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ATTORNEY GENERAL OPINION NO. 91-4

TO: The Honorable Mark G. Ricks
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The Honorable Pam Bengson Ahrens
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Per Request for Attorney General's Opinion

QUESTION PRESENTED:

To what extent do the federal and state constitutions and the federal Voting Rights Act place restrictions on the reapportionment process in Idaho?

CONCLUSION:

The fourteenth amendment of the United States Constitution requires that districts be of equal population. The fifteenth amendment, as implemented by the Voting Rights Act, mandates that a legislative plan not impair a minority's ability to participate in the political process and elect representatives of their choice. Finally, the Idaho Constitution both limits divisions of counties and specifies the number of legislators allotted to each district.

ANALYSIS:

Pursuant to art. 3, § 2, of the Idaho Constitution, the Idaho State Legislature is preparing to reapportion the State of Idaho. We have been asked to discuss the effects the United States Constitution, the Voting Rights Act and the Idaho Constitution will have on this reapportionment. Our analysis is divided into four parts. In part one, we define key terms. Part two addresses the equal population requirement. Part three analyzes the current law on racial and partisan discrimination and suggests how to avoid problems in these areas. Finally, in part four, we turn to the Idaho Constitution and address: (1) division of counties; (2) creation of multi-member districts; and (3) a timetable for the legislature to complete its reapportionment plan.

I. DEFINITIONS

The following are definitions of terms used throughout this opinion.

1. Congressional Plans - Congressional plans are plans that divide the state into districts for the purpose of electing members to the United States Congress. These congressional districts are governed by art. I, § 2, of the United States Constitution and must be as equal as practicable in population.

2. Floterial District - A floterial district encompasses within its boundaries two or more other districts, each electing a member or members to a legislative or other public body. A floterial district is used when none of the encompassed districts is by itself entitled to another seat, but the combined district populations do entitle the area as a whole to additional representation.

3. Fracturing - Fracturing is drawing district lines so that a minority population is broken up among several districts, thus keeping them a minority in every district.

4. Gerrymandering - Drawing districts with odd shapes to create an unfair partisan advantage is called gerrymandering. Packing and fracturing are the most common gerrymandering techniques.

5. Ideal Population - This is the starting point for determining the extent to which district populations are not equal. The "ideal" district population is usually equal to the total state population divided by the total number of districts. For example, if a state's population is four million and there

are forty legislative districts, the "ideal" population is 100,000.

6. Legislative Plans - Legislative plans draw districts for the purpose of electing members to the state legislature. Under the fourteenth amendment of the United States Constitution, legislative districts must be substantially equal in population.

7. Multi-member Districts - A multi-member district is a district represented by two or more legislators elected at large by the voters of the district.

8. Overall Range - The "range" is a statement of the population deviations of the most populous district and the least populous district, expressed in either absolute or relative terms. For example, if the ideal district population is 100,000, the largest district in the plan has a population of 102,000 and the smallest district has a population of 99,000, then the range is +2,000 and -1,000, or +two percent and -one percent. The "overall range" is the sum of the deviation of the most and least populous districts, disregarding the "+" and "-" signs. In the preceding example, the "overall range" is 3,000 people, or three percent.

9. Packing - Packing is drawing district boundary lines so that members of a minority are concentrated, or "packed," into as few districts as possible. They become a super majority in the packed districts - 70, 80, or 90 percent. They can elect representatives from those districts, but their votes in excess of a simple majority are not available to help elect representatives in other districts.

10. Single-member Districts - In single-member districts, the voters in the district elect only one legislator to a political body.

II. SUBSTANTIAL EQUALITY

The primary requirement of legislative districts is that they be substantially equal in population. The United States Supreme Court, in Reynolds v. Sims, 377 U.S. 533, 568 (1964), held that the equal protection clause of the fourteenth amendment of the United States Constitution "demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races."

"Substantial equality" of population has come to mean that a state legislative plan probably will not be thrown out if its

overall range is less than ten percent.[1] For example, assuming legislative districts would be perfectly equal if they each contained 100 citizens (the "ideal population"), but the smallest district actually contains 96 individuals, while the largest contains 104, the overall range would be eight percent. If the overall range of a legislative plan is kept below ten percent, the plan is prima facie constitutionally valid. Connor v. Finch, 431 U.S. 407, 418 (1977).

The legislature should be on notice that the success of a legislative plan with an overall range of less than ten percent is not guaranteed. However, once a legislative plan has an overall range of less then ten percent the challenger bears the burden of proving the plan violates the equal protection clause. See Gaffney v. Cummings, 412 U.S. 735, 740-41 (1973). The challenger cannot bear this burden merely by offering an alternative plan with a lower overall range, but must affirmatively demonstrate a constitutional violation, such as racial discrimination or partisan gerrymandering. See REAPPORTIONMENT LAW: THE 1990'S 31 (NCSL 1989).

The Idaho Legislature can take precautionary steps to ensure that a plan with an overall range of less than ten percent stands up in court. Three-judge federal courts called upon to adopt redistricting plans within the ten percent overall range, have applied three criteria to demonstrate the plans were fair: (1) that the districts be composed of contiguous territory, (2) that the districts be compact, and (3) that districts attempt to preserve communities of interest.[2] See Carstens v. Lamm, 543 F. Supp. 68 (D. Colo. 1982). This office strongly recommends that the Idaho Legislature utilize the above criteria in order to avoid a possible challenge to its legislative plan. Due to state constitutional limits discussed below in Part IV, these criteria can not be used in deciding the extent to which counties must be divided to create districts. However, once a decision to split a county has been made, the three criteria -- contiguous territory, compactness and preserving communities of interest -- should be used to determine exactly where district lines should fall.

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[1]This standard is much less exacting than that applied to congressional districts. Congressional districts are governed by art. I, § 2, of the United States Constitution rather than the equal protection clause. The United States Supreme Court has determined that congressional districts must be as equal in population as "practicable" and has thrown out plans with an overall range of less than 1%. See Karcher v. Daggett, 462 U.S. 725 (1983).

[2]The term "communities of interest" means "distinctive units which share common concerns with respect to one or more identifiable features such as geography, demography, ethnicity, culture, socio-economic status or trade." Carstens v. Lamm, 543 F. Supp. 68, 91 (D.Colo. 1982).

Clearly, legislative plans within the ten percent standard have a good chance of standing up in federal court. By contrast, a legislative plan with an overall range greater than ten percent "creates a prima facie case of discrimination. . . ." Brown v. Thomson, 462 U.S. 835, 842-843 (1983). To date, the only "rational state policy" justifying an overall range of more than ten percent in a legislative plan has been recognition of the boundaries of political subdivisions. See Mahan v. Howell, 410 U.S. 315 (1973) (upholding a Virginia legislative plan with a sixteen percent overall range because the Virginia General Assembly's peculiar authority to enact legislation dealing with particular subdivisions justified an attempt to preserve political subdivision boundaries in drawing house districts); and Brown v. Thomson, supra, (1983) (upholding Wyoming's state policy of using counties as legislative districts and ensuring each county at least one representative, even though that policy created an overall range of eighty-nine percent). It is our opinion the Thomson decision is an aberration and should not be relied on to depart from the ten percent range. Appellants in that case did not directly challenge the eighty-nine percent overall range, but only the effect of giving a particular county its own representative. Id. at 846.

Despite Thomson and Mahan, the United States Supreme Court has generally not been sympathetic to plans that fall outside the ten percent limit, even if the plans protect political subdivisions. See Chapman v. Meier, 420 U.S. 1 (1975), and Connor v. Finch, 431 U.S. 407 (1977).

The Idaho Supreme Court addressed the issue of population equality in Hellar v. Cenarrusa, 106 Idaho 586, 682 P.2d 539 (1984) (Hellar III), and struck down a plan with a deviation of approximately thirty-three percent. The court concluded the plan could not be justified on the basis of maintaining county boundaries, given the fact that several alternative plans both maintained county lines and fell within the ten percent limit. Id., 106 Idaho at 589-90, 682 P.2d at 542-43. Thus, the Idaho Supreme Court has not considered protection of political subdivisions a policy that easily justifies deviation from equal population principles.

In conclusion, legislative plans with an overall range greater than ten percent will be struck down unless they are necessary to promote a rational state policy, in particular, to respect the boundaries of political subdivisions. However, this justification is not readily accepted by the United States Supreme Court. Based on the reasoning in Hellar, supra, and Idaho's new constitutional amendment, see art. 3, § 5, the Idaho Supreme Court is also unlikely to accept this justification. On

the other hand, legislative plans with an overall range of less than ten percent are prima facie constitutionally valid, and are substantially more likely to stand up in court. Thus, the Idaho legislature should ensure its legislative plan has an overall range of less than ten percent.

II. DILUTING MINORITY VOTES

When a legislative plan discriminates against racial or language minorities, the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1982), is implicated. When a plan discriminates against a partisan minority, the equal protection clause is implicated. We discuss each in turn.

A. Discrimination Based on Race or Language

1. Background

The Voting Rights Act of 1965 was designed to protect the right to vote as guaranteed by the fifteenth amendment and to enforce the fourteenth amendment. Section 2 of the Act attempts to secure political power for racial and language minorities by prohibiting states and political subdivisions from using voting qualifications, prerequisites to voting, or any other practices which result in a denial or abridgement of the right to vote on account of race or language. 42 U.S.C. § 1973(a) (1982). A violation of the act is established if "based on the totality of the circumstances . . . the political process" is not "equally open" to members of a racial or language minority 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." 42 U.S.C. § 1973(b) (1982). The Voting Rights Act prohibits conduct that results in a denial or abridgement of the rights of racial minorities. There is no requirement of discriminatory intent. 42 U.S.C. § 1973(a) (1982).

In Thornberg v. Gingles, 478 U.S. 30 (1986), the plaintiffs challenged a North Carolina redistricting plan on the ground that the multi-member districts contained in the plan impaired the ability of blacks to participate equally in the political process and elect representatives of their choice.[3]

[3]Legislative plans challenged under the Voting Rights Act usually involve multi-member districts. This is so because multi-member districts generally contain more voters, and thus further dilute the minority vote, especially if the minority is insular and compact. Thus, even in Idaho where only two house representatives are allotted per district, these districts included are one hundred percent larger in voter population than they would be if there was only one house representative per district.

Justice Brennan, writing for the majority, discussed factors a court should consider when determining whether the "totality of the circumstances" indicates a violation of section 2. The two most important factors to consider are racial polarization (racial bloc voting), and the electoral success of minority candidates (whether the minority "experiences substantial difficulty in electing representatives of their choice"). Id. at 48, n. 15.

In addition to these objective factors, the minority group must prove:

(1) that the minority is sufficiently large and geographically compact to constitute a majority in a single-member district;[4]

(2) that it is politically cohesive; and

(3) that, in the absence of special circumstances, bloc voting by the white majority usually defeats the minority's preferred candidate.

Id. at 50-51.

The Thornberg Court struck down most of the challenged districts, concluding they were characterized by racially polarized voting, a history of official discrimination in voting matters and campaign appeals to racial prejudice. The Court held that those factors, together with the use of multi-member districts, impaired the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect representatives of their choice. Id. at 80.

At first glance, the Voting Rights Act appears to pose little problem in Idaho. A challenger, under Thornberg, must demonstrate that the minority would have to be sufficiently large and compact to constitute a majority, if given a single-member district. Due to the small number of minority members in Idaho, it is unlikely this standard could be met.

However, the discussion does not stop here. Justice Brennan in a footnote left open what standard would apply if a challenger alleged a minority's ability to influence the election process was impaired, as opposed to its ability to elect representatives.

[4] "The single-member district is the appropriate standard to measure minority group potential to elect because it is the smallest political unit from which legislators are elected." Id. at 50, n. 17.

Thornberg at 46, n. 12. Thus, although the criteria enunciated in Thornberg do not pose a problem, the opinion nevertheless raises warning signals.

This raises the question whether a minority that is too small to constitute a majority in any single district could nevertheless argue that the legislative plan impaired its ability to influence the political process, or fragmented the minority among too many districts. The vast majority of federal courts have ignored footnote 12 in Thornberg and have refused to entertain challenges that do not meet the brightline Thornberg test of having a minority large enough to elect a candidate. See McNeil v. Spring Field Park Dist., 851 F.2d 937 (7th Cir. 1988); and Monroe v. City of Woodville, Miss., 881 F.2d 1327 (5th Cir. 1989). An exception to this trend can be found in East Jefferson Coalition v. Jefferson Parish, 691 F. Supp. 991, 1006 (E.D. La. 1988), where a federal district court concluded that Justice Brennan's footnote, combined with legislative history, indicated that minorities insufficient in number and compactness to constitute a majority of a single-member district could nevertheless be afforded relief if "a proposed remedy [would] . . . provide them the ability to influence elections." Parish has not been followed in the federal courts. Consequently, despite Justice Brennan's footnote 12, federal case law indicates that the Thornberg criteria are to be applied to all vote dilution claims.

The Idaho Legislature must nonetheless consider the strong possibility that the Idaho Supreme Court may choose to protect racial minorities to a greater extent than do federal courts. The Idaho Supreme Court has not yet addressed what protections the Idaho Constitution may afford minorities in the voting rights context. However, in Hellar III, supra, the court noted that voting rights are protected by the Idaho Constitution's equal protection clause, and this clause may be construed independently of the federal Constitution. Additionally, as discussed below, the Idaho Supreme Court has adopted a substantially stronger stand against partisan gerrymandering than has the federal judiciary. Finally, unlike the federal courts, the Idaho Supreme Court has no reason to fear it will be swamped by minority challenges to legislative plans if it opens the door to claims of vote dilution.

In conclusion, due to the small numbers of minorities in Idaho, a challenge such as the one brought in Thornberg, alleging an impairment of the ability to elect representatives should pose little threat to a legislative plan. A more difficult question arises if the minority alleges that its ability to influence the electoral process has been impaired or that its members have been unnecessarily split among districts. The Idaho Supreme Court has

yet to determine what guarantees the state constitution affords minorities in the voting context but has adopted a much tougher standard against gerrymandering than have the federal courts. Consequently, this office recommends that the legislature take steps to ensure its plan does not impair a racial or language minority's ability to participate in the political process and elect representatives of their choice. This office suggests the legislature avoid dividing compact communities primarily composed of a racial or language minority.

B. Discrimination Based on Party

Legislative districts, despite compliance with the one-person-one-vote criteria, are sometimes drawn to create an unfair partisan advantage. Partisan minorities, faced with so-called "gerrymandering," must look either to the equal protection clause or the Idaho Constitution for a remedy.

1. Federal Law

Traditionally, federal courts have avoided the issue of gerrymandering. However, in 1986, the Supreme Court for the first time stated outright that partisan gerrymandering is a justiciable issue. Davis v. Bandemer, 478 U.S. 109 (1986). A plurality of the Court concluded the equal protection clause prohibited gerrymandering, but set an exacting standard for prevailing on such a claim. A claimant alleging partisan gerrymandering must prove "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." Id. at 127. Additionally, the level of the "discriminatory effect" must be high:

> [m]ere lack of proportional representation will not be sufficient to prove unconstitutional discrimination . . . . Rather, unconstitutional discrimination occurs only when the electoral process is arranged in such a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.

Bandemer has only been interpreted once by a lower court. In Badham v. March Fong Eu, 694 F.Supp. 664 (N.D. Cal. 1988), the court threw out a claim that congressional districting in California discriminated against Republicans. After finding the complaint did sufficiently allege discriminatory intent, the court applied a two-pronged test, requiring (1) a history of disproportionate results and (2) "strong indicia of lack of political power and the denial of fair representation." Id. at 670. The court concluded that because there were no allegations that the claimants were being "entirely ignored[d] by their

. . . representatives" and because they had not been "shut out" of the political process, there was no equal protection violation.

In conclusion, under federal law, a claim of partisan discrimination is not easy to make out. The partisan minority must essentially be shut out of the political process, a difficult claim to prove.

2. Idaho Law

While a claimant would have difficulty prevailing under federal law, the same may not be true under Idaho law. The Idaho Supreme Court has addressed partisan gerrymandering only once. In so doing, it took a much stronger stand on the issue than has the United States Supreme Court.

In Hellar v. Cenarrusa, 106 Idaho 586, 682 P.2d 539 (1984) (Hellar III), the court discussed a legislative plan which contained "unrefuted" evidence of gerrymandering. Id. at 590, 682 P.2d at 543. The Idaho Supreme Court by-passed the federal criteria and looked neither at discriminatory intent nor the effect of shutting a minority party out of the political process. The mere fact that the districts were oddly shaped and splintered traditional neighborhoods was sufficient for the court to conclude partisan gerrymandering had occurred. Additionally, the court was troubled that no incumbents had been pitted against each other. This appears to run directly contrary to the United States Supreme Court's approach in Karcher v. Daggett, 462 U.S. 725, 740-741 (1983), suggesting that "avoiding contests between incumbent representatives" might even justify some variance from the equal population requirement. Nevertheless, the Idaho Supreme Court appears to have found this policy a per se indicator of invidiousness and partisan gerrymandering.

The bottom line here is that the Idaho Supreme Court in Hellar III created its own standard to avoid partisan gerrymandering. This office suggests a number of precautionary steps the legislature should take to meet this standard. First, if both parties assist fully in drafting the plan, it is far less likely the court would conclude the minority party is shut out of the political process. Second, in drawing boundaries, the legislature should avoid oddly shaped districts and splintered neighborhoods that might establish discrimination against the minority party. Finally, as much as the legislature may wish to minimize contests between incumbents, it must realize the Idaho Supreme Court has not been sympathetic to this policy.

IV. THE IDAHO CONSTITUTION

The Idaho Constitution has recently been amended. See art. 3, §§ 2, 4, and 5. These amendments provide new guidelines for reapportionment regarding: (1) when counties may be divided; (2) what limits there are on multi-member districts; and (3) what timeline should be established for reapportionment.

A. Division of Counties

The first issue raised by the new amendments involves the extent to which counties may be divided to create districts.

Prior to the 1986 amendments, art. 3, § 5, of the Idaho Constitution stated:

> A senatorial or representative district, when more than one county shall constitute the same, shall be composed of contiguous counties, and no county shall be divided in creating such districts.

The Idaho Supreme Court, in Hellar v. Cenarrusa, 104 Idaho 858, 861, 664 P.2d 765, 768 (1983), (Hellar I), concluded that the prohibition against dividing counties applied only to districts composed of more than one county. By contrast, a large county could be divided so long as the districts into which it was divided were wholly contained within that county and contained no members from another county. Id.

The second circumstance where a county could be divided was if the division was necessary to comply with the federal Constitution:

> [w]here art. 3, § 5, of the Idaho Constitution conflicts with the equal representation mandate of the Fourteenth Amendment of the U.S. Constitution, the latter will prevail. However, in order for the fourteenth amendment to displace the Idaho constitutional provision, there must be no possibility of compliance with both.

Hellar I, 104 Idaho at 860, 664 P.2d at 758. Thus, under Hellar I, if a district was composed of more than one county, those counties could also be divided, if necessary to meet the requirements of the federal Constitution. The court concluded such a division was not necessary in that case, since an alternative plan met federal constitutional requirements without splitting counties.

Largely in response to Hellar I, II and III, the Idaho Constitution was amended. Art. 3, § 5, now states:

> A senatorial or representative district, when more than one county shall constitute the same, shall be composed of contiguous counties, and a county may be divided in creating districts only to the extent it is reasonably determined by statute that counties must be divided to create senatorial and representative districts which comply with the constitution of the United States. A county may be divided into more than one legislative district when districts are wholly contained within a single county . . . .

The new art. 3, § 5, largely reiterates the Hellar I holding: the legislature is free to divide a county in creating districts if the districts are wholly contained within the county; if they are not, counties can be divided only as necessary to meet federal constitutional mandates.

This office concludes that the new language interposes a different standard of review into the issue: if the legislature determines by statute that a division of counties is necessary to meet the requirements of the U. S. Constitution, and if this determination is not arbitrary, capricious or unreasonable, it should be upheld. Thus, unlike Hellar, a court applying the new art. 3, § 5, to a legislative plan, should not conduct a de novo review of whether it was necessary to divide counties to meet federal constitutional requirements. Rather, the court should decide if the legislature's resolution of this issue was reasonable and, if so, should uphold the legislative plan.[5]

Under what circumstances would a court conclude the legislature's determination was not reasonable? The most obvious circumstance would be if a challenger offered an alternative plan which both fell below the ten percent overall range and divided substantially fewer counties than did the legislature's plan. Such an alternative plan, by meeting equal population requirements while minimizing county divisions, could easily call into question the reasonableness of the legislature's determination of which counties had to be divided to meet federal constitutional mandates.

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[5]This level of deference would only apply to the narrow issue of whether counties must be split to meet federal constitutional mandates. Such deference would not apply to separate issues of equal population, racial discrimination and gerrymandering. Thus, for example, the court could conclude the legislature reasonably determined counties must be split, yet throw out the legislative plan because its overall range was too high or it diluted the voting power of a racial or party minority.

To avoid this scenario, this office recommends adherence to the following guidelines. First, and most importantly, the legislature should make every effort to minimize county divisions. Second, if a county must be divided, the legislature should be prepared to demonstrate that the basis for the division is either to comply with equal population requirements or to avoid a Voting Rights Act violation. Counties should not be divided to protect either a party or an incumbent. Third, if equal population requirements do mandate county divisions, the legislature should avoid unnecessarily reducing the overall range at the expense of county lines. The legislature must balance the federal constitutional mandate of equal population principles with the state constitutional principle of protecting county lines. The Idaho Supreme Court might not be sympathetic to a plan which further reduces the overall range, say to four or one percent, at the expense of county boundaries, since this further reduction is not mandated by the federal Constitution. Fourth, if a county must be divided, the legislature should avoid excessively fragmenting that county. If a county is splintered among several districts, the voters from the splintered county may have their interests neglected. This runs counter to the policy contained in art. 3, § 5, and may be considered indicative of gerrymandering. Fifth, the legislature should try not to divide counties into bizarrely shaped districts. Again, this could be viewed as evidence the county division was based on gerrymandering or protection of incumbents, rather than federal constitutional mandates.

We have considered a challenge based on a plan which falls below the ten percent range and divides fewer counties. Alternatively, a challenger might offer a plan which divides still fewer counties but only at the cost of <u>increasing</u> the overall range above the ten percent limit. Such an alternative plan should not be a threat to the legislature's plan. The new art. 3, § 5, by its terms, gives the first and highest priority to the United States constitutional requirement of equal population. Consequently, it is our opinion that the Idaho Supreme Court would not look favorably on an alternative plan with an overall range greater than ten percent, even if the plan divided fewer counties, so long as the legislature's own plan fell below the ten percent limit and only divided counties to the extent reasonably necessary to meet the equal population requirements.

B. Multi-Member Districts

The next issue raised by the state constitutional amendments concerns the limits placed on multi-member districts.

At the outset, we note there is some confusion over what the term "multi-member district" means in Idaho. Under federal law, a multi-member district is a district represented by two or more legislators of a legislative body, elected at large by the voters of the district. See e.g., Whitcomb v. Chavis, 403 U.S. 124 (1971). Under this definition, every district in Idaho is a multi-member district. This definition runs counter to what some in Idaho understand a multi-member district to be. In Hellar v. Cenarrusa, 106 Idaho 571, 574, 682 P.2d 524, 527 (1984) (Hellar II), the Idaho Supreme Court indicated that of the thirty-three districts in Idaho, only six of them are multi-member -- the six containing more than one senator. The court did not count the twenty-seven districts containing only one senator and two representatives as multi-member districts.

Unfortunately, this confusion over terminology creates ambiguity regarding the new state constitutional provisions addressing multi-member districts. For the purpose of our analysis, we adopt the definition enunciated by the United States Supreme Court. We do so because this definition more closely comports with what appears to have been one of the purposes behind the constitutional amendments, namely, limiting all districts, even those referred to in the constitution as multi-member districts, to just one senator and two representatives.

The Idaho Constitution limits the number of legislators that multi-member districts may contain. In separate provisions, the Idaho Constitution addresses two types of multi-member districts: those composed of more than one county and those composed of only one county. We discuss each type of district in turn.

First, the Idaho Constitution expressly limits the number of legislators to be apportioned to a multi-member district composed of more than one county. Art. 3, § 5, states in pertinent part:

> Multi-member districts may be created in any district composed of more than one county only to the extent that two representatives may be elected from a district from which one senator is elected. (Emphasis added.)

Read literally, this provision requires that a multi-member district, composed of more than one county, must contain exactly one senator and two representatives. This reading appears to comport with legislative intent. One policy behind art. 3, § 5, is to protect the smaller counties. By requiring that multi-

member districts composed of more than one county contain just one senator and two representatives, small counties are protected. Without this provision, small counties could be attached to larger counties to form districts. Equal population requirements could be met by giving these districts a high number of legislators, but the smaller county's vote would essentially be swallowed up by the vote of the larger county. Consequently, Idaho's new constitutional provision, limiting the number of legislators per district, curtails the extent to which small counties may be joined to large counties to create districts.

Having addressed the number of legislators that may be apportioned to multi-member districts composed of more than one county, we now turn to the number of legislators who may be apportioned to multi-member districts composed of only one county. More specifically, may districts, such as district eleven (Canyon County), continue to run at large more than one senator and two representatives? This office suggests that the only safe answer is No.

Art. 3, § 5, is silent as to multi-member districts composed of only one county. However, limitations on these districts are provided in other amendments as well as by Idaho tradition and legislative history. Art. 3, § 2, provides that the senate shall consist of "not less than thirty nor more than thirty-five members." Art. 3, § 4, states that the legislature shall be apportioned to "not less than thirty nor more than thirty-five legislative districts. . . ." This tracking between the number of districts and the number of senators indicates each district is to be apportioned only one senator. In addition, art. 3, § 2, states "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." This language, along with Idaho's traditional two-to-one ratio between representatives and senators, indicates each district is to be allotted two representatives.

This interpretation of art. 3, §§ 2 and 4, is buttressed by legislative history. On March 1, 1985, Representative Haagenson explained proposed amendments, H.J.R. 2, to the State Affairs Committee. These amendments were identical to the amendments adopted the following year. Representative Haagenson stated that under the amendments, "there will be two representatives and one senator from each district." Thus, the legislative history also suggests that in the future all multi-member districts, including those composed of only one county, may consist of only one senator and two representatives.

In conclusion, the Idaho Constitution very possibly limits the number of legislators in all districts. As the legislature

drafts its plan, it would be prudent to allot each legislative district only one senator and two representatives.

C. A Time Frame

The final issue raised by the new amendments is when the legislature must complete the reapportionment. Pursuant to art. 3, § 4, the legislature following the 1990 census must be elected under the new plan. This would be the fifty-second legislature, which convenes on January 11, 1993. In order to comply with this requirement, the current legislature must have its plan in place prior to the primaries for the fifty-second legislature. By statute, these primaries are presently scheduled to take place on May 26, 1992. Idaho Code § 34-601. To avoid any last minute rush, the legislature may choose to call a special session in 1991, and thereby give itself sufficient time to draft its legislative plan before the next primaries take place.

V. CONCLUSION

As the legislature undertakes its reapportionment task, it will want to take a number of steps to ensure its legislative plan stands up in court. First, the overall range of the plan should be less than ten percent. Second, the plan should not discriminate against racial or language minorities. A community with a racial or language minority that is numerous, compact and politically cohesive should be split only if absolutely necessary to meet equal population requirements. Third, partisan minorities should not have their vote diluted. Thus, the legislature should avoid oddly shaped districts and splintered neighborhoods indicative of gerrymandering. Fourth, the legislature should minimize the division of counties into districts not wholly contained within the county. If such counties must be divided, this division should be based on equal population principles or the Voting Rights Act. Counties should not be divided to protect parties or incumbents. Fifth, the legislature should limit districts to only one senator and two representatives. Sixth, the legislative plan must be completed before the next legislative primaries take place. These precautionary steps should help ensure the legislature's reapportionment plan withstands judicial scrutiny.

AUTHORITIES CONSIDERED:

1. *Constitutions*

U.S. Constitution, art. I, § 2.

U.S. Constitution, fourteenth amendment.

U.S. Constitution, fifteenth amendment.

Idaho Constitution, art. 3, § 2.

Idaho Constitution, art. 3, § 4.

Idaho Constitution, art. 3, § 5.

2. *Federal Statutes*

42 U.S.C. § 1973 (1982).

3. *Idaho Statutes*

Idaho Code § 34-601.

4. *United States Supreme Court Cases*

Brown v. Thomson, 462 U.S. 835 (1983).

Chapman v. Meier, 420 U.S. 1 (1975).

Connor v. Finch, 431 U.S. 407 (1977).

Davis v. Bandemer, 478 U.S. 109 (1986).

Gaffney v. Cummings, 412 U.S. 735 (1973).

Karcher v. Daggett, 462 U.S. 725 (1983).

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Dated this 8th day of March, 1991.

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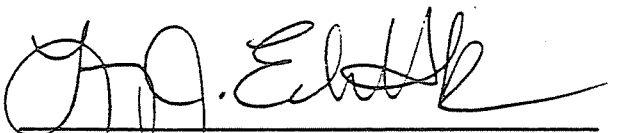

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