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Honorable Edward G. Janeway
President Pro-Tempore
Vermont Senate
State House
Montpelier, Vermont

Re: Opinion No. 27

Dear Senator Janeway:

You have asked the following questions with respect to apportionment of the General Assembly:

1. Are multi-member legislative districts constitutional?

2. What population deviation between legislative districts is constitutionally permissible?

3. What factors are constitutionally permitted in order to deviate from mathematical exactitude?

The Fourteenth Amendment to the United States Constitution forbids a state to "deny to any person within its jurisdiction the equal protection of the laws." The United States Supreme Court has construed this provision to mean that in the matter of state legislative apportionment, the

> "equal protection clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state

> legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the state."
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> Reynolds v. Simms, 377 U.S. 533, 568 (1964).

So long as the basic "one man, one vote" provision of the equal protection clause is followed, the Supreme Court has consistently refused to hold that apportionment schemes which utilize multi-member districts are per se unconstitutional. Fortson v. Dorsey, 379 U.S. 433 (1965); Burns v. Richardson, 384 U.S. 73 (1965); Whitcomb v. Chavis, 403 U.S. 124 (1971). In all these cases, the Supreme Court expressly reversed district court rulings which declared multi-member districts to be unconstitutional in the States of Georgia, Hawaii and Indiana, respectively.

In Chavis the Court rejected several propositions contending that the use of multi-member districts denied voters the equal protection of the laws. The Court rejected them because there was no evidence to sustain them on a factual basis. These were, in brief, as follows:

1. Multi-member districts inherently discriminate against other districts (a) because each voter is represented by more legislators and (b) because at-large legislators may bloc vote and thus over-represent their constituency; and

2. In a large multi-member district, the plan worked invidiously against a specific segment of the county's black ghetto voters, as compared with white areas where most of the senators who were actually elected lived.

The Court concluded with these observations:

> "We are not insensitive to the objections long voiced to multi-member district plans. Although not as prevalent as they were in our early history, they have been with us since colonial times and were much in evidence both before and after the adoption of the Fourteenth Amendment. Criticism is rooted in their winner-take-all aspects, their tendency to submerge minorities and to overrepresent the winning party as compared with the party's statewide electoral position, a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests. The chance of winning or significantly influencing intraparty fights and issue-oriented elections has seemed to some inadequate protection to minorities, political, racial, or economic; rather, their voice, it is said, should also be heard in the legislative forum where public policy is finally fashioned. In our view, however, experience and insight have not yet demonstrated that multi-member districts are inherently invidious and violative of the Fourteenth Amendment."

These arguments are mentioned here to demonstrate that the Court has considered virtually all of the political science policy objections to multi-member districts and found them to be without constitutional significance in the abstract without actual proof. Thus, once a state has achieved a plan

of substantial population equality, either in multi-member or single-member districts, they are subject to challenge only on a demonstration that the plan "was designed to or would operate to minimize or cancel out voting strength of racial or political elements of the voting population." Burns v. Richardson, 384 U.S. 89. Moreover, the Court held in Chavis that a challenger of multi-member districts had the burden of proving their existence effected an invidious result, "real-life impact * * * on individual voting power." And, as Mr. Justice White observed, "We have not yet sustained such an attack." 403 U.S. 144.

The Court has, in fact, suggested that a legislature might have legitimate policy reasons for preferring multi-member districts. In Burns v. Richardson, the Federal District Court had ordered the state to reapportion itself, saying:

> "We believe that the Senate should be redistricted into single senatorial districts, although we may approve two-member districts if and only if the legislature can affirmatively show substantial reasons therefor."
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> 384 U.S. 87.

The Supreme Court rejected the district court's holding that the legislatively devised multi-member scheme effected an invidious result. It stated that once the district court decided not to impose its own senate apportionment plan, but to allow the legislature to frame one, judgments as to the desirability of multi-member versus single-member plans were exclusively for the legislature to make. In that case, the legislature did assign reasons for its choice. The Court implied they were valid ones for a legislature to consider. The reasons given by the Hawaii Legislature for devising a multi-member apportionment scheme were as follows:

> "(1) Single-member districts would tend to cause the senators therefrom to be concerned with localized issues and ignore the broader issues facing the state, and therefore it might fragment the approach to statewide problems and programs to the detriment of the state; and (2) historically the members of the house had represented smaller constituencies than members of the senate, and tradition and experience had proved the balance desirable; (3) multi-member districts would increase the significance of an individual's vote by focusing his attention on the broad spectrum of major community problems as opposed to those of more limited and local concern; (4) to set up single-member districts would compound the more technical and more intricate problem of drawing the boundaries; (5) population shifts would more drastically affect the boundaries of many smaller single-member districts - to a greater degree than would be found in larger multi-member districts, citing Oahu's population boom and subdivision development."
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> 240 F. Supp. 727.

I emphasize, however, that whether a legislative scheme consists of single-member districts or multi-member districts or a combination of the two, they must conform so far as practicable to the equal protection requirement. The legislative reasons cited by the court above would in no way justify substantial deviation from population equality for the sole purpose of creating multi-member districts.

Moreover, if a legislative plan does not conform to the Fourteenth Amendment, the United States Supreme Court has plainly stated that federal district courts, which must then devise court-ordered plans, should be guided by the principle that "single-member

districts are preferable to large multi-member districts as a general matter." Connor v. Williams, 402 U.S. 690 (1971).

Accordingly, it is my opinion that a legislative apportionment scheme utilizing multi-member districts which achieve representational equality approximately equal to a single-member district plan would conform to the Fourteenth Amendment to the United States Constitution.

Historically, Vermont's House has been based on a single-member district scheme, while the Senate has been based predominantly on a multi-member plan since 1836 when the Senate was created. Since, so far as the Senate is concerned, county lines by force of federal constitutional provisions and state decisional law are to be given no weight, In re Senate Bill 177, 120 Vt. 365 (1972), the legislature is free, if it desires, to create multi-member Senate districts of whatever geographical area seems wise. The United States Supreme Court, in Reynolds v. Simms, 377 U.S. 533, 577 (1963), indicated that modern views of bicameralism might well include one body of single-member districts "while the other could have at least some multi-member districts." If the legislature were to decide that the Senate were to be composed mainly of multi-member districts, while the House would be comprised predominantly of single-member districts, that scheme would appear to have a legitimate place within the Fourteenth Amendment. If such a plan is considered, it would be constitutionally strengthened and less vulnerable to attack if the multi-member Senatorial districts are as nearly equal as possible in numbers of Senators.

Your second question asks for my opinion as to what population deviation is constitutionally permissible. The equal protection clause requires, absent justification on the basis of a rational state

policy, deviations in population amongst legislative districts to be zero. That should be the starting point of any apportionment scheme. Even if this goal is a practical impossibility, it is nevertheless a dangerous, if not a fatal concept to establish a target of some arbitrary percent deviation and draw the plan around that figure. In Kirkpatrick v. Preisler, 349 U.S. 526 (1969), for example, the Supreme Court used one legislator's statement with regard to congressional districting that "he deemed it proper to attempt to achieve a 2% level of variance rather than to seek population equality" as evidence of a bad faith attempt at congressional districting. The equal protection clause means that only deviations which are fully justified by legitimate state considerations will be tolerated.

The Supreme Court has, however, given some indication of minimum deviations which appear presumptively justifiable in state reapportionment plans.

In Pennsylvania, the state's reapportionment plan was attacked, inter alia, on population equality grounds. The senatorial districts deviated from the ideal district population by 2.02% for the smallest and 2.29% for the highest. The smallest house district and the largest deviated from the ideal district by 2.48% and 2.98%, respectively. Commonwealth ex rel. Specter v. Levin, 448 Pa. 1, 293 A. 2d 15 (1972), appeal dismissed for want of a substantial federal question, sub nom, Specter v. Tucker, ____ U. S. ____, 41 U.S.L.W. 3181 (October 10, 1972). (Appellant's Jurisdictional Statement, pp. 26-31, specifically presenting the population inequality claim). The Pennsylvania Supreme Court's decision was sustained by dismissal of the appeal. The Pennsylvania Supreme Court characterized the foregoing deviations as "minimal" and held that "the deviations clearly do not dilute the equal-population principle 'in any significant way.'" 293 A. 2d 15. Significantly, the Pennsylvania plan was prepared by a bi-partisan commission and therefore relatively free of implications

of partisan gerrymandering. Hence, a total deviation approximating 5% would appear presumptively valid with the challenger required to prove an invidious effect. On the other hand, the Supreme Court struck down Florida's apportionment scheme containing variances in the Senate of almost 26% and the House of 33% where no justification was offered. Swann v. Adams, 385 U.S. 440 (1966). Abate v. Mundt, 403 U.S. 102 (1971), approved a deviation of 11.9% for county government where special considerations inapplicable to state government existed, but emphasized the uniqueness of the facts. In my opinion then, any population deviations would have to be fully justified by some important state policy, although minor ones deviating from the ideal of no more than 2 1/2% on the high and low side would enjoy some presumption of validity.

This brings us to your final question: What is permissible for a state to consider in departing from mathematical exactitude?

The Legislative Apportionment Board majority report of December 27, 1972, contains variances for the Senate of 4.459% over-represented to 4.992% under-represented, or a total deviation of 9.451% for its predominantly single-member district plan. The board stated its plan was based on a strong effort to establish compact and contiguous districts which attempted to honor "community of interests." These considerations appear to be valid state interests which, if fully justified, would survive constitutional scrutiny. The board plan would, therefore, appear to be a base line standard of "practicality" against which any other plan would have to be measured.

Slightly larger deviations than the board's may be constitutional, but only if supportable by a rational state policy, and only if the variation is not so great as to indicate any retreat from the basic goal of population parity. In making this statement, I point out that the board's planned variations affect only

approximately 148 people per 1% deviation from the ideal senate district. In small districts, large percentage deviations may in reality affect insignificant numbers of people. Since we are concerned with people, rather than percentages, some flexibility is permissible.

Reynolds and later cases such as Abate v. Mundt, 403 U.S. 102 (1971), indicate a concern for fair and effective government rather than mathematical niceties.

While insisting on substantial equality of population in districting as the foundation principle, the Reynolds opinion is full of caveats all going to the basic proposition that "Mathematical exactness or precision is hardly a workable constitutional requirement." "The equal protection clause," the Court stated, "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 practicable." 277 U.S. 577.

Reynolds itself discusses various factors which might justify deviations from mathematical exactitude. The opinion mentions prevention of gerrymandering by adherence to traditional political or natural historic boundaries, creation of compact and contiguous territories, and "modern views of bicameralism" which involve creating a different "complexion of the two bodies" so that different constituencies can be represented, as important considerations. To achieve this "apportionment in one house could be arranged so as to balance off minor inequities in representation of certain areas in the other house." 277 U.S. 577. For example, Burns v. Richardson, supra, in approving multi-member districts as a rational approach, implies that the considerations quoted at page 5 of this opinion, which are not mathematical ones, are constitutionally permissible. "But neither history alone,

nor economic or other sorts of group interests are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes." 277 U.S. 580.

Inherent in these cases is the principle that good faith apportionment, creating districts as nearly as practicable equal in population are constitutional if small deviations occur in order to foster the valid state interests listed. Otherwise, apportionment cases would become a function of numerical one-up-manship with the lowest number always winning approval, regardless of the effect on representative government. Such a simplistic principle demeans both the constitution and the courts which interpret it.

Very truly yours,

Kimberly B. Cheney

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