



Ep. 54: Redistricting and the Census—What You Need to Know

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Jose Garriga:

Hello, and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

Redistricting is a critical concept on the American political scene. At the federal, state, county and municipal levels, officials and interested parties keep a close eye on the process, and litigation related to redistricting is a constant in that process. With the release of the 2020 Census data, a crucial input is now available for review, analysis and use.

We have with us today Akin Gump litigation partner Hyongsoon Kim and Supreme Court and appellate senior counsel Aileen McGrath, and Crimcard founder and managing partner, Dr. Kareem Crayton.

Hyongsoon has handled a variety of commercial and consumer litigation across the country on behalf of both private and public clients and leads Akin Gump's redistricting litigation practice.

Aileen spent nearly a decade in the San Francisco City Attorney's Office, where she focused on government litigation, including litigating issues related to the 2020 Census, defending San Francisco in several elections-related lawsuits, and working with many city departments and elected officials to avoid litigation over city laws and policies.

Kareem is a law and a political science expert who has published extensively on how the Voting Rights Act informs redistricting. His extensive consulting record includes state and local jurisdictions in more than 10 states.

They'll be discussing redistricting in the Census, how redistricting works, and how it can lead to litigation, and what relevance these Census results have for redistricting purposes—perspectives of particular interest for jurisdictions preparing to go through the redistricting process themselves.

Welcome to the podcast.

Hyongsoon, Aileen, Kareem, welcome to the show. We have a lot of ground to cover, so let's dive right in. To start, let's look at the big picture, maybe see if we can give listeners an overview here. What are the basic principles for redistricting that state and local governments need to understand? Aileen, could you lead off, please?

Aileen McGrath: Sure. Thanks, Jose and thanks for having us. There are basically three sets of legal rules that apply to redistricting. One is the principle of population equity, another that you've already alluded to is the Voting Rights Act, and the last are various specific state and local laws that, obviously, vary from one jurisdiction to another. But there are some common approaches, and I'll touch a little bit on each of these and what they mean.

Population equity means that districts have to be drawn so that they are more or less the same size. This is a really important requirement for federal congressional redistricting, where districts have to be, literally, almost exactly the same size. There's a lot more room for leeway in the state and local context, and usually a 10% margin of difference or so is acceptable, although some states set a different threshold. In this area, the biggest challenge for governments is assessing population shifts to understand whether and how maps need to be redrawn and also in understanding who counts for those purposes. The usual rule is you look to total population, but every cycle, questions about who is counted come up. Do only citizens count? Do you count only the voting-age population? Where do people live, like incarcerated people, for instance, for purposes of the count? These are all questions related to population equity that jurisdictions are likely to be confronting.

Then we have Section 2. Section 2 addresses race-based impacts, and, broadly speaking, it prohibits governments, state and local jurisdictions, from structuring elections in a way that takes political power or electoral power away from minority voters. That's something that's known as "vote dilution." In the redistricting context, courts apply a test from the Supreme Court's decision in a case called *Thornburg v. Gingles* to decide whether a district violates Section 2. The *Gingles* test looks at, first, whether a minority population is geographically compact enough that it could control the outcome of an election in a particular district. Second, whether the group typically votes as a bloc for the same kind of candidate. And, third, whether the rest of the population in the area usually votes as a bloc for a different candidate, which means that if the minority group's power is not protected, it will never be able to elect a candidate of its choice. Then if all of these circumstances are true, courts look to the "totality of the circumstances" to decide whether a district is unlawful.

Section 2, you've probably read and heard a lot about Section 2 over the last several years. The law in this area has been evolving in a number of different ways. One is the Supreme Court decided a major Section 2 case out of Arizona this past term. And in that case, the Court said a whole podcast's worth of things, honestly. But among them was that even if a voting law has a negative impact on a minority group, the Court said, and this is a pretty big shift, it can still be legal if members of that group have an opportunity to vote, the law isn't racially motivated, and the state has an interest in enforcing whatever the particular voting law is. Which it almost certainly, we'll say that it does.

The Arizona case wasn't about redistricting specifically. It was about other kinds of elections laws, so it remains to be seen how that decision will play out in the redistricting context. But at a minimum, it suggests that the Section 2 analysis might look very different and that challengers might have a harder time making out a Section 2 case in the redistricting context. That's not the only Voting Rights Act case to come out of the court recently. I know Hyongsoon has been closely tracking the impact of an older

decision in *Shelby County v. Holder*. So, Hyongsoon, I don't know if you have anything to add about what we're looking at from the impact of that decision.

Hyongsoon Kim: Sure, Aileen. I completely agree with everything you've said about Section 2. I think, just for purposes of this upcoming redistricting cycle, Section 2 claims are going to really have the spotlight. In part, because as you said, Aileen, the Supreme Court back in 2013 said in the *Shelby County* case that Section 5 of the VRA, which required certain covered jurisdictions to get pre-clearance before they could make changes to election practices or procedures, the Supreme Court basically gutted that requirement. Although Section 5 is still alive, the Supreme Court said you can't use the coverage formula in a different part of the VRA that had previously been used to determine which jurisdictions are subject to pre-clearance.

So until Congress enacts a new coverage formula to replace the one that was previously invalidated, Section 5's pre-clearance requirement is toothless. So as a result, you have a lot of communities and ethnic, racial groups, minority groups that will, in all likelihood, focus more heavily on the front end of the process, of the redistricting process with an eye to taking advantage of the remedies that are available under Section 2. So it's just a way of highlighting, Aileen, the point you've been making, which is Section 2 is a really interesting and developing area of law and will likely take center stage in the next redistricting cycle.

Aileen McGrath: And to make it even more complicated, to bring it back to Jose's question, thanks Hyongsoon, we can see there's a ton of activity along federal statutory requirements. There are federal constitutional requirements. There are also a whole separate dimension of state and local separate requirements that jurisdictions have to navigate. These run the gamut in terms of what they require. Some states have rules that require that districts be shaped in certain ways. Others, like here in California, there's a state law requirement that jurisdictions respect communities of interest, which is basically a legalese way of saying that election districts are supposed to reflect communities that share social and economic interests. These can be fairly imprecise requirements, so there are a lot of judgment calls that need to be made along the way. And, finally, many state and local laws require that redistricting be accomplished using certain public processes like public hearings, opportunities for public comment. So these legal requirements add another dimension to the whole process.

Jose, that gives you a sense of the legal landscape. There are a lot of guardrails in this area and a lot of rules that need to be followed as jurisdictions move through this process.

Jose Garriga: Thank you, Aileen. As a matter of fact, let me stay with you for the next question. It's something I think that you all are very much well suited to answer is, what role will lawyers typically play in this process?

Aileen McGrath: Obviously, you alluded at the beginning of the podcast to the possibility of litigation. There's always that prospect, but there are many questions that have to be answered throughout the redistricting process long before you're really thinking about the prospect of litigation. There are really two main ways that lawyers can get involved earlier on, I would say. One is to help facilitate public meetings and public input and ensure that the process is transparent from start to finish. As I said, this is often something that state and local law requires happen with redistricting. And it's often something that has to follow specific legal requirements like state open meetings laws, local sunshine laws, and so forth. Lawyers are often very important to helping jurisdictions navigate that

process, which is also a substantively important part of the process too. Getting public input and ensuring that communities understand the process is all important to helping local jurisdictions accomplish it successfully.

The other thing I would say is that lawyers play an important role in helping jurisdictions manage the data input aspect of this process. Jurisdictions basically receive raw data showing population shifts, but they then have this enormous task of processing it in light of the various requirements. As you can see, given the Section 2 requirements, the state law requirements, it's not as simple as just popping data into an algorithm and having it spit out a redrawn map. Lawyers play an important role in helping local governments understand, okay, we have this data, we have these numbers, we need to redraw these maps. What do we have to do besides just inputting these numbers and moving around boundaries to ensure that we comply with all of the various legal requirements? So there are a lot of opportunities for lawyers to participate from very early on in the redistricting process.

Jose Garriga: Thank you, Aileen. We talked about the Census, and this is really one of the pivotal points of this episode. Unsurprisingly, there are many surprising and interesting facts we learned in the Census. I know here in the District, certainly in terms of the growth of the District and the demographic mix of the District has changed dramatically since 2010. So, Kareem, could you talk about one or two of the ones that you consider to be most relevant to redistricting?

Kareem Crayton: Sure. I think that one of the basic things that we're learning about is that this process of diversifying our population in this country is happening a lot faster than I think we initially predicted. The fastest-growing states in this country are Texas and Florida, and they are two of the most diverse states. In fact, the most rapidly growing metropolitan areas as the Census counts them, is this place called The Villages in Central Florida. The other point that actually follows from that is, in addition to this rapid diversifying part of our country, we've got actually areas of the country that are rural, in rural counties, particularly in the South, where the population overall is declining. But the uptick to the extent that there's a shift relates to that increased growth among populations like Asian Americans and Hispanics, as the Census describes them. Latino or Latina would be the way I would. But in any case, in areas like Arkansas and in the Eastern part of the state and northwest Alabama, these are population areas that are declining overall, but are actually rapidly seeing a different composition of the population.

As has been mentioned earlier, when you have these shifting populations, particularly communities of color, there are going to be new and important considerations in certain county and local governments related to the Voting Rights Act. All of these things, I think, are pointing in the direction of cities as well, because cities actually are growing a lot faster than people anticipated. And where you see cities, some of which have peaked in terms of their growth in the last 10 years, there are going to be jurisdictions that are thinking about growth, not just over the last 10 years that has been astronomical, but also some cities are going to grow even more so. That'll be both in terms of overall numbers, but, then again, the composition of the population will change.

I think one of the big questions a lot of communities will be thinking about is not only how to think about the Voting Rights Act implications, but what to do about growth. Because these districts that are going to be created are going to last for 10 years, and many people right now basically who are eight years old, will be voters by the time these districts are in full development. So there's lots to argue about the Census, but right now

we're actually at a moment where we're just still grappling some of the local ways in which the Census has surprised us.

Jose Garriga: That's interesting, thank you. Let's talk about something that has already been mentioned several times, and that's litigation. Hyongsoon, I'm going to ask you, please, what types of claims do you believe are most likely to be raised in litigation as a result of this redistricting cycle? And what factors are most likely to influence the type of litigation to be brought in a particular jurisdiction?

Hyongsoon Kim: Sure. I'll summarize some of the types of claims we expect. I'll say it's hard to cover the breadth and the depth of all of these potential claims in a short podcast. I would invite listeners to contact us directly about issues relating to particular jurisdictions so we can give more tailored thoughts. I also want to note, we're going to talk about litigation that comes out of the released Census data I'm sure that's on folks' minds.

With that, we have three basic types of cases, and they do arise out of some of the legal principles that Aileen covered earlier. Aileen had previously talked about what's known as the *Gingles* or the vote dilution claim based on Section 2 of the VRA. Aileen's already talked about some of the basic requirements of that claim so I'm not going to cover that in more detail. But certainly for the reasons we already talked about, we can expect to see those kinds of claims in this cycle.

We also have what are colloquially known as *Shaw* claims for the *Shaw v. Reno* case, the Supreme Court case from 1993. These are cases where groups alleged that race was the predominant motive for redrawing lines. For example, where lines are allegedly unexplainable on their face except for race, or where you have situations where traditional redistricting principles were ignored. Things like keeping communities of interest intact, respecting community input, compactness of districts—things that fall into this somewhat vague category of traditional redistricting principles.

What happens is you have jurisdictions that are faced with a little bit of a conflict. There's a balancing act because on the one hand, you're trying to respect minority voters' wishes and avoid these *Gingles*-type claims. On the other hand, you also want to avoid the charge that race was a predominant motive for drawing lines. These kinds of cases do raise issues about legislative intent. The litigation tends to include battles over privilege, over the production and the protection of communications about redistricting. These are battles that Kareem, Aileen and I have fought a number of times in the past. It's easy for us to say, "Look, just avoid problematic communications. You impose messaging discipline so that the final evidentiary record clearly establishes the objective and fair reasoning behind the drawing of these lines." But in practice, things are not quite that simple. Legislators and decision-makers, they're communicators. They're not always receptive to instructions to avoid discussions of some topics.

In that regard, Aileen, I'd love to hear your thoughts on this. You previously headed up the appeals for San Francisco City Attorney's Office. I'm sure you have thoughts on how to balance the need to protect privilege with the need of legislators and government officials to communicate. Do you have some thoughts on this? Can you talk a little bit about your perspectives?

Aileen McGrath: Yeah, I mean, it's an interesting example because working with elected officials and public officials, particularly around their communications and their meetings with one another and with their constituents, is a really interesting area that's fraught with potential landmines. For instance, a lot of states have laws that restrict the kinds of

conversations that government officials can have among themselves behind closed doors, as opposed to in the course of a formal notice meeting. It's really important for lawyers working in this process to understand that legal landscape and to be able to advise their clients about it because these kinds of unexpected, "Oh, wait. That was actually a meeting that happened when those four people talked about this issue that we didn't notice," those kinds of issues come up, and it's really important to have someone who's familiar with them and can explain that to the appropriate officials.

Beyond that, I would just say that it's really important in helping educate officials about the importance of privilege and what they can say and what they can't say, you have to understand the instinct that they have, which are good instincts to share information with the public and to want to respond to their constituents' demands. As a lawyer, that means you have to work really hard to help your client to be able to communicate with the public as much as possible while still being aware of, okay, these are things that are privileged. This is information that's sensitive. We need to communicate this in a certain way. Have those kinds of conversations. It can also mean being really mindful as the lawyer of the difference between a policy decision and a legal decision so that the client understands they are in full control of policy decisions. And the only time that you're going to step in and do what they might perceive as interfering with that, or interfering with their desire to communicate a certain message or to have certain conversations, is when there's a really good and important legal reason for doing so.

But it's definitely a balancing act, and it's one that tends to look very different when you're working with public entities because of the legal requirements and the desire for transparency and all that, than it does in the private sector.

Hyongsoon Kim: That's really helpful, Aileen. It's just interesting to talk about these issues from your perspective, because when you look at them from a litigator's perspective, we're looking at them after the fact, when you're fighting to protect the privilege that potentially applies to those communications. And the focus is entirely about, okay, how can you keep those communications sacrosanct? What are the facts that help to establish the existence of the privilege? It's a very different perspective when you are going through the legislative or the redistricting process itself, and you're balancing all of these different interests, Aileen, as you said.

There's one last category of claims, which are equal population claims. Aileen, you had already mentioned these also at the outset of the podcast. And I think also, Aileen, as you mentioned, there's different aspects to these claims. There's the, you have to hew to a certain percentage deviation, that I think jurisdictions have become more careful about over time. But you also mentioned, Aileen, this issue of who's counted for purposes of determining compliance with the population standard. I think that question is particularly timely given the recent release of the Census data.

I would like to turn it over to Kareem to address this issue. You had before the release of the Census data, a number of individuals, as in states, they're suing either to speed up or slow down the Census process. And other states are suing to change the way that the Census counts population. I think a lot of folks want to know, now that the numbers are released, are those court fights over? Are there new fights that we can expect? Kareem, can you give your thoughts on this?

Kareem Crayton: Sure. In fact, I think the answer to both questions is it's definitely the case that some of these cases will continue, and there probably are going to be new cases that come up. I really appreciate the framework that Aileen offered about the role that lawyers play in

this space. Now, in this conversation, wearing more of my lawyer hat, by saying this actually brings into view both the point about what the data tells us and also how choosing which data will apply comes with consequences. The basic role I think I tend to play in these matters is to try to give a clear sense of what both the data can say, depending on which route you choose, and what the legal implications are. Whether you're going to get sued and whether you have an argument to offer.

In this context, the cases that are going to continue are going to be cases that go to the method that the Census used to count people. Because, of course, we were in a global pandemic, the normal course of counting people had to change. People didn't all answer the Census questionnaires, and the door-to-door operation was ended early this year, in 2020, that is, and the Census tried to compensate for that by adopting, essentially, an estimation method. That raised a number of questions about whether or not that was the correct method to use and also related to that are questions about privacy. The Census engaged in a process, which we won't go into detail so as not to bore people, with this idea of differential privacy, to assure that people, individuals answering in a particular home in the neighborhood weren't giving away to, let's say, the public, looking at the aggregate numbers, all of the information about who they are, what their household looks like, et cetera. Whether or not the differential privacy protocol was appropriate is another area that has been litigated. It will likely continue to some degree now that the numbers are out.

The big questions I think going forward that are new now that the numbers are out, is how, again, bodies decide to use this information. And the big question there, actually, are two, related to this question. One goes to prison populations. The latest move in a lot of states and jurisdictions is to count people where they come from, as opposed to where they are currently, might be incarcerated or under supervised release, because of the equity concerns. Presumably many people over 10 years may go back to where they live, and most policies take the view that it is unfair to the populations where people live to deny them political power. So, there are lawsuits pending about whether or not that policy is consistent with federal or state constitutional provisions.

Then there are, as I said earlier, Voting Rights Act questions. Whether or not communities of color have been accurately counted, and whether or not they're large enough in number can have legal implications about the kinds of districts that can be drawn. Whether a district that is a majority of African Americans or Asian Americans actually will matter, depending on the count that is used. Whether or not you're counting people who the Census is estimating versus the people that actually the jurisdiction happens to know are there because of either estimates or, potentially, growth that may occur in the next 10 years. Those are different approaches that one might use to the data. But all of that goes to what Aileen described earlier, this question about what variation might exist between district populations, and all of that's going to be litigated, presumably in one district or another, in part, because of the implications.

I think the job going back to the point that the role of lawyers can do to add value to this process is to help jurisdictions work through what can be complex issues. What the Census did or didn't do, what the alternatives were. But, then, also what the implications for the jurisdiction are just in terms of the work that they're charged to do. Roads, bridges and all of these things that cities manage have to be built, schools have to be staffed. How you go about managing those policies, in part, is rooted in how the Census questions are dealt with. So, separate and apart from the litigation, there are policy questions that, ultimately, as Aileen pointed out, the city or county has to choose. But the

job, I think, of lawyers is to help guide at least an understanding what the implications are.

Jose Garriga: Thank you, Kareem. As a matter of fact, I'll stay with you because, I guess, to close I would ask, do you have any best practice recommendations for jurisdictions that are, in fact, seeking to reduce the risk of litigation?

Kareem Crayton: I think, from our discussion, it really will depend a lot on context. Jurisdictions, as I said, have a lot of different priorities based on how large they are or small they are. But I think the most significant thing that probably comes through in all of the conversation that we've seen so far, really, is to get good advice. That no matter what choice you make about either policy or law, that you understand clearly what the implications are. So, I would say more than anything, the first order of business should be bringing in expertise to help walk through the process. It's a once-every-10-year process, and most people who do it in year one aren't around in year 10. So, work with people who've thought through this a lot to help, at least, understand what the stakes are as you go forward.

Hyongsoon Kim: Kareem, I completely agree, and I'd just add, as we've talked about in this podcast, there's a confluence of events that have led to an even more increased likelihood of litigation arising out of redistricting. So, it's just to underline the point that you made, Kareem, that it's good and important to get solid advice, including pre-litigation advice, as folks are commencing their redistricting process.

Kareem Crayton: I think that's exactly right, Hyongsoon, and the unprecedented nature of so many things right now—again, the global pandemic, the lateness of the Census—I think puts even more pressure on getting it right the first time. And as you said, making those choices early on before you even think about drawing lines is, I think, the best advice.

Jose Garriga: Thank you. Listeners, you've been listening to Akin Gump partner Hyongsoon Kim and Supreme Court and appellate senior counsel, Aileen McGrath and Crimcard founder and managing partner Kareem Crayton. Thank you all for coming on the show today and bringing listeners up to speed on this very important, very headline-making topic.

And thank you, listeners, as always, for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* at your favorite podcast provider to ensure you do not miss an episode. We're on, among others, iTunes, YouTube, and Spotify.

To learn more about Akin Gump and the firm's work in, and thinking on, litigation matters, look for "litigation" or "Supreme Court and appellate" at the Experience and Insights & News tabs at akingump.com and then take a moment to read Hyongsoon's and Aileen's bio's on the site.

Until next time.

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