

EVALUATING CONSTITUTIONAL PROVISIONS IMPACTING REDISTRICTING IN 2022

**Testimony of Susan Lerner, Executive Director, Common Cause/NY
Before A Joint Hearing of the
Legislative Task Force on Demographic Research and Reapportionment
Senate Standing Committee on the Judiciary
Assembly Standing Committee on Governmental Operations
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Good morning. I am Susan Lerner, Executive Director of Common Cause/New York. Common Cause/New York is a nonpartisan citizens' lobby and a leading force in the battle for honest and accountable government. Common Cause fights to strengthen public participation and faith in our institutions of self-government and to ensure that government and political processes serve the general interest, and not simply the special interests. For 50 years, we have worked at both the state and municipal level to bring about honest, open and accountable government that serves the interests of all residents equally. Consonant with our overall mission we have consistently worked to improve accessibility, accuracy, transparency, and verifiability in our democratic process at the city, state and national level.

Common Cause is actively engaged in working to support fair, non-partisan redistricting throughout the country. We focus on insuring that the coming decennial redistricting will be performed in accordance with nonpartisan rules designed to create districts of relatively equal population that will provide fair representation for all. We support independent redistricting commissions and work for their adoption wherever practical. In California, Common Cause California wrote and helped pass the initiatives which transferred responsibility for redrawing the legislative, congressional and Board of Equalization district lines to the people in the form of a new Citizens Redistricting Commission. Our national redistricting project is a leader in the fight for fair redistricting, conducts research, develops policy, and provides support for redistricting reform initiatives in numerous states, well as litigating to vindicate fair redistricting principles and defeat gerrymandered maps.

In 2011, Common Cause/NY released the only set of non-partisan redistricting maps for both the state legislature and Congress, which were widely hailed as fair and viable alternatives to the legislature's official proposals. Ultimately, portions of our map were incorporated by the federal court in the congressional district maps used today. During the 2012-13 New York City Council redistricting cycle, Common Cause/NY offered neighborhood workshops, ensuring that residents understood the

redistricting process and were able to contribute to setting political boundary lines, as well as drawing reform maps for New York City Council districts and Nassau County legislative districts. We also helped organize the Nassau United Redistricting Coalition in the last redistricting cycle and most recently, Fair Maps CNY, the latter of which helped pass an independent citizen-led redistricting commission which will draw the maps for Syracuse Common Council districts in the upcoming redistricting cycle.

IMPROVING NEW YORK'S CONSTITUTIONAL REDISTRICTING PROVISIONS

Events transpiring since the 2014 adoption of a constitutional redistricting amendment make adjustments to the current constitution provisions necessary. Common Cause/NY urges the Legislature to use this opportunity to make additional changes to the redistricting provision which will clarify and strengthen it, eliminating unconstitutional, contradictory and ambiguous language within the provision and minimizing the potential for litigation. If the Committees and Task Force desire, we are prepared to submit our suggested revisions to the Readjustments and Reapportionment provision of the State Constitution.

Deadlines Must Be Changed

The combination of the consolidation of the congressional and legislative primaries, moving the primary date forward to June from September, and the delay in the 2020 census caused by COVID-19, require that the deadlines for completing maps must be changed. The current deadlines for the redistricting commission to present its maps to the Legislature is January 1, but no later than January 15 of any year ending in 2. In the event the commission's maps are not approved, the commission would then have 15 days from notification, but no later than February 28 to submit a revised map. This time frame would result in district maps that would not be finalized until after candidates began petitioning to be placed on the June primary ballot. Clearly, this is an unworkable schedule and must be changed.

We propose that the deadlines be amended so that the commission's first map is due on December 1 of any year ending in 1 and any revised plan be due on December 15 of the same year. Revising the deadlines for the maps, combined with the fact that the census completion and reporting will be delayed this cycle, results in the significant shortening of the time available for the redistricting commission to take public testimony in various locations around the state and to garner extensive public input. However, the requirement that the commission take testimony and receive public feedback on its proposed maps through twelve hearings conducted in named locations around the state is an admirable and essential requirement and must be preserved.

Eliminate Unconstitutional Language

The basic redistricting provisions of our state constitution were written in 1894 and provide for a complicated “ratio” system to be used in redistricting, calculated to result in less representation for the more populous counties. In 1964, the U.S. Supreme Court, in *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964), found that the 1894 redistricting provisions in the New York State Constitution, which resulted in under-represented counties and over-populated districts in both houses of the Legislature, violated the Equal Protection clause of the U.S. Constitution. And yet, amazingly, 56 years later, the clearly unconstitutional redistricting provisions remain in our state constitution. The 2014 redistricting amendment simply overlaid new sections over the unconstitutional provisions and, arguably, references them as “state constitutional standards” which are to be respected. There is no justification for retaining these clearly unconstitutional provisions, found in §4(d) and in §5 beginning with the words “excluding aliens” through “of new towns by the Legislature.” Eliminating the unconstitutional language from 1894 will simplify and clarify the redistricting provision. We also recommend eliminating the phrase “and in compliance with state constitutional requirements” from §4(c), as either redundant or improperly referencing the unconstitutional 1894 language.

Incorporate Further Good Redistricting Practices

§4(c) sets forth the standards by which district lines are to be drawn. These standards were explained as chosen to discourage or prevent gerrymandering and result in fair district lines. Nevertheless, there are a number of ways in which §4(c) can be improved to more readily achieve the goal of drawing fair district lines.

Memorialize the Ban on Prison-Based Gerrymandering

New York has adopted an important redistricting practice which should be memorialized in our state constitution: a ban on prison-based gerrymandering. Requiring the re-allocation of incarcerated people back to their places of last residence in the state constitution will give this important policy the recognition and permanence it deserves. This can be done by adding the requirement that all incarcerated persons be re-enumerated to their place of last residence, to the extent practicable, as a new subparagraph in §4(c). We also recommend adding language to §4(a) which would require that the data re-enumerating persons who are incarcerated must be provided to the redistricting commission no later than September 1 of any year ending in 1.

Define the Appropriate Standard for Equivalence in Size As +/- 2%

§4(c)(2) requires that districts shall “contain as nearly as may be an equal number of inhabitants”, but contains the permissive clause “[t]o the extent practicable.” Equivalence for congressional districts translates into no more than 1 person difference in the size of districts. Courts have approved state legislative districts as equivalent in size that deviate as much as plus or minus 5%. Such a standard can result in a close to 10% difference in population between the largest and smallest districts. Such a large population deviation is unwarranted and contrary to the goal of the equivalence provision. Providing for a set deviation standard will further the goal of population equivalence.

While the goal of achieving districts which deviate from each other by no more than a single person is admirable, it is not practical when mapping legislative districts, which are much smaller than congressional ones. In our experience in drawing district maps for both houses of the Legislature and for the congressional delegation, more flexibility in district population size is needed to properly respect communities of interest and jurisdictional boundaries for towns and other government units. We found that adhering to a 1% or 1.5% deviation resulted in arbitrary boundaries that ignored communities of interest, while using a 5% deviation is not necessary to achieve a fair and impartial result. Based on our experience, Common Cause/NY recommends that language be added to §4(c)(2) which sets the allowable population deviation at no more than plus or minus 2%.

Allow the Commission to Draw Fair Maps

§4(c)(5) states that district lines should not be drawn to discourage competition or to advantage or disadvantage incumbents. The subparagraph further requires that the redistricting commission shall also consider communities of interest and pre-existing political subdivisions, as dividing communities of interest or political subdivisions is a tool used to prevent certain populations from achieving political power. Cracking communities and political subdivisions is a frequent tool used to gerrymander. It is often used to prevent communities of color from accumulating political power. The standards are the appropriate requirements and, if followed, are likely to assist in drawing fair maps as well as set a workable standard by which any court can evaluate maps drawn by the redistricting commission or the Legislature. However, the requirement that the redistricting commission draw district lines to maintain the cores of existing districts contained in this subparagraph is anomalous. It appears to contradict the principles that the other provisions follow.

Maintaining the cores of existing districts makes it harder to achieve the standards set forth in the rest of the subparagraph. It is widely accepted that the current senate map is gerrymandered. Common Cause/NY provided detailed analysis of the deficiencies of the current senate map in testimony before LATFOR during the last redistricting cycle. Aside from the fact that there does not exist any population justification for the creation of the 63rd senate district, the demographic data did not support placing it in the capitol region. Examining downstate senate districts suggests that they were drawn in an arbitrary and capricious manner, in addition to being drawn approaching the outside acceptable deviations in size. It is much more difficult to achieve a fair map if the map drawer is required to start from a gerrymandered map. In our experience in drawing district lines, the procedure which is most likely to result in fair maps is to start from a blank page and fairly apply the standards enunciated to the demographic data. Accordingly, we recommend that the phrase “of cores of existing districts” be stricken from §4(c)(5). We also recommend amending the language of §5(c)(5) to prioritize keeping communities of interest together.

Eliminate Block on Border

In our experience drawing district lines, the requirement of adhering to block on border unnecessarily divides cities and results in unnecessary division of communities of interest. We recommend that the block on border requirement be eliminated.

Insure Complete Census Counts of All Residents Without Exclusion

§5(a) declares the public policy of our state that redistricting will be conducted based on the total number of inhabitants, irrespective of citizenship status. The redistricting constitutional provision properly allows the legislature to order a state census, if the federal census does not result in a complete count. To insure that such a state census is itself complete, we recommend adding language to §4(a) requiring a state census that counts the total number of all inhabitants.

The Commission's Procedures Should be Fair and Politically Neutral

As a matter of policy, it is Common Cause/NY's position that the procedural rules which govern the conduct of any governmental entity should be fair and apply equally to all parties and in all situations. Particularly in this era of great political divisiveness, we believe that shifting procedural rules and standards that change based on election results set a dangerous and destructive precedent. The goal of ensuring that no one political party can dominate the work of the redistricting commission can be more equitably and safely achieved by requiring that at least one of the unaffiliated members of the redistricting committee must vote with the majority in order for the final maps to be approved.

Accordingly, Common Cause/NY recommends that the redistricting provision be amended to create a politically neutral and uniform procedure for approving the maps by a) striking the language in §5(b)(6) which sets up a supermajority voting requirement in the event that the leaders of each of the two houses of the Legislature are of the same political party, b) adding language to §5(b)(5) to require that the two final members of the commission are unaffiliated with any political party and c) by striking the language in §4(b) which sets up shifting voting rules for the approval of the maps in the senate and assembly based on the party affiliations of the leaders of each house.

Common Cause/NY stands ready to assist in any way the process of improving our state's redistricting procedures.