

Making Local Redistricting Less Political: Independent Redistricting Commissions for U.S. Cities

Steve Bickerstaff

ABSTRACT

The article addresses at least three subjects not now addressed in the literature: (1) existing municipal redistricting commissions; (2) the need for independent commissions at the city level; and (3) the primary issues to be resolved in designing a city redistricting commission.

JUST LIKE THEIR COUNTERPARTS at the federal and state level, many municipal election districts must be redrawn every ten years to reflect changes in population. Yet, while commissions are increasingly popular in federal and state redistricting, virtually nothing has been written about their use at the municipal level. This is particularly surprising because many cities are charter or home-rule jurisdictions that generally have broad legal authority to adopt their own process for drawing local districts.

Municipal redistricting need not be a quintessentially political process. True, party and faction politics are an unavoidable part of law making even at the city level and, once drawn, every election district line has a political effect. However, there is a difference between the inevitable effect of drawing district lines and the controllable purpose behind that redrawing process.

This article will examine a potential model for municipal-level city independent redistricting commission derived from a survey of the 50 largest cities nationwide and the states with such commissions. The piece will also argue that a politically indepen-

dent redistricting commission is the best means of taking self-interest out of the redistricting process and increasing public trust.¹

A quick definition: for the purposes of this article, I consider a commission to be “independent” if it is both (1) autonomous, meaning its redistricting product is final without any action by the city council, and (2) politically independent, meaning that members of the commission are selected in a manner free of political influence from the city council or political factions.

The legal and political science literature is full of analyses of the role that personal and political party self-interest plays in the drawing of state and congressional districts. Similarly, courts usually assume that politics is inevitably a major factor in redistricting by a legislature. See, e.g. *Vieth v. Jubelirer*, 541 U.S. 267, 285–86, (2004) (indicating that partisanship is an “ordinary and lawful motive” in redistricting); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1297 (S.D. Fla. 2002) (indicating that the “raw exercise

Steve Bickerstaff retired from the University of Texas School of Law in Austin, TX, in 2012. He has represented state and local government jurisdictions on redistricting matters for over 35 years. He wishes to thank Professors Patrick Wooley and Joseph Fishkin and the members of the Austin, Texas, Independent Redistricting Commission for their thoughtful recommendations during the preparation of this article.

¹Many of the observations in this article are derived from my own experience during 35+ years in representing state and local governments in redistricting. I have been the attorney of record in at least 30 redistricting lawsuits, including over 15 that involved evidentiary trials or hearings and have guided over 100 different local governments through preparation of hundreds of official redistricting plans. While I believe that my observations generally are indicative of municipal redistricting nationwide, my experience is limited primarily to jurisdictions in Texas.

of majority legislative power does not seem to be the best way of conducting a critical task like redistricting, but it does seem to be an unfortunate fact of political life around this country”).

It is not surprising, then, that concerns about such self-interest are present at the municipal level as well. Media outlets in Los Angeles, Chicago, and Dallas all expressed concern and criticism about the 2011 round of redistricting in those cities. These media comments reflect a general public cynicism that exists in virtually all circumstances when elected officials draw their own election districts—a cynicism I believe is warranted given that city incumbents are just as concerned as their counterparts at the state level about the potential effect of redistricting on their own interests.

My observations do not arise from a mistrust of city officials. After all, I have successfully represented elected officials for 40 years. As such, I know that elected officials are seldom evil but always human. As politicians, they generally have worked hard and raised and spent large amounts of money to win election. There is, therefore, considerable temptation to seek a friendly district that will make reelection easier and less costly, and/or will further one’s own policy goals (or frustrate one’s opponents). Consequently, incumbents view every aspect of the redistricting process through a prism that focuses on the impact on reelection chances and the ultimate success of political and policy goals.

Moreover, it is helpful to consider how redistricting at the municipal level differs from the state level. One major difference is the number of seats involved compared to the number of residents. There is no established number of city council members nationwide; as a result, the number varies enormously from city to city. For example, the cities of Chicago and New York have 50 and 51 districts respectively; by contrast, the city of Los Angeles has only 15 councilmembers even though it has more residents than Chicago.

Another key difference is that many cities use nonpartisan elections in which numerous local factions compete for a voice on the city council. However, these factions also play a major role even in partisan local races. They may be self-identified as primarily pro-business, anti-tax, progressive, pro-real estate development, pro-environment, pro-growth, anti-growth, or as having some other interest. Neighborhoods, religious groups, racial, or ethnic organizations, such as gay and lesbian voters, that are not large enough to control a state legislative

or congressional district may organize and fight to create a city district “of our own” to gain clout on local issues.

Finally, most large cities have a disproportionately large percentage of racial and ethnic minority residents, which makes compliance with the U.S. Constitution and federal voting rights laws particularly important. Given even a modicum of racially polarized voting, the ability of minority voters to elect persons of their choice to a city council is affected by which census areas are included in a given district. Voting rights concerns, therefore, often come into tension with what incumbents believe is best for their political futures.

The biggest problem, though—which is not limited to the municipal level—is public concern about self-interest and self-dealing in redistricting. This has led to cynicism and public distrust of elected officials which diminishes their credibility in dealing with other issues.

I believe that given these characteristics and challenges, an independent redistricting commission is much better able to act in accordance with the legal and objective guidelines at the municipal level.

To determine the current status of municipal redistricting nationwide, I surveyed the 50 largest cities through use of city websites, news stories, e-mail messages, and telephone interviews to determine the cities that use a redistricting commission and the structure of those commissions. Here’s what I found:

- Only four of the 50 largest cities Tucson, Columbus (Ohio), Portland, and Seattle—elect all members on the city council at-large from the city as a whole. Seattle in November 2013 changed to primarily single-member districts. The first district election will be in 2015. New districts will be drawn in 2022 by an autonomous commission;
- Thirteen cities—Houston, Jacksonville, Indianapolis, Charlotte, Detroit, Memphis, Boston, Denver, Kansas City, Virginia Beach, Colorado Springs, Raleigh, and Arlington (Texas)—elect part of the council members at-large from the city as a whole or from “super districts,” but also elect part of the council members from single-member districts; and
- Thirty-three cities use only single-member districts.

These results indicate that the vast majority—47 out of 50—of the nation’s largest cities must redistrict

as necessary (usually once per decade) to equalize the number of persons in each election district. Of these, 40 out of 47 allow the city council to draw its own districts.

Note that because large cities tend to be charter or home-rule jurisdictions, they can adopt their own redistricting process without any need for state legislation to authorize it to do so. As a result, existence of a state redistricting commission is not necessarily indicative of whether (and if so, how) a city within the state uses a commission.

PART I: COMMISSIONS AT THE MUNICIPAL LEVEL

My survey found that many large cities used at least some version of a commission—though not independent—during the latest redistricting cycle.

Advisory commissions

Advisory commissions are common. They are usually appointed by existing members of the city council and thus usually produce a map that embodies the political or personal interests of a majority of the city council. Often, members of the city council interact privately with the members of the advisory commission (before and after appointment) to produce a politically satisfactory map. A recommendation from an advisory committee provides each council member with cover for adopting a plan that serves his or her own self-interest and neutralizes public testimony or submissions.

Of course, the reverse can also occur when appointments to an advisory commission—often driven by political considerations or rewards to individuals/groups supporting an incumbent's self-interest—yield members who see an opportunity to further their own ambitions as part of the process. When this happens, an appointee may see membership on the commission as an opportunity for public exposure rather than public service.

Interestingly, none of the 50 cities surveyed use a variation of this approach, which makes the advisory commission's plan final if the city council does not adopt its own plan within a specified length of time.²

No variation of an advisory commission approach prevents political or personal self-interests from prevailing over the public interest. In fact, they often encourage politics. There are many avenues through which political considerations can permeate the advisory

commission process. Ultimately, of course, the advisory commission's dominant characteristic is that it is only advisory; it may recommend a map to the city council, however, the city council is free to make changes in the recommended map or to substitute another plan entirely.

My survey found that only seven of the nation's largest 50 cities have autonomous redistricting commissions. These commissions are specifically discussed below.

Autonomous commissions appointed by the city council or other local officials

The City and County of San Francisco uses an autonomous commission (i.e., the Redistricting Task Force) to redraw city council districts. The mayor, board of supervisors, and city elections commission appoint the nine members of the task force.³ Appointees are selected from among applicants that qualify to serve on the commission. In the views of some media, appointments to the commission are heavily influenced by "the power circles of business, politics, labor and nonprofit groups" though the 2011 version received praise from community observers.

The autonomous commission in Seattle does not become active until 2022. It will consist of two members appointed by the mayor and two by the council (by 2/3 vote). These four commissioners select a fifth member.

Bipartisan commissions

Two cities in the 50 surveyed have autonomous bipartisan commissions:

- New York City's charter provides for creation of an autonomous Districting Commission to draw the 51 city council districts. Members of the commission are appointed by the council delegation of the major political parties (five from the largest party; three from the second major party) and the mayor (seven appointments) so that "individuals enrolled in a single political party shall not be a majority of the total number of members of the commission."⁴ The City of

²One variation: In Baltimore, the mayor proposes a redistricting plan to the city council that becomes final unless the city council adopts a different plan within 60 days of receiving it.

³City of San Francisco Charter, § 13.110(d).

⁴City of New York Charter, ch. 2-A, § 50.

New York has used this structure for redistricting since 1990 when the U.S. Supreme Court, in *Board of Estimate of the City of New York v. Morris*, 489 U.S. 688 (1989), held that districts had to be of approximately equal population instead of representing solely political units, such as boroughs.

- Since 1990 Tulsa, Oklahoma's nine city council districts have been drawn by an autonomous Election District Commission. The commission consists of three members—one appointed by the mayor (with the approval of the council) and one appointed by each of the two largest political parties. In 2011, the commission by 2–1 adopted a plan presented by the mayor's appointee to the commission and identified with the Republican Party after initially presenting five different maps for public comment. Democrats on the city council attacked the final map as aimed at defeating the Democratic incumbents and tried unsuccessfully to block use of the commission's plan before the 2012 elections. In 2011, Tulsa approved a charter amendment declaring future elections nonpartisan.

Independent commissions

There are three city redistricting commissions that are autonomous and on which the commission members are not appointed by the city council.

In 1992, the City of San Diego adopted amendments to its charter that set up an autonomous redistricting commission. Appointments to the commission are made by municipal judges and include members providing “geographic, social and ethnic diversity,” “a high degree of competency,” and “a demonstrated capacity to serve with impartiality in a non-partisan role.”⁵ The city council can become the appointing authority only if the municipal judges refuse to serve.

The City of Minneapolis has partisan elections. The city charter gives authority for the redistricting of city wards to the Minneapolis Charter Commission.⁶ The 24 members of this charter commission are appointed by the chief judge of the local judicial district. Before 2010, Minneapolis redistricting was done by a bipartisan commission with two members appointed by the city council and the rest selected by the charter commission from lists submitted by the two major parties.

In November 2012, the voters of Austin, Texas adopted a charter amendment that switched the city

council from a seven-seat at-large election system to ten single-member districts with citywide election of the mayor—a change that takes effect for the 2014 election. Under the charter amendment the districts are drawn by a 14 member independent commission.⁷ The commission adopted a final district map on November 28, 2013 for the November 2014 election.

The independent redistricting commission approved by Austin voters is patterned primarily after California's state independent commission. The specific aspects of the California commission are discussed below. The Austin commission is discussed further below.

PART II: STATE MODELS

By the latest redistricting cycle, 23 states had legally formalized some mechanism (usually by constitutional amendment) for officially drawing redistricting plans outside the state legislature. Twenty-two of these states used commissions. Another, Iowa, has a process through which redistricting plans are drawn initially by a nonpartisan staff, but require approval by the legislature.⁸ Several state commissions warrant specific attention as possible models for city action.

The most common form of redistricting commission at the state level is the bipartisan commission. Ten states have such commissions.⁹ These commissions are autonomous of the state legislature and are sometimes called independent commissions, but really are designed to be bipartisan (i.e., there is some effort to balance the membership of the commissions between the two major parties), not politically independent. Originally seen as a positive reform, these bipartisan commissions have largely been a disappointment. The major drawback for such commissions is that in their effort to reach a compromise for fairness between the two major

⁵San Diego, California Municipal Code, art. 7, § 27.1403.

⁶City of Minneapolis, Minnesota Charter, ch. 1, § 3. The neighboring city of St. Paul also vests its charter commission with similar authority.

⁷Ordinance No. 20120802-015, adopted on November 6, 2012 and codified as City of Austin Charter, art. II, § 3.

⁸Iowa Code, ch. 42.

⁹Alaska, Arizona, Colorado, Hawaii, Idaho, Missouri, Montana, Pennsylvania, New Jersey, and Washington.

parties, they often freeze out other political parties and end up gerrymandering districts to satisfy the incumbents of both major parties despite criteria established to prevent such a result.¹⁰ A plan that emphasizes partisan compromise between Republicans and Democrats may avoid extreme partisan bias in favor of one of these parties, but at the cost of sacrificing the interest of unaffiliated or independent voters, and furthering legislative gridlock between the two major political parties.

Some observers characterize the Arizona bipartisan commission mechanism for drawing state legislative and congressional district as independent because the state constitution provides for the selection of a five-member commission from a pool chosen by the state commission on appellate judicial appointments. I categorize this commission as a bipartisan commission because the first four members of the commission are selected from this pool by the legislative leaders of the two parties—making the commitment to partisanship a key factor in the selection. I do not think that the Arizona commission provides a good model, even for cities with partisan elections, primarily because it is too small to facilitate compromise among the different interests, it does not require a majority of each party on the commission to approve the plan, and a majority of its membership is chosen by politicians.

The only truly independent state commission is the California Citizen Redistricting Commission.¹¹ An indirect commissioner selection process is designed “to produce a commission that is independent from legislative influence and reasonably representative of this State’s diversity.”¹² Critics of the California commission described the commissioner selection process as overly complex and the requirement of at least three affirmative votes from commission members affiliated with each political party to approve each plan as unworkable. Many predicted disaster. However, the redistricting process and redistricting plans adopted by the California Citizen Commission in 2011 generally are seen as a great success with the districts in the plans apparently drawn in accordance with the constitutional criteria. No racial or ethnic minority organization challenged any of the plans in court and Republican court challenges to the plans were quickly rejected. The success of the commission is impressive in a state with the racial, ethnic, and political diversity of California.

PART III: THE ARGUMENT FOR AN INDEPENDENT REDISTRICTING COMMISSION FOR CITIES

The best method for lessening partisan and personal self-interest in a city’s redistricting process is difficult to discern for at least three reasons. First, redistricting occurs basically only once every ten years, meaning there are few data points to study for each jurisdiction. Second, each jurisdiction’s experience is unique, with the diversity in personalities and in political, racial, and ethnic composition

¹⁰In this past redistricting cycle alone, the state supreme court of six of these ten states invalidated redistricting plans drawn by state bipartisan commissions as violating the criteria set in the state’s constitution. The common thread among all of these cases is that the bipartisan commission ignored a clear constitutional requirement in order to allow itself greater flexibility to achieve a politically viable product. *See Holt v. 2011 Legislative Reapportionment Commission*, 2012 WL 360584 (Pa, Jan. 25, 2012) (In holding the redistricting plans of the Pennsylvania Legislative Reapportionment Board invalid, the Pennsylvania Supreme Court found that the commission “could have easily achieved a substantially greater fidelity to the [state constitutional] mandates of compactness, contiguity, and integrity of political subdivisions”); *In Reapportionment of Colorado General Assembly* (Case No. 11SA282), P.3d ___, 2011 WL 5830123 (Colo. Nov. 15, 2011) (The Colorado Supreme Court had done it also in 2002, *In re Reapportionment of Colorado*, 45 P.3d 1237 [Colo., 2002]); *Twin Falls County v. Idaho Commission on Redistricting* (Case No. 39373), P.3d ___, 2012 WL 130416 (Idaho, Jan. 18, 2012); *Missouri ex rel. Teichman v. Carnahan*, No. SC92237 (Missouri, Jan. 17, 2012); *In re: 2011 Redistricting Cases*, __P2d ___, 2012 WL 1414341, _ S-14721 (Alaska, May 10, 2012) (Seven months later, the Alaska Supreme Court rejected the commission’s adjustments of its plan *In re: 2011 Redistricting Cases*, S14721 [Alaska, Dec. 28, 2012]); *Solomon v. Abercrombie*, __P2d ___, NO. SCPW-11-0000732 (Hawaii, Jan. 6, 2012) (The commission failed to remove nonresident and military from the apportionment base as required by the state constitution).

In another two of the ten, the ostensibly neutral “tie-breaker” was alleged to be biased in favor of one political party and voted with that party on the final redistricting plan. In Arizona, the Republican governor failed in her effort to remove the chairman of that state’s commission for being biased in favor of the Democrats. In New Jersey, the governor vetoed an appropriation of \$179,000 for the projects of a Rutgers professor allegedly because the professor as the “tie breaker” on the state’s commission had voted with the Democrats. [*This latter episode is discussed in the companion piece on New Jersey’s “eleventh member.” —ed.*]

¹¹Proposition 11 (2008) codified as California Constitution, art. XXI and California Government Code, §§ 8252–8253.6. A subsequent initiative and referendum in 2010 (Proposition 20) extended the commission’s jurisdiction to include congressional districts.

¹²California Citizens Redistricting Commission Report on 2011 Redistricting 2 (2011).

making an enormous difference. Third, redistricting generally occurs suddenly and simultaneously at every level of government—making a comprehensive study difficult.

Nevertheless, several lessons are clear. Redistricting by officials that must seek (re-) election in those same districts creates an obvious conflict of interest. Advisory commissions do not overcome this conflict because they are by nature political and ultimately leave the final redistricting decision to the elected officials. Autonomous bipartisan commissions have, in some circumstances, reduced partisan conflict, but only by increasing incumbent protection and potentially freezing out third parties; thus, further search for reform is necessary.

Three recent trends in redistricting reform are potentially adaptable for cities. One, patterned generally after the process in Iowa, envisions redistricting by an outside body (e.g., a nonpolitical staff or commission) that takes effect unless rejected or changed by the city council. A second trend (e.g., Florida) leaves the redistricting process to the legislature or city council, but imposes strict constitutional or statutory limitations on any plan adopted by that body, such as a requirement that a redistricting plan may not be drawn with the intent of favoring or disfavoring any political party or individual.¹³ A third trend (e.g., California and San Diego, Minneapolis and Austin) is toward an autonomous citizen commission designed to remove political and personal self-interest from the process.

Independent commissions are especially suited for cities. Unlike Iowa, few cities have the capacity to dedicate employees to redistricting for a decade or to guarantee the city office's independence from political influence; moreover, Iowa's relative homogeneity differs from cities where the population is racially and ethnically diverse. Unlike Florida, the option of leaving redistricting authority with the city council under strict limitations on that body, does nothing to dispel the conflict between those limitations and the line-drawers' self-interest. Indeed, in order to be effective this approach depends on an engaged judiciary. Neither of these two options is likely to satisfy voters who are cynical about officials controlling the redrawing of the districts in which they seek reelection.

A politically independent commission is the best option. It enables cities to choose unbiased staff (attorneys and mapping consultants) based on merit,

not politics. Decisions by an independent commission are more likely to be made on the basis of redistricting criteria alone rather than as a result of political horse-trading over the political effect of any particular change or involving other issues pending at the council. This better positions such a commission to be transparent in its decision making and to hear witness testimony and legal advice without the distorting effects of any personal or political agenda. Therefore, it is not surprising that independent city commissions have generally won public plaudits.

I have seen no indication of scholarly opposition to the use of independent commissions at the municipal level. In fact, as seen in Part I, there are more independent commissions currently in use in American cities than at the state level. Although some critics suggest that "ordinary citizens" lack the same capability as politicians for understanding the complexities of redistricting, my experience in redistricting and the achievements in Austin say otherwise. City council members generally lack any meaningful expertise in redistricting and virtually always seek special assistance from experienced lawyers and mapping experts to help in redistricting. This same expert assistance can be furnished for the same or less cost to a citizen commission. Other costs of the independent commission are similar to those incurred by a city when it uses an advisory commission for conducting hearings and recommending district lines to the city council.

Aside from the general distrust of the capability of the public, some critics insist that the "pluralist" process of redistricting under influence by a legislative body is preferable to redistricting by an "insulated" commission. However, redistricting reform needs more emphasis on the express requirements of law and charter; not more incentives for partisan compromise or incumbent discretion in the drawing of districts.

Even jurisdictions with independent commissions, however, must be alert to the effort of politicians and others to game the process. It was reported that some Democratic witnesses tried to mislead the California commission. In San Diego, a city council member suggested that the independent commission track the boundaries of the city council's own

¹³E.g., Florida Constitution, art. III, § 21.

land-use “community plans” for its election districts. Members of an independent commission are qualified to identify and to disallow efforts to game the system, but they must be vigilant.

PART IV: DESIGNING AN INDEPENDENT REDISTRICTING COMMISSION FOR CITIES

For a redistricting commission to be effective both in producing redistricting plans in accordance with the approved criteria and in winning public trust, it must be independent of all of the political self-interests that affect the integrity of the redistricting process. Existing state and city commissions provide examples for how different jurisdictions have tried to achieve this independence.

Methods for selecting the members of the commission

The initial step toward designing an independent commission for a city is to find a truly fair and apolitical means of choosing the members of the commission. The natural tendency of party officials or members of a city council is to select someone aligned with a particular incumbent or political faction. As a result, members selected in this manner are less likely to be unbiased in their decisions on the commission.

Several states use the judiciary as an “impartial” means of screening potential members of a bipartisan commission or as a check on partisanship. This alternative deserves attention. Several states use the judiciary to choose a deciding vote and chairman for a commission, when other members of the commission cannot agree on the additional member. In other states the state judiciary actually picks some members of the redistricting commission or is expected to intercede to determine the legality of any redistricting enactment or if the state commission cannot agree on a redistricting plan.

Cities usually lack the authority to include the state judiciary in the redistricting process. Nevertheless, two existing independent city commissions rely on the judiciary to directly or indirectly select those responsible for redistricting city council districts. The city council districts in Minneapolis are drawn by the local Charter Commission, which is selected by the chief judge of the local district. However, this route for achieving judicial involve-

ment is not possible by the city alone in most states and depends instead on state involvement.¹⁴ The City of San Diego attempted to use the municipal judiciary.¹⁵ The possibility of using municipal judges to select commission members was posed in Austin, but supporters viewed the judges (city employees) as too susceptible to influence by the city council and decided instead to use the city auditor.

The means of selecting commission members is essentially the same in California and Austin. In each, the state or city auditor has the purely administrative role of screening the applicants for the redistricting commissions for eligibility and potential conflicts of interest in accordance with preset requirements. A review panel of independent auditors (certified public accountants) in each jurisdiction (chosen at random from eligible individuals) then creates pools of the most qualified applicants based in part on the applicants’ ability to be impartial and appreciation for the jurisdiction’s diverse demographics and geography. The first eight members of the 14 member independent redistricting commission in each jurisdiction are selected at random from these pools so no person is directly responsible for the selection or appointment of a commission. These eight commissioners then select the additional six commissioners from the persons remaining to maintain the racial, ethnic, gender, and geographic diversity of the redistricting commission.

This indirect method of selecting commissioners now in use in California and Austin has been described by detractors in both locales as “Rube Goldberg-like.” Nevertheless, it worked well in both jurisdictions. In Austin, the commission members worked exceptionally well together and most decisions were made by consensus, including adoption of the final plan. California’s commission successfully refuted allegations of wrongdoing by one Republican member.

No means of selecting members of a redistricting commission is foolproof. But virtually every city has an auditor that is a certified professional and, by the nature of the office that he or she holds, is more or less independent of the political

¹⁴However, in Tulsa, the city charter provides that a state district judge is to appoint a commission if the authorized city officials fail to timely do so. Tulsa City Charter, art. VI, § 10.1.

¹⁵The city subsequently eliminated its municipal court system and was therefore compelled in 2011 to use retired municipal judges to select the members of its redistricting commission.

influence of the city council. Given the successful role played by auditors in California and Austin, I urge consideration of this officer as a part of the selection process.

Eligibility to serve on the commission

Avoiding political influence means limiting membership on a city redistricting commission to competent persons interested in governance but unlikely to be driven by either their own political agenda or one set by politicians. A basic requirement is that a person must be a resident and voter of the city to be eligible for service on the commission. However, the length of time that he or she must have maintained this status can vary.¹⁶

Provisions often limit who can serve on the commission. The most common bar among states is for “public” or “elected” officials. Recently enacted provisions in Arizona and California are more detailed both in the breadth of their exclusions and in their effort to assure the bipartisan nature of the commission by requiring that, in order to be eligible, applicants must have been registered with the same party for 3–5 years immediately preceding appointment.

The charter provisions limiting who is allowed to serve on a city’s redistricting commission are even more detailed. I have listed below the following criteria for eligibility either utilized today by cities (or adapted from state requirements) to define the qualifications for eligibility to serve on a city redistricting commission.¹⁷ Such individuals must:

- Be a United States citizen;
- Be a registered voter and have been registered in the city for a specified number of years;
- Have voted in a prescribed number of recent city elections;
- Have demonstrated an ability to serve with integrity and impartiality;
- Have a high degree of competency to carry out the responsibilities of the commission;
- Have a flexible schedule for attending commission meetings;
- Have a general knowledge of the city and its neighborhoods.

In addition, the individual or any member of his or immediate family must not:

- Be or have been an elected official, or a candidate for any elected office;
- Have served as an officer, employee, or paid consultant of a political party or of the campaign committee of a candidate for elective state, county, or city office;
- Be or have been a state or local registered lobbyist;
- Be currently paid under a contract with the city or a controlling person of a firm that is operating under a contract with the city;
- Be or have been appointed to a city office;
- Have contributed (or made an independent expenditure) more than a specified amount to or on behalf of a candidate for city office.

While no current city charter requires that a qualified applicant must have been in a political party long enough to assure that he or she is not a “sleeper” from another party, such a requirement might be appropriate in cities with partisan elections.

In theory, the tougher the criteria for eligibility, the harder the potential task of finding persons to serve on a commission. Nevertheless, even where the requirements are most demanding (i.e., Austin), approximately 15 eligible certified public accountants applied to serve on the three person Applicant Review Panel and over 450 eligible persons applied for the 14 member commission.

The criteria for selecting members of a commission

One common objective for selecting members of a commission is diversity among members of the redistricting commission. Sometimes this is as simple as a general requirement for geographic diversity. On other occasions, however, a requirement for geographic diversity may be very specific.¹⁸ In some instances a requirement for geographic diversity also serves as an indirect means of furthering

¹⁶In Austin, a person is eligible for the commission only if he or she has been a registered voter in the city for the preceding five years and has voted in at least three of the past five city general elections.

¹⁷Although some form of all of these limits on eligibility now exists at a state or municipal level, it is possible that one or more of these exclusions could be challenged under the First or Fourteenth Amendments to the U.S. Constitution.

¹⁸For example, the state of Colorado requires that at least one of the appointees must reside “west of the continental divide.” In New York City, the commission must have at least one person from each borough.

the goal of racial and ethnic diversity as long as minority housing patterns are clustered within a city.

Mandating the selection of a city's commission members to assure racial, ethnic and gender diversity also is common. San Diego, Austin and New York each require such diversity for the commissions in those cities. The Austin charter is unique in providing that one of the members of the independent redistricting commission must be a student who is duly enrolled in a community college or university in the City of Austin.

The most important characteristics for members of an independent commission are competency, impartiality, and integrity. The Austin charter requires that the persons selected by the Applicant Review Panel for the pool of potential commissioners shall be the "most qualified applicants on the basis of relevant analytical skills, ability to be impartial, residency in various parts of the City, and appreciation for the City of Austin's diverse demographics and geography." The charters in San Diego and Minneapolis also have similar requirements as part of their selection process.

Members of an independent commission should be selected with the objective of having a diverse commission of informed and engaged persons willing to follow only the express criteria and willing to put impartiality above partisan or faction allegiance. The means of selecting the commissioners must be designed to achieve this goal.

Participation by the city council

It is appropriate to consider how much input to allow the city council. Although it is essential that the members of the commission must not be embroiled in city politics, some formal role for members of the city council may be appropriate. The Austin charter provides one alternative; each member of the city council is entitled to eliminate one person (a total of seven persons in 2013) from the pool of 60 applicants selected by the Applicant Review Panel. The council has only five days in which to exercise this option so that it cannot become a drawn-out political process. In 2013, no member of the Austin city council exercised this right.

Although some limited role for the city council may be appropriate, it should not be able to affect the selection process. In Austin, the members of the Applicant Review Panel may "not communicate directly or indirectly with any elected member of

the Austin City Council, or their representatives, about any matter related to the nomination process or any applicant prior to the presentation by the panel of the pool of recommended applicants to the council of the City of Austin." A similar provision exists for the California commission.¹⁹ However, most city charter and state redistricting provisions are silent on the issue of communications between the city council and the persons responsible for the selection process.

Once the commission is selected, the issue becomes the extent to which communications should be allowed with commissioners and commission staff outside of a public hearing. Most city charter and constitutional provisions are silent on this point. This issue is discussed further under "transparency" below.

Selecting the commission staff

Essentially every large local government using single-member districts (and many small ones) hires expert staff to assist during the decennial redistricting process. Legal counsel and mapping consultants hired by a city council to help on redistricting are part of the reason for incumbent and faction self-interest permeating a city's final plan.

The competition among legal counsel and mapping experts for this work is intense at the city level. In some instances the hiring decision may actually be determined by the degree of allegiance owed by the legal counsel or redistricting expert to a member of the city council or its controlling political faction. However, even when the hiring decision is not driven by such obvious political interests, a legal counsel or redistricting expert is unlikely to be hired if he or she is not perceived by the incumbent officials as sensitive to the interests of those officials. Future business opportunities for the legal counsel and mapping expert with this same or another jurisdiction may depend on satisfying the city's incumbents. Legal counsel and mapping experts for a commission do not confront these same pressures and are better positioned to give assistance that is not skewed by their own self-interest considerations.

Although a city redistricting commission has a limited existence and ceases to function (if not to

¹⁹California Government Code, § 8252.

exist) once a redistricting plan is final and in effect, it needs a staff for the period in which it is active. The charter provisions for an autonomous commission should require that the city council fund the commission and its staff. Such a provision is essential to assure the independence of the commission including the costs of multiple public hearings, correspondence, transparency, experts, legal counsel and defending the plan if necessary in subsequent litigation.

A commission's staff should be experienced in redistricting, unbiased, and otherwise qualified. The most difficult task for the commission is making objective decisions based on public testimony. A commission's staff must be committed to assisting the commission in this task and not acting to enhance its own reputation or to achieve its own goals. Requiring staff decisions to be made only by an extraordinary majority of the commission is one option.

However, dependency on outside consultants may be less by the next round of redistricting. Technology now makes it possible for a court to assess redistricting plans on the basis of actual data rather than on the basis of data filtered through findings of fact or an expert witness. The same is true of a redistricting commission. Technology may make the redistricting consultant less important or even obsolete by 2021; at least it may lessen the need for consultants selected for their political prowess.

Restrictions on commission members after serving

To prevent the influence of politics on the decision making of the commission, it is also critical to restrict what a member can do after serving on the redistricting commission. Several states and cities impose such limitations.

This fundamental limitation prohibits any commission member from seeking election in any of the districts drawn by the commission. Other limitations designed to prevent political influence on commissioners may include time-limited restrictions on a commissioner's right to become a lobbyist, city employee, or city contractor.

Any limitation on the future activities of a member of the commission is also likely to discourage a person with political ambitions from applying to serve on the commission. If a person thinks that he or she might want to be a candidate in the future, he or she is unlikely to risk serving on the commission.

Legal criteria used in city redistricting

The legal criteria for drawing city council districts are expressed in state or federal law; others are expressed in the city charter. These expressed criteria are the only legitimate ones for determining how districts should be drawn. They vary by jurisdiction and change with time. There is not, however, any normative interest in redistricting that somehow establishes an ideal objective.

The nearest to a normative public interest for redistricting existing in this nation is the principle that election districts must be drawn on the basis of "one person, one vote." However, this policy was ignored for decades by state and local governments. Even today, no other nation adheres to or enforces this policy as strongly as the United States. Although it is difficult to imagine that the federal courts will ever abandon this principle, it remains under challenge as courts wrestle with the issue of whether the principle requires election districts with an equal number of persons or an equal number of voters.

A second set of noteworthy principles also has its origin at the federal level. The courts have found that the U.S. Constitution prohibits redistricting schemes that create racial gerrymanders or are invidiously discriminatory. At the same time, Section 2 of the Voting Rights Act of 1965 imposes legal constraints on the result of redistricting plans for minority voters covered by the Act.²⁰ As important as these principles are for redistricting in U.S. cities today, they are not recognized worldwide and, even in this country, are currently in flux as shown by the United States Supreme Court decision in *Shelby County v. Holder*.

Amazingly, many of the cities that leave redistricting to the city council have little or no expressed criteria for how districts are to be drawn. By contrast, the charters of cities that require commissions generally also have criteria for how the districts are to be drawn.

The most common requirements are for districts to be compact, contiguous and approximately equal in population. These requirements are recognized as generally being aimed both at benefiting the voter and at preventing gerrymanders. However,

²⁰42 U.S.C. §§ 1973 et seq.; see *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

cities may provide very specific requirements based on the circumstances of the particular jurisdiction.²¹ City charters also often provide for the recognition of political subdivisions or boundaries within the city. A common requirement at the city level is that to the extent possible the districts should be built using existing election precincts.

These criteria are sometimes at odds. As a result, it is useful if the charter establishes a hierarchy of these criteria to make clear which criterion is more important when a conflict exists.

Under the traditional redistricting process, the city council member must constantly weigh what is good for his or her political future against what is required by the federal or state law, or the city charter, or sought by public testimony. In this balancing act, the council member's self-interest has an advantage. Courts defer to redistricting plans enacted by a state legislature or local governing body because, as with any legislation enacted by such an elected body, the enactment is presumed to be constitutional and embedded with public policy decisions made by the public's elected representatives. The judicial inquiry into the legality of a legislature or governing board's redistricting plan starts and stops with whether the plan violates any specific legal constraint. The presence in a redistricting plan of an officeholder's personal and political self-interest is not a basis for holding a redistricting plan invalid. As a result of these presumptions, it is relatively easy to disguise a lawmaker's self-interest with some vague and imagined public interest when determining that interest is left to the same lawmaker's discretion.

On the other hand, autonomous redistricting commissions are not elected and their redistricting plans do not necessarily enjoy the same presumptions of validity or public interest that accompany a plan enacted by a legislature or city council. This can be seen as a practical matter in many of the recent court decisions striking down state bipartisan commission plans. The Supreme Court of Pennsylvania expressly held that, unlike a state legislature's redistricting plan, the state's commission plan was not entitled to presumptions of validity.²² It is reasonable to assume that a city redistricting plan too must adhere more closely to the express criteria set by federal and state law and the city charter than one enacted by the city council. If this is true, personal and political self-interests cannot so easily be disguised within other imagined

public interests as can occur in a plan drawn by the city council.

Several charters or state constitutions expressly prohibit a redistricting plan being drawn to advantage or protect an incumbent. The Austin charter goes further by prohibiting districts being drawn to favor or discriminate against any candidate, incumbent, or political group. A common means of furthering this goal is to also prohibit the consideration of certain data, such as incumbent residences. An independent commission is an effective means of dealing with the exclusion of election data and incumbent residences because the commission members have no personal use for such data.

Achieving transparency in decision making

Historically, openness and transparency in redistricting decisions by a city council has meant little more than a routine of public hearings, with formal votes occurring in public. Testimony at these public redistricting hearings is often parochial or orchestrated by the political parties or factions and has little effect on the final plan. Although the city council's final votes occur in public, the final plan has generally been crafted out of sight and with attention to the political compromises necessary to secure the votes needed for final adoption.

As a result, most residents remain apathetic throughout redistricting by politicians. Many see the hearings as a charade and accept that a city council ultimately will do whatever a majority of the council wants to do (and private lobbying permits) regardless of public testimony. They believe cynically that if the public testimony coincides with an incumbent's self-interests, the incumbent will see it as good; if not, then some "public interest" can be imagined by the council members to explain

²¹For example, the city charters in New York and Minneapolis require that a district must be no more than twice as long as it is wide. The New York charter also specifies that whenever a part of a district is separated from the rest of the district by a body of water, there must be a connection by a bridge, a tunnel, a tramway, or by regular ferry service between the parts of the district. The Austin charter requires that nearby areas of population cannot be bypassed for more distant population. The Minneapolis charter specifies that "boundary lines shall follow the centerline of streets, avenues, alleys and boulevards."

²²Holt v. 2011 Legislative Reapportionment Commission, 2012 WL 360584 (Pa, Jan. 25, 2012).

how the final redistricting plan fails to incorporate the result suggested by the public testimony.

An essential starting point for achieving transparency in decision making is preventing non-public communications about redistricting with the members and staff of the commission. In an effort to prevent private one-on-one lobbying, California and Austin forbid any member of the commission or its staff communicating “with or receiv[ing] communications about redistricting matters from anyone outside of a public hearing.” This prohibition applies to the members of the city council.

Technology has dramatically increased the opportunity for transparency and for public participation in the redistricting process. A basic tool for an independent commission is the commission website. Essentially all city redistricting commissions in the 2011–2012 redistricting cycle had a website through which basic information was available. However, the independent commission in Austin went further. Moreover, instead of voting on different redistricting plans as proposed by its members, the Austin commission in open meeting (video recorded and televised) went about assigning each city election precinct one-by-one to a district. At least two additional possibilities for public participation (public access to geographic information systems [GIS] and availability of mapping consultants to help members of the public evaluate plans) exist today, but were not used in Austin. By the next time redistricting is certain to come around again (2021), technology may allow for even greater public awareness and participation. This technology should be fully utilized.

Of equal or greater importance than mere public participation is the opportunity for the public to react meaningfully to a commission’s proposed process and the ability of the commission to respond to public comments. Such an opportunity must be provided many times through the repeated dissemination of maps, online and by print, as the maps are changed in response to public comment.

Drawing election districts with equal population is a zero-sum process. No plan pleases absolutely everyone. Under such circumstances, making the process fair and the decision maker responsive to public comment is as critical to winning trust from a skeptical public or activist organization as the specifics of the final plan itself. An independent commission, a transparent redistricting process, responsive decision making, and the smart use of technology make this possible.

CONCLUSION

The voters of this country are increasingly skeptical and discouraged about a political system that seems trapped in a mindless gridlock between the two major political parties. The largest plurality of voters now denies affiliation with either of these two parties. Yet, when redistricting scholars write about reform, they generally focus on how best to achieve political “fairness” between the Democrats and Republicans. This is a narrow and wrong-headed view that inspires gridlock and only further entrenches these two parties and their affiliated incumbents. Redistricting should be a periodic process that changes the boundaries of voting districts to reflect population changes and does so in accordance with express requirements that define the public interest. Nothing more! No political party or faction, individual or incumbent should be allowed to use the process to further their own self-interest.

Critics of an independent commission urge that only politicians and their partisan supporters know how best to redistrict. History has shown otherwise. Entrusting redistricting to the politicians elected from those districts, or their surrogate commissions, creates an obvious conflict of interest and has been a mistake. A politically independent commission provides the best hope for protecting the public interest and eliminating or controlling the influence of such self-interest in redistricting.²³

Just as existing charters vary widely, each city must feel free to design its own provision for an independent redistricting commission based on

²³City councils have been reluctant to give up authority over redistricting. The changes in San Diego and Minneapolis came only after intense public and media campaigns aimed at eliminating political self-interest and “cronyism” from the redistricting process. Sometimes, when available, voters must effectively cut a self-interested city council out of the approval process through initiative and referendum amendment of the city charter as happened in Austin. This alternative must remain as a viable option for change. In Austin, Texas, provisions for the city’s independent redistricting commission were submitted to the voters in 2012 through an initiative petition after supporters of single-member districts and the commission idea lost confidence in the Austin city council acting on its own to do so. Some members of the Austin city council openly opposed this initiative and charter change. In California, the independent commission was created through a voter initiative only after its supporters had tried unsuccessfully for three years to win legislative approval of a constitutional amendment creating such a commission. Many members of the California legislature opposed adoption of the amendment in the 2008 election. *See* Gerrymander: The Movie (2010).

local circumstances. Existing provisions only provide examples. It is critical, however, that any selection of wording from among the many options be guided by the primary objectives of making the commission independent of all self-serving personal and political interests and giving voters confidence in the fairness of the process.

Address correspondence to:

Steve Bickerstaff
University of Texas School of Law
727 E. Dean Keeton Street
Austin, TX 78705

E-mail: sbickerstaff@utexas.edu