VANDERBILT Law School

September 12, 2019

Hon. Keenan Keller
Senior Counsel
House Committee on the Judiciary
2138 Rayburn Building
Washington, D.C. 20515

Dear Mr. Keller:

I am writing to follow up on our conversation after the hearing in Memphis last week of the Judiciary Committee's Subcommittee on the Constitution, chaired by Rep. Cohen. I do not have Rep. Cohen's email address, so I am sending this letter to you in the hope that you will take the appropriate steps to bring it to the attention of Rep. Cohen and his staff. I would like its contents to be included in the hearing record as a point of clarification of discussions and comments involving Chairman Nadler, Rep. Cohen, and me.

The issue involved the role of state courts in Congressional apportionment. Chairman Nadler and Rep. Cohen interpreted my comments (in response to questions) to mean that state courts had no jurisdiction to interpret state constitutional law and apply it to Congressional apportionment. That does not reflect my position, so I thought that I would take a moment to clarify my view, which was expressed in the context of criticizing the stance of the Pennsylvania Supreme Court in implementing a reapportionment plan for members of Congress from Pennsylvania.

Under Article I, Section 4 of the United States Constitution, the power to determine the "Times, Places, and Manner of holding Elections" for members of Congress "shall be prescribed in Each State by the Legislature thereof." That provision contemplates a role for states in apportioning Congressional seats within their jurisdiction.

The apportionment process is assigned to the state's legislature, indicating that apportionment is a part of a state's political/legislative process. Since the 1930s (*Smiley v. Holm*), the Supreme Court has allowed governors to participate through exercise of the veto power, if that is part of the normal political lawmaking process of the state. A state referendum on ratification of a districting plan is allowed, as ratification is part of the normal lawmaking process (*Ohio* ex rel. *Davis v. Hildebrant*) In a recent case from Arizona (*Arizona State Legislature v. Arizona Independent Redistricting Commission*), the Supreme Court allowed that state to vest Congressional districting in a separately chosen commission, not the legislature. The Court's rationale turned on how direct democracy was a reservation of lawmaking power in the people, and a state could choose to vest districting power in the people themselves, as the ultimate sovereigns in the state's lawmaking process. Critical in the Arizona case was characterizing districting as part of the lawmaking process.

In the Pennsylvania case, allowing a state Supreme Court to declare a districting plan invalid under a state constitution would seem to be part of the lawmaking process. Courts determine whether the outcome of the political process accords with a state's constitution. So a judicial declaration

of unconstitutionality under the state's constitution would probably be all right, consistent with how a state's lawmaking process works, with judicial review. The court would have jurisdiction to make such a judgment. And when, as in Pennsylvania, the governor vetoes proposed apportionment legislation, that seems all right as well. The governor's role in the lawmaking process has been recognized when it is a traditional part of a state's lawmaking process.

In my opinion, what is not all right, however, is for a court to redraw district lines on its own based on state constitutional law. In a somewhat different context, that issue was raised but left unanswered in *Branch v. Smith* (2003).

That issue was my focus when I was testifying.. In my judgment, such judicial action stretches the *Smiley* and the *Arizona* cases too far. In no sense are courts part of a state's lawmaking process when they are crafting and imposing their own apportionment plan. And districting is and must be part of a state's lawmaking process. It is one thing to declare invalid the work of the lawmaking process under state constitutional principle; it is quite another to take on the apportionment process itself by developing and implementing a judicially-crafted apportionment plan under state law.

At most, what the state court can do is to block a state's Congressional redistricting as adopted by the legislature, but it cannot redo the districting on its own.

In sum, a state court has authority to review a state's legislatively-drawn Congressional apportionment as it does review other state legislation for conformity to a state's constitution. A state Supreme Court, such as Pennsylvania's, has authority to determine and declare whether a Congressional apportionment statute is consistent with state constitutional requirements. But that power does not include the power to establish and impose, as a remedy or otherwise, its own apportionment plan under state law. Under Article I, Section 4 of the United States Constitution, that exercise of judicial power intrudes on the state's lawmaking process.

If the political branches cannot agree on an apportionment alternative, then there is impasse. In essence, the state's lawmaking process has failed to exercise the authority conferred by the Constitution on state legislatures. This is where federal law enters in. Federal statutory law contemplates what to do when there is impasse in the state's lawmaking process.

The Constitution contemplates a federal Congressional role in redistricting. That role is triggered when the state lawmaking process defaults (through political impasse). Under Article I, Section 4, "Congress may at any time by Law make or alter" the regulation of states' Congressional elections, including apportionment. In such circumstances, federal law steps in to deal with the impasse.

Specifically, 2 U.S.C. Sec. 2a(c) deals with this precise type of impasse/default situation – what to do "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment." That is, if there is no change in the number of representatives based on the census, representatives "shall be elected from the districts then prescribed by the law of such

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State." Where there is no change in overall representation in a state after the last census, the federal statutory command is pretty direct and provides a federal statutory basis for federal guidance and intervention. *Id.* at (c)(1).

In sum, where impasse in a state's lawmaking process arises, federal law intercedes and relies on preexisting districting. The reliance on preexisting districting is required under federal law unless there is a breach of federal (not state) constitutional requirements – *e.g.*, one person, one vote. Given that partisan vote dilution cases are now not justiciable under federal constitutional principles (*Rucho v. Common Cause*), impasse at the state level triggers reliance on preexisting districting in the absence of a violation of federal law. A state Supreme Court cannot resolve such an impasse by imposing its own apportionment plan; federal law controls.

I hope that this analysis clarifies my comments and the basis for those comments.

Very truly yours,

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and Health Law & Policy
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cc: Paul Taylor