



ALBANY LAW SCHOOL

GOVERNMENT LAW CENTER

WARREN M. ANDERSON LEGISLATIVE BREAKFAST SEMINAR SERIES

What You Need to Know About the Upcoming Redistricting Process

By Kendra Sena

This summary of the second Anderson program, held on April 9, 2019, was written by Kendra Sena, the Government Law Center's Senior Staff Attorney.

Scott Fein, partner at Whiteman Osterman & Hanna, LLP, and Chair of the Government Law Center Advisory Board, organized and moderated a discussion of gerrymandering, the census, and how we count who is counted. He began with a brief etymological lesson: the term “gerrymandering” was coined in 1812 after Massachusetts Governor Elbridge Gerry signed a law to redraw the state senate election districts to favor his own party. One of the particularly wending districts was said to resemble a salamander, leading to the portmanteau of the governor’s name with the beastly district: [gerrymander](#).

The topic is a meaty one and with that in mind, Fein engaged the panel of speakers in a lively and fast-moving discussion. **John Flateau**, Professor of Public Administration and Political Science at CUNY and a Fellow at the National Academy of Public Administration, said that gerrymandering does not occur around the world; the United States, unlike most countries, has election districts that are routinely redrawn by whichever party is in power, leaving the process vulnerable to gerrymandering. He said there are at least two types of gerrymandering: political and racial. Maps can be drawn to overconcentrate one group in a district, called “packing,” or to splinter a

constituency into several districts, called “cracking.”

When asked whether there was anything good about gerrymandering, **Kelly Percival**, Counsel with the Democracy Program at the Brennan Center for Justice at NYU Law School, was emphatic in her answer: No. She said the process entrenches political power at the expense of representation and accountability. Districts should be drawn to represent the people, their identities, and their needs, and give them the ability to hold their representatives accountable. Gerrymandering undermines both of those goals. **Jeff Wice**, who leads the Rockefeller Institute of Government’s New York Counts program, a 2020 census and redistricting information center, added that the principle of one person, one vote should be paramount, and districts should be about equal in population. New York falls far from that ideal; whereas congressional districts cannot differ from one another by more than one person, New York State and local districts are permitted a 10% deviation.

Blair Horner, executive director of the New York Public Interest Research Group (NYPIRG), said a non-gerrymandered New York would have more state senators from the city of New York, and more

Assemblymembers in upstate New York. And while New York State amended its constitution in 2014 to create a redistricting commission that will establish state senate, assembly, and congressional districts, the measure, he said, fell short of real reform; the commission is advisory-only and the legislature is free to reject the commission's proposed plans. Moreover, the provision that would reduce the permissible interdistrict deviation to 2% is easily overridden by the legislature. The process, he said, protects incumbents and political parties, and should instead be drawn by an independent commission that does not stand to benefit directly from an unfair map. **Flateau** pointed out that Arizona, California, and Nebraska all have independent commissions. And because in 2013 the U.S. Supreme Court case [Shelby Co. v. Holder](#) nullified the section of the Voting Rights Act that would have required New York to submit its proposed plan to the Justice Department for review, there is no effective check on the plans that will result.

Wice and **Flateau** discussed the 2010 state law ending prisoner gerrymandering, reallocating up to 58,000 prisoners back to their home communities for redistricting purposes, and the uncertainty whether the next redistricting plan will follow that law.

Wice introduced the two cases related to gerrymandering that the Supreme Court will shortly rule upon: [Rucho v. Common Cause](#) and [Lamone v. Benisek](#). The cases, which challenge the validity of highly partisan election maps in North Carolina and Maryland, were argued in March and rulings are due by June. **Percival** expressed optimism that the court might offer a workable standard for controlling at least the most extreme form of gerrymandering.

When **Flateau** pointed out the court chose not to implement one such standard—the [“efficiency gap” method](#)—in the 2018 case [Gill v. Whitford](#), **Percival** clarified that the efficiency-gap standard is a mathematical formula to provide evidence of gerrymandering, and not a legal standard in itself. Given the Justices' questioning at oral argument, she suspected the court was less interested in jurisdictional reasons to throw out the cases and seemed likely to adopt “totality of the circumstances” language, crafted narrowly to control the floodgates of potential litigation.

Turning to the census, **Fein** pointed out that results of the count govern how much federal money is allocated to the states. In New York, that number runs between 800 and 900 billion dollars, supporting 300 federal programs, and comprising 30% of the state's budget. **Percival** added that the census is the first duty ascribed to the Congress by the U.S. Constitution. The count, she explained, determines the number of representatives each state has in congress and well as funding for federal programs like healthcare and schools. An undercount, she cautioned, compounds problems for already under-resourced communities. For example, the federal government provides funding through the Title I program for schools serving high numbers of children experiencing poverty. Children are hard to count, children experiencing poverty are hard to count, and children of color experiencing poverty are doubly hard to count. An undercount means that schools cannot prepare for the numbers of high-needs children they will serve and that they will not have sufficient resources to serve them when they arrive. In addition to children and people experiencing poverty,

Flateau noted that students, seniors, immigrants, and highly mobile people are hard to count. And while Minnesota, for example, has a census response rate of 81%, New York State's response rate is only 69%. New York State is projected to lose two congressional seats due to an undercount in the census—and the result is not politically benign. The census has long been weaponized, he said.

The reasons for the anticipated undercount are many. **Wice** said the census procedure was time-consuming and burdensome, requiring people to open their mail, copy a 12-digit code either onto a web form, phone system, or hard copy. The census is also intimidating, said **Percival**, and many people have concerns about confidentiality and privacy. This is especially true for

immigrant communities who have been scared off from the census because of the question on citizenship. Although strong laws exist to prohibit sharing the information for law enforcement or immigration purposes, people are largely unaware of the laws, she said. **Horner** noted that although the state allocation of \$20 million for census outreach dwarfs the numbers committed to the project in prior years, the funding is not enough to overcome the challenges of counting all New Yorkers; he called on the state to commit more resources to census outreach, to mobilize the public to understand the rules governing the count, and to leave no stone unturned, especially in hard-to-count communities. The stakes, it would seem, could not be higher.