S T A T E O F T E N N E S S E E
OFFICE OF THE
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January 10, 2002

Opinion No. 02-010

State Senate - Redistricting Plan - Constitutionality

QUESTION

Whether Senate Bill 197, as amended by the Senate Judiciary Committee on January 8, 2002, is constitutional.

OPINION

Based on a limited review of Senate Bill 197, this Office believe that the proposed legislation as amended by the Senate Judiciary Committee on January 8, 2002, is constitutionally defensible.

ANALYSIS

Senate Bill 197 redistricts the Tennessee State Senate based on the 2000 Federal Decennial Census. Determining whether a redistricting plan for a state legislative body is constitutional is a rather complex proposition. There are a number of federal and state constitutional provisions to consider along with the interpretative case law. In addition, certain federal statutory requirements must also be met.

First, a plan must comply with the doctrine of "one person, one vote" as established by the Supreme Court of the United States under the Fourteenth Amendment. In *Reynolds v. Sims*, 377 U.S. 533, 577, 84 S.Ct. 1362, 1389, 12 L.Ed.2d 506 (1964), the Court explained the "one person, one vote" requirement as it applies to reapportionment of state legislative districts: "[t]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." However, "[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature." *Id.* at 579, 84 S.Ct. at 1391. The Court applied these competing principles in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), a challenge to the Texas state legislative redistricting plan. In a unanimous decision, the Court concluded that the "relatively minor" total population variance of 9.9% between the largest and smallest districts, standing alone, did not violate the "one person, one vote" standard. *Id*. at 764, 93 S.Ct. at 2338.

In *Mahan v. Howell*, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973), the Court considered a plan passed by the Virginia General Assembly which complied with a new state constitutional provision requiring that the new districts keep political subdivisions intact. The resulting plan produced a population variance of 16.4% between the largest and smallest districts. The Court applied a two-part test in determining whether the plan complied with "one person, one vote": "[w]hether it can reasonably be said that the state policy ... is, indeed, furthered by the plan adopted by the legislature, and whether, if so justified, the divergences are also within tolerable limits." *Id.* at 326, 93 S.Ct. at 986. The Court concluded that the first prong was met because political subdivisions remained intact under the plan, with the exception of Fairfax County, which was split into two five-member districts. As to the second prong, the Court held that although the variance of 16.4% "may well approach tolerable limits, we do not believe it exceeds them." *Id*. at 329, 93 S.Ct. at 987.

These three cases, read together, indicate a general three-part classification scheme for redistricting plans. Those plans producing a total population variance of less than 10% are de minimus violations of the one person, one vote standard, and a plaintiff challenging such a plan cannot prevail on this evidence alone. Those plans producing a variance of more than 16.4% may be insupportable on any grounds. Those plans with a variance falling between those two boundaries establish a prima facie violation, but may be justified by a plan that reasonably furthers a rational state policy.

Second, a plan may not constitute a partisan gerrymander in violation of the Fourteenth Amendment of the United States Constitution. According to *Davis v. Bandemer*, 478 U.S. 109, 129, 106 S.Ct. 2797, 2809, 92 L.Ed.2d 85 (1986), in order to prove a case of partisan gerrymandering, the plaintiffs must prove discriminatory intent and effect. Merely showing that a redistricting plan adversely affects the proportionate voting influence of the minority party does not constitute a discriminatory effect. In particular, the Court stated:

> Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that the legislature in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.

Mere lack of proportional representation is insufficient to prove unconstitutional discrimination. *Id.* 478 U.S. at 132, 106 S.Ct. at 2410. Furthermore, "a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult." *Id.* An unconstitutional partisan gerrymander exists "only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* In order to prove a partisan gerrymander, there must be a showing of a history, actual or projected, of disproportionate results in conjunction with indicia of a lack of political power and the denial of fair representation. *Id.* 478 U.S. at 139-40, 106 S.Ct. at 2814.

Third, a plan may not constitute racial gerrymandering in violation of the Fourteenth Amendment. In the wake of the 1990 census, the Supreme Court rendered opinions in several cases involving racial gerrymandering challenges to state redistricting efforts, including *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). The Court balanced the competing constitutional guarantees that: 1) no state shall purposefully discriminate against any individual on the basis of race; and 2) members of a minority group shall be free from discrimination in the electoral process. In balancing the constitutional guarantees, the Court set forth procedures to follow in evaluating racial gerrymander challenges to redistricting plans. A plaintiff challenging the constitutionality of a redistricting plan on racial grounds must have standing and must prove that the plan was racially gerrymandered. Once the plaintiff proves that a district was racially gerrymandered, the court, applying strict scrutiny, must determine whether the state had a compelling governmental interest in creating the majority-minority district and whether the district was narrowly tailored to achieve that interest.

Two years later, the Court in *Miller v. Johnson*, 515 U.S. 900, 906, 115 S.Ct. 2475, 2483, 132 L.Ed.2d 672 (1995), set forth the following standard for determining whether a plan constitutes a racial gerrymander:

> The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process ... . '[D]iscriminatory purpose ... implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker ... selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects ... .' 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.'

Fourth, a plan must not violate Section 2 of the Voting Rights Act which prohibits any state or political subdivision from imposing any voting qualification, standard, practice or procedure that results in the denial or abridgment of any citizen's right to vote on account of race, color or status as a member of a language minority group The 1982 amendments codified a "totality of circumstances" standard to be used for determining whether a challenged practice results in an abridgment of the right to vote. Currently, a violation of Section 2 is established 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 racial, color, or language minority class] ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected ... is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

See 42 U.S.C. § 1973. Generally, Section 2 cases have involved claims that the political process was not equally open to certain minorities because of the use of multimember districts, packing minorities into a single district, or fracturing minorities into several districts. Challenges under Section 2 are fact intensive issues involving a wide array of factors in determining whether there is a violation.

Fifth a plan must comply with the Tennessee Constitutional provisions relating to the division of counties in forming multi-county districts. Article II, Section 6 of the Tennessee Constitution states as to the state Senate that "[i]n a district composed of two or more counties, each county shall adjoin at least one other county of such district; and no county shall be divided in forming such a district." In a series of redistricting cases based on the 1980 Federal Decennial Census, the Tennessee Supreme Court applied this constitutional provision to state Senate and House redistricting plans. In *State ex rel Lockert v. Crowell*, 631 S.W.2d 702 (Tenn. 1982)(*Lockert I*), the Court found that Article II, Section 6 may still be applied to redistricting of the state Senate but must yield to the extent necessary to comply with federal law, namely "one person, one vote" and the Voting Rights Act. The Court further interpreted this constitutional provision in *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836 (Tenn. 1983)(*Lockert II*) and *State ex rel. Lockert v. Crowell*, 729 S.W.2d 88 (Tenn., 1987) (*Lockert III*). Based upon the 1980 Federal Decennial Census, the Court upheld the 1984 State Senate Plan, which detached a portion of Shelby County in forming a multi-county district, stating the following:

> We affirm all the principles of law enunciated in *Lockert I* and *Lockert II* and resolve all doubts with respect to the Legislature's justification in dividing Shelby County in favor of the constitutionality of Chapter 753, Public Acts of 1984, the fourth reapportionment act since the census of 1980, and terminate this serial litigation.

Lockert III, 729 S.W.2d at 90.

This Office has been asked whether Senate Bill 197, as adopted by the Senate Judiciary Committee on January 8, 2002,[1] complies with these constitutional provisions and federal statutory law. Based upon a limited review of this complex legislation and applying these correspondingly complex set of federal and state constitutional and federal statutory redistricting requirements, it is this Office's opinion that the proposed plan is constitutionally defensible. Due to the extremely limited period of time this Office has been given to review this plan, this Office is unable to offer a detailed analysis of each of these various constitutional and statutory provisions as applied to this plan.

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[1]This Office received a map of the Senate Plan, as amended by the Senate Judiciary committee, on Wednesday, January 9, 2002.