

**[J-99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111-2012]
 IN THE SUPREME COURT OF PENNSYLVANIA
 MIDDLE DISTRICT**

AMANDA E. HOLT, ELAINE TOMLIN, LUIS NUDI, DIANE EDBRIL, DARIEL I. JAMIESON, LORA LAVIN, JAMES YOEST, JEFFREY MEYER, CHRISTOPHER H. FROMME, TIMOTHY F. BURNETT, CHRIS HERTZOG, GLEN ECKHART, JOAN JESSEN, ELIZABETH ROGAN, JAMES HERTZLER, GARY EICHELBERGER, BARBARA B. CROSS, AND MARY FRANCES BALLARD,	: No. 133 MM 2012 : : Appeal from the Legislative : Reapportionment Plan of the 2011 : Legislative Reapportionment : Commission, dated June 8, 2012 : : ARGUED: September 13, 2012 :
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Appellants

v.

2011 LEGISLATIVE
 REAPPORTIONMENT COMMISSION,

Appellee

DENNIS J. BAYLOR,

Appellant

v.

2011 LEGISLATIVE
 REAPPORTIONMENT COMMISSION,

Appellee

: No. 126 MM 2012 : : Appeal from the Legislative : Reapportionment Plan of the 2011 : Legislative Reapportionment : Commission, dated June 8, 2012 :

: ARGUED: September 13, 2012 : :
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STATE REPRESENTATIVE JOHN P.
 SABATINA, JR. FOR THE 174TH
 LEGISLATIVE DISTRICT AND STATE
 REPRESENTATIVE THOMAS R.
 CALTAGIRONE FOR THE 127TH

: No. 127 MM 2012 : : Appeal from the Legislative : Reapportionment Plan of the 2011 : Legislative Reapportionment
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LEGISLATIVE DISTRICT, : Commission, dated June 8, 2012

Appellants :
ARGUED: September 13, 2012

v.

2011 LEGISLATIVE
REAPPORTIONMENT COMMISSION,

Appellee

THOMAS SCHIFFER, RACHEL J. : No. 128 MM 2012
AMDUR, JOAN TARKA, LAWRENCE W. :
ABEL, MARGARET G. MORSCHECK, : Appeal from the Legislative
LAWRENCE J. SHRZAN, SHIRLEY : Reapportionment Plan of the 2011
RESNICK, SUSAN JEWETT, AND CARL : Legislative Reapportionment
DUZEN, : Commission, dated June 8, 2012

Appellants :
ARGUED: September 13, 2012

v.

2011 LEGISLATIVE
REAPPORTIONMENT COMMISSION,

Appellee

SENATOR JAY COSTA, SENATOR : No. 39 WM 2012
LAWRENCE M. FARNESE, JR., :
SENATOR CHRISTINE M. : Appeal from the Legislative
TARTAGLIONE, SENATOR SHIRLEY M. : Reapportionment Plan of the 2011
KITCHEN, SENATOR LEANNA M. : Legislative Reapportionment
WASHINGTON, SENATOR MICAHEL J. : Commission, dated June 8, 2012

Stack, Senator Vincent J. : ARGUED: September 13, 2012

HUGHES, SENATOR ANTHONY H.
WILLIAMS, SENATOR JUDITH L.
SCHWANK, SENATOR JOHN T.
YUDICHAK, SENATOR DAYLIN LEACH,
SENATOR LISA M. BOSCOLA,
SENATOR ANDREW E. DINNIMAN,

KATHRYN VARGO, JENNIFER GRAB,
SANDRA WOLFE, ANTONIO LODICO,
EMILY CLEATH, DANIEL MCARDLE
BOOKER, RACHEL CANNING, AND
PATRICK CLARK,

Appellants

v.

2011 LEGISLATIVE
REAPPORTIONMENT COMMISSION,

Appellee

PATTY KIM,

Appellant

v.

2011 LEGISLATIVE
REAPPORTIONMENT COMMISSION,

Appellee

COUNCIL PRESIDENT, HOLLY BROWN,
MAYOR CAROLYN COMITTA, JOHN
HELLMAN, MAYOR LEO SCODA,
COUNCIL PRESIDENT RICH KIRKNER,
COUNCILPERSON JENNIFER MAYO,

Appellants

v.

: No. 42 WM 2012
:
: Appeal from the Legislative
: Reapportionment Plan of the 2011
: Legislative Reapportionment
: Commission, dated June 8, 2012

: ARGUED: September 13, 2012

: No. 129 MM 2012
:
: Appeal from the Legislative
: Reapportionment Plan of the 2011
: Legislative Reapportionment
: Commission, dated June 8, 2012

: ARGUED: September 13, 2012

: No. 130 MM 2012
:
: Appeal from the Legislative
: Reapportionment Plan of the 2011
: Legislative Reapportionment
: Commission, dated June 8, 2012

: ARGUED: September 13, 2012

JOSH SHAPIRO, LESLIE RICHARDS,
DAYLIN LEACH, SAMUEL ADENBAUM,
IRA TACKEL, MARCEL GROEN, HARVY
GLICKMAN, AND DAVID DORMONT,

Appellants

v.

2011 LEGISLATIVE
REAPPORTIONMENT COMMISSION,

Appellee

: No. 134 MM 2012
:
: Appeal from the Legislative
: Reapportionment Plan of the 2011
: Legislative Reapportionment
: Commission, dated June 8, 2012
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: SUBMITTED: September 13, 2012
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CONCURRING OPINION

MR. JUSTICE SAYLOR

DECIDED: May 8, 2013

My assessment of the 2011 Legislative Reapportionment Plan, and my conclusion that it satisfied constitutional requirements, are a matter of record. See Holt v. 2011 Legislative Reapportionment Comm’n, ___ Pa, ___, ___, 38 A.3d 711, 762 (2012) (“Holt I”) (Saylor, J., concurring and dissenting). Although expressing receptivity to the Court’s movement to a “more circumspect position regarding the role of population equality,” id., I was of the view that prospective guidance would have been appropriate. Ultimately, I noted that, in view of the substantial deference to be accorded to the LRC’s 2011 plan, it satisfied constitutional requirements.¹ Likewise, I agree with the majority that the 2012 plan should be given the force of law and write further to comment on the nature of judicial review employed in connection with this sui generis governmental task.

¹ The majority in Holt I held that the LRC’s work is not entitled to deference or a presumption of constitutionality. See Holt I, ___ Pa. at ___, 38 A.3d at 734-35. This topic is discussed below.

Initially, however, I wish to note that, as before, my view of the actions of the 2011 Legislative Reapportionment Commission (the “LRC”) differs somewhat from that of the majority. As I suggested in Holt I, particularly in view of the many difficulties (including, perhaps, necessary compromises) inherent in crafting a reapportionment plan, I believe that criticism of the internal process by which the LRC performs its constitutional obligations should be undertaken with caution. Contrary to the majority’s assertions, moreover, the LRC’s present advocacy does not appear to overstate the constitutional commands under which it operates. Rather, it seems to me, for example, that the LRC appropriately points out that Article II, Section 17 requires that the Commission be composed mainly of legislative floor leaders, accomplish its work in a set timeframe, and act by majority vote; and reasonably explains why continuity of representation, while not constitutionally required, represents a “legitimate consideration” that the LRC may, in its discretion, take into account. See Brief for LRC, at 12-15, 40.

Redistricting is, by design, a legislative undertaking. See Holt I, ___ Pa. at ___, 38 A.3d at 745 (acknowledging that redistricting has an “inevitably legislative” component); see also Butcher v. Bloom, 415 Pa. 438, 461, 203 A.2d 556, 569 (1964) (“The composition of the Legislature, the knowledge which its members from every part of the state bring to its deliberations, its techniques for gathering information, and other factors inherent in the legislative process, make it the most appropriate body for the drawing of lines . . .”). As such, it often involves amorphous and immeasurable “background factors” – which have been aptly described as a “second layer of inherent constitutional considerations.” Majority Opinion, slip op. at 41 (summarizing the LRC’s description). In reviewing the LRC’s work product, this Court is often limited to an examination of the surface of a districting map whose features are supported by factors

that are hidden from our view. Moreover, the very nature of the maps, with their 50 Senate and 203 House districts covering thousands of political subdivisions in a state with a distinctive topography and highly uneven population distribution, may leave us with little apart from intuition to gauge whether the district shapes and political subdivision splits exceed the “outer limits of justifiable deference,” Albert v. 2001 Legislative Reapportionment Comm’n, 567 Pa. 670, 688, 790 A.2d 989, 1000 (2002) (Saylor, J., concurring) – particularly as there is no requirement that the LRC provide an explanation for its decisions.

A logical consequence is that the Commission’s final work product is, by necessity, reviewed largely for an abuse of discretion. I recognize that it is now binding precedent that a final plan approved by the LRC does not carry a presumption of constitutionality, and as such, it is not reviewed deferentially. See Holt I, ___ Pa. at ___, 38 A.3d at 734. Nevertheless, it is difficult to perceive how such a holding is not merely symbolic or semantic in nature, particularly given the limited tools that have been developed in the case law since the present redistricting methodology was adopted in the 1968 Constitution. Indeed, the very mention of “outer limits” which the LRC may or may not “test,” Holt I, ___ Pa. at ___, 38 A.3d at 761, invokes the language of discretion, see id. at ___, 38 A.3d at 758 (referencing the LRC’s “discretionary task within the limits set by the Constitution”); Majority Opinion, slip op. at 38 (suggesting that there is “considerable discretionary authority reposed in the LRC” to perform its mission); id. at 47 (recognizing that protecting district lines may be honored as a discretionary matter within constitutional limitations), a concept that incorporates a range of permissible choices that are reasonable and non-arbitrary, and that subsumes deferential review as an essential aspect. In short, the LRC’s ability to exercise discretion implies a deferential standard of review. See Gen. Elec. Co. v. Joiner, 522

U.S. 136, 143, 118 S. Ct. 512, 517 (1997) (referring to “deference” as “the hallmark of abuse-of-discretion review”).²

In summary, the Court has only a few definable standards in reviewing a reapportionment plan, such as population deviation benchmarks and a strict contiguity requirement enforced except in the rarest of situations. Beyond that, alternate plans forwarded by challengers assist the Court to employ its intuitive judgment as to whether the LRC has “gone too far,” and hence, abused its discretion. Whether or not we say deference is at work, the acknowledgement of discretion and the allocation of the burden of proof accord with the character of the exercise that lies at the heart of redistricting – which, as noted, is legislative and political.

² Consistent with this notion of deference, if no challenge is filed, the plan automatically attains the force of law. See PA. CONST. art. II, §17(e). Additionally, if a challenge is filed, the challenger bears the burden to establish that the plan is contrary to law. See id. §17(d); see also Majority Opinion, slip op. at 34; Holt I, ___ Pa. at ___, 38 A.3d at 718 (referring to a challenger’s “heavy burden” of establishing a plan’s unlawfulness (quoting Albert, 567 Pa. at 685, 790 A.2d at 998)).