and ordered:

> The product of that good faith exchange will be a joint stipulation for submission no later than October 5, 1984, listing with *conciseness* and *specifity*:
>
> (1) those *agreed* valid policies and interests presently served by the Board; and
> (2) those *disputed* policies and interests which at least one defendant maintains are valid and are presently served by the Board. For each such disputed consideration, plaintiffs are to explain the basis of their objection.
>
> After reviewing that joint stipulation, the court will schedule a conference with the parties to discuss the subsequent procedure for bringing this litigation to an expeditious and equitable end.

Morris I, 592 F. Supp. at 1477-78 (emphasis added).

The *Morris II* decision addressed the 17 justifications identified in the joint stipulation. It concluded that the valid justifications were insufficient to justify the 132.9% deviation and declared "the Board's voting plan under sections 61 and 62 of the New York City Charter" unconstitutional and, recognizing that recasting the voting plan to be "a legislative task," enjoined the city defendants "to undertake curative measures with all deliberate speed" but permitted the Board "to continue to perform its duties under the present plan" while the voting process was being cured. *Morris II*, 647 F.Supp at 1478-79.

Given the unique situation in the *Morris* cases, they do not provide a workable template for the hearing structure in this case.

CONCLUSION

For the reasons set forth above, because there is no reason for the bifurcated hearing structure suggested by Plaintiffs and it will not assist this Court in resolving this case, Plaintiffs' motion should be denied.

Respectfully submitted,

March 5, 2002

Linda J. Shorey
Pa. ID No. 47477
Julia M. Glencer
Pa. ID No. 80530
Jason E. Oyler
Pa. ID No. 84473
John P. Krill, Jr.
Pa. ID No. 16287
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500
Counsel for Jubelirer and Ryan

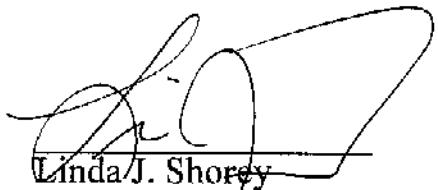
CERTIFICATE OF SERVICE

I certify that on March 5, 2002, I caused a copy of Presiding Officers Memorandum in Opposition to Plaintiffs' Motion to Divide March 11-12 Hearing:

Fax and First class mail
Paul M. Smith
Thomas J. Perrelli
Daniel Mach
Brian P. Hauck
JENNER & BLOCK, L.L.C
601 Thirteenth Street, NW
Washington, D.C. 20005
(202) 639-6000
Counsel for Plaintiffs

Hand Delivery
Robert B. Hoffman
REED SMITH LLP
213 Market Street, 9th Floor
P.O. Box 11844
Harrisburg, PA 17108
(717) 257-3042
Counsel for Plaintiffs

Hand Delivery
J. Bart DeLone
Senior Deputy Attorney General
Office of Attorney General
Appellate Litigation Section
15th Floor Strawberry Square
Harrisburg, PA 17120
(717) 783-3226
Counsel for the Commonwealth, Governor Schweiker, Secretary Pizzingrilli, & Commissioner Filling



Linda J. Shorey
Pa. ID No. 47477
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500
(717) 231-4501 (fax)
Counsel for Defendants Jubelirer and Ryan