

## The Role of State Attorneys General in Federal and State Redistricting in 2020

James E. Tierney, Lecturer on Law, Harvard Law School, and former Attorney General, Maine\*  
Justin Levitt, Professor of Law, Loyola Law School\*

***Summary: State Attorneys General have long played important roles in their states' redistricting processes and will do so again in 2020. This memo outlines but a few of the cases in which state Attorneys General have exercised both their jurisdiction and discretion with respect to redistricting, and outlines additional roles that could emerge in the 2020 cycle.***

### ***Discussion:***

State Attorneys General are the chief legal authorities within the executive branch, and have the duty to enforce their laws and defend both the state and federal constitutions. Attorneys General have long been entrusted with sweeping discretion in these duties, and the redistricting process is no exception.

### ***Attorneys General Are Independent Constitutional Officers***

State constitutions have explicitly rejected the federal model of a “unitary executive” and have opted instead for a “divided executive” with several statewide elected officials. The Attorney General is separately elected in 43 states and elections for 30 of those state Attorneys General will be held in 2018.

State separation of powers doctrines generally afford each of the statewide elected officials, including the Attorney General, significant independence.<sup>1</sup> The strongest component — and indeed the primary enforcer — of these separation of powers provisions is the state Attorney General. Consistent with this approach, the state’s Attorney General may not be removed by the state’s Governor in every state except for Alaska and Wyoming.<sup>2</sup>

State Attorneys General have often charted their own way, occasionally in opposition to other statewide elected officials, including on redistricting<sup>3</sup> and matters of election administration.<sup>4</sup> There is no reason to believe that state Attorneys General will not be prepared to be an independent voice once again in the redistricting of the 2020 cycle.

### ***Attorneys General Play a Key Role in Drafting Redistricting Lines***

**Express Constitutional Role:** In several states, state Attorneys General are themselves members of the redistricting bodies that draw the lines. In Arkansas, for example, a commission comprising the Attorney General, Governor, and Secretary of State draws the lines for state

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\* Institutional affiliations are provided for identification purposes only, and do not reflect institutional endorsement.

<sup>1</sup> See, e.g., *Perdue v. Baker*, 586 S.E.2d 606 (Ga. 2003).

<sup>2</sup> William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L. J. 2446 (2006).

<sup>3</sup> See, e.g., *Perdue*, 586 S.E.2d 606; *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003) (en banc).

<sup>4</sup> See, e.g., *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 531-32, 536-37 (S.D. Ohio 2004); Ted Wendling, *New Ohio Election Up roar*, CLEVELAND PLAIN DEALER, Oct. 30, 2004.

legislative districts.<sup>5</sup> In Mississippi, the state legislative lines are drawn by the Attorney General, Secretary of State, Chief Justice of the state Supreme Court, and the state House and Senate majority leaders.<sup>6</sup> And in Texas, the state legislative lines are drawn by the Attorney General, Lieutenant Governor, Comptroller of Public Accounts, Commissioner of the General Land Office, and the state House majority leader.<sup>7</sup> The lines of state legislative districts, of course, have electoral repercussions beyond the state: state legislators set the state's rules for local, state, and federal elections.<sup>8</sup>

### *Attorneys General Interpret State Law*

All state Attorneys General have the power to interpret state law through the issuance of formal Opinions.<sup>9</sup> While these rulings can be challenged, they serve as a powerful default interpretation; they are relevant in guiding those who draw redistricting lines in the first instance, and in guiding courts during later litigation. In every case, an Opinion of the Attorney General binds the Attorney General in all subsequent legal proceedings.

This authority is especially important in redistricting matters where the law may be quite vague, and where an Attorney General may be called upon to interpret rules regarding the substance, procedure, and impact of the redistricting process. State Attorneys General have even been asked to opine about the overall lawfulness of a statewide redistricting plan,<sup>10</sup> or whether redistricting plans may be subject to referendum by the voters.<sup>11</sup>

**Substantive Rules of Redistricting:** The Attorney General may interpret a state's substantive redistricting rules, construing what is required by a mandate to draw contiguous districts in the context of waterways;<sup>12</sup> what it means to achieve "substantially" equal population<sup>13</sup> or equal population "as nearly as practicable,"<sup>14</sup> and whether that population count can or must modify the count provided by the national Census;<sup>15</sup> what compliance with the Federal Voting Rights Act requires;<sup>16</sup> what it means to draw districts that are "compact"<sup>17</sup>; what it means to draw

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<sup>5</sup> ARK. CONST. art. VIII, § 1.

<sup>6</sup> MISS. CONST. art. XIII, § 254.

<sup>7</sup> TEX. CONST. art. III, § 28.

<sup>8</sup> *See, e.g.*, U.S. CONST. art. I, § 4.

<sup>9</sup> NAT'L ASS'N OF ATT'YS GEN., STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 54-83 (Emily Myers ed., 2013).

<sup>10</sup> *See, e.g.*, 2002 Op. Tenn. Att'y Gen. No. 02-010; 1997 Op. Ark. Att'y Gen. No. 97-216; 1996 Op. Ky. Att'y Gen. No. 96-1; 1991 Op. Neb. Att'y Gen. No. 91049.

<sup>11</sup> *See, e.g.*, 1991 Op. N.D. Att'y Gen. No. 91-15.

<sup>12</sup> *See, e.g.*, 2000 Op. Md. Att'y Gen. No. 00-016.

<sup>13</sup> *See, e.g.*, IDAHO CODE § 72-1506(3).

<sup>14</sup> *See, e.g.*, PA. CONST. art. II, § 16; 76 Md. Op. Att'y Gen. 214 (Aug. 28, 1991); 1991 Op. Idaho Att'y Gen. No. 91-4. Twenty-seven states have a similar constitutional or statutory constraint, not further defined, on state legislative districts.

<sup>15</sup> This may include, for example, issues of statistical adjustment, decisions about whether to include noncitizens or nonresidents, or decisions about where to properly count individuals who are incarcerated during the Census. *See, e.g.*, 94 Md. Op. Att'y Gen. 125 (July 2, 2009); 85 Md. Op. Att'y Gen. 18 (Feb. 7, 2000); 1998 Op. Nev. Att'y Gen. No. 98-15; 1992 Op. Tenn. Att'y Gen. No. 92-21; 76 Md. Op. Att'y Gen. 209 (Aug. 12, 1991); 1991 Op. Tex. Att'y Gen. No. DM-6.

<sup>16</sup> *See, e.g.*, 74 Op. Cal. Att'y Gen. 136 (Aug. 9, 1991); 1991 Op. Neb. Att'y Gen. No. 91049; 1991 Op. Idaho Att'y Gen. No. 91-4.

districts that “respect” political boundaries;<sup>18</sup> what it means to “make use of” existing geographical boundaries where feasible;<sup>19</sup> what it means to maintain “communities of common interest”;<sup>20</sup> what it means to “unduly” favor a candidate or political party;<sup>21</sup> or what it means to draw districts that “encourage electoral competition.”<sup>22</sup> It may be desirable to further interpret these constitutional or statutory criteria — or it may be more desirable to leave them undefined and subject to the discretion of the line-drawers. The important point is that the Attorney General retains substantial interpretive authority.

**Procedural Rules of Redistricting:** The Attorney General may also interpret important procedural provisions of state law pertaining to redistricting. These include rules about ballot initiatives concerning redistricting, and about campaign finance limitations for funding the redistricting process.<sup>23</sup> They also include rules about the redistricting process itself: whether the primary districting body cedes its authority to draw lines after certain points in the legislative session;<sup>24</sup> rules about the structuring, funding, and operation of redistricting bodies, including personnel limits and quorum requirements;<sup>25</sup> rules about re-districting multiple times in a decade;<sup>26</sup> rules about hearings, open meetings procedures, and other transparency provisions;<sup>27</sup>

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<sup>17</sup> See, e.g., OHIO CONST. art. XI, § 7; 2001 Op. N.D. Att’y Gen. No. 2001-L-18; 74 Op. Cal. Att’y Gen. 136 (Aug. 9, 1991). Twenty-six states have a similar constitutional or statutory constraint, not further defined, on state legislative districts; nine states have a similar constraint on congressional districts.

<sup>18</sup> See, e.g., S.D. CODIFIED LAWS § 2-2-32; 1992 Op. Neb. Att’y Gen. No. 92096; 1991 Op. Idaho Att’y Gen. No. 91-4. Thirty-four states purport by constitution or statute to require attention in state legislative redistricting to political boundaries of some kind, but leave substantial discretion as to the means of compliance with the requirement; twelve states do the same for congressional districts.

<sup>19</sup> See, e.g., FLA. CONST. art. III, § 21(2). Twelve states have a similar constitutional or statutory constraint, not further defined, on state legislative districts; five states have a similar constraint on congressional districts.

<sup>20</sup> See, e.g., OR. REV. STAT. § 188.010. Eleven states have a similar constitutional or statutory constraint, not further defined, on state legislative districts; six states have similar a constraint on congressional districts.

<sup>21</sup> See, e.g., HAW. CONST. art. IV, § 6; 74 Op. Cal. Att’y Gen. 136 (Aug. 9, 1991). Eight states have a similar constitutional or statutory constraint, not further defined, on state legislative districts; seven states have a similar constraint on congressional districts.

<sup>22</sup> See, e.g., REV. CODE WASH. § 44.05.090. Arizona has a similar provision, ARIZ. CONST. art. IV, pt. 2, § 1. New York, instead, states that map-drawers “shall not discourage competition.” N.Y. CONST. art. III, § 4(c)(5).

<sup>23</sup> See, e.g., Op. Va. Att’y Gen. (Dec. 11, 2000).

<sup>24</sup> See, e.g., 2001 Op. Nev. Att’y Gen. No. 2001-14; 76 Md. Op. Att’y Gen. 249 (Apr. 10, 1991). Thirty-eight states have some sort of constitutional or statutory deadline for state legislative redistricting; thirteen states have a similar deadline for congressional districting.

<sup>25</sup> See, e.g., 2009 Op. Miss. Att’y Gen. No. 2009-00620; 2007 Op. Ariz. Att’y Gen. No. I07-011; Op. Tex. Att’y Gen. No. JC-0388; 1992 Op. Neb. Att’y Gen. No. 92100.

<sup>26</sup> In twenty-one states, there is substantial constitutional ambiguity with respect to the ability to redraw state legislative lines multiple times in a decade; in seven states, the same is true for congressional lines. Indeed, in both Louisiana and Nebraska, the state Attorneys General issued Opinions construing each respective state constitution to allow the legislature to redistrict as many times as it wished through the course of a decade. 1999 Op. La. Att’y Gen. No. 99-54; 2002 Op. Neb. Att’y Gen. No. 02003. And in Indiana and New Mexico, the state Attorney General construed the state constitution to prohibit such re-redistricting. 1995 Op. Ind. Att’y Gen. No. 95-1; Op. N.M. Att’y Gen. (Feb. 28, 2003). State Attorneys General have also opined about the legislature’s ability to redraw lines after a court had already done so. See, e.g., 2007 Op. N.M. Att’y Gen. No. 07-02; 2003 Op. Tex. Att’y Gen. No. GA-0063; 1992 Op. Neb. Att’y Gen. No. 92098.

<sup>27</sup> See, e.g., CAL. CONST. art. XXI, § 2(h); CAL. GOV’T CODE § 8253(a)(1)-(3), (7); Informal Letter Ruling, 2013 Op. Tex. Att’y Gen. No. OR2013-08855; Informal Letter Ruling, 2012 Op. Tex. Att’y Gen. No. OR2012-12723; Informal Letter Ruling, 2011 Op. Tex. Att’y Gen. No. OR2011-09168; Op. N.C. Att’y Gen. (Feb. 14, 2002).

and even rules about whether to follow map drawings or written descriptions of redistricting bills when the two diverge.<sup>28</sup>

**Impacts of Redistricting:** Moreover, state Attorneys General have opined on the ramifications of redistricting, including the effective date of the new map;<sup>29</sup> whether partial redistricting triggers new elections;<sup>30</sup> how to address representation by legislators whose districts have changed or the locations of new elections;<sup>31</sup> candidate residency requirements and term limits affected by redistricting;<sup>32</sup> and petition requirements for candidates seeking signatures in districts whose bounds have changed, including signature requirements for presidential electors.<sup>33</sup>

Attorney General Opinions may therefore substantially affect not only how the redistricting body goes about its work, but whether it can go about its work at all, and the ramifications of redistricting once complete. Indeed, these Opinions can also affect legal challenges against redistricting plans, as they bind the office of the Attorney General in all public representations.

### *Attorneys General May Advocate for Model Districts*

Some states have reformed their redistricting process, including reforms designed to avoid the worst conflicts of interest when legislators draw their own district lines.<sup>34</sup> In the other states, Attorneys General have the inherent power to create a public counterweight to partisan or other excesses of the primary districting body. After Census data are released, for example, the Attorney General could convene a bipartisan or nonpartisan commission or other body designed to produce maps that the public would perceive as fair.<sup>35</sup> Though these maps would not be formally binding, they would have substantial persuasive authority, and might well force the primary districting body either to trim its worst instincts or justify substantial departures from the public model. The Attorney General might use these maps to help determine whether the primary districting body's maps can lawfully be defended in court, in whole or in part. And in the course of litigation, courts often find such maps exceedingly useful as a basis for comparison with the maps produced by the body with formal authority.

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<sup>28</sup> See, e.g., 2015 Op. Miss. Att'y Gen. No. 2015-00193; 1998 Op. Ark. Att'y Gen. No. 98-214; 1994 Op. Alaska Att'y Gen. No. 663-94-0567.

<sup>29</sup> See, e.g., 1992 Op. Neb. Att'y Gen. No. 92034.

<sup>30</sup> See, e.g., 1995 Op. Tex. Att'y Gen. No. DM-351; 1992 Op. Wash. Att'y Gen. No. 12.

<sup>31</sup> See, e.g., 2011 Op. Wyo. Att'y Gen. No. 2011-003; 2002 Op. Tenn. Att'y Gen. No. 02-030; Op. N.D. Att'y Gen. No. 2001-L-25; 1992 Op. Mo. Att'y Gen. No. 89-92.

<sup>32</sup> See, e.g., 2011 Op. Wyo. Att'y Gen. No. 2011-003; 2002 Op. Del. Att'y Gen. No. 02-IB14; 2002 Op. Ala. Att'y Gen. No. 2002-165; 2002 Op. Ala. Att'y Gen. No. 2002-118; 2001 Op. Ariz. Att'y Gen. No. I01-019; Unofficial Opinion, 2001 Op. Ga. Att'y Gen. No. U2001-3; Op. Va. Att'y Gen. (July 17, 2001); 2000 Op. Colo. Att'y Gen. No. 00-5; 1995 Op. Miss. Att'y Gen. No. 95-0440; 1992 Op. Del. Att'y Gen. No. 92-F001; 1991 Op. Ohio Att'y Gen. No. 91-045.

<sup>33</sup> See, e.g., 2012 Op. Colo. Att'y Gen. No. 12-06; 2009 Op. Miss. Att'y Gen. No. 2009-00001; 2002 Op. Ariz. Att'y Gen. No. I02-002; 1992 Op. La. Att'y Gen. No. 92-235.

<sup>34</sup> Bruce E. Cain, *Redistricting Commissions A Better Political Buffer?*, 121 YALE L.J. 1808, 1813-14 (2012) (discussing the Iowa model); Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1837-39 (2014) (same).

<sup>35</sup> In 2011, the Virginia Governor used precisely such a process. See Va. Gov. Exec. Order No. 31 (2011).

## *Attorneys General Control Redistricting Litigation*

The vast majority of statewide redistricting efforts result in litigation. In the 2011 cycle alone, the congressional redistricting process or result went to court in 31 states, and the process or result for state legislative maps went to court in 38 states.

Some of this litigation is literally automatic: in states like Colorado, Florida, and Kansas, each state legislative map is automatically reviewed by the state Supreme Court.<sup>36</sup> Elsewhere, the chances are extremely high that someone — and often multiple different groups, each with different agendas — will sue.

When state officials are sued over district plans, the state Attorney General has the responsibility to defend that which can lawfully be defended, as well as the responsibility to determine what cannot lawfully be defended.<sup>37</sup> The attorney general has a duty of honesty and candor to the courts, and must deliver high quality, nonpartisan legal views to the judicial decision maker. Indeed, “[u]nlike other attorneys who are engaged in the practice of law, the Attorney General has a common law duty to represent the public interest.”<sup>38</sup>

In keeping with that responsibility, in some states, the Attorney General has the authority to initiate a challenge to a redistricting plan, if she believes that it does not comply with state law.<sup>39</sup> The Attorney General may also opine about the proper forum for a litigation challenge, and has the discretion to determine when to appeal an adverse decision.<sup>40</sup> And in the event that the maps are found unlawful by a court, the terms on which the Attorney General conducts litigation may well influence the scope and nature of remedial plans.

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State Attorneys General will therefore play a vital role in the state and federal redistricting that will take place after the 2020 census. Many of the men and women who will be serving their states as Attorney General during those critical years have yet to be elected, but upon assuming office will have the obligation to ensure that their state’s redistricting process occurs in a manner consistent not only with state law and federal statutes, but with the country’s highest constitutional mandates.

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<sup>36</sup> COLO. CONST. art. V, § 48(1)(e); FLA. CONST. art. III, § 16(c), (e); KAN. CONST. art. X, § 1(b).

<sup>37</sup> NAT’L ASS’N OF ATT’YS GEN., STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 84-104 (Emily Myers ed., 2013).

<sup>38</sup> Rhode Island v. Lead Industries Ass’n, Inc., 951 A.2d 428, 471 (R.I. 2008) (internal quotation marks omitted); *see also id.* (“In view of the grave responsibilities of attorneys general vis-à-vis the public, the holder of that high office, as distinguished from the usual advocate, has a special and enduring duty to seek justice.”) (internal quotation marks omitted).

<sup>39</sup> *See, e.g.,* People *ex rel.* Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003) (en banc).

<sup>40</sup> *See, e.g.,* 77 Md. Op. Att’y Gen. 11 (Feb. 19, 1992).