

Redistricting 2020, A Primer



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Introduction

Next year, the Legislature is tasked to create a new district map for state legislative seats. This redistricting is both a state and federal constitutional requirement. This redistricting will be based on 2020 census data and will establish the legislative map for ten years, starting with the 2022 election cycle. The U.S. Constitution and the South Dakota Constitution both impose requirements on how redistricting is conducted in South Dakota.

Federal Constitutional Requirements

According to Art. I, Sec. 2, Clause 3 of the U.S. Constitution, "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers[.]" Further, "The actual Enumeration shall be made... every subsequent Term of ten Years, in such Manner as they shall by Law direct." This section primarily applies to the apportionment of *federal* legislators in the United States House of Representatives, of which South Dakota only has one member at-large. However, this clause provides for the federal census, which South Dakota is required to use for redistricting. It also provides the framework for legislative redistricting in the South Dakota Constitution.

In 1964, another federal constitutional requirement of legislative districts was placed on states. In *Reynolds v. Sims*, the U.S. Supreme Court established the "One Person, One Vote" principle. The court held that the Equal Protection Clause of the 14th Amendment requires states to construct legislative districts that are substantially equal in population. Therefore, states must redistrict in order to protect the equality of every person's vote.

State Constitutional Requirements

The South Dakota Constitution provides further detail about how redistricting for the state legislature shall occur. First, Art. III, Sec. 2 (1936) states: "[T]he number of members of the house of representatives shall not be less than fifty nor more than seventy-five and the number of members of the senate shall not be less than twenty-five nor more than thirty-five."

Second, Art. III, Sec. 5 (1982) states:

- "The Legislature shall apportion its membership by dividing the state into as many single-member, legislative districts as there are state senators. House districts shall be established wholly within senatorial districts and shall be either single-member or dual-member districts as the Legislature shall determine.
- Legislative districts shall consist of compact, contiguous territory and shall have population as nearly equal as is practicable, based on the last preceding federal census.
- An apportionment shall be made by the Legislature in 1983 and in 1991, and every ten years after 1991.
- Such apportionment shall be accomplished by December first of the year in which the apportionment is required. If any Legislature whose duty it is to make an apportionment shall fail to make the same as herein provided, it shall be the duty of the Supreme Court within ninety days to make such apportionment."

Recent Redistricting Process

Since 1991, South Dakota has followed the process outlined below in order to complete all constitutional redistricting requirements. Public testimony is generally taken at all meetings.

| Time | Step |
|-----------------------------|---|
| During Session | <ul style="list-style-type: none"> Creation of an Interim Redistricting Committee. Generally, 15 members of the Legislature are appointed. |
| First Meeting (March/April) | <ul style="list-style-type: none"> Adoption of governing principles to guide redistricting. The 2011 guidelines are codified in SDCL 2-2-41. |
| Second Meeting (June) | <ul style="list-style-type: none"> Discussion of legal requirements, Supreme Court guidance, and demographics of the state. Creation of subcommittees for creating maps for major urban areas within South Dakota. |
| Third Meeting (July) | <ul style="list-style-type: none"> Reports of urban area subcommittees. Discussion of initial maps regarding minority populations within South Dakota. Creation of subcommittees for creating maps for minority populations within South Dakota. |
| Fourth Meeting (August) | <ul style="list-style-type: none"> Reports of minority area subcommittees. Discussion and adoption of maps for minority areas. |
| September/October | <ul style="list-style-type: none"> Deadline for submission of maps to the LRC. |
| Fifth Meeting (September) | <ul style="list-style-type: none"> Discussion and adoption of maps for major urban areas. Complete petitions for special session to approve redistricting maps. |
| Sixth Meeting (October) | <ul style="list-style-type: none"> Final discussion of maps and next steps. |
| October/November | <ul style="list-style-type: none"> Special Session for Redistricting. |
| December 1st | <ul style="list-style-type: none"> Redistricting complete. If not, Supreme Court shall complete redistricting with ninety days. |

Current Estimated Timeline

Due to the ongoing COVID-19 pandemic, the estimated timeline for the U.S. Census Bureau may be impacted compared to previous decades. The Census Bureau completed its canvas of those who failed to respond to complete the census online in September and is on schedule to deliver the apportionment counts to the President and Congress by December 2020. However, the Census Bureau has requested a delay of delivery of the data to states. If Congress grants this request, the Census Bureau would have until no later than July 31, 2021 to send the data to states. Census data must be used as the primary basis for redistricting, but other data such as voter registration, race, and voting age population may be considered. Normally, states receive the census data prior to March 31.



Population and Ideal District Size

Once the total population of South Dakota has been determined and reported by the Census Bureau, the calculation to determine the ideal size for a legislative district is relatively straight forward. The total population is divided by the total number of legislative districts, which shall be the "ideal" number for every district. Due to U.S. Supreme Court precedent, the population range between the districts with the least and most people should be no more than 10%. Anything over 10% is presumptively unconstitutional, while anything under 10% is assumed to be constitutional. However, just because a map is under 10% does not mean it is protected from constitutional challenges or lawsuits on other grounds.

Ideally, the smallest district would be no more than 5% below the "ideal" district size and the largest district no more than 5% above. However, this range can be adjusted as long as the deviation is no more than 10%. If the smallest district is 2% under and the largest district 8% over, that also would be allowable.

Beyond population size and deviation, states are authorized to consider other factors when creating a legislative map. Currently, SDCL 2-2-41 contains the guidelines that are of primary significance to the legislative redistricting committee. These are:

- (1) Adherence to standards of population deviance as established by judicial precedent and to standards of population deviance as prescribed by S.D. Const., Art. III, § 5;
- (2) Protection of communities of interest by means of compact and contiguous districts;
- (3) Respect for geographical and political boundaries; and
- (4) Protection of minority voting rights consistent with the United States Constitution, the South Dakota Constitution, and federal statutes, as interpreted by the United States Supreme Court and other courts with jurisdiction.

On a separate note, if South Dakota were to be allocated two seats in the U.S. House of Representatives, the bar is set much higher. The U.S. Supreme Court has interpreted Art. I, Sec. 2, Clause 3 of the U.S. Constitution to mean congressional districts must be equal as practicable. There is no allowance for deviations or getting close. Although the guidelines in SDCL 2-2-41 can still be considered, creating districts of equal size becomes paramount.

Possible Challenges

First, if South Dakota does not receive the census data until after March 31, it may be challenging for the Legislature and its committees to meet the constitutional requirements to approve a new legislative district map by December 1, 2021. The South Dakota Constitution does not provide a process for the Legislature to obtain an exception in circumstances like this.

Additionally, due to the COVID-19 pandemic, there are some concerns that the census data will not be as accurate as in previous decades. There is some speculation that this could lead to lawsuits at the state and federal levels about the quality of the data and its use in redistricting.

Finally, for the first time in decades, South Dakota will not be required to submit any maps to the U.S. Department of Justice for preclearance. This is because Section 4(b) of the Voting Rights Act of 1965 was declared unconstitutional. According to the U.S. Supreme Court, jurisdictions included in the statute had not been updated in decades, and many of the factors therefore no longer applied to these jurisdictions. There may be heightened scrutiny on these districts since the U.S. Department of Justice no longer has this authority.



Conclusion

Next year, the Legislature is required under the South Dakota Constitution to complete the redistricting of legislative districts by December 1, 2021. For redistricting, the Legislature is subject to provisions of the U.S. and the state constitutions, federal and state law, and U.S. Supreme Court precedents. This issue memorandum serves as a primer to the redistricting process, constitutional and legal requirements, and challenges that have or may arise due to the shifting legal landscape and the COVID-19 pandemic.

DRAFT

This issue memorandum was written by Matthew Frame, Legislative Attorney, on November 16, 2020 for the Legislative Research Council. It is designed to provide background information on the subject and is not a policy statement made by the Legislative Research Council.

