

EDITORIAL

A DEFENSE OF LEGISLATIVE REDISTRICTING

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Virginia is one of thirty-six states in which the legislature holds primary responsibility for the process of redrawing the lines of legislative and congressional districts after the completion of each decennial census.¹ During the last two sessions of the Virginia General Assembly, however, there have been concerted efforts by Governor Tim Kaine, General Assembly Democrats, and a collection of interest groups calling themselves the Virginia Redistricting Coalition to limit the legislature's responsibility for redistricting.² In 2008 and 2009, those efforts failed.³

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1. See NATIONAL CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010 178–79 app.B (Draft Version 2009), available at http://www.senate.mn/departments/scr/redist/Red2010/Redistricting_Law_2010.pdf.

2. See Anita Kumar, *Delegates Toss Early Voting, Redistricting Bills*, WASH. POST, Jan. 19, 2009, at B2; Virginia Redistricting Coalition, Home, <http://www.fixthelines.org/> (last visited Mar. 17, 2009); see also Virginia Redistricting Coalition, Coalition Members, <http://www.fixthelines.org/CoalitionMembers/tabid/564/Default.aspx> (last visited Mar. 17, 2009) (listing members of the coalition).

3. H.B. 1685, Va. Gen. Assembly (Reg. Sess. 2009) (left in the House Privileges and Elections Committee); H.B. 1793, Va. Gen. Assembly (Reg. Sess. 2009) (left in the House Privileges and Elections Committee); H.B. 2538, Va. Gen. Assembly (Reg. Sess. 2009) (left in the House Privileges and Elections Committee); H.J. Res. 702, Va. Gen. Assembly (Reg. Sess. 2009) (left in the House Privileges and Elections Committee); S.B. 926, Va. Gen. Assembly (Reg. Sess. 2009) (left in the House Privileges and Elections Committee); S.J. Res. 281, Va. Gen. Assembly (Reg. Sess. 2009) (left in the Senate Privileges and Elections Committee); S.J. Res. 312, Va. Gen. Assembly (Reg. Sess. 2009) (left in the Senate Privileges and Elections Committee); H.B. 339, Va. Gen. Assembly (Reg. Sess. 2008) (left in the House Privileges and Elections Committee); H.B. 836, Va. Gen. Assembly (Reg. Sess. 2008) (left in the House Privileges and Elections Committee); H.B. 1070, Va. Gen. Assembly (Reg. Sess. 2008) (left in the House Privileges and Elections Committee); H.J. Res. 28, Va. Gen. Assembly (Reg. Sess. 2008) (left in the House Privileges and Elections Committee); H.J. Res. 70, Va. Gen. Assembly (Reg. Sess. 2008) (left in the House Privileges and Elections Committee); H.J. Res. 120, Va. Gen. Assembly (Reg. Sess. 2008) (left in the House Privileges and Elections Committee); H.J. Res. 181, Va. Gen. Assembly (Reg. Sess. 2008) (left in the House Privileges and Elections Committee); S.B.

Proponents of plans that would reduce or mitigate the legislature's responsibility for redistricting have an easy answer for their legislative defeats: the self-interest of lawmakers. There is, though, another less sensational explanation. The current system of redistricting works and serves Virginia particularly well. Moreover, a better alternative has yet to be created. In short, proponents of plans that would rely on appointed bodies to draw new districts are offering a solution to a nonexistent problem.

The current method of redistricting in Virginia is the only system that has proven to be inclusive, representative, and practical. But more importantly, it is the only method that makes legislators directly accountable to the voters for the district boundaries they enact into law.

Since every Virginian is represented in the General Assembly by a senator and a delegate, the current method of redistricting is the only way to ensure that *every* Virginian has a voice in the process. Unelected panels comprised of retired judges, like the one endorsed by the Virginia Redistricting Coalition have no such guarantees of inclusiveness.⁴ Additionally, because the panel would answer to those who appoint them, they are further removed from the public and cannot compare to the representative nature of an elected legislature.

Those promoting redistricting by the appointed instead of the elected frequently compare such a process to the one employed by the federal government's Defense Base Closure and Realignment ("BRAC") Commission.⁵ The idea is that a commission would create a proposal to which the legislature would be required to give an up-or-down vote.⁶ However, such comparisons are not really applicable. The purpose of

38, Va. Gen. Assembly (Reg. Sess. 2008) (left in the House Privileges and Elections Committee); S.B. 243, Va. Gen. Assembly (Reg. Sess. 2008) (incorporated into Senate Bill 38 by the Senate Privileges and Elections Committee); S.J. Res. 5, Va. Gen. Assembly (Reg. Sess. 2008) (left in the Senate Privileges and Elections Committee); S.J. Res. 59, Va. Gen. Assembly (Reg. Sess. 2008) (left in the Senate Privileges and Elections Committee); *see also* Michael Sluss, *House Committee Kills Redistricting Legislation*, ROANOKE TIMES (Va.), Feb. 18, 2009, at A10 (describing the vote by a House of Delegates subcommittee to kill Senate Bill 926 and other redistricting legislation).

4. Three of the constitutional amendments that would allow for redistricting reform in the most recent General Assembly session require that members of the commission be former judges and justices of the Virginia courts. *See* H.J. Res. 181, Va. Gen. Assembly (Reg. Sess. 2009), § 6(d) (as introduced Jan. 9, 2009), H.J. Res. 702, Va. Gen. Assembly (Reg. Sess. 2009), § 6(d) (as introduced Jan. 14, 2009); S.J. Res. 59, Va. Gen. Assembly (Reg. Sess. 2009), § 6(e) (as introduced Jan. 8, 2009).

5. The BRAC Commission was created by Congress in 2005 to provide an objective, non-partisan, and independent review and analysis of the list of military installation recommendations issued by the Department of Defense. Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, §§ 2901–2911, 104 Stat. 1485, 1808–19 (codified as amended at 10 U.S.C. § 2687 (2006)).

6. *See* Defense Base Closure and Realignment Commission, Commission Process, <http://www.brac.gov/Process.html> (last visited Mar. 20, 2009).

the BRAC Commission was to reduce the number of military facilities in order to increase the efficiency and effectiveness of our national security.⁷ Considering that Virginia must comply with the strict provisions of the Voting Rights Act, redistricting poses no such daunting challenge.⁸

Judging from Virginia's most recent redistricting, the Commonwealth appears to be drawing districts right the first time. The latest maps, both legislative and congressional, adhere to court and code mandates regarding the drawing of legislative districts.⁹ The required features include contiguity, compactness, and communities of interest.¹⁰

As evidence of the current plan's success, not a single court case challenging Virginia's current House of Delegates, Senate, or Congressional maps prevailed.¹¹ Furthermore, unlike successful contests of the plans drawn for the 1980s and 1990s, no legal challenge remained judicially viable beyond the first year after the plans for this decade were drawn.

Critics of the current method frequently assert that the current lines are unrepresentative of Virginia's electorate.¹² In fact, the opposite is true. The current redistricting plan has reflected the votes of Virginians with remarkable accuracy. In the 2007 elections for the Virginia House of Delegates, forty-three percent of Virginians cast ballots for Democratic nominees,¹³ and the Democrats won forty-four of the one

7. See Defense Base Closure and Realignment Act § 2901(b).

8. The Voting Rights Act requires covered jurisdictions to obtain federal approval before making any change to voting procedures. U.S. COMM'N ON CIVIL RIGHTS, REAUTHORIZATION OF THE TEMPORARY PROVISIONS OF THE VOTING RIGHTS ACT: AN EXAMINATION OF THE ACT'S SECTION 5 PRECLEARANCE PROVISION 1 (2006), available at <http://www.usccr.gov/pubs/060706VRAbrief524.pdf>. Virginia is one of the sixteen covered jurisdictions. *Id.* at 2.

9. See VA. CODE ANN. § 24.2-303.2 (Cum. Supp. 2008), §§ 24.2-302.1, -303.1, -304.1 (Repl. Vol. 2006). District maps are available through the Virginia Division of Legislative Services. Va. Div. of Legislative Servs., District Maps: 2001 Congressional District Maps, <http://dlsGIS.state.va.us/congress/2001PDFs/chap7Tab.pdf> (last visited Oct. 13, 2009); Va. Div. of Legislative Servs., District Maps: 2001 House District Maps, <http://dlsGIS.state.va.us/House/2001HousePDFs/chap1Tab.pdf> (last visited Oct. 13, 2009); Va. Div. of Legislative Servs., District Maps: 2001 Senate District Maps, <http://dlsGIS.state.va.us/senate/2001PDFs/Chap2Tab.pdf> (last visited Oct. 13, 2009).

10. See VA. CONST. art. II, § 6; *Abrams v. Johnson*, 521 U.S. 74, 91–92 (1997); *Bush v. Vera*, 517 U.S. 952, 959–60 (1996); *Miller v. Johnson*, 515 U.S. 900, 919 (1995); *Shaw v. Reno* (Shaw I), 509 U.S. 630, 637 (1993); *DeWitt v. Wilson*, 856 F. Supp. 1409, 1414 (E.D. Cal. 1994), *summarily aff'd*, 515 U.S. 1170 (1995).

11. See, e.g., *Hall v. Virginia*, 385 F.3d 421, 423, 432 (4th Cir. 2004); *Wilkins v. West*, 264 Va. 447, 480, 571 S.E.2d 100, 119 (2002); *Hall v. Warner*, No. CH02-100, slip op. at 1 (Va. Cir. Apr. 17, 2002) (order of nonsuit).

12. See Virginia Redistricting Coalition, About Redistricting: The Problem, <http://www.fixthelines.org/AboutRedistricting/TheProblem/tabid/565/Default.aspx> (last visited Mar. 17, 2009).

13. Washington Post Special Reports, Local Elections 2007, http://www.washingtonpost.com/wp-srv/metro/elections/2007/results/virginia_assembly.html (last visited Oct. 13, 2009).

hundred seats.¹⁴ In the 2007 elections for the Virginia Senate, fifty-five percent of Virginians cast ballots for Democratic nominees,¹⁵ and the Democrats won twenty-one of the forty seats.¹⁶ This testifies to the accuracy of the current lines—especially in the House plan—and their ability to reflect the expressed desire of Virginia voters.

As is true of most well-intended “reforms,” those advancing an appointed commission to perform redistricting claim their proposal will bring about better government through “fairness” and “competitiveness.”¹⁷ Considering that control of the Virginia Senate switched from Republican to Democrat during this decade, those claiming a lack of competitiveness find their arguments directly challenged by election results.¹⁸ The congressional delegation has changed as well, going from majority Republican to majority Democrat.¹⁹ The House of Delegates has also seen a major shift in its partisan makeup, going from a twenty-eight seat Republican majority in 2002²⁰ to an eight seat majority in 2009.²¹

A more complex issue is competitiveness, which is, at best, an elusive concept. As the results of the 2008 presidential elections show, partisan preferences within communities are not static.²² Achieving “competitiveness” for even a single election cycle would likely result in drawing lines tortuously, cutting communities and localities, and creating less compact districts. Competitiveness is not a constitutional, court, or code requirement for redistricting for a very good reason: it directly

14. See generally Virginia State Board of Elections, Nov. 6, 2007 General Election Official Results, <https://www.voterinfo.sbe.virginia.gov> (follow “Election Results” hyperlink; then follow “2007” hyperlink; then follow “November 6, 2007 Election Results” hyperlink; then follow “House of Delegates” hyperlink) (last visited Mar. 17, 2009).

15. Washington Post Special Reports, *supra* note 13.

16. See generally Virginia State Board of Elections, Nov. 6, 2007 General Election Official Results, <https://www.voterinfo.sbe.virginia.gov> (follow “Election Results” hyperlink; then follow “2007” hyperlink; then follow “November 6, 2007 Election Results” hyperlink; then follow “State Senate” hyperlink) (last visited Mar. 17, 2009).

17. See Virginia Redistricting Coalition, Virginia Needs Redistricting Reform, <http://www.fixthelines.org/Home/tabid/527/Default.aspx> (last visited Mar. 17, 2009).

18. See *supra* note 16 and accompanying text.

19. Virginia’s Congressional delegation is comprised of five Republicans and six Democrats. 2009 REPORT OF THE SECRETARY OF THE COMMONWEALTH 658–61, <http://www.commonwealth.virginia.gov/StateGovernment/BlueBook/report.cfm> (follow “11_Virginia Congressional Delegation pdf” hyperlink) (last visited Mar. 17, 2009).

20. See generally Legislative Information System, 2002 Session: General Assembly Members, <http://leg1.state.va.us/021/mbr/MBR.HTM> (last visited Mar. 17, 2009).

21. See generally Legislative Information System, 2009 Session: General Assembly Members, <http://leg1.state.va.us/091/mbr/MBR.HTM> (last visited Mar. 17, 2009).

22. In 2008, Barack Obama became the first Democratic presidential nominee in forty-four years to carry Virginia, a traditionally red state. Tim Craig & Anita Kumar, *Obama Beats McCain in Va., Ending 44-year GOP Reign*, WASH. POST, Nov. 5, 2008, at A6.

conflicts with other mandated requirements of drawing district lines.²³

In many cases, competitiveness and the preservation of communities of interest are inherently contradictory. How would a competitive district be drawn in the high-population localities of Alexandria and Arlington, for example? How could competitiveness be achieved while adhering to the provisions of the Voting Rights Act? Those promoting competitiveness as a principle for redistricting inadvertently discount a more important concept. The centerpiece of representative democracy is not limited to fostering debate in elections, but to enabling representation for citizens of disparate views in decision-making legislative bodies.

Even considering all these problems with assigning redistricting to an appointed panel, the issue of accountability is even more perilous. The only proven way to guarantee accountability in the redistricting process is to have elected public officials—who must submit to the voters at elections—be responsible for the lines. In contrast, appointed panels would be accountable to those who appointed them. Since such proposals customarily have elected officials doing the appointing, they create a convenient buffer to prevent anything approaching direct accountability. This fact alone makes changing the current system undesirable.

Another argument offered in favor of removing redistricting from the purview of elected representatives is to take the politics out of the process, as if it would ever be possible to remove politics from an inherently political process and body. What it would really do is shift the politics to a less transparent level. The making of appointments would become very political and would be more susceptible to backroom deals, since fewer people would be involved.

Those who would have Virginia adopt redistricting by an unelected commission frequently market their proposal as “bipartisan redistricting.” They would be well-advised to examine the results of the most recent legislative elections more closely. Currently, Virginia’s House of Delegates has a Republican majority while its Senate has a Democratic one.²⁴ Regardless of who is elected Governor this year, both parties will play major roles in drawing district lines.

23. See *supra* note 9 and accompanying text.

24. The 2009 House of Delegates is comprised of fifty-three Republicans, forty-five Democrats, and two Independents; the 2009 Senate is made up of twenty-two Democrats and eighteen Republicans. See generally Legislative Information System, 2009 Session: General Assembly Members, <http://leg1.state.va.us/091/mbr/MBR.HTM> (last visited Mar. 17, 2009).

In closing, it is no mistake that a clear majority of the states continue to perform redistricting in the same manner they have since the final ratification of the United States Constitution in 1789. This is because it works and continues to work over two hundred years later.