

Memorandum

To: Hon. Jeanette K. White, Chair
Senate Committee on Government Operations
From: Thomas A. Little, Esq.
Date: February 2, 2016
Re: Proposition 4

The Committee has asked me to speak about Proposition 4, which proposes two changes to the Vermont Constitution: (1) limit the size of senatorial districts to no more than three Senators, and (2) make the decisions of the Legislative Apportionment Board on the Senate and House districts final (i.e., not subject to review and revision by the General Assembly).

The “Time Lock”. I first want to say something about the constitutional amendment “time lock” provision of Section 74 of the Vermont Constitution (Section 74 is attached to this Memorandum.). Since the days of the Republic, the Constitution prohibited amendment during certain periods. This is known as the “time lock” provision. The time lock used to open the Constitution up to amendment only once every 10 years. In 1974, we amended that provision to reduce the time lock to four years.

Under the time lock, constitutional amendments are in order during the current biennial session starting (i.e., the 2015-2016 biennium). In order for an amendment to proceed, it must be adopted by the Senate by a 2/3 vote and by the House by majority vote – during that biennium. (And I think the House has only an up or down vote, i.e., if it amends the Senate’s proposal, the proposal dies unless the Senate starts over again. I believe this has happened before.)

Next, in the ensuing biennium (2017-2018), the amendment must be concurred in by majority votes of both bodies (again, I believe, with no possibility of amendment). If this successfully happens, then the proposal is submitted to a vote of the voters of the state (typically, either at Town Meeting or in November).

The window for the Senate to propose amendments does not open up again until the 2019-2020 session.

Proposition 4 and the Recent History on Proposals to Limit the Size of Senatorial Districts. Sections 13, 18 and 73 of Chapter II of the Vermont Constitution mandate reapportionment of the Vermont Senate and House following the release of the decennial U.S. Census. The General Assembly enacted Chapter 34A of Title 17, establishing the Legislative Apportionment Board (the Board) to prepare and file proposed Senate and House plans to adjust district boundaries to reflect shifts in population and assure substantially equally representation.

The 2010 Census counted 625,741 residents in the state. This was up 16,914 residents from 2000, a 2.8% increase. Dividing the 2010 population by the 30 Senate districts yielded an ideal district population of 20,860.

I served as Chair of the Apportionment Board when it reviewed the results of the 2010 census and delivered redistricting proposals to the Senate and House. In 2011 the Board reviewed a plan that made relatively few adjustments to the existing districts (but which did subdivide the Chittenden district), but this left the overall deviation at just above 20, which was problematic. The Board also reviewed a plan with all single-member districts, but this encountered opposition within the Board, based on the lack of much resemblance to the county structure, a factor set forth in our state Constitution and statutes. Thus, neither of these alternatives gained the support necessary to achieve a consensus. The resulting plan adopted by the Board proposed significant changes to the districts in the northern half of the state, to account for the recent decades of population shift towards the northwest portions of the state. Respect for county lines played a significant role in drawing the Board's final map. The driving factor behind the adopted map, however, was the constitutionally mandated goal of making whatever changes proved to be necessary to achieve substantially equal representation in the Senate for Vermonters, regardless of where they live.

Article II, Section 18 of the Constitution currently places no limit on the number of Senators in a district, using "one or more" language. Section 1881 of Title 17 sets the number of Senators in each district, and allocates six Senators to the Chittenden district (Chittenden County, less Colchester and Huntington).

The Board devoted considerable time and effort to the issue of large, multi-member districts. This issue comes up for discussion with every reapportionment cycle, and the position of various Apportionment Boards on the issue is typically expressed in their final proposals. The 1972 and 1981 Board plans proposed eliminating the large districts with many at-large Senators in favor of smaller districts with fewer Senators to achieve what those Board's saw as more effective representation. In 1981, the Board proposed dividing the Chittenden and Rutland districts into smaller districts. The Board specifically noted in its plan that a multi-member district with a large population center potentially disenfranchises residents in the smaller towns of the district. The Board plan in 1972 also proposed smaller districts in the interest of substantial equality. The 2001 Board plan in contrast points to the value of maintaining some multi-member districts (see pp. 8-9 of the Board's 2001 plan). That year, the House Committee on Government Operations proposed a plan with 15 two-member districts; it was not embraced by the Senate.

During the winter and spring of 2011, the Board received correspondence that included public sentiment about multi-member districts mainly favorable to the breaking up of the Chittenden district. These constituents believed that the time and financial costs of campaigning in the Chittenden district hinder candidates for office. Other correspondence voiced concern about the prevalence of bullet voting and other forms of tactical voting that occurs in multi-member districts. The Board received no correspondence recommending retention of the current Chittenden district.

Periodically, some have questioned the constitutionality of a six-member district. The Vermont Constitution and statutes are silent on this, and no court has ruled on the issue. Chapter II, § 18 of the Constitution (and subsequent court cases) suggest that – in addition to the mathematical

standard – county lines should be preserved when creating districts. The multi-member districts over the years have typically met those requirements.

In the end, the Board determined that breaking the Chittenden district into smaller districts had considerable merit, and recommended that the Senate give serious consideration to the idea. That did not happen.

The Board did develop several “subdivided” Chittenden Senate district maps, some with two three-member districts and others with three two-member districts. Therefore, I believe it is feasible to implement the mandate of the first part of Proposition 4. I also believe it is the right thing to do.

Prop. 4: Giving the Apportionment Board the Final Say on Senate and House District Maps. The second part of Proposition 4 proposes to make the Apportionment Board autonomous, i.e., to make its redistricting decisions final and binding on the Senate and House. Under current law, the Board delivers its House and Senate proposals to those respective bodies, and each body is free to start from scratch, and sometimes does.

Proposition 4 proposes to retain the current structure and composition of the Board. The proposal would move language currently in 17 VSA sec. 1904(a) to Chapter II, Sec. 73 of the Constitution:

A Legislative Apportionment Board is created and shall comprise a Special Master designated by the Chief Justice of the Supreme Court; one resident of the State appointed by the Governor from each political party that has had more than three members serve as members of the General Assembly for at least three of the five biennial legislative sessions since the taking of the previous decennial census under the authority of Congress, which residents are not all from the same county; and one resident of the State elected by the State committee of each of those political parties.

This provision was in effect in 2011, and resulted in a seven-member Board - the Chair/Special Master, and two members each from the Progressive, Democratic and Republic parties. One important question presented by Proposition 4 is whether an apportionment board thus constituted is the body best suited to make final decisions about Senate and House district boundaries. Of course, the larger question for many remains whether the General Assembly should withdraw from its historic role in this process. I will defer addressing that question for another day.

I do want to explain how one state structures this process. California recently eliminated its legislature from the state legislative redistricting process, and serves if not as a model at least as an example of how that could work.

In California, an independent commission draws both congressional and state legislative district lines. This was established in 2008 by a ballot initiative. The California commission comprises 14 members: five Democrats, five Republicans and four belonging to neither party. A panel of state auditors selects the pool of nominees from which the commissioners are appointed. This

pool consists of 20 Democrats, 20 Republicans and 20 belonging to neither party. The majority and minority leaders of both chambers of the state legislature may each remove two members from each of these 20-person groups. The first eight commission members are selected at random from the remaining nominees in a manner so as to yield three Democrats, three Republicans and two belonging to neither party. The first eight commissioners appoint the remaining six, which must include two Democrats, two Republicans and two belonging to neither party.

The Commissioners must meet the following requirements in order to serve:

1. Members must have voted in at least two of the last three statewide elections.
2. Members cannot have switched party affiliation for at least five years.
3. "Neither commissioners nor immediate family may have been, within 10 years of appointment, a candidate for federal or state office or member of a party central committee; an officer, employee, or paid consultant to a federal or state candidate or party; a registered lobbyist or paid legislative staff; or a donor of more than \$2,000 to an elected candidate."
4. Members cannot be "staff, consultants or contractors for state or federal government" while serving as commissioners. The same prohibition applies to the family of commission members.

In order to approve a redistricting plan, nine of the commission's 14 members must vote for it. These nine must include three Democrats, three Republicans and three belonging to neither party. Maps drawn by the commission may be overturned by public referendum. In the event that a map is overturned by the public, the California Supreme Court must appoint a group to draw a new map.

The California law and process have withstood vigorous court challenges.

The California model is considerably more complex than the current Vermont Apportionment Board. I gather (although I have not done the research) that California chose its system to assure that the resulting Commission membership was diverse, avoided conflicts of interest, and would be perceived by Californians as credible and fair. I have not completed my own thinking about whether the Vermont Board satisfies these concerns and, if not, how Vermont should modify it to do so. This Memorandum, then, is still a work in progress.

I would be pleased to discuss this with the Committee and try to answer questions.

§ 72. [AMENDING CONSTITUTION]

At the biennial session of the General Assembly of this State which convenes in A.D. 1975, and at the biennial session convening every fourth year thereafter, the Senate by a vote of two-thirds of its members, may propose amendments to this Constitution, with the concurrence of a majority of the members of the House of Representatives with the amendment as proposed by the Senate. A proposed amendment so adopted by the Senate and concurred in by the House of Representatives shall be referred to the next biennial session of the General Assembly; and if at that last session a majority of the members of the Senate and a majority of the House of Representatives concur in the proposed amendment, it shall be the duty of the General Assembly to submit the proposal directly to the voters of the state. Any proposed amendment submitted to the voters of the state in accordance with this section which is approved by a majority of the voters voting thereon shall become part of the Constitution of this State.

Prior to the submission of a proposed amendment to a vote in accordance with this section, public notice of the proposed amendment shall be given by proclamation of the Governor.

The General Assembly shall provide for the manner of voting on amendments proposed under this section, and shall enact legislation to carry the provisions of this section into effect.

17 VSA § 1904. Legislative apportionment board

(a) There is hereby created the legislative apportionment board, consisting of: a special master designated by the chief justice of the supreme court; one resident of the state of Vermont for five years immediately preceding the appointment, appointed by the governor from each political party that has had more than three members serve as members of the general assembly, who are not all from the same county, for at least three of the five biennial legislative sessions since the taking of the previous decennial census of the United States; and one resident of the state of Vermont for the five years immediately preceding the appointment, elected by the state committee of each of those political parties, a quorum of each committee being present and voting. No member of the board shall serve as a member or employee of the general assembly, or of either house thereof. The special master so designated shall be chair of the board, and shall call such meetings as may be necessary for the accomplishment of the duties of the board hereafter set forth. The secretary of state of Vermont shall be secretary of the board, but shall have no vote. For the purpose of determining representation of a political party under this section, if a candidate for election to the general assembly accepted a nomination from more than one political party, that candidate's party affiliation shall be only that political party to which he or she filed a petition for nomination.

(b) Members of the board shall first be selected on or before July 1, 1990, and thereafter members shall be selected decennially before July 1 and shall serve until their successors are selected. The appointing or electing authority shall fill vacancies.

(c) For administrative purposes, the board shall be part of the office of the secretary of state, and funds for the board's operation shall be appropriated for the secretary of state, provided, however, that expenditures of such appropriation shall be directed by the board.

(d) Members of the board not receiving a salary from the state shall receive per diem compensation and expenses as provided in 32 V.S.A. § 1010.

(e) The board may employ or contract for such expert assistants or services, or both, as may be necessary to carry out its duties. (Added 1965, No. 97, § 4; amended 1989, No. 200 (Adj. Sess.), §§ 6a, 6b; 1991, No. 116 (Adj. Sess.), § 6, eff. Feb. 13, 1992; 2009, No. 18, § 1.)