July 6, 2001

Tom Stuart, Co-Chair
Idaho Commission for Reapportionment
2301 Hillway Drive
Boise, ID 83702

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Mr. Stuart:

You have asked this office to provide you with legal advice regarding three questions at issue before the Commission for Reapportionment (the "Commission"). As you set them forth, those questions are:

1. The question is whether the commission has discretion to apportion the House of Representatives by the use of sub-districts whereby the Seats A and B of what would otherwise be a two-seat multi-member district are not to be elected at large from each of the thirty to thirty-five districts, but rather would be elected individually from sub-districts comprising half the population of the legislative district.

2. The question is whether each legislative district in the state must be apportioned with a two-seat multi-member district, or whether the commission has discretion to apportion the House of Representatives with single-member districts as was done in Idaho prior to the 1960's or with a mix of two-seat multi-member districts and one-seat single-member districts containing half of the population as the multi-member districts.

3. The question is whether the federal Voting Rights Act prohibits the use of two-seat multi-member districts in situations where a racial or ethnic minority would not constitute the majority in the two-seat multi-member district, but would constitute the majority of a one-seat, single-member sub-district made up of half the population of the district.

Questions "1" and "2" will first be addressed under Idaho's constitutional and statutory law. The questions will then be analyzed under the applicable federal laws.

The first issue being considered by the Commission is whether it may apportion the House of Representatives by dividing districts into sub-districts, whereby rather than electing two representatives at large district-wide, half of the district elects one representative and the other half elects a second representative. The creation of sub-

districts is not specifically addressed in the Idaho Constitution or applicable statutory law. Reference is only made to legislative "districts." The language of article 3, section 2 of the Idaho Constitution appears to preclude the election of the House of Representatives in such a fashion. Article 3, section 2, subsection (1), provides, "The senators and representatives shall be chosen by the electors of the respective counties or districts into which the state may, from time to time, be divided by law." This language strongly suggests that each legislative position is to be filled by a district-wide vote and that *all* of the electors within the respective district are to participate in the selection of all senators and representatives.

The second question posed by the Commission is whether it may reduce the number of members in the House of Representatives so that only a single representative is elected in each district, or, alternatively, if it may devise a redistricting plan under which some districts are two-seat multi-member districts and others with half the population of the multi-member districts elect only a single representative. Article 3, section 2, subsection (1) of the Idaho Constitution provides that, "the senate shall consist of not less than thirty nor more than thirty-five members. The legislature may fix the number of members of the house of representatives at not more than two times as many representatives as there are senators." Article 3, section 4 of the Idaho Constitution sets the number of districts from which the legislature is to be drawn at not less than thirty nor more than thirty-five. Those are the identical numerical limitations imposed upon the size of the senate.

While the Idaho Constitution permits the membership of the House of Representatives to range to any number no greater than seventy under the current scheme, it also directs that the legislature is to set the number of members in the House of Representatives. The legislature has set that number at seventy, two per legislative district, the maximum allowed under the constitutional framework. Idaho Code § 67-202. Additionally, the Idaho Constitution directs the legislature to enact laws providing standards to govern the Commission. Idaho Const. art. 3, § 2(3). In 1996, the legislature adopted Idaho Code § 72-1506, entitled, "Criteria governing plans." That statute directs the Commission that districts are to be "substantially equal in population." Idaho Code § 72-1506(3).

The state's constitutional and statutory scheme presently envisions one senator and two representatives to be elected in each of the state's thirty-five legislative districts. The constitution would not preclude the formation of a house of representatives smaller than seventy members. However, without disregarding the legislature's directive that there are to be two representatives per district, the Commission could not return to single-member districts as existed more than forty years ago.

The possibility of creating a mix of two-seat multi-member districts with one-seat single-member districts would also conflict with the legislative directive found in Idaho

Code § 67-202. Further, a redistricting plan of this nature would also appear to be at odds with Idaho Code § 72-1506, in that the districts adopted under such a plan would not be substantially equal in population.

It should also be noted that any redistricting plan adopted by the Commission is subject to federal law in addition to state law. On the federal level, challenges to state redistricting plans generally arise under the Equal Protection Clause of the Fourteenth Amendment or the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. The Commission is directed to the Office of the Attorney General's "Commission for Reapportionment Guidelines" issued June 5, 2001, and the Attorney General's Opinion No. 91-4 contained therein for a more thorough analysis of the basic requirements to comply with the applicable federal constitutional and statutory laws.

"[A]s a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." Reynolds v. Sims, 377 U.S. 533, 568, 84 S. Ct. 1362, 1385, 12 L. Ed. 2d 506 (1964). The Fourteenth Amendment requires that legislative redistricting be done in a fashion which will give substantially equal weight to each vote.

"Congress enacted Sec. 2 of the Voting Rights Act of 1965 . . . to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall 'be denied or abridged…on account of race, color, or previous condition of servitude.' U.S. Const., Amdt. 15." Voinovich v. Quilter, 507 U.S. 146, 152, 113 S. Ct. 1149, 1154-55, 122 L. Ed. 2d 500 (1993). "Section 2 thus prohibits any practice or procedure that, 'interact[ing] with social and historical conditions,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." 507 U.S. at 153, 113 S. Ct. at 1155, *quoting* Thornburg v. Gingles, 478 U.S. 30, 47, 106 S. Ct. 2752, 2764, 92 L. Ed. 2d 25 (1986).

The Commission must strive to comply with both state and federal law when undertaking the task of redistricting. In the event state and federal law conflict, the Supremacy Clause, U.S. Const., art. VI, cl. 2, directs that the Commission must comply with federal constitutional and statutory requirements even if the only way to do so would be to invalidate the state constitution and/or statutes. However, in order for federal law to displace the state law, there must be no means of complying with both. "[I]n order for the Fourteenth Amendment to displace the Idaho constitutional provision, there must be no possibility of compliance with both." Hellar v. Cenarrusa, 104 Idaho 858, 860, 664 P.2d 765, 767 (1983).[1] Except in those instances where Congress has preempted an area of law altogether, state law is nullified by the existence of federal law pertaining to the same subject matter only to the extent that there is an actual conflict with the federal law. Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713, 105 S. Ct. 2371, 2375, 85 L. Ed. 2d 714 (1985).

The final question posed by the Commission is whether the Voting Rights Act prohibits the use of two-seat multi-member districts in situations where a racial or ethnic majority would not constitute the majority under such a districting plan, but would constitute the majority in a one-seat, single-member sub-district made up of half of the district. There can be no definitive answer to the Commission's question pertaining to the Voting Rights Act, other than to state that the Act does not *per se* prohibit multi-member districts in instances where a protected class could constitute the majority of a single-member sub-district. Additionally, proof of only the showing set forth in the final question would fall short of stating a claim or establishing a violation of the Voting Rights Act.

The body of case law developed under the Voting Rights Act reflects that challenges to redistricting schemes under the Act require an intensive analysis of the facts of each individual case.

Section 2 of the Voting Rights Act, as amended, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
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> (b) A violation of subsection (a) of this section 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 class of citizens protected by subsection (a) of this section 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 to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

The United States Supreme Court's decision in Thornburg, *supra*, is regarded as the leading case in addressing challenges to legislative redistricting plans under Section 2 of the Voting Rights Act subsequent to its amendment in 1982. Thornburg and its

progeny hold multi-member districts and at-large elections schemes are not *per se* violative of minority voters' rights. 478 U.S. at 45, 106 S. Ct. at 2764.

> Section 2 contains no *per se* prohibitions against particular types of districts: It says nothing about majority-minority districts, districts dominated by certain political parties, or even districts based entirely on partisan political concerns. Instead, § 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the *effect* of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter.

Voinovich, 507 U.S. at 155, 113 S. Ct. at 1156.

To prove a violation of the Voting Rights Act, plaintiffs must show the state's apportionment scheme operates to minimize or cancel out the voting strength of the protected class. Voinovich, 507 U.S. at 147, 113 S. Ct. at 1151-52. Three threshold conditions must be met by plaintiffs:

> [F]irst, the minority group "is sufficiently large and geographically compact to constitute a majority in a single member district"; second, the minority group is "politically cohesive"; and third, the majority "votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate."

Abrams v. Johnson, 521 U.S. 74, 91, 117 S. Ct. 1925, 1936 138 L. Ed. 2d 285(1997), *quoting* Thornburg, 478 U.S. at 50-51, 106 S. Ct. at 2766-67.

The Court in Thornburg reasoned that a minority group must be able to make an initial showing that it is large enough and compact enough to constitute a majority in a single-member district because, "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." Thornburg, 7478 U.S. at 51, n.17, 106 S. Ct. at 2767, n.17. Once the potential to elect a minority candidate is established, the plaintiffs still bear the burden of showing that the minority group and the majority group vote in blocs for different candidates. Bloc voting by the minority shows the group's cohesiveness and supports a claim that the group could elect its preferred candidate in a single-member minority-majority district. Likewise, it must be shown that the majority group votes as a bloc in order to demonstrate that the minority's candidate generally could not prevail on election day.

If plaintiffs are able to meet the three threshold requirements, it must then be shown that "under a totality of the circumstances," the minority group's ability to equally participate in the electoral process has been diluted by the districting scheme:

> As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstances" and to determine, based "upon a searching practical evaluation of the 'past and present reality,'" whether the political process is equally open to minority voters. "This determination is peculiarly dependent upon the facts of each case," and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanisms.

Thornburg, 478 U.S. at 79, 106 S. Ct. at 2781 (citations omitted).

The question to be asked when determining whether a particular practice or procedure impairs the statute is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Id.,* 478 U.S. at 44, 106 S. Ct. at 2763 (citations omitted). Citing to the Senate Report, the Thornburg Court found the determination is to be made based on the assessment of various objective factors. Those cited factors were: the history of voting-related discrimination within the state or political subdivision, the extent to which voting is racially polarized, the extent to which voting practices or procedures tend to enhance the opportunity for discrimination against the minority group, the exclusion of members of the minority group from candidate slating processes, the extent to which the effects of past discrimination hinder the group's ability to effectively participate in the political process, the use of racial appeals in political campaigns, and the extent to which members of the minority group have been elected to public office in the jurisdiction. *Id.*, 478 U.S. at 36-37, 106 S. Ct. at 2759.

As noted, the determination of the existence of a Voting Rights Act violation is particularly fact intensive. Absent specific information regarding demographics and past electoral practices in a specific legislative district, any suggestion that the Act would require changes in the state's redistricting scheme would be purely speculative. Even if a Voting Rights Act violation existed, the remedy would not necessarily be single-member districting. A less drastic change to the state plan could possibly be identified to cure the defect and yet continue to follow the state constitutional and statutory scheme.

The Commission has neither the function nor the information before it to engage in the kind of extensive fact-finding and legal analysis that courts engage in to determine violations of the Voting Rights Act. Moreover, the Commission does not have before it adverse parties that the courts generally rely on to make an informed decision. Therefore, we recommend the Commission not create sub-districts since it is not in a position to assume the Idaho Constitution is invalid.

Very truly yours,

THORPE P. ORTON
Deputy Chief of Staff

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[1] *Cf.* Davis v. Chiles, 139 F.3d 1414 (11th Cir. 1998). In this case involving a Voting Rights Act challenge to two at-large judicial districts in the state of Florida, the Eleventh Circuit Court of Appeals observed the plaintiff's interest in a proposed remedy of modified sub-districting was outweighed by the state's interest in maintaining its existing judicial model established in its constitution. "[W]e read the first threshold fact of *Gingles* to require that there must be a remedy *within the confines of the state's judicial model* that does not undermine the administration of justice." *Id.,* 1421, *quoting* Nipper v. Smith, 39 F.3d 1494, 1531 (11th Cir.1994). While it is not precedential authority, Davis may be instructive to the Commission in analyzing a potential Voting Rights Act violation in light of Idaho's constitutional and statutory legislative districting scheme.