

M E M O R A N D U M

March 20, 1991

TO: The Members of the Montgomery County  
Commission on Redistricting

FROM: Linda B. Thall *Linda B. Thall*  
Senior Assistant County Attorney

RE: Update on 1981 County Attorney Memorandum Regarding  
Applicability of One-Man, One-Vote Requirements and  
Permissible Variations in Reapportioning Councilmanic  
Districts.

In July 1981, former County Attorney Paul A. McGuckian provided the Commission on Redistricting with a legal memorandum addressing two related redistricting issues. First, the memorandum addressed the question of whether the one-person, one-vote requirement mandated by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution applied to Montgomery County's redistricting efforts. Second, the memorandum explained the extent to which the population in the councilmanic districts could vary and still be in compliance with the charter requirement that councilmanic districts be of substantially equal population. At its last meeting, the Commission requested that I review the findings made by the County Attorney on both of these issues. I have reviewed the 1981 memorandum and brought up to date the legal research upon which that memorandum was based. My conclusions are set forth herein.

I. Applicability of the Equal Protection Clause to County Redistricting

The Equal Protection Clause of the Fourteenth Amendment requires that apportionment of citizens to a legislative district be conducted in such a way that the districts are comprised of substantially equal population. This is to assure that the vote of any citizen is approximately equal in weight to that of any other citizen in the governmental unit. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). This requirement, which applies to state and local governments as

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well as to the federal government, is commonly known as the "one-person, one-vote" requirement.

In his 1981 memorandum to the Commission, the County Attorney concluded that the one-person, one-vote requirement did not apply to the Montgomery County Council. His conclusion was based on the fact that at that time §102 of the Montgomery County Charter required that council members be nominated and elected by the qualified voters of the entire County. This charter provision was in compliance with Art. VII, §1 of the Maryland Constitution, which required at that time that County Councilmembers be elected "on the general ticket of each county by the qualified voters of the several counties of the State". In the case of Montgomery County Council v. Garrott, 243 Md. 634, 222 A.2d 164 (1966), this constitutional language was construed by the Maryland Court of Appeals to forbid the election of councilmembers by districts. At issue in the Garrott case was a resolution by the County Council to amend the charter to provide that voters in each of seven councilmanic districts containing approximately equal numbers of residents would elect one councilmember to represent that district. The court held that the Council resolution was invalid under Art. VII, §1 of the Maryland Constitution. The court stated that "the County Council cannot bring about a charter requirement that election of council members be by the voters of a district as long as §1 of Art. VII and §3 of Art. XI-A of the Constitution stand as they now read." 243 Md. at 647, 222 A.2d at 170.

Although the County Attorney's conclusion regarding the one-person, one-vote requirement was correct at the time it was made in 1981, subsequent changes to the Maryland Constitution and to the Montgomery County Charter now support a different conclusion. In 1986, Art. VII, §1, of the Maryland Constitution was amended to provide that certain counties could provide for election to County office from districts, or by the voters of the entire county, or by a combination of these methods of election. The amendment excluded charter counties such as Montgomery County from coverage under this section. The election of councilmembers in charter counties is now addressed in Art. XI-A, §3A of the State Constitution. (This section was also amended subsequent to the Garrott decision.) This section gives the County the authority to provide in its charter for the election of County Councilmembers "by the voters of councilmanic

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districts therein established, or by the voters of the entire county, or by a combination of these methods of election." Art. XI-A, §3A(a). Pursuant to this authorization, the Montgomery County Charter was amended so that only four of the nine councilmembers are nominated and elected by the qualified voters of the entire County. Each of the five other members of the Council is now nominated and elected by the qualified voters in one of five councilmanic districts.

Because the Montgomery County Charter now provides for the nomination and election of certain members from councilmanic districts, the Fourteenth Amendment's Equal Protection Clause applies to govern redistricting decisions made by this Commission. Thus, the one-person, one-vote requirement is applicable to the County. As a practical matter, however, this should not result in changes to the standards applied by the Commission in arriving at redistricting decisions. Independent of the requirement imposed by the Equal Protection Clause, the Montgomery County Charter requires that the population of councilmanic districts be substantially equal. The County Attorney's 1981 memorandum noted this charter requirement and advised the prior Commission on Redistricting that it should follow the federal cases interpreting the Equal Protection Clause restrictions on redistricting. Thus, by virtue of the Charter requirement, the County has already incorporated the Equal Protection Clause requirements into its law.

## II. Permissible Deviations From Equal Population Districts

The Supreme Court has recognized the practical impossibility of arranging legislative districts so that each has an identical number of residents, citizens, or voters. Thus, the Equal Protection Clause has been held to require only that the government make an honest and good faith effort to construct districts as nearly of equal population as is practicable. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). The Supreme Court recognized that some deviations from population equality may be necessary to permit pursuit of other legitimate objectives such as maintaining the integrity of political subdivisions or providing for compact districts of contiguous territory. Reynolds v. Sims, *supra*; Brown v. Thomson, 462 U.S. 835, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983).

As the 1981 memorandum noted, there are two different percentages that are used by the courts when analyzing redistricting plans. The first and most important standard is the "maximum percentage variation". This is computed by adding together the percentage variation of the district most overrepresented and the percentage variation of the district which is the most underrepresented in comparison to the ideal district. The total percentage obtained by adding these two figures together is sometimes referred to as the "total deviation percentage". The other percentage figure is the "average percentage deviation", which is computed by adding together all of the variances from the ideal district and dividing that figure by the number of districts involved. The average percentage deviation is considered when the maximum deviation percentage is above ten percent.

The two leading Supreme Court cases in this area continue to be White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973). In White v. Regester, the Supreme Court stated that relatively minor population deviations among state legislative districts would not be considered to substantially dilute the weight of individual votes in the larger districts. The Court indicated that a maximum percentage variation of less than ten percent would not require additional justification in order to be upheld. See also, Brown v. Thomson, *supra*; Connor v. Finch, 431 U.S. 407, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977). Where the maximum percentage variation is above that percentage figure, the government is required to show that the higher percentage variation is justified "based on legitimate considerations incident to the effectuation of a rational state policy". White, 412 U.S. at 764, 93 S.Ct. at 323, quoting Reynolds v. Sims, 377 U.S. 533, 579. In such cases, the court will look at the reasons asserted for the population deviation.

As noted in the County Attorney's memorandum, contiguity and compactness are two considerations recognized as valid when justifying population variations between districts. The Commission is required by §103 of the County Charter to consider these two factors along with equality of population in creating its redistricting proposal for the County Council. The contiguity requirement "mandates that there be no division between one part of a district's territory and the rest of the

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district; in other words, contiguous territory is territory touching, adjoining and connected, as distinguished from territory separated by other territory." Matter of Legislative Districting of the State, 299 Md. 658, 475 A.2d 428, 437, appeal dismissed, Wiser v. Hughes, 459 U.S. 962, 103 S.Ct. 286, 74 L.Ed.2d 272, and Andrews v. Hughes, 459 U.S. 962, 103 S.Ct. 286, 74 L.Ed.2d 272 (1982).

The compactness requirement is a relative rather than an absolute standard and as such cannot ordinarily be determined by a visual examination of an electoral map. Compactness is a requirement for a close union of territory rather than a requirement dependent upon a district being of any particular shape or size. This requirement is essentially an anti-gerrymandering safeguard. It is, in application, to be subservient to the dominant federal constitutional requirement of substantial equality of population among districts. Matter of Legislative Districting of the State, supra. In that case, the Court of Appeals stated that it did not violate the compactness mandate to take account of existing political subdivision lines, topography, the irregularity of state and municipal boundaries, means of transportation and lines of communication.

Article III, §4 of the Maryland Constitution requires that the State give due regard to natural boundaries and the boundaries of political subdivisions when creating state legislative districts. Although this Constitutional requirement is not binding on the County, it is very likely that a court would approve the County's consideration of these factors as well. In Reynolds v. Sims, supra, the Supreme Court recognized that other valid considerations, which do not significantly impair equality of apportionment, may be taken into account. See also, Connor v. Finch, supra. The Court said that a State could legitimately desire to maintain the integrity of various political subdivisions and that indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. Natural, historical and geographic boundaries, as well as political lines, may therefore be considered in designing districts as long as the purpose is not to achieve a political gerrymander prohibited by the compactness provision. Preservation of well-recognized boundary lines is recognized as a valuable aid to voters in orienting

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themselves to the territory of their districts. Accordingly, while it is not legally required to do so, the Commission may appropriately consider and recognize natural and public municipal boundaries in creating new boundaries for the councilmanic districts.

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