



INSIDER NJ

Gerrymandering Shakeup Could Be Looming And It Could Drive Up Campaign Spending

BY JEFF BRINDLE • 01/18/18 1:11pm

A kink has been put in the armor of partisan gerrymandering, which is an attempt to redraw voting district lines to benefit one party over the other.

Welcoming in the New Year, the 4th U.S. Circuit Court of Appeals on Tuesday, January 9th, determined that North Carolina's congressional redistricting map is unconstitutional.

The panel of federal judges ruled that the map was violative of the equal protection clause of the Constitution and gave unfair partisan advantage to the Republican party.

The opinion by the Court of Appeals represents the first time a congressional map was struck down on the basis of partisan gerrymandering.

As fate would have it, almost to the day federal judges were striking down the North Carolina map, a separate panel of federal judges was in effect upholding Pennsylvania's congressional district map.

On Wednesday, January 10, the Pennsylvania panel ruled that the question of the constitutionality of the Republican drawn map in the Keystone state was not the courts to decide.

The above two cases are among numerous challenges currently being directed toward alleged partisan gerrymandering. Partisan gerrymandering has been a fixture of both political parties throughout the nation's history.

One case in particular has been taken up by the U.S. Supreme Court. This past October, the High Court heard oral arguments involving a challenge to Wisconsin's General Assembly map.

In *Gill v. Whitford*, William Whitford argued that the district map drawn by Republicans in Wisconsin in 2011 constitutes extreme partisan gerrymandering and should be ruled unconstitutional.

Previously, the U.S. Supreme Court did hear a challenge to partisan gerrymandering. In that case, *Vieth v. Jubelirer*, 2004, the Court failed to rule partisan gerrymandering unconstitutional because the justices could not agree on a test to measure when gerrymandering becomes violative of the constitution.

This time, however, it may be different. A mathematically-based "efficiency gap" measure has been developed to respond to the Court's concern with how to establish a standard by which to judge whether a map is unconstitutional because of partisan gerrymandering.

In fact, the “efficiency gap” standard was used in the North Carolina case as a basis for determining the map to be unconstitutional.

The “efficiency gap” standard suggests that votes are wasted when individual voters are included in a district for the purpose of favoring one party over the other and in an amount way beyond the number of votes necessary to win. If a district’s vote is consistently more than 55 percent of the vote for one party or the other, it would meet the “efficiency gap” standard.

Before advocates for eliminating partisan gerrymandering get their hopes up too high, however, it is worth looking at comments made during oral argument in the Whitford case.

Justice Ruth Bader Ginsberg stated the following “If you can stack a legislature in this way, what incentive is there for a voter to exercise his vote.”

However, the Chief Justice, John Roberts, appeared to look at the issue differently.

In suggesting that a finding of unconstitutionality would transfer responsibility for redistricting away from state legislatures to the Court, Roberts said “we will have to decide in every case whether the Democrats or Republicans win. That is going to cause very serious harm to the status and integrity of the decisions of the Court in the eyes of the country.”

So once again, the deciding vote may come down to Justice Anthony Kennedy, who, in the 2004 case, stated that the issue did come under the Court’s jurisdiction. He added, however, that he was troubled by the lack of a standard by which to measure extreme partisan gerrymandering.

If the Court does decide in Whitford that partisan gerrymandering is unconstitutional, the impact on the electoral process will be two-fold. First, it will change a geographically cohesive and contiguous district electoral system into a proportional system. Second, it will make legislative and congressional elections more competitive.

By creating districts that are less geographically cohesive, a district map system would be established that might divide communities and dilute the influence of many groups and individuals across the political spectrum.

On the other hand, an electoral map based on proportionality would give both parties a better chance of electing their candidates in a more competitive environment and perhaps lead to a more representative government that would invite compromise and a greater spirit of bipartisanship.

In addition, minimizing partisan gerrymandering that would make legislative and congressional elections more competitive would also bring about a spike in campaign spending. Candidates and parties will be driven to raise and spend mounting dollars and independent groups will gain even more influence over the electoral process.

Thus, the U.S. Supreme Court has a “hot-potato” on its hands. If it determines gerrymandering to be unconstitutional, it changes history by removing redistricting out of the hands of state legislatures.

On the other hand, if it leaves in place the current method of redistricting it retains a system that in some instances greatly favors one party over the other, and one voter over the other.

My guess—the Court finds some middle ground that undercuts extreme partisan gerrymandering but leaves in place a primary role for state legislatures in the process.

Jeff Brindle is the Executive Director of the New Jersey Election Law Enforcement Commission.

The opinions presented here are his own and not necessarily those of the Commission.