

Initiative & Referendum Institute

IRI REPORT

REDISTRICTING: ANOTHER CALIFORNIA REVOLUTION?

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Governor Arnold Schwarzenegger has called for reform of the way districts are drawn for state and federal legislative offices. Currently, the California legislature has the power to draw district lines for the state Assembly, the state Senate and the U.S. House of Representatives. Each house draws its own districts, and they work together on the congressional districts. In California, legislators have used their redistricting authority to construct districts that protect incumbents. In other states, like Texas, the majority party draws district lines to entrench their political control. This process is often called partisan gerrymandering, named for Massachusetts Governor Elbridge Gerry who in 1812 crafted a salamander-shaped district for political purposes. Redistricting often must occur after the decennial census to readjust boundaries to account for population shifts. The redistricting reform supported by Schwarzenegger would shift the power to draw district lines to a nonpartisan commission of retired judges.

Reasons for Schwarzenegger's Reform Proposal

Criticism of partisan gerrymandering has grown in recent years for several reasons:

- Very few state or federal legislative elections are competitive. In 2004, only a handful of federal congressional races were competitive; and in California, not one seat of 153 changed party affiliation (although some new faces will arrive in Sacramento because of term limits). The precise role of incumbent-protecting gerrymandering in virtually eliminating political competition is uncertain because there is also a sizable incumbency advantage in Senate and gubernatorial races, which are unaffected by redistricting. However, in 2004, competition was substantially more robust in these elections than in races for the U.S. House or state legislatures.
- Legislators have been increasingly aggressive in using gerrymandering to ensure continued domination of the currently powerful party. This reality was dramatically illustrated when several Texas Democrats fled the state to deprive the Texas legislature of a quorum and to block temporarily consideration of a redistricting plan favorable to Republicans. Ultimately, after several special sessions of the legislature and a change in the legislative rules, the plan was adopted, but it is now being challenged in the courts.
- The United States Supreme Court signaled in a 2004 case (*Vieth v. Jubelirer*) that the courts would largely stay out of partisan gerrymandering cases, leaving the problem to the political process.

Schwarzenegger is interested in redistricting reform for several reasons:

- Unlike his success in the initiative process, he was not successful in influencing state

candidate elections in November. Not only does he hope that a different method of drawing legislative districts would increase competition and allow him to wield more influence, but he is also hopeful that the candidates who would succeed in the new districts would be political moderates more likely to support his agenda and to reach compromises.

- He may be using the threat of removing the power to redistrict from lawmakers as a way to pressure them to accept his proposals on the budget and other policy initiatives. Lawmakers jealously guard their ability to shape electoral politics in ways that benefit incumbents and the majority party.
- Redistricting reform is part of a larger package of reforms the Governor supports, concretely demonstrating to voters his commitment to fundamental change of the political system. His State of the State address laid out four reform proposals, one of which was reform of democracy through adoption of a nonpartisan redistricting commission. Schwarzenegger has called a special session of the state legislature to consider the package of reforms. He has told lawmakers that if they do not adopt a new method of redistricting, as well as other reforms, he will take his proposals directly to the people through the initiative process. Even if the legislature compromises with the Governor, most of the reforms including redistricting will have to be submitted to the people to take effect.

Nonpartisan Commissions in Other States

Currently, twelve states (Alaska, Arizona, Arkansas, Colorado, Hawaii, Idaho, Missouri, Montana, New Jersey, Ohio, Pennsylvania, and Washington) use commissions as the primary institution that draws state legislative boundaries; three (Iowa, Maine, and Vermont) use commissions in some sort of advisory capacity; and five (Connecticut, Illinois, Mississippi, Oklahoma, and Texas) use backup commissions under certain circumstances if the legislature fails to redistrict. Seven states (Arizona, Hawaii, Idaho, Indiana, Montana, New Jersey and Washington) use commissions to draw districts for the U.S. House of Representatives. The commission in Iowa, which deals with both state and federal districts, has more power than its classification as advisory would suggest. The five-member nonpartisan commission advises the Legislative Service Bureau in drawing maps, through the use of computer programs to create compact and contiguous districts without considering data about party affiliation; its plan is submitted to the legislature, which is required to consider it under rules which prohibit amendments and force a straight up-or-down vote. Only after two plans have been rejected does the legislature play a more active role.

Commission members are typically selected by various elected officials and judges. For example, in Alaska, the Governor appoints two members, the president of the Senate

appoints one, the Speaker of the House appoints one, and the Chief Justice of the state Supreme Court appoints one. In Hawaii, the President of the Senate appoints two members, the Speaker of the House appoints two, minority Senate party leaders appoint two, and the eight appointees select the ninth commissioner who also serves as chair. Arizona has one of the more complicated selection processes. The Commission on Appellate Court Appointees creates a pool of 25 nominees, ten each from the two largest political parties and five who are not affiliated with the major parties. From this pool, the highest ranking officer of the state House, the minority leader of the House, the highest ranking officer of the Senate, and the minority leader of the Senate each appoint one commission member. The four appointees select a fifth to be chair; if they deadlock, the Commission on Appellate Court Appointments selects the chair.

As the Arizona system demonstrates, the rules for these commissions are usually designed to assure that both major parties are represented and that the tie-breaking vote is cast by a member selected in a bipartisan or nonpartisan way. For example, many state systems rely on lawmakers from the majority and minority parties in the state senates and houses to select commission members (e.g., Idaho, Montana, and New Jersey). In some cases, some members are selected by the judiciary (e.g., Colorado) or the chairman or tie-breaking vote is selected by the judiciary (e.g., Pennsylvania and Washington).

The rules establishing redistricting commissions may also require that members come from all parts of the state. Alaska requires that each judicial district be represented by at least one member of the five commissioners. Colorado requires that each congressional district must be represented by at least one commissioner, and no more than four people, and that at least one commissioner live west of the Continental Divide. In a few states, members are not allowed to be elected or appointed officials (e.g., Idaho and Montana). Missouri and Montana also prohibit commission members from running for office for some period of time following the redistricting. In contrast, the redistricting commission in Arkansas is made up entirely of elected officials, but ones in the executive branch: the Governor, Secretary of State, and Attorney General. Some political commentators have observed that politics do not entirely disappear from redistricting when political actors have responsibility for appointing commissioners. Instead, political considerations play a significant role in the appointment process.

There is clearly some connection between adoption of an independent redistricting commission and the initiative process. The ability to circumvent the legislature, which is reluctant to give up its redistricting power, through the initiative process seems crucial to reforming the process so that it is controlled by a more independent entity. Seventy-five percent of the 12 states that use commissions as the primary means of redistricting are also states where voters have access to the initiative; 65 percent of states with some sort of commission (primary, advisory, or backup) are initiative states. A recent study commissioned

by the IRI by Melissa Cully Anderson and Nathaniel Persily demonstrates, however, that most commissions have been adopted by the legislature, not through the initiative (see note at end). Only four states transferred control of redistricting to commissions through direct constitutional initiatives: Arkansas (1936, primary); Oklahoma (1962, backup), Colorado (1974, primary), and Arizona (2000, primary). Nonetheless, Anderson and Persily conclude that the legislatures in many of these states adopted reform only as a response to a credible threat that reformers would use the initiative process to establish a commission. By preempting the initiative, lawmakers can control the design of the commission and retain some influence over the selection of its members.

Previous California Initiatives on Redistricting Commissions

Currently, the petition on redistricting reform circulating in California proposes a constitutional initiative establishing a commission of three retired judges to draw district lines for both houses of California's legislature, the U.S. House of Representatives and the Board of Equalization (SA04RF0031, available at www.caag.state.ca.us/initiatives/activeindex.htm.) The initiative is sponsored by Ted Costa, and the provisions echo the reform briefly described by the Governor in his State of the State address.

In the past two decades, California voters have considered three constitutional initiatives transferring primary redistricting authority from the legislature to an independent commission. Californians have rejected all these initiatives. A fourth initiative qualified but was removed from the ballot by the state Supreme Court.

- In 1982, Prop. 14, a constitutional initiative, would have transferred primary redistricting authority to an independent commission with at least 10 members selected by an appellate court justice panel and representatives of the political parties. Prop. 14 failed, with 45.5% voting in favor and 55.5% voting against. The leading opponents to the measure were powerful lawmakers Jesse Unruh, David Roberti and Willie Brown, who argued that it transferred power to unaccountable appointed officials.
- In 1984, Prop. 39, a constitutional initiative, would have established an eight-member redistricting commission selected, by lot, by the President of the University of California system from two lists of appellate court judges. In addition, the Governor and a political leader of the other party would each appoint one non-voting member. Prop. 39 failed, with nearly 45% voting in favor and 55% voting against. Voters were concerned about the price tag for the commission, put at as much as \$3.5 million for the 1985 reapportionment process by the Legislative Analyst, and they were worried that the commission would not really be nonpartisan.
- In 1990, Prop. 119, a constitutional initiative, would have established the Independent

Citizens Redistricting Commission of 12 persons appointed by retired appellate justices from a group of nominees chosen by non-partisan, non-profit state organizations. At least five of the members would have come from each of the two major parties, and the other two members would not have been affiliated with the major parties. Prop. 119 failed, with only 36% voting in favor and nearly 64% voting against. Opponents argued that the commission would not be accountable to the people and thus would be controlled by special interests. On the same ballot, Prop. 118 would have required a two-thirds vote of both houses of the state legislature to adopt a redistricting plan. This measure also failed, with 33% voting in favor and 67% voting against.

- In 2000, wealthy Silicon Valley entrepreneur Ron Unz qualified Prop. 24 for the ballot. This constitutional initiative proposed several political reforms, including a provision that would transfer the power to redistrict to the state Supreme Court. The Court would have relied on a panel of retired federal and state judges “reflecting the cultural and ethnic diversity of California” to hold public hearings and gather evidence to support a new map of districts for state and federal legislators and the Board of Equalization. The plan adopted by the Court would be submitted to the people for approval. This initiative was removed from the ballot after the California Supreme Court held that it violated the Constitution’s single-subject requirement for initiatives (*Senate of the State of California v. Jones* (1999)).

Note. A draft version of the Anderson-Persily study discussed above was presented at the “Impact of Direct Democracy” conference and is available at http://lawweb.usc.edu/csfp/conferences/direct_democracy/directdemocracy_05.html.

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