

STATE OF INDIANA)	MARION SUPERIOR COURT EN BANC
)	
COUNTY OF MARION)	CAUSE NO. 49D04-0210-MI-1844
PHILIP C. BORST,)	
)	
Petitioner,)	
)	
and)	
)	
BART PETERSON and)	
ROZELLE BOYD,)	
Intervenors.)	

DISSENTING OPINION
TO THE RATIFICATION OF A VETOED PARTISAN MAP

The purported majority opinion merely ratifies a vetoed partisan political redistricting map (“the Borst Map”). We judges below say the Court can do better by appointing a neutral master commissioner, as the law allows, and the taxpayers deserve.

The partisan plan, and the order ratifying it, are defective because:

1. Indiana law only gives this court power to draw district lines, with the help of a neutral master commissioner if necessary.
2. The law and codes of ethics require judges act neutrally to resolve this dispute, and a neutral master will assure such a result here.
3. The record is besieged by procedural irregularities resulting in evidence not being submitted, judges ruling on evidence they did not read, and some judges not participating.
4. Borst failed to prove his case - his map is not proven to be “compact” or within precinct boundaries as the law requires.
5. Borst uses race as a primary factor to draw districts, fractures some communities, and illegally packs African Americans.
6. The Borst Map is simply a political gerrymander.

This Court Cannot Ratify a Vetoed Map

This case is governed by one simple statute, I.C. 36-3-4-3 (“the Statute”). It is unambiguous, so this court cannot resort to other rules of construction nor apply unusual or stylized meanings to commonly understood words. Sholes v. Sholes (2001), Ind., 760 N.E. 2d 156; Brownsburg Area Patrons Affecting Change v. Baldwin (1999), Ind., 714 N.E. 2d 135. The Statute only allows us to do two things: hear allegations whether a legally enacted map (or “division”) violates the Statute; or draw a district map ourselves (with a master commissioner). Since the Borst Map was vetoed, it is not law, has no legal effect, and is entitled to no deference. State Board of Tax Commissioners v. State ex.rel. City of Indianapolis (1926), Ind., 1953 N.E. 404; Minnesota State Senate v. Beens, 406 U.S. 187 (1972). In fact, the Borst Map is “defeated” because the council did not override the Mayor’s veto, or even attempt one. I.C. 36-3-4-16 (c). Accordingly, the Borst Map can only be an *imagined* “division.” We are then left with essentially a blank page from which to proceed, and no more, since there is no map about which to hear any allegations. Instead, the majority awkwardly claims the Mayor’s veto of the Borst Map somehow confers legal status and deference to it, and claims jurisdiction over the Mayor’s veto as an “allegation” challenging a “division” under the Statute. The majority’s imagination matches the Borst Map, but it is still mistaken.

The General Assembly considered whether some Marion County ordinances should be exempt from a mayor’s veto, and listed them all at I.C. 36-3-4-14 (b). They specifically allowed vetoes of Marion County redistricting maps in the same chapter of the Indiana Code as the Statute, under which this action is brought, and with comparable legislative history. We are bound to view all statutes relating to the same subject together “to produce a harmonious scheme.” Saylor v. State (2002), Ind., 765 N.E.2d 535. Any

court looking at these statutes together can only harmonize a tune entitled “No Subject Matter Jurisdiction.”

Nevertheless, the majority inexplicably ignores the Statute, and ignores the clear requirement to draw district lines with a neutral master. Instead, it desperately relies on defunct council minutes to justify the vetoed Borst Map, and acts as a surrogate council to approve it. This clearly violates the Statute and Indiana law.

We do need not assume more power than we possess to resolve this case. The majority acts beyond its authority, and errs by doing so.

This Controversy Requires A Neutral Master Commissioner

As shown above, the Statute leaves us only one choice here: draw district lines with a master commissioner. Beyond this legal requirement, judges are bound to be neutral. Canon 3, Indiana Code of Judicial Conduct. Although any political map may be presumed to have a political bent, the law presumes a judicially drawn map will not seek partisan advantage and will be consistent with traditional roles of judicial neutrality. Prosser et. al. v. Election Board of Wisconsin et. al, 793 F. Supp. 859 (W.D.Wis. 1992). Otherwise, a political majority of any court can merely adopt a partisan map - as happened here. Acting without apparent neutrality contradicts the clear policy of the Statute to provide a solution when politics has failed. Furthermore, it contradicts the oft-stated policy of non-interference with other branches of government. *See generally* State ex. rel. Masariu v. Marion Sup. Ct. No. 1 (1993), Ind., 621 N.E.2d 1097. The judges in Prosser faced the same circumstances this Court faces today. As it eloquently explained:

(W)e are not reviewing an enacted plan. An enacted plan would have the virtue of political legitimacy. We are comparing submitted plans with a view to picking

the one (or devising our own) **most consistent with judicial neutrality**. Judges should not select a plan that seeks partisan advantage--that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda --even if they would not be entitled to invalidate an enacted plan that did so. (emphasis supplied)

793 F. Supp. at 867

The majority's ratification of a vetoed partisan map is clearly inconsistent with judicial neutrality and should be remanded.

We must not act, or appear, partisan to resolve this matter. The appointment of a neutral master commissioner is the right way, as a matter of law, policy, and ethics. The Court has been long aware of many available masters at little cost, yet the majority opinion finds this too bothersome or too expensive. The Court's discretion is abused by such disregard.

The Trial Was Conducted Improperly

Contrary to assurances by the majority, the record should be clear that both sides, and all judges, were seriously hindered by the manner in which this case was handled. Despite requests and suggestions to adopt specific procedures, clearly explained to members of the court and the parties, the *en banc* proceedings were difficult and dysfunctional:

- (a) Trial was set for only 3 hours, 90 minutes each side.
- (b) Trial briefs were not required until 2 p.m. the day before trial.
- (c) The parties were allowed to submit additional material as "evidence," not under oath, and without cross-examination.
- (d) Court deliberations were conducted less than 24 hours later over the lunch hour.

- (e) Judges were not served with all pleadings, nor informed in a timely manner, despite repeated requests.
- (f) The parties were unable to present all evidence necessary to fairly present their case.
- (g) Many judges could not, and did not, read the material.
- (h) Some judges were absent at trial, or never read the material, yet deliberated and ruled on the merits.
- (i) One judge was detained, for religious reasons, for only 1 week past the Court's deliberations, yet the Court proceeded without his participation, denying the parties an en banc trial, as required by the Statute.

As a result, both sides suffered, and this Court faced a disorderly and bewildering spectacle. Despite this procedural calamity, and requests for additional time to present evidence, the majority acted anyway.¹

The parties have a constitutional right to a fair trial. Constitution of Indiana, Art. I, §12. So, this court has the responsibility to proceed in an orderly manner, especially in an *en banc* proceeding. Western Pacific Railroad v. Western Pacific Railroad Company, 345 U.S. 247 (1953). Unfortunately, we failed to do so.

Borst Did Not Prove His Case Under the Statute

¹ Despite good faith, one judge's participation in the case could erode public confidence in the Court's neutrality because his brother, a City-County councilor, may have cast the deciding vote on the Borst Map before it was vetoed, or otherwise has a more than *de minimus* interest in the proceedings. In Re Wilkins (2003), Ind., 780 N.E.2d 842. Such ethical issues can have the same effect as substantive law on the merits of a case. See generally Smith v. Johnston (1999), Ind., 711 N.E.2d 1259.

Assuming we should only consider a vetoed map, Borst has the burden under the Statute to prove three things:

1. the districts are “compact,” subject to natural boundaries like major highways;
2. the districts do not cross precinct boundary lines; and
3. the districts are equal in population “as nearly as possible.”

Borst failed to prove two elements, and misinterprets the third. The majority errs by apparently finding otherwise.

Compactness

The majority claims compactness cannot be measured exactly, so anything will do. But Borst’s only witness at trial, Dr. Steven Voss, admitted if he drew a district map for Marion County, it would not be the Borst Map. He still granted his expert approval because the Borst Map made him “less nervous” than any other version. (We feel this evidence only proves the need for a calmer and more neutral master to develop a range of other alternatives.) Most disturbingly, Dr. Voss’s claim the Borst Map is compact is not supported by the evidence. For example, District 17 on the Borst Map is divided almost down the middle by Interstate 65, despite the Statute’s clear admonition that districts cannot be divided by a major highway, let alone the most major highway in the city. Yet, Voss found this to be “compact.” In addition, District 9 on the Borst Map is clearly not compact on its face. Dr. Voss found no justification for it, other than his guess it must be “residual,” that is, some sort of leftover area that does not fit within the mapmaker’s other intentions. There is no allowance for “residual” districts in the Statute, only compact ones. Voss even admitted he does not favor “residual” districts, yet he blessed District 9 without any sound basis.

Furthermore, the Borst Map fractures some communities of interest, for example, Franklin Township and Warren Township, making Districts 23 and 12. The racial aspects of such fractures is discussed below.

Precinct Boundaries

With respect to whether precinct boundaries are violated, the evidence is no better than inconclusive. The majority even admits the Borst Map is “imperfect” in this regard. Borst presents a belated affidavit of a purported expert, who did not testify at trial, using specialized technical language claiming boundaries were not broken and the other side’s data is wrong. The other side presented testimony and affidavits to the opposite. (See Exhibit K and Affidavit of Sutherland filed February 10, 2003). This court cannot weigh such testimony without a master, and in fact, did not do so, despite the majority’s assurances. Overall, Borst failed to show, by a preponderance, precinct boundaries were not violated. So this element remains unproven.

Equal Population

Although the Borst Map does show equal population without dispute, the majority holds the erroneous view that the Court is required to ratify a map with as low a deviation as possible, despite its other effects. On the contrary, the Statute’s standard for equal population is fulfilled when a “substantial equality of population” exists, especially when rational state policies, like compactness and natural boundaries, are adversely affected. Reynolds v. Sims, 377 U.S. 533 (1964); Voinovich v. Quilter, 507 U.S. 146 (1993). But the majority misinterprets and overstates this standard to the exclusion of the other requirements of the Statute, contrary to law.

African-Americans Are Illegally Packed By The Borst Map

The evidence clearly shows the Borst Map is drawn to intentionally pack African-Americans into 7 districts. Such race-based redistricting is not always unconstitutional – it can allow African-American neighborhoods to be fairly represented. But when such districts are drawn without regard to traditional districting principles listed in the Statute, like compactness, the map violates the Constitution. Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900 (1995). As the 2000 Census clearly shows, African-Americans now live in virtually every part of Marion County, and deserve a chance to be represented in every part (Exhibit M). Instead of limiting African-Americans to 7 seats in ghettoized districts, African-Americans must have reasonable opportunities of being elected to seats all over the county. Bush v. Vera, 517 U.S. 952 (1996). As the U.S. Supreme Court explained in Bush, when the intention at the outset is to create so-called “majority-minority” districts, then strict scrutiny applies, and the map is unconstitutional unless compactness requires districts to be packed. The African-Americans living along Interstate 65, for example, are not compact in Borst’s District 17, and the Borst Map is illegal.

Borst’s claim that African-Americans must be packed to abide by the Voting Rights Act is disingenuous and mistaken. Borst claims his map “gives” African American 7 seats out of 29 to be proportional to the county’s African-American population. But the Voting Rights Act does not require maximizing African-American seats when it violates other traditional districting principles in the Statute. Shaw v. Reno, *supra.*; Johnson v. DeGrandy, 512 U.S. 997 (1994). The majority fails to comprehend the Voting Rights Act requires many preconditions to establish a violation, and most

importantly, must be considered with at least 8 objective factors to determine “the totality of the circumstances.” It lamely justifies the Borst Map with unsupported “race dilution” theories and the like. Borst’s evidence fails to show a totality of circumstances was ever considered. He nakedly claims, through Dr. Voss and others, Indianapolis is a highly segregated city to justify drawing highly segregated districts. Such packing is wrong and illegal. Thornburg v. Gingles, 478 U.S. 30 (1986); Grove v. Emerson, 507 U.S. 25 (1993). Under the Voting Rights Act, the electoral process must ensure equality of opportunity, not equality of outcome, and give each person equal access to political participation. Baird v. Consolidated City of Indianapolis, 976 F.2d 357 (7th Cir. 1992).

Borst’s claim that his map must be adopted or he will be forced to violate the Voting Rights Act rings particularly hollow after Sexton v. Servaas, 33 F.3d 799 (7th Cir. 1994). Borst sat on the council in 1994 when it made the same argument to defend its 1991 redistricting map. The federal courts found it meritless, and so do we.

The Borst Map Is A Political Gerrymander

If the Borst Map is arranged in a manner that will consistently degrade a group of voters’ influence on the political process as a whole, then it is an unconstitutional gerrymander. Davis v. Bandemer, 478 U.S. 109 (1986). Such a finding can be supported by evidence of denial to a minority of voters of a fair chance to influence the political process. Davis v. Bandemer, *supra.*, at 132.

The parties generally agree that partisan voting in Marion County, if it can reasonably be determined, is presently about *51 percent* Republican and *49 percent* Democrat (Exhibit A, next to last page). Yet, testimony at trial shows the Borst Map is

likely to elect 16 Republican districts out of 25, or about *64 percent*. Indeed, in 1999, under the Republican-drawn outgoing map, Republicans won 15 out of the 25 districts.

But Borst argues Republicans are fairly entitled to 15 or 16 Republican majority districts out of the *total 29*. Borst's mistake, and the majority's error, is the intentional inclusion of the 4 at-large seats in the political arithmetic. The Statute only allows the council to make a "division" of *25 seats, not 29*. If Borst is entitled to map a 51 percent Republican majority, he can only draw *13 districts out of 25, not 15 or 16*.

The assumption that the 4 at-large seats will be automatically Democrat, and the intentional inclusion of the seats in the political design of 25 single-member districts, effectively shuts out Democrats from a fair opportunity to win a majority of the council. There is no evidence, or logical argument, to support such an assumption about at-large seats in a county that is almost politically equal.

The majority tries to convince us that Democrats "should have" an at-large advantage only because a Democrat mayor is running as an incumbent. Such speculation is more suited for political pundits than a court of law. If Republicans have 51 percent of voters, they could arguably win at least 2 of the 4 at-large seats. Regardless, at-large seats cannot be considered under the Statute, or any map drawn under it. *See generally City of Port Arthur v. U.S.*, 459 U.S. 159 (1982).

The Borst Map is not necessarily defective under Davis v. Bandemer because it is drawn by one majority party to protect itself. But it is definitely defective when it intentionally denies the other party at least a fair chance. Assuming the 4 at-large seats are Democrat lays a convenient foundation to calculate more Republican seats for the

next 10 years. Accordingly, Democrats are clearly denied a fair chance and are “consistently degraded.”

Conclusion

This case was an opportunity for this Court to resolve a partisan dispute, advance the public interest, and protect taxpayers and voters. Instead, it is ratifying a partisan map, failing to appoint a neutral master, failing to draw compact districts that do not snake along interstate highways or dump voters into arbitrary residual areas, failing to design districts to allow African-Americans to participate all over the county, and failing to prevent a political gerrymander to respect the rights of all political parties. If this case is remanded for appointment of a neutral master, as we hope, we pledge to act neutrally, conduct proper and open proceedings, and develop a fair district map, as the law requires.

Dated this 14th day of February, 2003.

David J. Dreyer, Judge
Marion Superior Court

And all judges below who have participated and concur in this dissent:

Concurring Judges To Dissent From Majority Opinion

Hon. Linda Brown
Hon. Barbara Collins
Hon. Thomas Carroll
Hon. Charles J. Deiter
Hon. Evan D. Goodman
Hon. John Hanley
Hon. Grant Hawkins
Hon. Jane Magnus-Stinson

Hon. Patrick McCarty
Hon. Mark Stoner
Hon. Tanya Walton Pratt
Hon. Gerald Zore

c: All counsel of record