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JUDICIAL SANCTIONS AND LEGISLATIVE REDISTRICTING IN WASHINGTON STATE

W. Basil McDermott*

INTRODUCTION

History has been unkind to state legislatures. As one looks at the development of those bodies in our society today, only the dull are even mildly optimistic about the ability of such assemblies to understand, let alone manage, the immensely disruptive changes that have been taking place in this century. Change is history's joker slipped openly into a deck of stacked problems that frustrate the most able politicians and bewilder the vast majority. Like generals who are best prepared to fight yesterday's war, state legislatures look boldly toward the past hoping against hope that the times will stop a-changing. Wise men will make no bets.

In a sense the story is an old one—the problems facing men outgrew the capacity of the political structures designed to handle such problems. This was further complicated, we now like to argue with political hindsight, by an historical mistake when state constitutions were written. There was no *realistic* method for changing the composition of state legislatures according to the criteria spelled out in most state constitutions themselves, even aside from any long-run potential conflict with the Federal Constitution. The state constitutions generally carried an admonishment that periodic redistricting should take place and then left the enforcement of such procedural changes to the legislators themselves. This was similar to permitting the rabbits to guard the carrot patch. Politicians rarely rush to take action detrimental to their own political careers and the attempt to assign to the state legislature the responsibility for taking action opposed to the

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interests of its own members was an exercise in political fantasy. Granting at the outset that redistricting concerns the distribution of political power in the state legislative process, and further conceding that "the exclusion of any group of men from power is, sooner or later, their exclusion from the benefits of power,"[1] the problem still remains: How can power be redistributed when men charged with that responsibility have little incentive to take such action? This is what *Baker v. Carr*[2] is all about. The history of "The Tennessee Reapportionment Case," as *Baker* became known, is illustrative of the unwillingness of state legislatures to redistribute power on the basis of population growth. For our purposes, this case is important because of the impetus and legitimacy it gave to the federal court system to prod state legislatures into redistricting. Drastic in its break with precedent and ambiguous in its lack of specific standards to be applied in apportionment cases, the *Baker* decision promised to have a lively political future. Men who were originally opposed to giving up power were not likely to rush into compliance merely on the basis of one judicial decision.

The immediate impact of *Baker v. Carr* in Washington was the commencement of a lawsuit, *Thigpen v. Meyers*,[3] challenging the constitutionality of Washington's 1957 apportionment statute. Though the suit was brought in June of 1962, it was not until February of 1965 that the Washington Legislature finally complied with the judicial directive to redistrict. Thus, Washington's redistricting controversy covered nearly three years and included a broad spectrum of political participants. Two governors, both political parties, the Attorney General, the Secretary of State, the League of Women Voters, the Washington State Grange, several lawyers, and three federal judges were at one time or another involved in the final outcome in varying degrees. This study centers on the relationship between judicial sanctions and legislative compliance. Only the uninitiated suppose that all judicial sanctions are of equal value in encouraging

1. H. Laski, An Introduction to Politics 28 (1965).
2. 369 U.S. 186 (1962). Specifically, only three points were made: (1) State legislative districting is a *justiciable* issue; (2) The federal courts have appropriate *jurisdiction* to consider the problem; (3) Those individuals challenging Tennessee's districting pattern have *standing* to sue in the federal courts.
3. 211 F. Supp. 826 (W.D. Wash. 1962) [hereinafter cited as *Thigpen*].

compliance, especially when the problems are highly political. Throughout this three-year period a number of different sanctions were used at different times. The strategies pursued by the federal judges and the various responses evoked by these different strategies provide the setting for an analysis of the politics of compliance. That obedience is a rather complicated matter, one may suspect. To explain precisely why is the task at hand.

I. THE IMMEDIATE IMPACT OF *BAKER V. CARR*

Unlike a number of other state constitutions, the Washington State Constitution stipulates that population is to be the primary basis for apportionment and districting for both houses of the state legislature.[4] Whether through intent or neglect, the state legislature has not *voluntarily* redistricted since 1901. It should be noted, however, that redistricting to some extent was accomplished in 1930 and in 1956 by the process of initiative. The refusal of the legislators to redistrict in the earlier period from 1901 to 1930 was candidly justified by one legislator in 1913 who exclaimed: "Self-preservation is the first law of nature."[5] Such factors as personal career considerations, the possibility of weakening current party alignments in the legislative process, and the possibility of altering the balance of urban political strength all contributed to the legislative inaction. In addition to these factors, there was no doubt some influence exerted toward discouraging redistricting, as in other states, by interest groups receiving advantages from the status quo.[6] Occasionally coalitions of conservative urbanites in some states have teamed with their conservative brothers from the rural districts in successful moves to thwart any redistricting measure that might substantially alter the status quo. Intricately linked with such coalition tactics is a deep rooted rural fear of greater representation for the metropolitan areas, which has frequently blocked re-

4. The actual provision is that after each Census enumeration

> made by the authority of the United States the legislature shall apportion and district anew the members of the senate and house of representatives, according to the number of inhabitants.

WASH. CONST. art. II, § 3 (1889).

5. As quoted by G. BAKER, THE POLITICS OF REAPPORTIONMENT IN WASHINGTON STATE 1 (1960).

6. G. BAKER, RURAL VERSUS URBAN POLITICAL POWER 13 (1955).

districting.[7] However, what appears to be a simple dichotomy between the rural and urban forces is somewhat misleading. For at least in Washington, the conflict has predominately been between regions with rapidly growing populations and areas with a slower rate of growth.[8]

Though state legislatures refuse to redistrict of their own volition, it has been suggested that those states which possess the initiative process possess a way to bypass legislative inactivity to accomplish redistricting. In Washington the first successful initiative measure on redistricting was enacted in 1930. It increased membership in the house from 97 to 99 and in the senate from 42 to 46. It also provided that Representative District boundaries were to be the same as Senatorial Districts, and that each legislative district was to have a minimum of two representatives. For the most part, county lines were utilized as boundaries for the districts.

There was a lapse of 26 years before the next successful redistricting. Again it was accomplished by initiative. The League of Women Voters of Washington sponsored the provision, designated Initiative 199, which was approved in the November 1956 election by a vote of 448, 121 to 406,287.

According to one analyst's study of the 1956 initiative, voting behavior was highly rational, with groups who would benefit from the plan supporting the measure and groups destined to lose representation opposing the measure.[9]

Unfortunately for the supporters of the initiative, its passage did not guarantee that it would be implemented and become operative as originally intended. Due to the passage of an amendment to the Washington Constitution in 1952, the state legislature had been given the power to amend any initiative proposal adopted by the voters. The earlier provision of the constitution had provided immunity either from amendment or from repeal of any initiative for a two-year period. Once Initiative 199 had been approved the legislators began to think in terms of self-preservation. Several personal friendships played an important part in the legislative action in the 1957 session that revised Initiative 199,[10] although the greatest determinant of a legisla-

7. *Id.*, at 26.
8. Webster, *Voters Take the Law in Hand*, 36 NAT'L MUNIC. REV. 240 (1946).
9. G. BAKER, THE POLITICS OF REAPPORTIONMENT IN WASHINGTON STATE 7 (1960).
10. *Id.*, at 11.

tor's vote to amend the initiative was either the impact that the initiative had on his district or the impact that Substitute Senate Bill 374 would have.[11] The choice was dictated largely by the legislator's perception of which district lines provided the greatest probability of his being re-elected. The problem was that "any reshuffling of constituencies seems to benefit only a few lawmakers, while it inevitably has adverse consequences for many."[12]

The amendment to the initiative creating three new legislative districts was passed by a narrow vote. The matter, however, did not end with the legislative revision since the constitutionality of the amendment was challenged in *State ex rel. O'Connell v. Meyers*.[13] From a legal standpoint the essence of the suit was whether the revision was in actuality a "repeal," which would have been unconstitutional, or merely an "amendment," which was permissible. From a political standpoint, the opponents of the legislators' action challenged the revision on the ground that the bill created population inequalities. These inequalities, the opponents contended, violated the constitutional provision of the Washington Constitution which specified that both houses should be based on population. In a five-to-four vote the Washington State Supreme Court avoided a direct confrontation with the political aspects of the case by reasoning that judicial notice could not be taken of the populations within various legislative districts. Since evidence of population discrepancies was inadmissible, the court assumed that the legislature had fulfilled its constitutional mandate. Additionally, the court ruled that standards were not available to determine when an "amendment" is in reality a "repeal" of an initiative.

In Washington State the use of the federal judiciary as an avenue for relief in redistricting had been an unmarked route prior to *Baker v. Carr*. The immediate impact of that case was a suit filed by M. L. Borawick, an attorney from a suburban area south of Seattle, challenging both the Congressional and state districting patterns. *Thigpen v. Meyers* was to become popularly known as "The Washington Reapportionment Case." The formal plaintiff in the suit was James Thigpen, at

11. *Id.*, at 9-12.
12. *Id.*, at 10.
13. 51 Wn. 2d 454, 319 P.2d 828 (1957).

the time a local justice of the peace from Midway, but the actual driving force in the entire case was Borawick.

On July 13, 1962, a three-judge court consisting of Circuit Court Justice Gilbert H. Jertberg, and District Court Justices William J. Lindberg and William T. Beeks denied Thigpen's motion for a temporary restraining order, which would have prevented any further elections under the 1957 districting law and also denied the defendant's motion to dismiss the suit. The matter was postponed until November 12, 1962, at which time a pretrial hearing was to be held before Judge Beeks. This was not to be the last occasion for the judges to defer action in this case. In this instance they were awaiting the outcome of a new initiative on redistricting (formulated by the League of Women Voters) to be considered by the voters on November 6. The judges saw no danger in permitting the people to express their wishes. One constant in the judges' behavior during the three-year controversy was their deference toward the normal political processes within the state to solve the problem. In this respect, Initiative 211 played a role even though it was defeated.

On November 6, 1962, Initiative 211 failed by a margin of 44,666 out of 837,504 votes cast. The vote on the measure can be viewed in a number of ways. Conceivably in 1956 there was a greater interest in the campaign due to a right-to-work initiative on the ballot also. Additionally, 1956 was a presidential election year while 1962 was not, and the voter turnout was typically smaller in the nonpresidential year. The State Superintendent of Elections commented that "when vote turnout is low the conservatives dominate the results."[14] With only 67 percent of the eligible voters casting their ballots in 1962, as compared with 82 percent in 1960, it is quite possible that such an observation is correct.

True to its summer decision to consider the complaint in the *Thigpen* case after the November 6 general election, the federal district court then held several pretrial conferences. These early meetings enabled both sides to agree on three important preliminary matters. First, it was undisputed that *Baker v. Carr* had granted jurisdiction to the lower federal courts to consider redistricting. Second, it was agreed that the

14. Interview with Kenneth Gilbert, Deputy Secretary of State and Washington State Supervisor of Elections, May 13, 1964.

Secretary of State's calculations on the number of inhabitants in each legislative district was accurate. These population figures had been transposed from federal census tracts to state legislative districts on the basis of the 1960 Federal Census. The case would be argued on the basis of these factual discrepancies between populations in various Congressional and state legislative districts. Third, the attorneys agreed on six legal questions for consideration. The first and second questions dealt with the justiciability of a suit alleging unconstitutionality of Congressional and state legislative districts. Concerning this latter aspect an attempt was made to distinguish between the Washington and Tennessee situation by asking whether the presence of the initiative process in Washington did not justify dismissal of the action since all avenues of relief had not been pursued. The third and fourth questions concerned the extent to which, if any, the two districting arrangements violated the 14th Amendment. The final two questions dealt with proper remedies if the existing districting were held unconstitutional. These questions, however, were postponed for later consideration.

The agreement reached by the attorneys was formalized by Judge Beeks on November 16 in the Pre-Trial Order.[15] The court also ruled that the complaints concerning districting for Congress and for the state legislature were to be treated as separate and distinct issues.

The most important aspect of the Pre-Trial Order concerned the admitted facts contained in the 1960 population study. In retrospect, this was probably the most crucial factor for rationalizing the decision, because the eventual holding was strictly based on numerical disparities in legislative districts rather than on any evidence of policy discrimination by such an unrepresentative legislature. Once the state accepted the study as valid, the court had before it all the evidence necessary to decide that the various districts were "invidiously discriminatory," if the judges were so inclined. How vital this one factor was in the case is best illustrated by the attempt by Mr. Lyle Iversen, the newly appointed attorney for the state in the case, to have these stipulated facts withdrawn from the Order at a special hearing held on November 26.

15. Pre-trial order, record, vol. 2 at 58, No. 5597, *Thigpen*, 211 F. Supp. 826 (W.D. Wash. 1962).

The choice of the day for oral argument of the *Thigpen* case was not a random selection.[16] In the attempt to explain[17] his choice, Judge Beeks found himself in the position of one "who doth protest too much." Even granting that the Judges had not made up their mind at this point, the fact that they were concerned enough about a possible "contingency" seems to indicate their predisposition toward the plaintiffs. (There was absolutely nothing forcing the court to establish a trial date so conveniently preceding the 1963 legislative session, except insofar as the court anticipated a certain decision in the case and therefore desired to afford a maximum opportunity for legislative compliance with that decision.)

One of the more intriguing phases of the controversy involved the proper weight to be attached to the presence of the statutory initiative process for redistricting. Does it really make any difference to the constitutionality of a redistricting measure if it is approved or rejected by initiative? And if so, to what extent?[18] At the time these questions

16. Judge Beeks noted that the

> date was selected by the Court for a purpose. In fixing the trial date the Court took notice of the fact that the Legislature of the State of Washington would convene in regular session on January 14, 1963, and the date selected would give the Legislature advance notice of the Court's decision, in the event the decision be such that the Legislature might wish to take legislative action.

Court's Oral Opinion on Pre-Trial Motions, Record, vol. 2 at 69, No. 5597, *Thipgen*, 211 F. Supp. 826 (W.D. Wash. 1962).

17.
> Now, in this connection, I would add the cautionary remark that nothing I have said, nothing in the action taken by the Court in fixing the trial date, should be considered as any indication whatsoever of what the Court's final decision may be. The fixing of the trial date was simply a precaution taken by the Court to cover a possible contingency.

Id.

18. The argument on this point clearly offered the judges an opportunity to choose their own area of emphasis. On the one hand, they could focus on the role of the initiative. On the other, they could evaluate the existing districting pattern irrespective of the initiative's role. Mr. Voorhees obviously favored the latter alternative:

> At first blush it might appear that since the people of this state have the power to redistrict by initiative, the remedy of those who claim to be under-represented should be at the polls rather than in the courts. This contention does not, however, bear analysis, for the question before this court is not whether the under-represented voters of the State of Washington have any other recourse, but rather whether the present allocation of representatives is or is not constitutional. If the present allocation is such that it deprives some voters of the equal protection of the laws that allocation is unconstitutional irrespective of whether the people have or do not have the power of initiative. Were this not true, no statute of a state, having the initiative, could ever be declared unconstitutional, for the citizens of that state could always, if they chose, amend the offending statute without seeking the protection of the courts.

Memorandum of Authorities of Intervener, League of Women Voters, record vol. 2, at 59, No. 5597, *Thigpen*, 211 F. Supp. 826 (W.D. Wash. 1962).

had not been directly answered, but ideas on the subject appeared in several amici briefs in *Baker v. Carr*. One brief argued that the right to relief by the Supreme Court should not depend on possible alternative political remedies,[19] while another questioned the practicality and effectiveness of the initiative as an adequate remedy.[20]

Actually, Washington is one of the very few states in which the initiative has been utilized, however falteringly, with any real success in redistricting. But even in respect to the successful campaigns in 1930 and 1956 one writer commented that:[21]

> . . . despite these two successful uses of popular initiative . . . to force reapportionment and redistricting on a reluctant legislature, the failure of most such efforts raises a serious question; namely, whether popular initiative and referendum actually do provide the voters with a "practical opportunity" for correcting "invidious discrimination."

The point is, as Professor Hugh A. Bone of the University of Washington put it in 1952, that "apportionment by initiative is expensive and cumbersome and is likely to be successful only where there is a large, under-represented urban population which organizes itself into a great citizens' movement for reapportionment."[22]

From a practical standpoint it would appear that the initiative

19. Brief for AFL-CIO as Amicus Curiae at 9-12, Baker v. Carr, 369 U.S. 186 (1961).

20. *Id.* On this point, noting the manifold difficulties with the initiative process in Oklahoma the brief related:

> The organizational effort and expense of printing, circulating, gathering, submitting and securing favorable rulings on such measures is tremendous—but probably the most difficult obstacle is the campaign . . . . Thus, while initiative appears to offer sound relief, as a practical matter is has become progressively more inadequate. Apparently this is caused by the increasing expensiveness of the procedure, the difficulty of explaining increasingly complex proposals, and even more from the lack of compromising and amendatory processes that are such a fundamental part of legislation.

Brief for Oklahoma as Amicus Curiae at 15, 17, Baker v. Carr, 369 U.S. 186 (1961).

21. Silva, *Apportionment in New York*, 30 FORDHAM L. REV. 581, 595 (1962).

22. Even in a comparative sense, the record of successful initiative attempts in redistricting is dismal.

> In some respects the experience in Washington lends encouragement to the use of initiative, but the preponderance of evidence elsewhere points to the contrary. For one thing, constitutional initiative is found in only 10 states other than Arizona, Arkansas, and Colorado [California, Massachusetts, Michigan, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, and Oregon]. Maine, Montana, South Dakota, Utah, and Washington permit statutory initiative which could probably be used to achieve some reapportionment. In most of the states providing for initiative, the device has not even been tried.

Bone, *States Attempting to Comply With Reapportionment Requirements*, 17 LAW & CONTEMP. PROB. 387, 410 (1952).

process is not an effective answer to legislative inaction. The relief for malapportionment needs to be effective rather than potential if it is to have any practical political meaning. Indeed, in *Baker v. Carr*, one crucial basis for the Supreme Court's intervention centered on the question of adequate relief.[23]

In *Thigpen*, the stage was set for judicial responsiveness to the demands of those in favor of redistricting. Judge Beeks' December opinion responded to four important aspects of Washington's redistricting controversy.[24]

First, it conveniently treated the issues of Congressional and state districting separately. Lacking any substantial guidance by the Supreme Court on the matter of Congressional districting, the court noted the various discrepancies in the seven districts and concluded that the allegations of "invidious discrimination" were unsubstantiated.[25]

Having dismissed the complaint concerning Congressional districts, the court turned its attention to the disparities in population ratios for both houses of the Washington Legislature. First the court noted what each district should contain if all were equal in population as based on the 1960 Census,[26] and then reiterated the specifications of the Wash-

23. On this point Walter Lippmann argued that the proponents of judicial restraint, as represented by Justices Frankfurter and Harlan, have not adequately answered the question: Where is a practical remedy to be discovered if not in the federal judiciary?

> The crux of the issue posed by the Frankfurter-Harlan dissenting opinions is right here. When, as they admit, there may be a 'major ill,' when, as they concede, 'other branches of government fail to act,' where in the American system of government are we to look for a remedy? This is the question that has to be answered before the charge against the majority of the court can be discussed realistically. Until the supporters of the Frankfurter-Harlan school answer this question, they are open to the retort that they are preaching a most dangerous policy, which is that, for certain ills of the American republic, there is to be no legal remedy.

The Seattle Times, June 19, 1964, at 8, col. 5.

24. In rather eloquent fashion Judge Beeks duly credited *Baker v. Carr* with fostering the present case:

> Population growth generates many problems. This is one of them. Spawned by the historic pronouncement in *Baker v. Carr* this class action is before us challenging the Federal constitutionality of existing legislative and congressional reapportionment in the state of Washington.

Thigpen, 211 F. Supp. 826 (W.D. Wash. 1962).

25. *Id.*, at 829-30.

26. *Id.*, at 830-31. The court meticulously spelled out the numerical discrepancies listing three major points:

> 1. If each district had exactly the same population as every other legislative district, the number of persons per State Representative would be 28,527 and the number of persons per State Senator would be 57,636. 2. The 34th Legislative District is the only District in the State of Washington approximating the norm. The others range from 57% below the norm to 102% above the norm as to population per State Representative and from 65% below the norm to 152% above the

ington Constitution that called for basic equality as the operating rule in legislative districts.[27] The opinion then pointed out that while perfect equality is not mandatory, discrepancies must be justified on some reasonable basis such as "geography, economics, mass media and functional or group voting strength."[28] Furthermore, contrasting the design of the representative system to guarantee that each "individual . . . cast an effective vote"[29] with the entire scheme of districting in the state, the court concluded that "invidious discrimination" existed and that such discrimination destroyed the commonly applied presumption of statutory validity.[30]

Next, because considerable attention had been given to the question of whether the initiative process in Washington should substantially affect judicial action, Judge Beeks directly met that issue:[31]

norm as to population per State Senator. 3. Twenty-four legislative districts containing 1,086,924 persons, or 38% of the total population of the State, have 51 of the 99 votes in the State House of Representatives, and twenty-five legislative districts containing 1,088,415 persons, or 35.6% of the total State population, have a majority in the State Senate.

27. *Id.*, at 831, citing State *ex rel.* O'Connell v. Meyers, 51 Wn. 2d 454, 458, 319 P.2d 828, 829 (1957), which upheld the reapportionment act of 1957 (WASH. REV. CODE § 44.06.010 *et seq.*; *repealed* by WASH. REV. CODE § 44.07.005 et seq. (1969)).

28. *Id.*

29. *Id.*

30. *Id.*, at 832. To shift the burden of proof to the state to defend the present scheme was certainly an exercise of judicial discretion. Only the purported extremity of the situation justified this tactical move by Judge Beeks. He commented:

> We are aware of the presumption of constitutionality of the statutes in question. We are likewise cognizant of the burden cast upon an assailant. The population figures before us reveal the existence of extreme and striking disparities in voting values as to both houses of the State Legislature. These are of sufficient magnitude to rebut the presumption. Such being so, the defendants have the burden to establish some rational basis for them. This, they have failed to do. The lines of inequality run the length and breadth of the State, from east to west and from north to south, between contiguous districts and between different districts in the same cities. The inevitable effect thereof has been to increase rather than decrease disparities in voting strength with the growth of population. The conclusion is inescapable that the existing apportionment of the Washington Legislature is invidiously discriminatory.

31. *Id.* Judge Beeks did three things of major importance in this portion of his decision. (1) He questioned the "meaning" of an electoral choice. The same question has been raised by others, but most attention has been on the "meaning" of electing a particular policy-maker, rather than voting on a specific issue. (*See* R. DAHL, A PREFACE TO DEMOCRATIC THEORY Ch. V (1956)). It seems more likely that Judge Beeks was expressing a value choice and then rationalizing it. The same rationalization was used by certain Washington Legislators to justify amending the initiative effort of the League of Women Voters in 1956. They contended that the voters actually were approving the "principle" of redistricting, rather than the specific plan put forth in the initiative. At any rate, one faces a hopeless dilemma if each choice must be constantly re-evaluated for its "real meaning." (2) Then he said it really did not matter. Yet it obviously does matter, from a realistic standpoint, as to what will ultimately be con-

> We are asked to decline jurisdiction because the voters of Washington at the general election on November 6, 1962, defeated an initiative measure designed to reapportion the Washington Legislature according to population revealed by the Federal census of 1960. Our answer is concise and direct. We have no way of knowing whether the measure was defeated because a majority did not desire reapportionment or whether they didn't understand it (there were numerous other complicated matters on the ballot) or whether the opponents were better organized than the proponents. It makes no difference. The inalienable constitutional right of equal protection cannot be made to depend on the will of the majority. . . .
>
> The Washington Legislature must be apportioned on a constitutional basis. Invidious discrimination gnaws at the very vitals of our democratic way of life. Reapportionment is a political act, a constitutionally created duty which every member of every legislature has taken a solemn oath to perform.

Finally, having ruled that the state's existing legislative districting violated the mandate of *Baker v. Carr*, the court was faced with the selection of an adequate remedy. Judge Beeks temporarily side-stepped this problem by postponing any further judicial action on the matter until after the 1963 Legislature had an opportunity to redistrict the state:[32]

> We take notice of the fact that a new legislature will convene on January 14, 1963. Believing as we do, that redistricting should be acomplished by the body constitutionally responsible therefore and that the sins of the fathers should not be visited upon the sons, we are deferring final action to afford it the opportunity of discharging its constitutional mandate. If it fails, we, ever conscious

sidered "constitutional" in terms of compliance. It does not matter only if enough important political actors in the system agree with the judges. It is not necessary to question the existence of certain "inalienable constitutional rights" in order to understand that judges as well as other policial actors necessarily must make value choices. They, however, are forced to rationalize their preferences with more elaborate arguments than most other decision-makers. (3) Judge Beeks then suggested that this particular type of invidious discrimination is anti-democratic. This, of course, one cannot fully dispute until one knows what the judge considers to be the essence of democracy and why. What Judge Beeks does not say, and indeed what would be intolerable to voice openly, is that opposition to invidious discrimination is primarily being launched by minority interests now disadvantaged in the political process, rather than by a widespread majority throughout the state. It happens that federal judges seem to be more sympathetic to the demands of groups in suburban and urban areas than they are to the demands of rural areas. Perhaps they would not be federal judges if they were not predisposed this way.

32. *Id.*, at 832.

of our oath to uphold the constitution of the United States, will unhesitatingly take appropriate action to correct the inequity.

Having so said, the matter is continued until April 8, 1963, for further hearing.

II. THE POLITICS OF NONCOMPLIANCE: 1963 LEGISLATIVE SESSION

The 1963 Legislature failed to redistrict either during the regular sixty-day session or during the twenty-three days of special session. There were three principal reasons for noncompliance: (1) The formation of a political coalition in the state House of Representatives between the Republican Party and six dissident Democrats proved to be the major stumbling block; (2) in light of this coalition and other factors, the judicial admonition to the legislators proved too weak; (3) Democratic Governor Rosellini discouraged redstricting through his inaction.

Men who are wise in the ways of legislative politics understand that usually redistricting is not prompted by nonpartisan reasons; "apportionment is politics, and in politics no one is neutral."[33] The first question most Washington legislators asked about every redistricting proposal was what the bill would do to their chances for re-election.[34] Regardless of party affiliation their first concern was personal. Due to this aspect of political survival, opposition to redistricting was rather widespread, with the great bulk of legislators desiring no change at all.[35] Each incumbent demanded to know precisely what part of his district would be altered before he would give his support to any measure. The more objective[36] aspects of the legislator's worries were

33. Dixon, *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAWYER 367, 369 (1963).

34. The same propensity for self-preservation seems to be pervasive throughout the country where redistricting is concerned. STEINER AND GOVE in LEGISLATIVE POLITICS IN ILLINOIS 99 (1960), quote one legislator as exclaiming:

> Outsiders shouldn't stick their noses in and tell this committee how to reapportion the state. . . Any man in this legislature who doesn't fight for his own district is a particular damn fool. I'm not for too many sitting members running against each other if we can work it out.

35. Interview with Slade Gorton, then Republican State Representative from the 46th District in Seattle, on April 22, 1964 [hereinafter cited as Interview with Slade Gorton]. Mr. Gorton was authorized by the Republican caucus to lead their districting efforts in the 1963 season.

36. Objectively, the legislators could have a relatively sound notion of what type of

compounded by subjective fears over the unknown and largely unknowable feelings that new voters might have for the legislator. The total effect amounted to motivation for many legislators to favor the status quo.

If personal consideration on the part of legislators were substantial in determining attitudes toward a new bill, no less so were matters involving advantages to be gained or lost for the political parties in the legislative process through reapportionment. Once enough incumbent legislators of each party were satisfied with a given bill then the question of party dominance, which had perhaps been dormant previously, sprung to life. Which party will have control of the legislative process? On what bases will the new bill be established? In the House, where the controversy was most intense, the leaders in both parties agreed that party divisions were much more important than the rural-urban split, irrespective of factions within both parties. Slade Gorton, who led the Republican redistricting efforts, stated that there is a "far more profound difference between party members than between country mice and city mice."[37] Wes Uhlman, a Democratic legislator from Seattle, stated that it was "almost 100 percent a party issue. It was a power struggle between the two parties."[38]

In terms of numerical strength the Democrats should have won the redistricting controversy in the 1963 session. There was a Democratic governor and majorities of 33 to 16 in the State Senate and 51 to 48 in the House. If politics were simply a matter of numbers, the Democrats would have dominated the action in the session. Instead a legislative deadlock resulted from the formation of a political coalition between six disgruntled Democrats and the forty-eight member Republican minority. After the bolting of these six Democrats, the Republicans were able to elect a Speaker of the House, organize the committees, and create a tense political situation which resulted in noncompliance

voters (as far as party affiliations were concerned) would be put into their districts under a new bill. Subjectively, however, the legislators could not know to what extent intangible factors (such as name familiarity, personality, and incumbency) might overcome the basic disposition of most citizens to vote on the basis of party alignment. Whether or not these are properly deemed "objective" and "subjective" differences is not as important as how the various legislators perceived the influence new districts might have on their political futures.

37. Interview with Slade Gorton, *supra* note 35.

38. Interview with Wes Uhlman, then Democratic State Representative from the 32nd District, April 18, 1964. Mr. Uhlman was instrumental in the Democratic effort to redistrict.

with the judicial admonition to redistrict. The motives of the Democratic dissidents were varied, while "the principal motivation of those Republicans who organized the coalition and secured its acceptance by the Republican caucus was redistricting." The Republicans, Gorton argued, desired a defensive advantage in order to prevent the Democrats from thrusting a redistricting bill upon them that would have been even less acceptable than the 1957 plan. The clear intent was to force compromise through the threat of deadlock.

The major contention of the Republicans was that, in the 1962 general election for the House, the total vote cast for Republican candidates was 52.7 percent while the number of Republican representatives elected to that chamber was only 48.48 percent. They desired a plan that would distribute party seats in a more equitable manner. The Democrats countered with the argument that the statistics used by the Republicans distorted the meaning of the 1962 elections since in three legislative contests the Republican candidate ran unopposed. This, the Democrats claimed, exaggerated the legitimacy of the Republican contention that they ought to receive an equal number of representatives proportionate to the percentage of votes cast throughout the state. Even conceding the Democrat's argument, however, the Republicans still received a majority of the popular vote and only a minority of the legislative seats. Whether or not this was an intolerable discrepancy, it nonetheless provided a point of debate for the Republicans. Gorton wanted a bill that would reflect equal population districts in accordance with the Washington State Constitution, yet still give the Republican party what he considered its proper share of the legislative seats. His strategy in pursuing districts of relatively equal size was somewhat less flexible than that of his Democratic alter ego in the Senate, R. R. Greive, especially with respect to the issue of preservation of incumbents of both parties. Greive was somewhat more willing to accommodate incumbents than Gorton; with a 33 to 16 majority in the Senate, Greive could afford to be somewhat more broadminded about the issue as far as the House was concerned.

Matters were further complicated on the issue of proper standards. How closely would population be followed? When and where could exceptions be made? To what extent should incumbents be favored, irrespective of party? To what extent should safe party districts be created?

Within the House, Representatives Gorton and Uhlman among others, continually debated the merits and intentions of the divergent party claims. Between the House and the Senate the dialogue was continued between Gorton and Greive, although the approach of the latter two politicians was quite different. Senator Greive worked informally during most of both sessions to obtain coalition votes for his bill. He was unsuccessful, however, in persuading any of the 48 Republicans or the six dissident Democrats to support his plan. His strategy was to wait until the House coalition enacted Gorton's redistricting bill; then he would amend his own Senate bill onto it and return the altered measure to the House for concurrence. He planned to time this maneuver in such a way that it would take place in the closing hours of the regular session when most legislators were quite weary and ready to adjourn. In this way Grieve hoped to secure enough votes from House Republicans and dissident Democrats to end the stalemate. Any defector from the coalition would have been asked to vote only once for Greive's bill, thus minimizing the ability of the coalition to pressure the legislator back into the fold.

Gorton's strategy was to continue negotiations until the Democrats made further concessions. He bargained with two thoughts in mind. First, he realized that the coalition's power stemmed from its ability to block a Democratic bill. Second, he believed that in the event of a legislative deadlock the Republican Party would fare much better under judicial reapportionment than under Democratic redistricting. Both of these factors minimized his fear of legislative noncompliance with the judges' instructions. Thus, Gorton utilized the potential threat of deadlock as a bargaining tool.[39]

Due to the political strategies of both camps only three significant roll call votes were made in the House during the two sessions. In each instance the coalition remained cohesive to a man, with one to six additional regular Democrats supporting the coalition. The first test of the coalition's solidarity on redistricting did not take place until the middle of the eighth week of the regular session. On March 7 the coali-

39. Perhaps it should be noted that Senator Greive was not impressed with Gorton's threat to allow the federal judges to decide the matter. Greive consistently maintained that the judges would never redistrict the state on their own, but would simply declare an at-large election, thus forcing a special session of the legislature to reconsider redistricting.

tion passed H.B. 436 by a vote of 55 to 44.[40] Gorton had decided to force formal negotiations with Greive, since little progress was being made informally. Gorton further hoped that Greive's leadership in the Senate might be broken with the aid of certain Democratic Senators who were not in agreement with the Senate Majority Leader. The attempt failed, however, and the regular session ended on March 14 without Senate action on the House redistricting bill.

The second formal vote on redistricting by the coalition was on March 25, the eleventh day of the special session. Since the Senate had taken no action on H.B. 436 during the regular session, it was necessary to re-enact the measure in the special session. On this occasion the coalition picked up two additional Democrats to pass H.B. 56, substantially the same bill as previously passed, by 57-41. On March 30 the Senate carried out Greive's strategy of "scalping" the House bill by substituting a Senate redistricting plan for the House bill through an amendment.[41]

The House responded to the Senate's attempt to scuttle the coalition's redistricting plan by rejecting the Senate amendment, 60 to 37.[42] The bill eventually found its way into joint conference committee, never to emerge for further floor action.[43] The special session adjourned on April 6 after twenty-three days. The Republicans' preference for deadlock rather than a Democratic plan had been realized; the coalition had served its purpose well. Two additional factors which contributed to noncompliance must also be examined: (1) the role of the judicial sanction, and (2) the role of the Governor.

There is a certain degree of irony involved in the impact that *Thigpen*

40. Jack Dootson was the only regular Democrat to support the coalition. All 48 Republicans and six dissidents voted together. The Seattle Post-Intelligencer, March 8, 1963, at 8, col. 1.

41. The final Senate vote was 26 to 23. Sixteen of the seventeen Republicans opposed Greive's amendment along with seven Democrats. Six of the seven were not regular supporters of Greive: Hallauer, McCormack, Riley, Washington, Rasmussen and Petrich. McCutcheon voted with them for purposes of strategy, in case a conference was established. The Seattle Post-Intelligencer, March 31, 1963, at 1, col. 1 & at 8, col. 1.

42. On March 31, six regular Democrats supported the coalition: Dootson, Gleason, O'Connell, Mundy, Smith, and Moon. The Seattle Post-Intelligencer, April 1, 1963, at 1, col. 5.

43. It is unknown whether the conference bill would have been passed if a floor vote had been taken. It is quite clear, however, that it did not meet the constitutional standards made explicit in Reynolds v. Sims, 377 U.S. 533 (1964). The House Republican Caucus voted 35-12 to support the conference report but this vote did not bind each Republican. The House Democratic Caucus voted 23-20 against accepting the report. The Senate Democratic Caucus purportedly rejected the bill by one vote.

v. Meyers had on the legislative attempt to redistrict. It was intended to be an impetus to action; yet it failed to accomplish that goal, partially due to the very nature of the judicial prodding. First, it was the weakest form of positive judicial action possible, being only an admonition rather than a final order of any sort. Secondly, it was ambiguous as to both the standards necessary for redistricting and the consequences that would befall the legislators in the event of noncompliance. In fact, the District Court may well have encouraged delay in the matter by postponing final action until after the legislative session.

To the extent that the 1963 legislature attempted to redistrict, however, *Thigpen v. Meyers* was the dominant motivating factor. Undoubtedly the federal judges desired redistricting by the legislature and the December opinion was basically designed to be "a lever to get the legislature moving again."[44] Unfortunately, the particular impact that the judicial admonition had on various legislators was somewhat weakened by the absence of any specific information about judicial retribution in the face of legislative nonconformity. The unknown nature of the threatened judicial action was either not distasteful enough or not sufficiently credible to induce compliance by many of the legislators. Nevertheless, the opinion of Judge Beeks, veiled threat that it was, constituted the major spur to action, being in some ways an abnormal sword over the legislators' heads. In general, there are numerous ways in which legislators deal with one another, some gentler than others, such as log-rolling, exchanging personal favors, compromising in order to take half a loaf rather than none at all, and even threatening to sabotage another legislator's pet bill if cooperation is not manifested. In contrast to such procedures, which are widely accepted as part of the game of legislative politics, the opinion of the District Court was a novel and somewhat unusual threat. A good number of the legislators did not know how to assess the importance of the new role of the federal judiciary in the ancient legislative controversy. At the start of the session, it appeared that the federal judges had secured the upper hand in the controversy, at least temporarily. But compliance to judicial directives has seldom been a matter of simple causal relationship between directive and behavior. In this case, the overriding influence of

44. Interview with Michael Hoff on May 1, 1964. Mr. Hoff served as a Law Clerk to Judge Beeks during the early stage of *Thigpen v. Meyers* until February of 1963.

the coalition negated any potential effectiveness of the judicial admonition.

Even aside from the coalition, however, the weakness and ambiguity of the court order undermined the judicial goal of redistricting. Compared to a number of other orders that the judges might have utilized, the order chosen was clearly the weakest one available, considering the role that the judges had decided to play in the controversy. To be sure, it is difficult, if not impossible, to imagine any order that might have been perceived by the legislators as worthy of compliance, thus overcoming the coalition's role. However, it is also evident that the order that was issued was not strong enough even to overcome the tendency for inaction on the part of many legislators, irrespective of the adverse consequences of the coalition. The nature of that order exhibited certain drawbacks.

In the first place the District Court ruling created a considerable amount of anxiety over the constitutional standards that must be met by any new districting bill. The Washington State Attorney General, John O'Connell, was beseeched to give his opinion on the matter to the legislature. "What, if any guidelines do you consider to have been set down by the Court in its opinion relative to what would be a constitutional apportionment law?" the joint committee on redistricting asked the Attorney General's office.[45] After careful scrutiny of the *Thigpen* opinion, O'Connell suggested that population deviations of more than two-to-one between the largest and smallest district in the state would undoubtedly be unacceptable, that all deviations from population equality necessarily must have some rational basis such as related to relatively unusual social and economic conditions of the different districts, and that regional representation in the state legislature must be fairly equal as well as district equality.[46] When asked about a statute providing for a federal type of apportionment plan, the reply was that the Washington Constitution precluded such an arrangement.[47]

The ambiguity as to what would happen to the legislators in case

45. Letter from Attorney General John J. O'Connell to W. G. Hallauer and Slade Gorton concerning standards to be met in apportionment, in the light of *Thigpen v. Meyers*, February 4, 1963, at 1.
46. *Id.*, at 6-8.
47. *Id.*, at 9.

they failed to comply further weakened the judicial admonition. The District Court had given no final order; the judges were assuming and hoping that a simple statement of the legislative duty to redistrict would be sufficient prodding. Thus they pursued what they considered to be the least offensive role outside of dismissing the suit altogether. To some legislators it was inconceivable that the judges would ever draw the lines themselves. Others believed that it would not be undesirable to have the judges do so; this feeling was especially prevalent among those legislators who did not like either the Republican or Democratic plans, and thought they might receive more consideration under a judicially formulated redistricting plan. Moreover, there were legislators who believed that eventually a new redistricting plan was inevitable, but hoped that 1963 was not the year of inevitability. They anticipated that the absence of a final order by the judges implied that the legislators would have more time to redistrict at a later date. Again, however, these considerations on the nature and weakness of the judicial mandate were secondary to the main cause of the deadlock, namely, the role of the coalition.

During the 1963 Legislative sessions, Governor Albert Rosellini did as little as possible to become directly involved in the redistricting battle. Those working for the Governor argued the position that redistricting "is a legislative responsibility."[48] What was difficult to perceive at the time, though, was that an assumed stance of uninvolvement is not necessarily devoid of political consequences. A position of neutrality by an important actor who might have influenced the outcome by direct participation is in reality a position that upholds the current distribution of power. The Governor's lack of involvement did not mean neutrality. He had competing claims to satisfy—claims that foreclosed active participation in redistricting. From a political standpoint, Governor Rosellini apparently felt that more could be lost than won by taking a strong stand on the matter, especially at a stage when the legislative role was dominant. He refused to jeopardize his legislative program by alienating influential legislators of either party. Also, since each party was not internally cohesive in support of one party bill, the Governor would have faced a quandary as to which particular

48. Interview with Burton R. Johnson, Legal Administrative Assistant to the Governor, May 13, 1964.

faction to support within his own party. Finally, due to the coalition's control of the House, bipartisan support for the Governor's program was vital if it was to be enacted. In short, it was not a sound political move to support either the Republican or Democratic plan.

III. THE FIRST JUDICIAL SANCTION: THREAT OF AN AT-LARGE ELECTION

Legislative noncompliance with the 1962 decision by Judge Beeks had not been seriously anticipated by most observers in the state. The failure of the legislature to comply shifted the arena of the political controversy back to the courthouse. Access to the judiciary now became of prime importance to all who were interested in influencing the type of solution the judges might suggest. For those intensely concerned with the redistricting problem, new questions had now come to the surface: What type of remedy would the judges undertake to fashion?[49] Was there a seirous possibility that the court itself would draw lines?

Voorhees and Borawick, the attorneys for the League of Women Voters and for Thigpen, respectively, were in agreement as to the remedy they would ask of the court, although counsel admitted that the court could take any of four approaches. First, the court might redistrict the state itself. Second, the court might appoint a master or a commission to redistrict the state subject to the court's approval. Third, the court might undertake to consolidate existing districts in order to equalize population for each district. Fourth, the court might declare the existing district lines unconstitutional.[50] This last approach was the alternative that both Borawick and Voorhees pressed upon the court—with the specific intent of encouraging the Governor to call another special session to solve the problem. They were not to be disappointed.

Judge Beeks began his Oral Opinion of May 3, 1963, by expressing

49. The uncertainty as to the type of remedy the judges might undertake stemmed from the unknown quality of Judge Beeks' threat in his December opinion, when he said that if the legislature fails to redistrict "we, ever conscious of our oath to uphold the Constitution of the United States, will unhesitatingly take appropriate action to correct the inequity." *Thigpen*, 211 F. Supp. at 832 (W.D. Wash. 1962).

50. Memorandum of Authorities on Behalf of Intervenor, League of Women Voters, record, vol. 2 at 59, No. 5597, *Thigpen*, 211 F. Supp. 826 (W.D. Wash. 1962).

regret that the legislature had not acted; but, lest this initial statement be misconstrued, he expressly disavowed any intention of judicially redistricting the state at that time.[51] He then declared that the 1957 districting laws were unconstitutional and null and void as relating to state legislative districts. The Secretary of State was enjoined from participating in any type of activity having to do with elections under the old districts, but was not forbidden to hold an election at-large. Jurisdiction of the suit was continued until May 4, 1964, or to such other time as the court dictated.

The sanction imposed by the court may be evaluated in several different ways. On the one hand, it was a victory for Borawick and Voorhees, since they received the exact remedy that they had argued was most appropriate at the time. On the other hand, in comparing the December, 1962, opinion of Judge Beeks to his May opinion, there was a modification, at least in tone, in the latter opinion. Originally, Judge Beeks had indicated that if the legislature failed to redistrict in 1963, the judges "ever conscious of [their] oath to uphold the Constitution of the United States [would] unhesitatingly take appropriate action to correct the inequity."[52] But now, in the May opinion, the judges appeared to hesitate; Judge Beeks commented that "such [legislative] failure . . . does not automatically invoke the equitable powers of this Court to accomplish such purpose."[53] While this verbal inconsistency on the court's part is readily discernible, yet from the standpoint of an actual judicial sanction, the judges had remained steadfast in their threat to act if the legislature failed to redistrict. Whether or not the court was consistent in its two opinions centers around the intention of the judges when they issued their December edict. If the original intent was actually to draw the new lines if the legislature

51. One proposition upon which all parties, including the Court, are in accord is that it is unfortunate that the legislature of the state of Washington did not redistrict on a constitutional basis during the past session. Such failure, however, does not automatically invoke the equitable powers of this Court to accomplish such purpose. Redistricting is primarily a political act to be performed by the legislative branch of our government. Judicial power to redistrict is a power which should be used rarely and only in exceptional circumstances. We do not find exceptional circumstances to exist in this case and we decline to undertake redistricting at this time.

Court Opinion, record, vol. 2 at 97, No. 5597, *Thigpen*, 211 F. Supp. 826 (W.D. Wash. 1962).

52. *Thigpen*, 211 F. Supp. 826 (1962).

53. Court Opinion, record, vol. 2 at 97, No. 5597, *Thigpen*, 211 F. Supp. (W.D. Wash. 1962).

could not agree on a bill, then an inconsistency is patently evident. But the court had not said exactly what type of action it would take in the face of legislative inaction; it had merely said that it would act. And, in the broader perspective, the court did act—by threatening an at-large election if the governor did not call another special session and if the legislature did not redistrict in time for the 1964 elections.

The court's quandary as to the appropriate remedy stemmed from the unexpected noncompliance of the legislature. The court probably did not really believe it would have to mitigate its earlier pronouncement.[54] Indeed, it is quite possible that[55]

> the original opinion may have reflected Judge Beeks' opinion on what the duty of the court was while the May opinion may have reflected the judge's personal reluctance to have the court actually draw the district lines.

How severe was the court's sanction? It had been argued that an at-large election would make travesty of the democratic process, assuming the ultimate possibility of having to carry out such an election. But this argument gave little attention to the ruling as a political threat, which was its implicit character, and the basic thrust of Borawick and Voorhees' argument. Until one could know the impact that the sanction would have throughout the state, it really was difficult to say with precision how severe the sanction was.

The immediate reaction of the State was to appeal the lower court's decision to the United States Supreme Court. Additionally, the State moved in the district court for a stay of that court's own ruling until the Supreme Court acted on the appeal. The district court judges, however, were unpersuaded by either written or oral arguments on this motion, and unanimously denied it on August 15, 1963.

The first sanction remained in effect until February 18, 1964, when Justice Douglas granted a stay of the district court's order pending further consideration of the appeal. At the same time, the Supreme Court gave no indication of whether it was going to hear oral arguments in the case, or whether it simply intended to decide the case on the basis of other districting litigation then before it.[56] Four months later,

54. Interview with Michael Hoff, Law Clerk to Judge Beeks, May 1, 1964.
55. Interview with Mrs. Joyce Thomas, Law Clerk to Judge Lindberg, May 1, 1964.
56. During the 1963 Term the Supreme Court heard complete arguments on re-

in *Reynolds v. Sims*, the Court held that both houses in all state legislatures must be apportioned on a strict population basis,[57] and one week after that, on June 22, the Supreme Court returned the *Thigpen* case to the district court affirming the lower court's action.[58]

Though the Supreme Court ruling increased tension in and urgency over the controversy, the district court judges were prevented from taking immediate action because of a Supreme Court rule allowing a 25-day waiting period before its orders took effect. From a strategic standpoint, the state planned to wait the entire 25 days, allowing the normal filing for legislative districts to occur from July 6 through July 17. The Attorney General then planned to ask the district judges to allow one more election under the old districts, on the ground that time was too short to accomplish redistricting. If the judges accepted the argument, it would extricate the Governor from the dilemma of either calling a special session with all the risks it entailed,[59] or forcing a possible election at-large, which understandably was not favored by many Democrats or Republicans.

Action by the judges came somewhat sooner than the Attorney General expected. Borawick and Voorhees asked O'Connell to waive the 25-day waiting period in order to implement the June 22 decision immediately. When the Attorney General rejected this proposal, Borawick petitioned the Supreme Court to make its order effective immediately. Justice Douglas complied with the request on July 11. Since this action then precluded any further filing for the legislature, O'Connell was forced to petition the district court to allow filings to continue through July 17. With a certain degree of reluctance, Judge Beeks granted the request on July 13.[60]

districting for six different states: New York, Alabama, Maryland, Colorado, Delaware, and Virginia. It was believed that Washington's case was among an additional nine that would be decided on the basis of the six before the Court.

57. The six cases were decided on June 15, 1964. The standards were specifically clarified in the Alabama case, Reynolds v. Sims, 377 U.S. 533 (1964).

58. In a *per curiam* opinion the Court said:

> The judgment below is affirmed on the merits, insofar as it relates to the apportionment of seats in the Washington Legislature. The case is remanded for further proceedings, with respect to relief, consistent with the views stated in our opinions in *Reynolds v. Sims* and in the other cases relating to state legislative apportionment decided along with Reynolds. . . .

Meyers v. Thigpen, 378 U.S. 554 (1964).

59. Burt, *Districting Risky Issue for Rosellini*, The Seattle Times, June 23, 1964, at 10, col. 2.

60. After granting the request, Beeks warned:

Once the initiative passed back to the district judges, they scheduled a hearing for July 16 to consider what relief might be appropriate in light of the Supreme Court ruling. It was at this hearing that the judges entertained a second sanction to encourage compliance.

IV. THE SECOND JUDICIAL SANCTION: THREAT OF WEIGHTED VOTES

The judges dominated the July 16 hearing much more than they had on April 29, 1963. Judge Jertberg began by emphasizing the leading principles in *Reynolds v. Sims:* (1) Both houses of a state legislature must be based on population; (2) the federal analogy is not applicable to state legislative districting; (3) it would be unusual to allow further elections under unconstitutional districts if a judicial decree had previously been entered in a given case. He then requested that all arguments concerning a possible remedy remain consistent with the *Reynolds* decision.

The Attorney General handled the arguments for the state.[61] Without mentioning the role of the coalition, Mr. O'Connell suggested that a basic reason for noncompliance in the 1963 legislative sessions was the ambiguity that existed in many legislators' minds over legitimate standards. The implication was that a newly elected legislature would surely redistrict. O'Connell's plea was for one more election under the old districts. To be sure, this would entail temporary violation of the constitutional mandate, but it would avoid the inevitable chaos of an election at-large. Besides, the Attorney General argued, there was insufficient time for the legislature to redistrict and for election officials to inform the public about the new districts.

After listening to various other approaches, Judge Beeks suggested

> And now I would like to express a word of caution. Do not infer from this action, this stay, that the Court is sympathetic or receptive to a request for a furtherance of the stay. Such would be wishful thinking, because I assure all concerned that the Court would be most reluctant to continue unconstitutional government.

Pp. 1-2. Court opinion, record, vol. 3 at 113, No. 5597, *Thigpen*, 211 F. Supp. 826 (W.D. Wash. 1962).

61. After the unsuccessful appeal to the United States Supreme Court, the Attorney General apparently believed that the controversy had become important enough to warrant his personal attention, so he took over full handling of the case from Special Assistant Attorney General Lyle Iversen, perhaps in the hope and reasonable speculation that the prestige of the Attorney General himself rather than one of his assistants would enhance the State's case.

that weighted voting might be a satisfactory temporary solution. Instead of an election at-large that no one seemed to desire, would not a system of voting weighted according to the population of a legislator's district, be acceptable? When questioned as to his preference between the two, O'Connell reluctantly chose weighted voting. Judge Beeks requested all attorneys interested to submit written arguments on the feasibility of weighted voting, in case a special session did not redistrict in time for the 1964 elections. The district court was losing little time in formulating a new sanction.

Judge Beeks delivered the opinion of the court on July 22, 1964. He began with an orderly account of the past events in the *Thigpen* case and suggested that its history was a "narrative of frustration and failure."[62] After cataloguing the patience of the judges and the past abundant opportunity for redistricting, the judge indicated that some type of judicial action was now necessary.[63]

What alternatives did the judges have? First, Judge Beeks indicated that the court might choose election at-large as a remedy, but he immediately rejected that alternative.[64] Second, the judges might actually redistrict the state; but the court rejected this solution as well. The clearest solution to the problem, Judge Beeks continued, was to call a special session of the legislature to redistrict immediately. The argument that there was not sufficient time to accomplish the task was deemed of little merit.[65] To induce the Governor to com-

62. Court opinion, record, vol. 4 at 125, No. 5597, *Thigpen*, 211 F. Supp. 826 (W.D. Wash. 1962).

63. *Id.*:

More than two years have now expired since the date of the original hearing without any accomplishment and the woes of reapportionment are still upon us. Like an echo from the past, we are again assured that the 1965 Legislature will lawfully reapportion itself if we will stay the effect of our decree of May 27, 1963, and permit matters to proceed as we did in December, 1962. This we refuse to do.

64. *Id.*:

Elections at-large would undoubtedly satisfy the constitutional requirements of legislative representation. They would, however, be chaotic insofar as the voting public is concerned and such remedy might very well produce a result far more inimical than the evils sought to be eradicated in that a legislature elected on a state-wide basis might very well produce a less representative government than now exists.

65. *Id.*

66. To the end that redistricting, a political act, may be accomplished in this State by the body primarily constitutionally charged with such responsibility, and to avoid any taint of unconstitutionality, we sanction a special session of the legislature for the sole and limited purpose of enacting redistricting legislation on a

ply, the court formally sanctioned a special session to deal strictly with redistricting.[66] Further, the court threatened to impose a weighted voting plan if such a special session was not called and redistricting was not completed by August 31, 1964.[67] This remedy was obviously designed to encourage redistricting, and the court gave no details as to its application. Such details, and a final decree on the matter, were postponed until after August 31.

Governor Rosellini remained steadfast in his opposition to a special session, indicating that he would accept weighted voting for the 1965 Legislative session unless it could be proven that it would not work.[68] In a meeting with state election officials[69] and his legal advisers, the Governor found enough opposition to a special session to rationalize his own preference. Since a good possibility existed that the Democratic Party would win sufficient seats in the 1965 legislature to prevent the formation of another coalition in the House and that Governor Rosellini would be re-elected, his resistance to calling a special session was politically understandable.

The federal judges had previously indicated they would consider the final decree sometime after August 31, but it was not until October 5 that any action was taken. Postponement was in part attributable to debates in the U.S. Congress on a possible reapportionment delay. When the judges perceived that no Congressional action was likely to be forthcoming, they scheduled a hearing, supposedly for the purpose of clarifying the details of a weighted voting plan for the 1965 legislative session. Instead of clarification, however, they totally abandoned the sanctions previously threatened, eliminating both the election at-large and weighted voting plans. Instead, they decreed that redistricting was to be the first order of business for the 1965 legislature, and they enjoined all other legislation until redistricting was

> constitutional basis, together with the enactment of such legislation as may be necessary to sustain such special session and to carry the plan adopted through the elective process.

Id.

67. *Id.*

68. The Seattle Times, July 23, 1964, at 1, col. 1.

69. *Id.*, Kenneth Gilbert, State Supervisor of Election was quoted as saying:

> For all practical purposes, it would be simply impossible for a special session of the legislature to pass a redistricting plan in time for the September 15 primary.

Further coverage on the meeting can be found in the next day's edition, The Seattle Times, July 24, 1964, at 1, col. 5.

completed.[70] They did not state a deadline for compliance, but stayed permanently their ruling of May 27 in order to allow the November election to take place. Finally, the court ruled that the legislative terms of those legislators elected in November would expire in one year rather than two.[71] The Attorney General was directed to formulate the final decree for the approval of the judges.

The final order that was entered on October 27 contained an explanation for the judicial revision. In the light of the failure of the Governor to call a special session, the court reasoned that:[72]

> . . . the primary objective of its decree at this time should be to effectively induce the 1965 session of the Washington State legislature to properly reapportion itself as its first order of business during the period of the session, and that, therefore, implementation of the 'weighted vote' solution described by the Court in its aforesaid opinion of July 22, 1965 is not now required.

The latter decree also modified the October 5 ruling by allowing the legislative terms to expire after the normal two-year period instead of on December 31, 1965, and by only enjoining final enactments of legislation other than redistricting, thus permitting committee consideration of other legislation.[73]

V. EVALUATION OF THE JUDICIAL SANCTIONS

Although the judges' attempt to encourage interim redistricting was unsuccessful, an inquiry into the comparative strength of the sanctions used and threatened by the judges should indicate whether there was a discernible pattern in their behavior.

Sanctions in redistricting may be typed as either *means* or *ends* sanctions. A means sanction is one designed to induce those normally

70. Court decree, record, vol. 4 at 151, No. 5597, *Thigpen*, 211 F. Supp. 826 (W.D. Wash. 1962).

71. *Id.*, at 145. This was modified in the October 27 decree, however, to allow terms of office to run until January 9, 1967, rather than to December 31, 1965. Though the Washington Legislature only meets biennally, this modification precluded even the possibility of additional legislative elections prior to 1966.

72. *Id.*, at 151.

73. *Id.* On October 5 the court had said that "no bill shall be introduced, considered or passed by either house of the Washington State Legislature or any committee thereof until the legislature shall have enacted into law a legislative apportionment plan" that is constitutional. But on October 27 the court allowed an elimination of the words "introduced, considered or" and "or any committee thereof."

responsible for redistricting to take action. An ends sanction is one designed to accomplish redistricting directly. An example of an ends sanction would be for the judges to draw the lines themselves, or perhaps appoint a special commission to do the job. Throughout the *Thigpen* case, however, all of the sanctions utilized by the judges were means sanctions.

Since all of the sanctions were of a particular type, is there any way to compare the various orders? Were they all equally severe in either intent or application? The necessity for some minimal agreement on criteria for evaluation and comparison is important if one is to examine the pattern of judicial behavior. For example, we might hypothesize that judges desiring to encourage compliance by redistricting will utilize increasingly severe sanctions until they receive compliance. Though the evidence in the *Thigpen* case does not support such a hypothesis, the only way to test the idea is to develop some standards for comparing various sanctions.

Comparative severity of a means sanction may be evaluated in the following way: A means sanction may be said to increase in severity to the extent that it disrupts the normal political process in attempting to accomplish redistricting. Thus, using this criterion, the chronological application of sanctions in the *Thigpen* case does not indicate the use of increasingly severe sanctions by the judges:

Chronological Application of the Sanctions

1. December, 1962:	Verbal Admonition to 1963 legislature
2. May, 1963:	Threat of at-large elections
3. July, 1964:	Threat of weighted votes
4. October, 1964:	Order to 1965 legislature

Sanctions in Decreasing Order of Severity

1. Threat of an at-large election
2. Threat of weighted votes
3. Order to the 1965 legislature
4. Verbal admonition to the 1963 legislature

The chronological order of the various sanctions used by the judges disproves the hypothesis stated above. Yet, there is no evidence to support the notion that the judges consistently proposed sanctions in a decreasing order of severity either. What then was the pat-

tern of the judges' behavior and what accounted for the pattern? Three comments are relevant.

First, the judges consistently utilized sanctions that tended to minimize the role that they would have to play in the enforcement of those sanctions. It was one thing for the judges to experiment with different sanctions in an attempt to induce others to redistrict; but quite another thing for the judges to undertake to draw the lines themselves. Throughout the case, the judges consistently tried to defer to the political judgment of the Governor and the legislature, explicitly disclaiming that redistricting was properly a judicial task.

Second, the judges consciously refused to issue orders that might have had a high probability of being ignored. Realistically, the court was speaking to the Governor rather than to the legislature when it threatened an at-large election and later threatened weighted voting. Until the Governor called the special session of the legislature, no one really knew whether agreement could be reached on redistricting. Never once, however, did the judges directly order the Governor to call a special session. Nor would they by-pass the Governor and call a special session of the legislature themselves. To have directly confronted such an important political actor as the Governor would have been both novel and risky. Given the Governor's unwillingness to call a special session, or even to promote in any significant way the accomplishment of redistricting during this period of time, the judges were understandably wary about challenging Governor Rosellini directly. Instead, the judges attempted to create an intolerable political situation through the use of threatened sanctions. The court anticipated that enough legislators would not desire to run at-large in 1964, and that these men would convince the Governor to call a special session to solve the problem. For reasons both related and unrelated to redistricting, the Governor chose to ignore the judicial threats.

Third, the judges attempted to be realistic in the timing of their sanctions. Once it became apparent that no special session would be called in time for the 1964 elections, the judges revised their sanction in order to disturb the normal election process as little as possible. In one sense this was judicial retreat, since it took much of the pressure caused by the threat of at-large elections off the Governor. But it was a retreat consistent with the judges' overall caution in the case and their reluctance either to redistrict the state themselves or to create

chaos in the election or legislative processes. Rather they chose an order to the 1965 Legislature.

The failure of the judges to apply increasingly severe sanctions was a result of the interaction among the foregoing factors. Evidently the judges feared disruption of the state's political process more than they valued the possibility of attaining immediate redistricting. To accomplish the constitutional task at the expense of disturbing the election process through weighted voting was deemed less important than enabling the normal political process to operate, as long as the judges believed they might still induce compliance. The order to the 1965 legislature constituted no more than the minimal amount of judicial prodding that they believed was necessary for the task. It was a compromise intended to be more severe than the verbal admonition to the 1963 legislature yet less severe than weighted votes or an at-large election.

VI. THE POLITICS OF COMPLIANCE: 1965 LEGISLATIVE SESSION

Legislative compliance with the judicial order to redistrict, as the first order of business in the 1965 Legislative session, took forty-seven days. Because it would be difficult to characterize this as automatic compliance, it is worthwhile to inquire into the factors that finally did contribute to compliance. The evidence suggests that interplay among three distinct inputs accounted for the redistricting; no single factor dominated the process. These ingredients were: (1) the role of the threatened judicial sanction; (2) the role of the Democratically dominated legislature; and (3) the role of the Republican Governor, Daniel J. Evans.

Without the judges' order prodding the legislators, there probably would have been no legislative redistricting in the 1965 regular session. The judicial sanction provided incentive for legislative agreement in two related ways. First, it gave the legislators another opportunity to fashion their own redistricting bill rather than have some other group do the task. Noncompliance at this stage of the controversy might well have completely removed the matter from legislative consideration, irrespective of the reasons for noncompliance. If the

lawmakers could not or would not enact a new plan, the chances were increasingly slight that they would have another opportunity. Second, the implication of the sanction—the threat of judicial reapportionment—served to induce compromise at a later point in the session when a political statemate arose between the Democratically controlled legislature and Republican Governor Evans. Thus, the sanction encouraged both initiation and completion of the job.

It is highly significant that there was no organized attempt at defiance analogous to Southern resistance where racial integration is concerned. Even those citizens and legislators who decried the movement towards population equality in state legislative districts evidently did not feel strongly enough about the issue to defy overtly the federal court. This relative complacency may perhaps be traced to the ascendant legitimacy of leadership by the federal judges. A number of developments had strengthened the hand of those pressing for redistricting in the past two years. First, the state of Washington had lost its appeal to the United States Supreme Court, thus precluding any further legal stall through the appeal process. Second, whatever the worth of the argument concerning the ambiguity of acceptable redistricting standards, that objection was greatly weakened with the decision of *Reynolds v. Sims* in June, 1964.

Third, the Congressional attempt to delay implementation of the *Reynolds* decision in the autumn of 1964 had failed. Fourth, even the Washington State Constitution embraced population equality for both houses as the sole standard for redistricting, and it was quite difficult for anyone to argue that outside pressure and federal encroachment upon states' rights was the root of the problem. Fifth, it appears that the lack of previous success on the part of the judges to encourage redistricting in 1963 and 1964 now paradoxically increased the legitimacy of their role. After all, it had been Governor Rosellini who appeared unreasonable and stubborn by refusing to call a special session. Sixth, without some type of cohesive opposition to the judges' prodding, time was on their side. So was the Republican Party. Thus, seventh, the commitment of the Republicans to a redistricting bill based on population equality gave added support to the judges' position. As Representative Slade Gorton consistently argued, any bill established predominantly on population necessarily would shift some power to the suburbs, and hence to the Republicans.

At any rate, these were the factors that tended to enhance the legitimacy of the judicial role in the controversy.

In addition, the 1965 sanction was considerably more severe than that of 1963. An order to accomplish some task immediately is much stronger than a suggestion that it would be appropriate to do it. But though the order was stern, and though it was perceived as legitimate by the legislators—as evidenced by their eventual compliance—still it was insufficient to prompt redistricting by itself.

The 1964 General Election on November 3 was significantly related to the redistricting controversy in several ways. The two-term incumbent Governor, Albert Rosellini, was defeated by a Republican, Daniel J. Evans, the 1963 Minority Floor Leader in the House of Representatives and an important participant in forming the coalition in the House. However, the Democratic Party won majorities of 60-39 in the House and 32-17 in the Senate. On a simple numerical basis, it was evident that the Republicans lacked enough votes to form another coalition with the six dissident Democrats even though all had been re-elected. Once again neither party would be able to dictate all the details of a redistricting plan. Though the Democrats were initially unwilling to do much bargaining with the Republicans, three Democratic failures to write their own bill encouraged compromise.

The 1965 Legislative Session officially opened at noon on January 11. With the lopsided Democratic majorities in both chambers, the Democrats hoped to rush a bill through for outgoing Governor Rosellini to sign before Governor-Elect Evans was installed at noon on January 13. On the 11th a joint caucus was held by the Democrats and it appeared that votes were lacking for a bill in the House. On the 12th the Senate approved a bill basically along party lines by 28-19, under the leadership of Senate Majority Leader Robert Greive. In the House, however, it proved impossible to muster the necessary 50 votes within the Democratic caucus and the bill did not make it to the floor for a final vote.[74] The first attempt to enact a Democratic gerrymander thus proved unsuccessful.

74. At this initial stage of the controversy, all 39 Republicans remained cohesive. Supposedly, at least 12 Democrats in the House were dissatisfied with Senator Greive's bill and would not pledge their support in caucus. All six of the dissident Democrats from the 1963 session opposed the bill. The Seattle Times, Jan. 12, 1965, at 1, col. 7.

Though the new Governor stated unequivocally that Senate Bill 2, approved on January 12, was unacceptable to him,[75] the House Democrats continued to work toward its passage. On January 20 they finally mustered enough votes to pass the bill (55 to 43)[76] with some minor amendments, and sent it back to the Senate. The Senators responded by approving all but one of the amendments and the House members then accepted this deletion. In its final form the Senate approved the bill 30 to 16, and the House 53 to 41, on January 22. Due to the Governor's earlier threat to veto a Democratically inspired bill, even though Attorney General O'Connell announced that it was probably constitutional, the measure was held over the weekend in both chambers to allow certain legislative leaders to arrange a conference with Governor Evans to plead for his approval. A meeting held on January 25 proved mutually unsatisfactory to both sides, and the Governor vetoed the measure the next day. The Democrats had received their second setback.

The Senate Democrats were immobilized only temporarily by Evans' veto. On January 28 a new bill was approved by a margin of 27-20.[77] This Senate bill, however, was not acceptable to a sufficient number of House Democrats to assure its passage. Therefore they decided to write their own bill, which was approved on January 30 by 57 to 40 and sent on to the Senate.[78] The differences between the two versions

75. Governor Evans made it clear that he would do everything in his power to prevent a Democratic gerrymander. In his opinion, Senate Bill 2 "was a highly one-sided proposal. . . . In fact, it was the cleverest job of gerrymandering in recent time." Seattle Post-Intelligencer, Jan. 15, 1965, at 14, col. 1.

76. In the House all 39 Republicans were joined by only four Democrats: Daniel Marsh, Chet King, Sam Smith and Jack Dootson. Only King was a former coalitionist. Though some committee assignments were granted to the coalition Democrats in order to induce them to return to the fold, still this was insufficient motivation to explain every vote. The widespread belief that Governor Evans was sure to veto the bill also complicates any evaluation of the various votes which deviated from party lines. The House amendments satisfied some members, but basically the bill was an attempt to embarrass the Governor and to establish a basis for future bargaining and compromise. Seattle Post-Intelligencer, Jan. 21, 1965, at 1, col. 6 & at 14, col. 1.

77. Three Democrats joined all 17 Republicans to oppose the bill: A. L. Rasmussen, Mrs. Frances Haddon Morgan, and Wilbur G. Hallauer. Two democrats were absent: Martin Durkan and August Mardesich. Voting at this stage still followed party lines overwhelmingly. Seattle Post-Intelligencer, Jan. 28, 1965, at 1, col. 6 & at 6, col. 1.

78. On final passage only three Democrats opposed the bill: These were Jack Dootson, Hayes Elder, and Chet King. King was quoted as saying that the measure would "redistrict me out of existence." The Seattle Times, Jan. 31, 1965, at 5, col. 1. Elder was a close personal friend of Greive's and owed his appointment to the House (when a vacancy occurred early in 1964) to Greive. Elder was from the same legislative district as Greive, had worked in Greive's campaigns for many years, and had served as legis-

were not ironed out until February 12, when the House approved a compromise Democratic measure by a 53 to 43 margin, and the Senate approved it 26 to 19.[79] Once again Governor Evans indicated he would veto, after having met with both Democratic and Republican legislative leaders in a series of bipartisan conferences. This third setback for the Democrats simply clarified the necessity for a bipartisan compromise solution. With the passage of time and the Governor's obvious willingness to continue indefinitely vetoing Democratic attempts at redistricting, Senator Greive became more amenable to a compromise solution. The important role of Governor Evans in forging such a compromise was the third factor accounting for ultimate compliance.

The new Governor's influence in redistricting clearly increased as the session lengthened. He used his executive position to work towards a redistricting compromise in numerous ways. Of course, one continuing source of his influence was his veto power; he not only made it clear that he considered such gubernatorial action appropriate, he even announced in advance his intention to veto particular measures. For example, Governor Evans explicitly promised during the first two days of the session to veto the Democrats' first attempt to redistrict the state if the House approved Senate Bill 2. However, when the bill was approved, he retreated long enough to study the bill before vetoing it, due to certain amendments added by the House. At a press conference the Governor stated that further consideration had to be given to the bill although he still expressed pessimism.[80] Such delay merely provided an avenue by which the Democratic leadership might arrange a conference with him to plead their case. It was an unfruit-

lative assistant to Greive in several sessions. On redistricting, his vote basically followed the Senator's. Mr. Dootson was purportedly upset with the Democratic attempts to redistrict all through the legislature. Only one Republican supported the bill, Newman Clark of Seattle.

79. The impact of the second redistricting bill was enhanced by the presence of an additional measure pending approval in the House. On February 5, the House had approved a referendum for March 2 on redistricting. Seattle Post-Intelligencer, Feb. 6, 1965, at 4, col. 6. The Senate substantially approved the same measure on February 12, but set the date for the special election on March 16. Seattle Post-Intelligencer, Feb. 13, 1965, at 1, col. 1 & at 7, col. 3. Thus, the Democrats were utilizing the threat of a referendum measure to increase their bargaining power with the Governor, even though they expected him to veto the second bill. Whether such a referendum measure could have bypassed the executive was doubtful, though, since the Governor's approval would have been necessary to establish a special election.

80. Details of the press conference were reported in the Seattle Post-Intelligencer, Jan. 21, 1965, at 15, col. 1.

ful meeting, however, and the Governor vetoed the measure on January 26.[81]

The same tactics were utilized by the Governor when the second Democratic bill was sent to him on February 12. On this occasion, however, real progress was made towards a solution. While it was obvious that the particular bill under consideration would be rejected by Evans, the long process of compromise was entered into seriously between the two political parties.

A second tool of influence that the Governor used was his threat of appealing to the federal judges to decide the matter if the legislature had not reached agreement on a "fair" bill by early February. In a press conference on January 28 he said that if the issue was not completed by the end of the week he would "try to jar things loose." He said that he might ask the judges to appoint a master to do the job, but that he would first attempt to "persuade the lawmakers to do the job."[82]

Additionally, the Governor attempted to influence the legislators through his constant use of press conferences, which mobilized public opinion, through his direct appeal to the legislature on February 1 in his budget message,[83] and through his announcement on February 5 that he would soon introduce his own bill.[84]

81. In his veto message the Governor repeated the criteria that Slade Gorton had written into the inaugural address. At that time Governor Evans had said: "I urged the Legislature to pass promptly a constitutional redistricting bill which would insure that the party which wins a majority of votes would win a majority of the seats in the legislature." Seattle Post-Intelligencer, Jan. 27, 1965, at 1, col. 8 & at 4, col. 1. A major problem still existed, however: which elections was the Governor discussing? This was a point on which agreement was never really reached throughout the conflict.

82. As quoted in the *Seattle Times*, January 29, 1965, p. 5.

83. Taking advantage of his appearance before the legislature to give his budget message, the Governor commented on redistricting:

> One third of this legislative session has passed. . . . I urge you, therefore, to broaden your perspectives to include, more completely, the representative interests of all citizens of the state; and to renew your faith that our distinctive representative form of American government only functions fairly when either political party whose candidates win a majority of the peoples' votes is assured a majority of the seats in the legislature.

The Seattle Times, Feb. 1, 1965, at 4, col. 3.

84. While agreement has not been reached, I am pleased to note that there have been a number of conferences, bipartisan conferences, going on the past few days. I think we are at least a step closer to a solution of this problem. However, I have indicated that I would take action. I propose . . . that there will be an executive request bill in the field of redistricting. This bill will be ready on Monday. I hope the legislature will take a close look at it.

Seattle Post-Intelligencer, Feb. 6, 1965, at 4, col. 8.

The use of executive influence to reach agreement was strengthened by the federal district court's unexpected announcement on February 19 that a hearing would be held on February 26 to consider expedition of redistricting. Chances for an accord between the Governor and the Democrats now appeared good.

By February 22 it appeared that a compromise bill was ready for legislative approval. The House members, however, revised the agreed-upon compromise to the advantage of the House Democrats, and passed the measure 57 to 42. The Senators were unwilling to accept the House version of the compromise and passed their own bill on February 23. This bill, in turn, was rejected by the Representatives, only to have the rejected measure returned for their consideration on February 25. When it appeared doubtful that any compromise solution would be enacted, the Governor made a final move to facilitate the bill's passage, although he did not initiate the action. At least one Democratic House member appeared willing to vote for the compromize solution if the Governor would promise not to utilize his veto power. When Representative Litchman made this quite clear, the Republican leadership convinced Governor Evans to strengthen his support of the compromise bill.[85] The next day the House approved the measure 53 to 46. As the Governor signed the bill the same day, he said that completion of redistricting was "a good commentary on the fine leadership of both sides and both houses."[86]

Certain partisan aspects of the bill imediately became obvious. In the Senate, five incumbents would be eliminated in the 1966 election.[87] Two were Republicans, two were Democrats, and one seat would be fought over by incumbents from opposing parties. With a 32 to 17

85. Earlier in the day on February 25, the Governor had said: "In all candor, this bill is very substantially closer to the compromise, and to what I consider reasonable, than (any other) bill that's either hit my desk or any that's had any consideration by the house or the other floor action." As quoted in The Seattle Times, Feb. 25, 1965, at 6, col. 1. Later the same day Evans met with Speaker Schaefer, and said that he would definitely approve the bill and expressed hope that enough Democrats would change their mind and support the measure.

86. The Seattle Times, Feb. 27, 1965, at A, col. 2.

87. Senators Charette (d) and Raugust (r) would not be in the Senate for at least two years after 1966. Their current terms expired at that time, but they were placed in districts that would not have another election until 1968. Three new Senate districts would have two incumbents in competition: Hallauer (d) and McMillan (d) in the new Second District; Atwood (r) and Lennart (r) in the Forty-Second; Donohue (d) and Freise (r) in the Eleventh. Seattle Post-Intelligencer, Feb. 28, 1965, at A, col. 4.

Democratic majority, the possibility of maintaining Democratic control appeared favorable. In the House, the compromise appeared to benefit the Republicans and those Democrats who supported their cause. Sixteen members of the lower body were threatened by the bill by being forced to compete with other incumbents in 1966. Of these sixteen, only three were Republicans[88] and only one was a dissident Democrat, Chet King. It was certain that four Democrats would be eliminated.[89] The two Republicans sacrificed in the redistricting bill were given appointments in the Evans' administration. The immediate advantage of the redistricting bill thus went to the Republicans.

On March 9, 1965, Judge Beeks accepted the redistricting compromise as constitutional:[90]

> The statute before the court represents a monumental step forward insuring to the people of this state equal representation. The statute does not achieve mathematical perfection in the solution of the problem of invidious discrimination which we have heretofore found to exist. The constitutional test, however, is not mathematical perfection, for, as stated in *Reynolds versus Sims*, mathematical exactness or precision is hardly a workable constitutional requirement.
>
> The Fourteenth Amendment requires that the state make an honest and good faith effort to construct districts in both houses of its legislature as nearly of equal population as is practicable. We believe that the statute viewed in its entirety meets such requirement. In so stating, however, we do not say there is no room for improvement in the statute. We have faith that the legislature will recognize its continuing responsibility in this respect, and that

88. The Republicans were Maurice Ahlquist, Elmer Huntley, and Robert Goldworthy. However, all three incumbents were spared the ordeal of intraparty blood-letting in a primary fight in 1966. Huntley was appointed to the State Highway Commission on March 26, 1965, and appropriately resigned from the Legislature at that time. Since he would have been forced to compete with Goldworthy, two problems were solved with one appointment. On May 7, 1965, Ahlquist was appointed State Conservation Director and resigned from the Legislature effective June 1, 1965. Since he would have been running against Ben Taplin, a late-hour supporter of the compromise bill, this appointment also served two ends. Taplin was now free to seek a second term without the added threat of facing an incumbent Republican as an opponent. It would appear that the Republicans were taking care of their own. *Id.*, at col. 5.

89. Democrats Anderson, King and Burtch were placed in a two-member district; Democrats Conner, Traylor, and Savage in a two-member district; Democrats Bozarth and Mansfield in a one-member district; Democrats Avey and Slagle in a one-member district; Republicans Goldworthy and Huntley in a one member-district; and Republican Ahlquist and Democrat Taplin in a one-member district. *Id.*

90. Oral opinion on defense motion to dismiss, record, vol. 5 at 177, No. 5597, *Thigpen*, 211 F. Supp. 826 (W.D. Wash. 1962).

following the 1970 federal census will achieve greater equality of representation.

CONCLUSIONS

Washington's redistricting controversy covered nearly three years and engaged a broad spectrum of political participants. Two governors, both major political parties, the Attorney General, the Secretary of State, the League of Women Voters, the Washington State Grange, several lawyers, and three federal judges, were involved in the case in varying degrees at one time or another. In viewing the variety of political behavior occasioned by *Thigpen v. Meyers*, this article has attempted to maintain a perspective that would reveal the most insight into the role of the federal judges in encouraging compliance. Of necessity the analysis has included both activity leading to judicial decisions, and the impact those decisions had in the state political process. In drawing together the disparate elements of the situation, the conclusions fall into three related categories: (1) the importance of judicial involvement in redistricting; (2) the limits on judicial effectiveness; and (3) the relationship of constitutency to compliance.

The initial conclusion is that judicial leadership was a necessary, even if insufficient, condition for redistricting in Washington State in 1965. The involvement of the federal judges was so important that probably no apportionment would have resulted from legislative activity without the judges' active and persistent prodding. One must also consider that Washington's history of legislative unwillingness to redistrict voluntarily dated back to 1901. This historical reluctance, in combination with the strong potential for political deadlock between Republican Governor Evans and the Democratic legislature, provide a vivid backdrop to illustrate the importance of the court's role. It is difficult to argue seriously that the legislators would have voluntarily spent forty-seven days in an attempt to redistrict.

Throughout the controversy the judges' behavior slowly contributed to ultimate compliance in several significant ways. First, the judges provided *access*, for all those interested in redistricting, to a new political arena that potentially promised to accomplish reapportionment. As a result of *Baker v. Carr*, the proponents of population equality in the state legislature found the federal judiciary a receptive focal point

for change. Furthermore, this new arena of political competition was kept viable through constant judicial supervision until compliance was attained.

Judicial leadership also added *legitimacy* to the cause of redistricting on the basis of population. Heavily endowed with symbolic attributes of impartiality, fairness, and nonpartisanship, the federal judges were able to gain widespread acceptance of their decrees by invoking constitutional norms. Their emphasis on a new redistricting plan effecting population equality was but an extension of standards previously stated in the Washington Constitution, recently emphasized in *Reynolds v. Sims*, and currently argued as a necessary prerequisite to a truly representative form of government. The legislators opposed to redistricting were thereby deprived of any significant symbolic arguments that might have provided a rallying point of support. The lack of organized opposition to the mandates of the court was an excellent indication that few people, other than the formal participants in the controversy, were vitally concerned about the issue. The length of the controversy derived principally from competition between the political parties for increased power in the legislative process. Neither party disputed the legitimacy of the court's role, but each simply desired to utilize the court's intervention to its own advantage. It should be pointed out, however, that the legitimacy of the judges' role was constantly growing during the controversy. Unsure at the outset as to the exact standards the Supreme Court would ultimately suggest in redistricting, the federal district judges were forced to proceed with caution. Eventually the standards were clarified. When the State of Washington lost its appeal to the United States Supreme Court, the federal judges attempted to continue to implement their earlier decision through the use of additional sanctions. The only serious setbacks to judicial leadership were delivered by Governor Rosellini, between the 1963 and 1965 Legislative Sessions. His defeat in 1964 increased the effectiveness of the court's role primarily because the Republican Party was much more committed to redistricting than was the Democratic Party.

Finally, the court's involvement was important because of the *potential power* of the judges to redistrict the state. It was clear from the outset that the judges could properly initiate some type of legislative activity by declaring the old districting patterns unconstitutional.

It was also evident that a court might realistically pursue this initial involvement by examining the constitutionality of any new apportionment bill. Thus, *Baker v. Carr* provided initiative and veto power as reasonable judicial tools. However, the extent to which judges might redraw the lines themselves was unclear. At best, this seemed to be a potential threat which the judges might utilize in case of legislative noncompliance. Judicial redistricting was certainly an available path which the federal judges in Seattle were unwilling to pursue if such could be avoided. Still, to all those legislators who preferred to maintain legislative control over a new apportionment plan, this potential power of the court was a potent threat.

Involvement of the judges was clearly important and quite vital, but it was not synonymous with effectiveness. The judges were able to provide a special form of leadership, but there was no automatic guarantee that they would receive quick compliance. There were stringent limits on the extent of judicial efficacy in the case.

A second major conclusion is that judicial sanctions were of limited effectiveness in accomplishing redistricting. There seem to have been three reasons for this. In the first place, sanctions were of limited effectiveness because of self-imposed limitations on the type of sanctions which the judges were willing to employ. Though the court desired compliance, the judges could not be certain whether any given sanction would secure the goal. Thus, it appears in retrospect that the judges attempted to gain compliance through an improbable mixture of maximum threat and minimum judicial involvement. The pattern of the judges' behavior revealed their unwillingness to disrupt the normal processes of political life. The judges consistently utilized sanctions that tended to minimize the role they would have to play in the enforcement of those sanctions. They consciously refused to issue orders that might have had a probability of being ignored. And they attempted to be realistic in the timing of their sanctions.

Several reasons probably accounted for the judges' overall caution in the application of sanctions. On the one hand, the judges had no particular desire to be involved in the controversy from the start. It was a distasteful job that could only increase the normal tensions between state and federal officials. On the other hand, the normal case load in the federal courts is quite demanding. Practically speaking, the judges were very busy men and any excessive involvement in a

largely political controversy could only demand extra time on their part. Their strategy was to force the normal channels of responsibility to handle the problem, if such were at all possible. Furthermore, should the judges ultimately have found it necessary to redistrict the state themselves, they would not have been able to escape accusations of partisanship since redistricting schemes invariably give benefits to some and handicaps to others. To become so deeply involved in the matter would surely have damaged to some extent, however, slight, the image of the federal judges as "fair," "impartial" arbiters who were above "politics." This overall self-imposed caution contributed to the limited efficacy of their sanctions.

In addition, the sanctions proved of limited effectiveness because they were unable to influence Governor Rosellini to call a special session. For some reason, the judges never directly confronted the Governor with an ultimatum to call a special session. They went as far as sanctioning a session to deal solely with redistricting, but they refused openly and directly to challenge the Governor.

The judicial sanctions also proved to be of limited value because of a strategic mistake of the judges in their application. It was the substitution of the threat of weighted votes in the 1965 Legislative Session for the threat of an at-large election that weakened the judges' impact. In all likelihood, Governor Rosellini would have called a special session if he had been convinced that the only alternative would be elections at-large. The threat of weighted votes was considerably less compelling, and relieved the Governor of much pressure from the legislature to call a special session. The threat of weighted votes probably prevented a settlement of the conflict at that time.

In sum, with certain self-imposed limitations bearing on the judges, they would neither specifically order the Governor to call a special session, nor redistrict the state themselves. Moreover, when it was apparent that their sanctions would not bring about a solution prior to the 1964 November Election, the judges preferred not to force an election at-large or even to disrupt the legislative process by use of weighted voting. The sanctions were important and necessary for ultimate compliance, but they were insufficient without additional support.

The final conclusion to be drawn is that legislative compliance was ultimately related to political self-interest. The constituents in Wash-

ington who had most to gain by greater representation were the citizens in the surburbs. The political party that had most to gain from their increased representation was basically the Republican Party. The redistricting controversy was not a mass movement for greater representation, and such was not necessary. The need for redistricting had been established by the federal judges; the momentum to accomplish that task was provided by those who had the most to gain.

The federal courts dealt basically with the distribution of political power as it related to numerical representation. The assumption was that "the exclusion of any group of men from power is, sooner or later, their exclusion from the benefits of power."[91] However, since legislatures are not operated and organized on the basis of a legislator's residency *per se*, but rather on the basis of political party alignments which include representatives from all population areas, the interest of the political parties was distinct from that of the judges. The court was concerned with population equality; the parties were concerned with present and future control of the legislative process. Probably there would have been no compliance with the court's directive if no advantage could have been obtained by those who compiled. The paradox was that the Democrats, too, could have redistricted the state on the basis of substantial population equality so as to preserve most of their legislative gains from the 1964 elections. But even so, some added representatives would inevitably have gone to the Republican Party, though the number lost would undoubtedly have been smaller if there had not been a Republican Governor to cajole the recalcitrant legislators.

The preeminence of self-interest also explains the unwillingness of Governor Rosellini to work actively towards redistricting during the 1963 Legislative Sessions and afterwards. He perceived it to be neither in his own personal interest, nor in the interests of the Democratic Party, to fashion a compromise with the House coalition, since he believed that the Democrats would control both the executive and legislative branches in 1965 and would thus be able to write their own redistricting bill without compromise. Unfortunately for his plans, he was not re-elected and his strategy became valueless. Similarly,

91. *See* note 1, *supra*.

Governor Evans' activism in the 1965 Legislative Session was a clear example of political self-interest at work. He used as many tools of executive influence as he believed feasible to reach an accord. His success was made possible by the cooperation of the Democratic Senate Majority Leader, who also complied with the Court's prodding because of self-interest. Senator Greive strengthened his personal position in the upper chamber through redistricting, while the Republicans made gains in the House.

These factors intermingled: the role of the judges and the role of political self-interest by those most responsible for compliance. For the legislators it was a matter of constituencies. It was a matter of self-interest. With the addition of judicial leadership, it eventually became a matter of compliance.

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