



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, the politics that compel them, and the important work of democracy.

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Redistricting: Partisanship, Politics, Power | OAS Episode 75

Welcome to “Our American States,” a podcast of meaningful conversations that tell the story of America’s state legislatures, the people in them, the politics that compel them, and the important work of democracy. For the National Conference of State Legislatures, I’m your host, Gene Rose.

Today we dive into the topic of redistricting. Following the official count from the U.S. Census Bureau every 10 years, states redraw their congressional and state legislative maps. This means in many states, preparation is already underway.

We have two guests that will provide insights on this process. Later in the program we get a perspective about the state legislative staff’s role from Michelle Davis, who is a senior policy analyst on redistricting and election law for the Maryland Department of Legislative Services.

We start our program with Wendy Underhill, who is the director of the Elections and Redistricting Program at the National Conference of State Legislatures. She’ll walk us through the various methods of redistricting and talk about the resources that are available to state legislators and state legislative staff.

Time Marker (TM): 01:19

Gene: So, Wendy, tell us what is redistricting and why is it important.

Wendy: Well, redistricting is the most potent political action that a legislature can take in the course of any given decade. It’s the redrawing of the lines from which their members are elected and, of course, Congress people are elected from districts as well.

Every 10 years the census does its work, comes up with new totals for how many people are in each state and each community, and it’s the job of the state, usually the job of the legislature, to divvy it up so that the districts are of equal population. Everybody will be representing the same number of people. And as population changes, the seats change in relation and, to some extent, political power changes along with that.

So, it’s a pretty big deal and may sound kind of arcane, but it’s very important in the electoral process that makes up our democracy.

TM: 02:12

Gene: So, you have told me before that the redistricting is right around the corner. What do you mean by that?

Wendy: Well, it takes place in 2021 primarily, so maybe that doesn't sound like around the corner to you, but 2019 and 2020 people who are elected to legislatures and some governorships will be the people who will do that redistricting in 2021. So the elections right now and even the one in 2018 are helping to set the table, put the people at the table who will be doing redistricting when it comes around.

So, it seems to me like states are gearing up right now to do it. They're choosing the equipment that they want to use, the technology, the software; they're figuring out who is going to be serving on the committees that will have this important task; and they're learning everything they can about what redistricting might mean for them come 2021.

TM: 03:05

Gene: So, do legislatures in every state draw congressional and state legislative maps?

Wendy: No, they don't. It is the tried and true traditional place for redistricting to be done at the legislature, but there are a number of states that are shifting that responsibility to commissions. For legislative redistricting 14 states use some variation on a board or a commission, and for congressional seats I believe it's six states that have a commission that takes that responsibility. So that's why I say it's still the tried and true and most common that the legislature does the work.

I will say that this decade, 2010 to now, there has been more interest and then more action on commissions. It's five states in this decade that have made a move in that direction, bringing that total, as I said, to 14 for legislative districts.

TM: 03:55

Gene: Briefly walk us through the process from when the U.S. Census Bureau does its count. What happens after that? How does the plan work its way from start to its final passage?

Wendy: Well, that's a good question, Gene, and I'm going to say it starts before the census. So, as I mentioned earlier, you do have states that are gearing up right now. For instance, who is going to chair your committee? That's an important decision to make. And who is going to be on that committee? That's important.

And then: What criteria do you want to use for redistricting? Most constitutions have that spelled out, but if you wanted to make a change in what was the basis for redistricting, now would be the time to be doing it.

One thing in particular I'm seeing states interested in right now is what kind of public input process they'll have for redistricting. Does it mean the same kinds of public input that you would have for any legislative action? Or are they going out around the state holding hearings? Are they even making it possible for the public to draw their own maps and submit them?

So those are some things that are on legislative plates right now, even before you get to the census.

So, then the census—they start counting up heads next year. On Dec. 21 of 2020 they will release the data on apportionment for Congress, which means how many seats each state gets. And then in the first three months of 2021 they'll distribute the very detailed data to the states which are going to draw those lines. This is down to the census block level, which could be as few as just a couple dozen people in a census block; they know how many people live in them and that data goes to the state.

At that point, hopefully you've got your technology, you've got your consultants, you've got your staff ready to go, and maybe you've even been drawing some preliminary maps because you kind of know where your population is shifting.

Then it's up to the legislature to determine what are the needs of their members, what they're looking for in their seats, and what are the needs of the community. It's an iterative process. I'll bet most states go through well over 100 maps before they choose the one that they really like. And in most states, it goes through the regular legislative process and is adopted by one chamber and then the other chamber, and then mostly goes to the governor for a signature.

TM: 06:08

Gene: Now, is it too late for a state to change the process that is being used? Are there options available for states to do this?

Wendy: Yes, there are still options. Here we are at the end of 2019, you might say, but depending on what your state's constitution is, you might be able to change it in 2020, running a resolution and getting it in front of your voters in 2020, and then it would be ready to go in 2021.

In some states you have to pass a resolution to amend the constitution through two consecutive legislatures, so for them it might be too late. That's one way to do it.

Another is if you wanted to change who was going to do it, you could have an advisory committee instead of a standalone commission doing some of the map drawing, and that advisory committee might not need to have a constitutional amendment to come into being, and that advisory committee would send maps to the legislature for its consideration.

That's a plan that Utah has done just real recently. So, it's a way to keep both the legislature in charge while giving more of a role to people on the outside.

And then, as I mentioned, it's not too late to make changes in your criteria, not too late to make changes in your public information side, and for a few states they're interested in making some changes around how prisoners are dealt with, whether they're counted at the site of the prison or if there's a way to reallocate them so they can be counted at the place that they came from.

TM: 07:37

Gene: Of course, the Supreme Court has been involved in redistricting cases before from the one person/one vote decision to last year where the court essentially said that it was not going to react to future redistricting challenges. Will that decision have an effect on how legislatures draw their maps starting with the next ones?

Wendy: An interesting question you ask, Gene, about what the Supreme Court's decision about partisan map drawing in June 2019 meant—that decision did say that the U.S. Supreme Court does not see something under the U.S. Constitution that makes partisanship in map drawing unconstitutional.

What it did not say is that it's not discussion that could be had at the state level. And so instead of seeing court cases go through the federal system, we might see more cases of partisanship go through state courts. A lot of states do have a free and equal clause in their constitution for elections and we've already seen that that's been used in North Carolina already since the Supreme Court did its action in June.

And so, I think most observers are expecting that we'll have just as much litigation. It might be through a different venue. It might be on some different topics. But this is an evergreen topic in front of courts. Redistricting is not going to be solved or cited or a final stamp never to be changed as far as I can see into the future.

TM: 09:04

Gene: So, isn't redistricting inherently a political process, and how does a bipartisan organization like NCSL toe the line with working with legislators in both parties?

Wendy: Well, it is a political process at the very heart. It's been called a blood sport. And it is one of the places where people go into their respective caucuses with the most amount of let's-stick-together I guess we'd say. So yeah, it's pretty hard to take politics out of redistricting; they are fairly inherent.

So if a state wants to say: We understand it's political, but let's put some guardrails around that, one thing they can do if they choose is to say: We want to ensure that a "yes" vote for a map in our state has some portion of bipartisan support. And then they can decide: Does that mean one person from the other party signs on, or do they require some minimum amount of participation from the minority party?

In Ohio there is a complicated plan for how they'll do their lines and it includes a requirement for bipartisan support, and if they can't get something passed, then they can lower that bar. But they're still looking for bipartisan support for a plan.

I don't think we're ever going to get away from partisanship altogether and it's just a question of whether you want to say both teams have the same amount of resources in front of them and let them go at it, or if you want to build some structures that help you come to a decision that includes at least some across-the-aisle action.

TM: 10:29

Gene: I'll let you get out on this question, Wendy: Are there specific resources that NCSL offers that can help states with redistricting?

Wendy: Well, yes indeed, we do have some good resources for states. We have an item called a Redistricting Starter Kit and if a person is new to redistricting, the NCSL Starter Kit is the place to start. It gives you not just the legal side of things, but some of the other things you might want to be thinking about at this point.

And we will soon have the Redistricting Law 2020 Book available to legislators, legislative staff. That should be out by the end of October and that does have all the details about what to expect in terms of the legal side of things.

Lots of web pages at NCSL—I mentioned the free and equal clauses—we've got those wrapped up. Public input—we have a new page that describes what each state offers on that.

And then beyond those kinds of written products, we have a series of seminars on redistricting. The next one is in Columbus later in the month. It's from Oct. 24 to 27 in Ohio, two and a half days kind of bootcamp for anybody who is going to be heavily involved in the process.

Beyond all of that though, I'd say we work for our members. So, if we hear from a member on the phone or if we get invited out to their state, we will do everything we can to provide the kind of customized support and research that might be needed. We're happy to come out. We're going to be in New Mexico and Texas and Oklahoma in the next six weeks. So, it's just a question of calling me up really and see if we can be of use to you back in your state.

TM: 12:05

Gene: OK, is there anything I haven't asked you, Wendy, that you believe is important to share with state legislators and state legislative staff?

Wendy: Oh, maybe what I'd like to say is that I'm noticing that there is a building interest and even excitement I think we could say about this process. I'm hearing some excellent questions about some of the more arcane parts of it, some related to citizenship and equal population, and some related to what does racial analysis mean in this regard.

So, they're not all the basic questions. Some of them are much more arcane and I just get the sense that people are alive to this and that this decade, maybe above all others, this will be something that will be front and center for the legislature as well as to some extent, front and center for the media and for the public.

It used to be that this was kind of a sleepy topic, only for the policy nerds, but it's not so sleepy anymore. It's something that is going to catch a lot of attention every which way.

Gene: We've been talking with Wendy Underhill who is the director of the elections and redistricting program at the National Conference of State Legislatures. Wendy, thanks for being a guest on "Our American States."

Wendy: Well, you are very welcome. I so appreciate the attention to redistricting.

Gene: We'll be back after these announcements from NCSL.

Music and Female VO:

When it comes to redistricting, the learning curve is steep, especially when it comes to the legal issues and technology. Let us help you and your team prepare for this complex, once-a-decade task at our seminar in Columbus, Ohio, Oct. 24th through the 27th. Register now at www.ncsl.org to reserve your spot.

Gene: We are talking with Michelle Davis who is a senior policy analyst on redistricting and election law for the Maryland Department of Legislative Services. Michelle, welcome to our program.

Mich: Hi, how are you?

Gene: I'm doing great, thank you.

TM: 14:03

Gene: Michelle, let's start off with telling us what your role is in the redistricting process in Maryland.

Mich: Well, I work for the Department of Legislative Services, which is a nonpartisan agency that provides staff support for the legislature. I know a lot of states don't have a nonpartisan agency. Some do; some don't. But ours is, and my role for redistricting is basically to provide all the services that all 188 General Assembly members would need.

So that includes tech support, legal advice, managing their redistricting data, staffing committees that are related to redistricting, basically seeing the process through from beginning to end.

TM: 14:52

Gene: We heard a lot about redistricting in the Supreme Court this year. Can you boil down what's happened on the legal front that legislators and staff need to know as we enter into this process?

Mich: Yeah. I would say if I need to boil it down, there are two big takeaways. The first one is that federal partisan gerrymandering challenge is no longer. The Supreme Court has ruled that the partisan gerrymandering challenge is non-justiciable. Now that may sound like good news for legislators, but there are two big "buts" I like to say; there are two very large caveats.

The first one is even though the federal courts won't hear a partisan gerrymandering challenge now, throughout history a lot of partisan gerrymandering challenges have been sort of taken to the courts and characterized as something else. So, a partisan gerrymander might be brought as a racial gerrymander or a minority vote dilution claim under the Voting Rights Act. Or it could simply be an equal population challenge, which is probably the most typical.

So, when you look at the history of a lot of the cases that have gone through federal courts and even the Supreme Court, partisan gerrymandering might have been sort of an undertone to the challenge, but they actually introduced the legal claim as something else. So that could still continue; so that's the first but.

And the second but is last year there was a state court case in Pennsylvania where the Pennsylvania State Supreme Court actually overturned the state's congressional map based on the state constitution. And most importantly, it wasn't a specific part of the constitution that dealt with redistricting because a lot of states have that as a requirement. This was based on sort of the general free and fair elections clause, which a majority of states have.

So, if we look at this as a possible precedent maybe for other state courts, it's possible. It's certainly not a given, but it's something to watch out for, that there could be other challenges in other states based on the same thing. And what basically the Pennsylvania Supreme Court said was that you cannot sort of prioritize partisan goals when you're drawing a map over the state constitutional principles. And when you do that, you violate this free and fair elections clause.

TM: 17:39

Gene: That's good information to know. Now while legislatures in many states have to approve their own plans, tell us what is the role of the nation's state legislative staff, like you, who will be working on redistricting?

Mich: Redistricting is different in every state, so it's hard to sort of generalize. But if I had to generalize, staffers in different states will, again, have to do what I do—basically take care of the process from beginning to end. And a lot of times the process isn't delineated somewhere in a law, or there are pieces here and pieces there. But the entire process is sort of fluid, if you will, and dynamic.

But generally, staffers are going to have to provide legal advice in the planning stages. They're going to have to perhaps draft bills. Drafting redistricting legislation is unlike drafting sort of a regular piece of legislation because most states have to describe a map in terms of geography. So, it's a very, very sort of specialized skill that you need to do to produce legislation that introduces or enacts a map.

If you're a staffer, you need to have, or at least it's best to have three very specific skills. One, of course, is being able to operate the software that you would use to draw maps, so that's the GIS skill that you would need, and also managing the data that comes with the GIS. So, in other words, there's software, but you are actually managing data just as you are sort of drawing boundaries. So, you have to sort of understand how the two work together and work with them both.

And the third skill is legal analysis, and when I say legal analysis, I don't mean sort of a review of the legal environment like we just discussed, but I mean when you're actually drawing the lines in the software, you have to understand every little thing that you do and how that affects you or whoever you're doing it for legally. In other words, you have to be able to avoid obvious legal pitfalls.

For example, you have to understand your deviations and sometimes it's not just as simple as staying within a 10%. You also have to look out for Voting Rights Act issues and what that means is every ten years we get this updated demographic data from the Census. So maybe 10 years ago in a particular area in your state, there weren't as many minorities, but maybe there's a growing minority population and you have to be able to see that and sort of understand the ramifications, if there are any, of the line drawing around that population.

So, there are many different things you can think about in terms of the Voting Rights Act. There are also state constitutional interpretations that you have to think about. In other words, there is what's in your state law and what's in your state constitution, but there are also interpretations of that from say your State Supreme Court, your state level court. You have to read those opinions and understand how they're interpreting your state law.

For instance, in Maryland our state constitution doesn't mention communities of interest. So in 2002 we drew legislative districts. We sort of prioritized communities of interest over county boundaries and the court struck down that map on that basis and that was because of the way it interpreted our state constitution.

So, there's a difference between just what's written in your constitution and in other state laws and what your state courts have said about it. That's important as well.

TM: 21:58

Gene: Let's talk about the physical aspect of redistricting. Is there special equipment or facilities that are required for this process?

Mich: Well, I have to say that it depends again on the state and what context, how many people you're servicing, so to speak, the level of workload that you're going to have. It all depends on that.

Something to think about—obviously you'll need the software. I don't think there's anyone left in the states that would do this with paper maps and pencils. So basically, what that means is generally laptops or maybe some kind of desktop. You also need printers. A lot of people kind of forget that.

If you can get it, you need perhaps a large plotter, especially if you have a pretty robust redistricting program where there are going to be lots of, say, public hearings and people looking over maps and things like that. You'll have to print very large maps and you need a plotter for that.

You'll need storage for all of this stuff and office space. And I always like to point out that in most states, as far as I know, most states when legislators are developing perhaps proposal maps, if you will, in a lot of states those are considered bills and bills that have not been introduced yet are usually considered private.

So in this sense you have to sort of understand that unlike a regular bill that's a piece of paper that you can maybe keep locked in an office somewhere in a cabinet or a drawer, you may be producing lots of maps people can see. And that may be private for a while; you may be doing that for a particular legislator who hasn't decided whether or not they're going to introduce it.

You need to think about your process and how you do things and if there are privacy concerns, you have to address them.

TM: 23:57

Gene: We've talked about a lot of aspects of redistricting, Michelle. Is there anything I haven't asked you that you believe is important for state legislators and staff to know about?

Mich: Yes. The other thing I wanted to note was legislative privilege, which has been sort of an active issue over the past ten years. For legislators, it's important for them to know that even though there's such a thing as legislative privilege, which sort of protects certain legislative documents, when it comes to redistricting it's a very, very, very scaled-down, very, very qualified legislative privilege.

We can't go into detail here, but it's important to have your legal staff look into that. On the federal level, the privilege has been qualified quite a bit and on the state level, it depends on different states. There have been various cases in the past ten years or so and some very recent cases that you have to be aware of.

And what it boils down to is almost everything is possibly discoverable in the aftermath of redistricting and in litigation. So, staffers and legislators have to be very careful with their personal email, their office email, and other types of records.

Gene: We've been talking with Michelle Davis who is a senior policy analyst on redistricting and election law for the Maryland Department of Legislative Services. Michelle, thanks for being a guest on "Our American States."

Mich: Thank you.

Music and Gene VO:

And that concludes this edition of "Our American States." We invite you to subscribe to this podcast on iTunes and Google Play. Until our next episode, this is Gene Rose for the National Conference of State Legislatures. Thanks for listening.