



The Our American States podcast—produced by the National Conference of State Legislatures—is where you hear compelling conversations that tell the story of America’s state legislatures, the people in them, and the policies, process and politics that shape them.

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Time to Redistrict | Dec. 14, 2020 | OAS Episode 116

Ed: Hello and welcome to “Our American States,” a podcast from the National Conference of State Legislatures. This podcast is all about legislatures: the people in them, the policies, process and politics that shape them. I’m your host, Ed Smith.

“This election was the most significant election of the decade in terms of redistricting control.”

That was Ben Williams, a policy expert on redistricting at NCSL. Ben is my guest on the podcast.

Possibly the most underreported story during the November 2020 election was the effect it would have on redistricting, the once-a-decade effort to draw congressional and state legislative districts.

Some expected a blue wave would put Democrats in control of more state legislative chambers and give them more control over redistricting this cycle. But it turned out to be the GOP that gained two chambers in New Hampshire, and the Republicans go into the 2020 cycle in control of 61 chambers versus 37 for the Democrats.

Ben explains how the election sets up legislatures to start the redistricting process and when sets of data from the Census will arrive. He also discusses an upcoming three-day redistricting seminar offered by NCSL that will take legislators and legislative staff through the various challenges involved in the process.

Ben, welcome to the podcast.

Ben: Glad to be with you.

Time Marker (TM): 01:39

Ed: Ben, now that the election is over, can you explain to us how that sets the stage for redistricting in 2021?

Ben: As you know, this election was the most significant election of the decade in terms of redistricting control. We started electing people who would play a role in redistricting, notably the governors in Virginia and some other states, in 2017. But 2020 was the year when the vast majority of state legislators who will participate in redistricting were elected, as well as a handful of governors.

So, going into this year, 30 state legislatures were controlled by Republicans, 19 were controlled by Democrats, and only the Minnesota legislature was split between the two political parties. The House was controlled by Democrats, and the Senate was controlled by Republicans.

Coming out, very little changed. Only the New Hampshire House and Senate flipped, and they flipped from Democrat to Republican, which means right now it's 31 Republican, 18 Democrat, and Minnesota is still split.

There is one caveat there. The Alaska legislature is split between... there is a coalition that controlled the House prior to the 2020 election, and it is unclear if a coalition made up of only one party or another will exist going forward. So, we're still waiting to hear from that, but by and large, it's looking like Republicans are in the driver's seat for redistricting in states across the country.

The picture does not change much once you factor in governors. The Republican advantage does drop slightly to 25 Republican states, 19 Democratic states, and only six states that are divided between the two parties. And that does include whether or not a state has a veto-proof majority in its legislature.

For example, in Massachusetts, a state where the legislature is responsible for redistricting, the Democrats have an overwhelming majority in both chambers. Even though the Governor is a Republican, the legislature can override his vetoes to pass bills that it wishes, which would include a redistricting plan.

That's not to say that every state passes redistricting plans through the legislature. There are 15 states that have commissions for legislative districts, and 10 states use commissions to draw their congressional districts.

By and large, this is a state legislative responsibility, although the number of commission states has increased slightly since 2010.

TM: 04:17

Ed: Now, the other big factor for redistricting is the Census, and we have read an awful lot of news about the 2020 Census and that lays the foundation for redistricting. Can you talk about when states will get the information from the Census that they need for redistricting? And to what degree, if at all, this court case about whether to include those living in the country illegally will affect the timetable?

Ben: The calendar for when data is released by the Census Bureau to the President, to the House of Representatives, and to the states is all set by congressional statute. So, there are two types of data that we're talking about here, so I want to make a distinction between them before we move forward.

There is the reapportionment data, which is the data that the Census Bureau generates to determine how many U.S. House of Representatives seats each state is allocated. That is due to the President by December 31st. And then it is distributed to the states shortly thereafter, so they know how many congressional seats they need to district for.

The second set of data is called the PL94171 file, and that has a complicated name; it's just the name of the public law that was passed in the 70s that created this Census data product for states. That file includes all of the information about the exact numbers of people who live in particular areas and their demographic makeups.

So, the litigation that is ongoing that you mentioned is related to both of these products. Just this week, there was an argument at the U.S. Supreme Court in a case called Trump vs. New York arguing about whether or not the Trump administration is permitted to exclude undocumented persons from the reapportionment count that is due on December 31st.

I think that the Supreme Court is likely to release that opinion on an expedited timetable just because of the pressure with the December 31st deadline fast approaching, although at this point, the Census Bureau, because of delays that have been cascading through the process going back to the start of the Covid-19 pandemic, they're unlikely to finish their product by the statutory deadline and it's likely to carry over into January of next year.

We'll have to wait to see when that comes out. If it comes out, depending on if it's before or after the inauguration of the President Elect, we know that the President Elect and the current President have different priorities around how to treat undocumented persons for purpose of the Census. So, that may have an impact in addition to the cases that you've mentioned.

TM: 07:10

Ed: So, we'll need to wait a while to see when that Census data is delivered and how it's handled. Would any delay affect reapportionment data and redistricting data?

Ben: That particular case that I was mentioning will not delay the release of the redistricting data. It is subject to potential delays of its own related to independent litigation that is ongoing and is likely to continue. I mean, if you think about it like this – depending on who is or is not included in the overall enumeration count, you may get certain areas in a particular state where their population voting power is increased or decreased.

And so, if you're a resident or a legislator or some other person in an area that suffers decreased power as a result of whether or not undocumented persons are included or excluded, you would have a probable cause of action to sue in court. Whether or not you succeed is to be determined, but the litigation itself could slow down the process.

And so, the potential for future litigation is the real unknown at this point. We will know more by late January, but at the time of recording this podcast, it's still unclear.

TM: 08:32

Ed: So, can legislatures get to work on redistricting right away once the legislative sessions start up?

Ben: Oh yes, they absolutely can. There are certain steps that you can take, getting the redistricting office set up, making sure that you have your duties allocated between staff and the different legislators on the committee who will be participating in the process. There is a certain amount of work that can be done in advance.

The real variable is different states have different redistricting deadlines, so some states have a deadline in their constitution that says that redistricting has to be concluded, for example, by the end of the first legislative session following the Census year, which would be these sessions coming up in 2021.

If the data is not available in time for states to comply with that, that creates a real conundrum for states. There are different solutions to this. New Jersey was in this situation. The legislature referred to the voters a constitutional amendment that created a backup mechanism for New Jersey to redistrict by a later deadline if they didn't receive their Census data in time. That was approved by voters. So, New Jersey has gotten itself out of that situation.

And in California, there was a similar problem and what happened there was California is a state that has a redistricting commission. The commission and the legislature both filed a lawsuit in the state supreme court asking for relief from this constitutional obligation because they didn't think they would have the Census data in time to comply, and the California Supreme Court granted them relief in this particular redistricting cycle only.

So, there are different options for states that are in that situation. If you have a statutory deadline rather than a constitutional deadline, obviously the state legislature can pass a new law extending the deadline. And if you are a state that doesn't have a deadline at all... maybe there's a tradition of redistricting in the first session after Census data is received by the legislature, but it doesn't have to be, then obviously those states have some leeway and they could potentially move it forward to the absolutely hard, final deadline, which is the filing deadline for the primary elections under the new districts.

In most states, that would be the primary elections for state legislative and congressional races in early 2022.

TM: 11:06

Ed: It is remarkable how Covid has affected essentially everything we do, including apparently redistricting. Let's talk some more about the work legislators and legislative staff have to do for redistricting.

I know NCSL already has held a few seminars on redistricting and you have another one coming up in January. Can you explain what you cover in these sessions and who should attend?

Ben: So, the NCSL redistricting seminars are designed to support our members. So, if you are a legislator or a legislative staffer who is going through redistricting for the first time, obviously this is a place where you can get a foundation of knowledge upon which you can do the obligations that are facing you.

If you're someone who has done this before, but you'd like a refresher, we will provide content that is designed to account for changes since the prior redistricting cycle, so legal updates, changes in the way data are produced. We'll have the primary creators of redistricting software and some consultants there to talk about their products and their services and how they have changed since 2010, the last time states were facing this obligation.

All of the content is designed to target every aspect of the redistricting process. So, we have a session covering state laws that govern redistricting and describing the variations from state to state. We have a description of how public input works in different states and how states have developed new techniques for letting the public participate in the process.

We have legal updates from attorneys who can explain the court cases going back to the 1960s through 2019 and 2020, and explain how the burdens and obligations on states and redistricting have changed.

We have people on the tech who will come in and talk about the data products that not only the Census Bureau releases, but the states can acquire from other sources to help them in their redistricting tasks.

We're trying to give a whole-world perspective on the redistricting process, because if you try to focus on one particular thing, as a state legislator or a state legislative staffer, you will probably miss some aspect that is critical. At NCSL, our job is to support the roles of staffers and legislators everywhere, so that is our objective.

Now, that's not to say that only legislators and legislative staffers attend. Members of the community obviously find value in these presentations as well and they're welcome to attend. These meetings are open to the public and I would welcome anyone who wants to come.

You can register for that at ncsl.org and you can find the January redistricting seminar. I think it's going to be a really good opportunity for people to get one last crack at it before we go headlong into redistricting in the coming months.

Ed: I'll be right back after this break to talk with Ben about the use of mapping software in the process, the roles filled by legislative staff, and how members of the public can have their say.

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TM: 14:53

Ed: I'm back with Ben Williams. Ben, I know we're well beyond the era of marking up maps with colored pencils. Can you talk about the role of redistricting specific software in the process?

Ben: Redistricting is a data-intensive task, and I wasn't around back in the 70s and 80s for redistricting, so I can only imagine how difficult and time-intensive it must have been to try to match up different pieces of paper with one another to redistrict in a particular area.

The software development has been a real boon to redistricting because instead of trying to make best guesses or make inferences because the amount of data isn't perfect, these programs can process... I don't know if there's a good word to describe it, but just an inordinate amount of data and present it in a way that makes it really easy to understand the consequences of a particular change.

To try to draw a picture for the listeners, just imagine you're looking at a map of the state and there are a bunch of boxes on the left-hand side of the screen that you can check and uncheck. Some of those boxes may be the voting precincts in a particular state. So, if you go down to your local church and that's the spot where you're assigned to vote, the area around that church would be your voting precinct. That is a layer of geography that these pieces of software can include.

It can include something as small as a Census block, which is a very minute piece of geography that is the smallest area of data for which the Census Bureau produces a product. It includes information on the demographics of the people who live in that area.

And then it can go all the way up to counties. And then the states can add their own data layers as well. They can add partisan data on the electoral outcomes in the past, which is a necessary factor when you're thinking about the Voting Rights Act, because the Voting Rights Act compliance requires you to take into account some political results.

It can include data on economic interests. So, if you're a state like Alaska where you are required to redistrict based on communities of interest, and a community of interest means... I think it's exactly an "integrated socioeconomic region." So, think fishermen and the Aleutian Islands, for example could be a community of interest.

You have that information overlaid with all of the other data that is in front of you. So, something that could have taken weeks and months in the past to make sure that you were complying with all the legal doctrines can be done much more quickly now with this software.

And it also gives you the opportunity to draw multiple maps and gather feedback from your members, gather feedback from the public, and have more of an inclusive process where you can figure out what kind of redistricting plan will be the best one for your state.

The role of software in the process can be described only as revolutionary.

TM: 17:50

Ed: So, let me ask you about the role of legislative staff, both in terms of doing an awful lot of this work and also, I guess, in some cases being the institutional memory for the legislature. I imagine this varies from state to state, but can you give us a range of what kinds of duties they have?

Ben: Legislative staff can vary. Some states have a staff person in house who does the actual map drawing themselves. That's not always the case. Sometimes an outside group or an outside person is brought in to assist the legislature or the commission with that process.

It's also possible that the state will just have a GIS specialist who doesn't necessarily only focus on redistricting. They can have other jobs as well focusing on GIS and elections, GIS and understanding environmental policies, healthcare outcomes. You can imagine the list of areas in which understanding geography could be useful.

But then they also do redistricting as well, and they will either draw the maps themselves or work with the outside person to create maps for the legislature.

There is usually another person as well who is counsel in the legislature who will advise the legislature on the responses or the outcomes that potential proposed maps could have and whether or not they comply with all the legal doctrines in that state.

And there could be a legislative staffer who is responsible for shepherding communications among the members of each caucus in an entire chamber or just the majority or the minority members on the committee that is responsible for redistricting.

No two states do this exactly the same. There is a lot of variation. But in general, those are the roles that you'll find in any particular state.

TM: 19:40

Ed: So, I know that there are expenses that are connected with redistricting and, given the economic troubles that legislatures are in right now, I guess the whole economy is in right now, is that going to impose a burden on some states? Is it that much money?

Ben: When we're talking about economic contractions like the one that we've seen this year and the ones that we may see in the future, it's certainly possible that there could be an impact. I will say the one thing that is fortunate for states is that there's typically a lag in the reduction in tax revenues due to an economic downturn and when the budget constraints occur.

So, a lot of the budget items for redistricting like buying the licenses to the redistricting software or hiring extra staff to assist the legislature just with redistricting on a temporary basis, or any other consulting fees that may occur. Those have probably already been accounted for in most states. I'm not going to say all. Some of the states that redistrict in years ending in 2, so 2022, they may still be waiting on something, and they may have to factor in potential revenue reductions into who they decide to hire and what products they decide to purchase.

But most states I think are fortunate in that a lot of these items are already accounted for and they're not additional liabilities that states have to consider in contrast to reduced revenues.

So, I would imagine that the average cost to the state is somewhere in the single seven figures, not necessarily the eight figures, and that's certainly nothing to turn your nose up at. That's quite a significant sum of money. But it's also not going to be the largest expenditure for states in this coming year. So, it's not something where if you were looking for fat to cut in the budget, this would not be the first place you looked at.

TM: 21:36

Ed: So, what's the role of the public in this process? We've been talking, of course, about the legislative role, and I'm sure this varies from state to state. But can you give us some examples of how states, how legislatures manage to bring the public in?

Ben: I'm going to give you a couple. In Oklahoma, for example this year, the legislature was looking at how to engage the public. They knew there was a public interest in the process. But they also were working with a tight budget, since we were just talking about budgets, and they were trying to figure out the most effective way to engage the public.

What they realized was that there are free open-source redistricting software programs that are available online. They don't necessarily have all of the bells and whistles that the paid software licenses that states will actually be using to draw the lines have. But they have enough that they can allow the public to give the legislature a sense of the kinds of things they're looking for in their districting.

So, the State of Oklahoma created a legislative email address that Oklahomans can send draft maps to, and then the legislative committee, the last time I heard I believe they were still planning to go around the state. We'll see whether or not that occurs depending on the Covid situation.

But the plan was to go around the state, have public hearings, look at maps that were submitted for those regions, and have a dialogue with anyone who decided to show up about what they're looking for and what they're not looking for in a particular area. So, that's the Oklahoma model. It was relatively easy to set up and it doesn't require a lot of planning on the front end. So, it has a lot of advantages to it.

There are other states like Utah. I'm going to describe what they did in 2010; my understanding is they're planning on doing something similar for 2020, but they haven't finalized it yet. In 2010, the Utah legislature entered into a contract with a private redistricting software vendor to create an online platform through which the public could create a login.

They could log in and they could draw a map of their own, similar to the Oklahoma model, but it's entirely done in house in the legislature with a redistricting program created by this vendor for the legislature.

And then the legislative committee went around the state and held hearings for all the different types of districting plans they were considering. They actually ended up adopting verbatim one of the maps that was proposed to them through this platform for the State Board of Education districts.

So, the public certainly had a say in how those were drawn because the person who drew them, their map was just adopted. That was something that I think a lot of people in Utah are proud of. Every time I've heard them talk about this it's brought up that that happened.

I know that Utah has gotten a lot of positive feedback for how they handled public input in 2010, and I would look for them to do something similar this year.

A lot of states as I understand it right now are wrestling with how to handle a public input process in an era of social distancing and restrictions on the size of public gatherings. You can imagine, if you're in a state like Colorado where I am, the idea of holding a public input hearing in February or March sounds pretty cold. I don't know if anyone would really want to sit outside for a long hearing under public health guidelines that may be more advantageous, whereas if you're in South Texas or Florida or Louisiana, a state where I used to live, that would be a much different story.

So, I think states are going to have to make individual calculations about whether or not it is still possible to hold the hearings they were hoping to hold in public areas around the state, whether or not they're going to have to move some of those online. Obviously, a lot of this is contingent upon the rollout of any vaccines and how quickly that occurs.

I would imagine that you're going to be hearing more from states across the country about how they're planning on handling this. Once they have released that information, we'll have a better understanding of the universe of different public input options that will be available to people in this coming cycle.

TM: 26:07

Ed: It seems like the map software and the ability to hold virtual gatherings should be well suited to keeping the public in the loop.

Well, Ben, before we wrap up, is there anything else you'd like to share with the audience?

Ben: I'd just like to say that anyone who is listening to this podcast, if you're a legislator or a legislative staffer, the team that I work on, the elections and redistricting team at NCSL, we're here to help you however we can. So, if you are going through the redistricting process and you have a question or a concern, reach out to us.

Our email address is elections-info@ncsl.org and someone on the team, probably myself or my supervisor, Wendy Underhill, the director of our program, will reach out to you and we'll help however we can. We are here to serve you at this time, and we understand that this is a multifaceted job with a lot of intricate details that have to be considered. If there's any way we could be of assistance, we would love to, so just let us know.

Ed: Well, thank you, Ben. I know from working with the elections and redistricting team at NCSL over the years what a wealth of knowledge the individuals have, and the amount of resources you have is simply remarkable. So, we'll make sure to link to all those things.

Ben, thank you for your time and your expertise. This has been really interesting. Take care and stay safe.

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Ed: And that concludes this edition of our podcast. We encourage you to review and rate our episodes on iTunes, Google Play or Spotify. You may also go to Google Play, iTunes or Spotify to have these episodes downloaded directly to your mobile device when a new episode is ready. For the National Conference of State Legislatures, this is Ed Smith. Thanks for listening and being part of "Our American States."