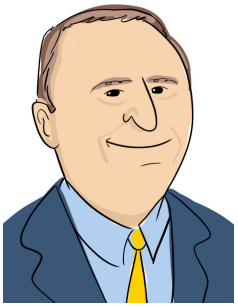
19 *Interview: Drawing for the courts*

MOON DUCHIN AND OLIVIA WALCH



NATHANIEL (NATE) PERSILY
JAMES B. MCCLATCHY PROFESSOR OF LAW
STANFORD LAW SCHOOL

Nathaniel (Nate) Persily has been involved in drawing plans for courts since the 2000 redistricting, sometimes as a "special master," tasked with direct action on behalf of the court. In one form or another, he has assisted courts in crafting Congressional or legislative districting plans in Georgia, Maryland, Connecticut, New York, North Carolina, and Pennsylvania, as well as drawing for numerous local governments.

In 2005, Persily wrote a "primer" on court-drawn plans in a law review article [2], noting:

> "In the many redistricting struggles that now follow each census, plaintiffs routinely turn to the courts not only to strike down plans as illegal, but also to draw remedial plans to take their place. Courts are not mere referees of the redistricting process; they have become active players, often placed in the uncomfortable role of determining winners and losers in redistricting, and therefore, by consequence, elections."

In the time since then, courts have possibly turned to Persily more than any other expert to play this role. We asked him about the process.

Q. What's the backstory—how did you come to be drawing maps for courts?

The first time I was called upon to draw a map for a state was in 2002 for the New York congressional redistricting. The legislature had deadlocked and the federal court had appointed a Special Master, former District Court Judge Fred Lacey, to come up with a redistricting plan. His staff reached out to Heather Gerken, then a Professor at Harvard, now Dean of Yale Law School.

The year before I had done a redistricting simulation for Heather's class, in which I brought in people from Caliper Corporation, who make Maptitude for Redistricting, the software package that is used by most jurisdictions for redistricting. (I had gotten to know the folks from Caliper from previous meetings of the National

Conference of State Legislatures where they did simulations for state legislators.) When Heather got the call, she recommended me and the rest is history.

At the time, I was an Assistant Professor at University of Pennsylvania Law School, on the verge of finishing my political science dissertation at U.C. Berkeley. I had no partisan affiliation or reputation and no track record when it came to redistricting—these turned out to be pluses, not minuses, for me to be appointed as the assistant to the special master, who naturally did not want someone who could be seen as siding with the Democrats or Republicans.

Since this was my first opportunity, though, I wanted help and suggested that Bernie Grofman of U.C. Irvine and Marshall Turner, who had just retired from the Census Bureau, should join me in drawing the map. (I had edited a small volume for the Brennan Center about two years earlier on "The Real Y2K Problem: Census 2000 Data and Redistricting Technology" [3] in which Bernie had a chapter, so I got to know him then.)

We worked with the Special Master and the New York Legislative Task Force on Redistricting (which staffed the legislature) to create a map for New York's congressional districts. Those first maps I drew are now framed on my wall! We had hearings, we drew a plan, but the plan endangered too many incumbents so the legislature rejected it when the Court gave it a second chance to overturn it. But the plan was considered to be politically fair, and that helped build my reputation drawing for courts; I then did legislative plans for Maryland and Georgia that in the end were perceived to be mildly pro-Republican. Sometimes I was working directly with the court, sometimes with a special master. That led me to being one of a small group of people who get appointed by courts.

It helps that I never registered with a party, gave money to candidates, or worked with parties directly. Those three early cases then led me in 2012 to be appointed by the Connecticut Supreme Court as a Special Master for the Connecticut congressional redistricting and then once again to assist a special master for the New York congressional redistricting, and then to serve as Special Master later in the decade in North Carolina to solve a racial gerrymandering problem identified by the federal court there.

Most recently, I was brought in by the state Supreme Court in Pennsylvania in 2018 to assist in their remedying the partisan gerrymander of the congressional districts that they struck down under the state Constitution. The map that emerged was mildly pro-Republican but Democrats still picked up three seats—moving from a 12-6 congressional delegation to 9 to 9, which for a purple state like Pennsylvania seems pretty fair.

Given how politically contentious that map inevitably was, I worry that I might now be out of the business of drawing maps for courts. But I am still doing maps for local jurisdictions, such as a recent one in Lowell, Massachusetts, that arose out of a settlement agreement from a voting rights lawsuit. Doing this kind of work really transforms your view of redistricting. It's a totally different world once you're weighing the fates of voters, candidates, and communities.

Q. What are the ways that a special master is at a disadvantage drawing lines? How might a lack of local knowledge impact the outcome, and how do you try to compensate for that?

In most situations, I get involved because the political process has broken down and a plan needs to be drawn in emergency fashion so that elections can take place. This is never the ideal environment in which to draw a plan. Nevertheless, even in an expedited process, either the Court or I can hold hearings to get participation from the litigants or interested parties.

You learn an enormous amount about community interests and on-the-ground politics in these cases. It brings out the best and worst in our political system. I remember in the first New York congressional redistricting that we moved Jamaica Bay out of Congressman Anthony Weiner's district. He sent the court a letter saying that he wanted his swamp back. No people lived in that census block, but he had ongoing environmental projects that he was supervising there. But we moved that large water block to ensure the adjacent district was more compact and contiguous. So, he never got his swamp.

I use that example when I teach Reynolds v. Sims—especially the line in that opinion that says trees and acres don't vote, people do. Well, apparently swamps do too. Justice Breyer wrote about this example in his Vieth v. Jubelirer dissent to demonstrate that political considerations are not always nefarious.[1]

And then there are always instances where groups of people either want to be in a different district from other groups or joined with their allies. Sometimes these are pretextual arguments for partisan- or incumbency-related considerations. But sometimes they are authentic expressions about how people define the boundaries of their community. For instance, I remember in the Maryland redistricting that obeying the boundary line that separates Baltimore City from Baltimore County ended up splitting the Orthodox Jewish community that straddles that border. But the court case that gave rise to the redistricting centered around protecting political subdivision lines so that community ended up divided.

When I am appointed as an expert or special master, most of what I do is acquaint myself with the community-defining characteristics of the state or locality. Often the parties to the litigation present those arguments. Sometimes the court will hold a hearing that allows nonparties to make submissions. Often I will release a draft map (as I did in North Carolina, for instance) that allows the parties to express their disagreement and suggest revisions based on nonpartisan criteria. However, it is always important to be careful because community of interest arguments are the most ripe for manipulation by partisans and incumbents.

Q. So what does the actual process look like, and how long might it take? Who puts together the raw data materials? Do you seek to uphold principles not

[1] "The use of purely political considerations in drawing district boundaries is not a 'necessary evil' that, for lack of judicially manageable standards, the Constitution inevitably must tolerate. Rather, pure politics often helps to secure constitutionally important democratic objectives. But sometimes it does not" [1].

specifically named in law or by the court that appoints you, or do you view the task very narrowly?

I don't build the data. Often I will have the jurisdiction provide it. Some things sound obvious but are in fact tricky, like identifying the boundaries of municipalities. It can be tempting to use data products from the Census, like their MCDs (minor civil divisions), which mostly nest in counties. I got burned once on this issue, in North Carolina, where it was argued that I had the wrong boundary files for cities. Similarly, you can try to shortcut community identification with CDPs (Census-Designated Places)—but this never matches up to the real conception of community. However it is collected, the parties must agree to the data and it must be transparent and public. Caliper provides the census data and boundary files, however, as used in the Maptitude software program.

The first ten hours (or 20, or 30) is me just staring at maps and trying to understand how the pieces fit together. Most of the time when I'm appointed, the legislature has failed to come up with a plan, so I need to work fast. Two months would be normal turnaround time. For most states, you can rough-draft a congressional plan in a day—but just because you can do it fast doesn't make it good! The number of stakeholders and the number of iterations can increase complexity a great deal. Georgia in some ways was the most intense process, because we drew over 300 districts for both the state Senate and the General Assembly, repeatedly.

My article *When Judges Carve Democracies* [2] discusses the role of courts and special masters in judicially supervised redistricting processes. Precedent exists discussing how aggressive the courts can be in designing a remedy for a given constitutional violation. A remedy ordinarily must be narrow: just solve the problem that gave rise to the court's involvement. If only two districts are malapportioned, for instance, you only adjust those two districts.[2] Most of the time, when I get involved, the Court directs me to remedy a particular problem in a particular set of districts. However, if the plan as a whole is legally infirm (for instance, if the state needs to transition from 30 to 28 districts or the plan as a whole is determined to be an illegal partisan gerrymander), then the remedy will be more comprehensive, perhaps requiring a plan drawn completely from scratch.

Q. Can you talk more about how you end up balancing the traditional districting principles, from compactness to political boundaries to communities of interest?

Let's start with compactness. Judges tend to like compactness measures because they have the feel of objective criteria against which you can evaluate whether one plan is "better" than another. But as you, more than anyone, know, these measures are highly contested and in tension with one another. Generally speaking, judges are also struck by the aesthetics, but they lean on the measures whenever possible. And so, speaking hypothetically here, if you can beat all the submitted plans on all metrics, that would be very persuasive. There is plenty of sleight of hand that

[2] *Perry v. Perez* 2012

lawyers use here. Part of my job is to identify that. It's more challenging for judges to deal with the quantitative data than many political scientists or mathematicians might realize.

Political subdivision splits are another way that courts evaluate redistricting plans, but here too lawyers sometimes try to pull the wool over judges' eyes. For instance, is it better to split one county into five pieces or two counties each into two pieces? There is no neutral way to answer that question.

Similar questions arise with communities of interest. Some communities want to have their influence spread among many districts, others want to be concentrated in one district. I remember in my first redistricting of New York that we drew a nice circular district around Buffalo, which previously had two halves of two districts. But then the headline was—"Buffalo loses congressional district"—when in reality they moved from two halves to one whole.

Compactness often comes with other costs, however. I once drew a gorgeous square district in northern Georgia—it looked like Wyoming! But a mountain range went right down the middle of it, so you had to exit the district if you wanted to travel from one side to the other. Even though it was great on the screen it did not make sense for the population.

In North Carolina, I drew a district around Greensboro that was mocked because of its "buzzsaw" shape. But it had ridges because of town boundaries themselves. That's kind of common: municipal boundaries are often crazily shaped and even noncontiguous due to annexations. People tend not to realize it, so when you draw a district around a city it might be weirdly shaped.

The plan we drew in Georgia paid great attention to political subdivision lines, but not precincts. As a result, hundreds of precincts needed to be redrawn to administer elections under the new districts. I am told the Secretary of State wept. But these are the tradeoffs when you maximize along one dimension without considering others. The impact that redistricting has on election administration is systematically underappreciated.

Q. This is already very complicated. Now how about the Voting Rights Act and racial fairness?

As you know, the law regarding race and redistricting is now, as has been true for thirty years, in flux. The upcoming redistricting is the first since the 1960s that will not be governed by Section 5 of the VRA, given the Court's opinion in Shelby County. In addition, line drawers need to navigate the competing demands of Section 2 of the VRA, which require attention to race, and the Shaw v. Reno line of cases, which caution against using race as the predominant factor in the construction of a district.

It is easier for courts to comply with these conflicting legal pressures than it is for legislators. Because a court need not pay attention to the same concerns about incumbency or partisanship that preoccupy a legislature, it is easier to draw compact districts that ensure minorities have an equal opportunity to elect a candidate

of their choice. When legislators do so, they often draw contorted districts that attempt to satisfy, not only the legal requirements, but the many other concerns that lead a district to snake from one area to another.

In my most recent work drawing a plan for Lowell, Massachusetts, I'm appointed pursuant to a settlement agreement between the city and a group of Latino and Asian American plaintiffs who threatened a Section 2 VRA lawsuit. The process has really been eye-opening and inspiring. The litigants and the community submitted maps. I drew a framework map based on what I heard. We then held three public hearings—one in English, another in Spanish and one in Khmer—in which anyone could offer comments. And now the districts are in place for the first time for both City Council and School Board.

It doesn't always need to be contentious! Sometimes the redistricting process makes you have added faith in democracy.

REFERENCES

[1] Stephen Breyer, Dissenting Opinion in *Vieth v. Jubelirer*. Available at law.cornell.edu/supct/pdf/02-1580P.ZD2.

[2] Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*. George Washington Law Review 73, 1131–1165, (2005).

[3] Nathaniel Persily, *The Real Y2K Problem: Census 2000 Data and Redistricting Technology* (Brennan Center 2000).