BRENNAN CENTER FOR JUSTICE

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Brennan Center for Justice
at New York University School of Law
on
H.B. 1256

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The Brennan Center for Justice at New York University School of Law appreciates the opportunity to testify on **House Bill 1256**, which would create an advisory commission to draw maps for consideration by the Virginia General Assembly, starting in 2021.

The Brennan Center is a non-partisan law and policy institute that works to improve our nation's systems of democracy and justice. Redistricting reform has long been an integral part of this mission. Over the years, we have partnered with Republican and Democratic lawmakers and grassroots advocates to promote independent, community driven, and transparent redistricting. We offer this testimony to highlight similarities and key differences between H.B. 1256, as it has been amended, and other redistricting reform proposals currently before the General Assembly.

H.B. 1256 would be a meaningful improvement on the current redistricting process. At present, both legislative and congressional redistricting in Virginia takes place through the regular legislative process, with comparatively few statutory or constitutional limits on how maps are drawn. This means that when the General Assembly and the Governor are of the same political party, as has frequently happened, maps can be passed on a party-line basis and that the mapdrawing process can be abused to aggressively target political opponents or undermine the political strength of communities of color, in particular African Americans. Even when control of Virginia government is divided, as it was in 2011, the resulting maps have sometimes been highly discriminatory and have had to be redrawn under court order after litigation.

Although the original filed version went further in creating an independent process, H.B. 1256, as currently amended, would improve on the status quo by statutorily giving initial mapdrawing responsibility to an advisory commission that would include citizen commissioners and by setting out detailed criteria to be used in drawing maps, establishing rules on who can serve as a citizen commissioner, among other provisions related to public input and transparency. Maps drawn by the commission would be submitted to the General Assembly for a up or down vote and would be subject to a gubernatorial veto.

However, H.B. 1256 is not the only option on the table. In addition to the purely statutory reforms in H.B. 1256, the General Assembly could alternatively advance S.J. 18, the proposed constitutional amendment passed by the General Assembly almost unanimously in 2019 and currently awaiting consideration on second resolution.

From the standpoint of redistricting policy, there are only a few differences between H.B. 1256 and S.J. 18. Each approach would create a 16-member redistricting commission, eight of whose members would be lawmakers and eight of whom would be everyday Virginia citizens. Both also contain important language enhancing protections for communities of color, who, in Virginia as elsewhere, frequently are targeted in redistricting.

And while S.J. 18 does not contain supplemental language dealing with redistricting criteria, who can serve as a citizen commissioner, or other provisions related to public input and transparency, S.B. 203 would statutorily enact provisions akin to those currently in H.B. 1256.

From a policy standpoint, there are three main differences between the two proposals:

1. Timing. Under H.B. 1256 the commission would convene slightly earlier than the one formed under S.J. 18.

2. Deadlock. Under H.B. 1256, failure by the commission to reach necessary consensus would send the redistricting process to the legislature. Under S.J. 18, it would go directly to the Virginia Supreme Court, with separate legislation in S.B. 203 setting out intended guidelines for the judicial process.

3. Gubernatorial veto. Under H.B. 1256, the Governor would be able to veto redistricting plans. Under S.J. 18, that power is eliminated.

Given that these two options are so similar, the main question for the General Assembly as it considers H.B. 1256 is whether it believes that more robust reform is realistic in the near to medium term.

If it does not, then constitutionalizing reforms through S.J. 18 may be compelling. The statutory reforms proposed by H.B. 1256 would not be entrenched in Virginia law, and there would be nothing to stop a future legislature from repealing H.B. 1256 and gerrymandering maps, perhaps even in a mid-decade redistricting if control of Virginia government changes hands. Communities of color could be especially hurt in that circumstance because a future legislature could choose to repeal or override the added protections for communities of color in H.B. 1256. However, if the General Assembly decides to go this route, we would also urge it to begin the process of constitutionalizing all of the provisions dealing with mapdrawing criteria, commissioner selection, and deadlock. While S.B. 203 offers a strong statutory framework for addressing these matters, but it is only statutory, leaving essential issues to the goodwill of future legislative majorities.

On the other hand, there are other bills, including the earlier version of H.B. 1256, that would create an even more robust and independent redistricting commission. If those proposals are still politically feasible, then the General Assembly might prefer to pass H.B. 1256 as a temporary fix while pursuing those options as a constitutional amendment. However, this requires a continued commitment to redistricting reform and political will to restart the constitutional amendment process. It also requires accepting the risk that the future elections could result in an anti-reform majority, potentially ending reform efforts for a decade or more.

Both H.B. 1256 and S.J. 18 with its enacting legislation are steps in the right direction, and both leave more to be done. As a constitutional amendment, S.J. 18 adds a degree of certainty that the process will not easily revert back to one decided by legislative majorities. But it does not include elements such as criteria that optimally would be constitutionalized. On the other hand, H.B. 1256 provides a temporary fix for 2021 with no long-term guarantees.

Ultimately, the General Assembly should carefully consider whether it is feasible or desirable to constitutionalize something more independent and protective than what S.J. 18 provides and whether the risk that nothing gets done is worth it.