

Charles T. Munger, Jr.

January 23, 2009

Representatives from the Bureau of State Audits
Public Meeting of January 26, 2009
Department of Health Services
East End Complex
1500 Capitol Mall
Sacramento, CA 95814

Honorable Members of the Bureau of State Audits,

My first recommendation is that you don't take advice from anyone who won't give their advice on the public record and sign their name. You should also take any advice from anyone who strongly supported or strongly opposed Proposition with a large grain of salt.

I, Charles T. Munger, Jr, am the donor ^{who made} with the largest individual contribution to the passage of Proposition 11. Get out the salt.

My second is that you bear in mind the tremendous trust the public and individuals like me have placed in the probity of your actions. Benjamin Franklin, on returning from the Constitutional Convention, was asked by a woman what he had brought to her state. "A republic, madam---if you can keep it." And we who voted for Proposition 11 and backed it have brought California redistricting reform---if *you* can keep it; if the Bureau of State Audits will withstand the narrow partisan and ideological pressures to which the California legislature, in four separate decades, succumbed; if you will set aside your individual preferences about how the state ought to be run, and instead see that the people who will draw the districts are chosen fairly, so that the people may decide.

This first public hearing is a deeply cheering and hopeful beginning, but it is only a beginning: the Big Four in 2000 began with open hearings and sweeping promises, but retired to the traditional smoke-filled private rooms in the end, where they apportioned the choice parts of the state among their partisans as you and I might carve a roast, and thought they were doing well. I exhort you to do better to set a precedent not only for future of California, but the nation, where state after state groans under a gerrymander, and looks now to California for a sign that it will not always be so.

I enclose some suggested protocols for the State Auditor and the Auditor Review Panel to follow, in order to fulfill the intent of the law; followed by some comment on why the suggested protocols will fulfill that intent. I close with some comments on the specific questions that were noticed as the subject of today's meeting.

Sincerely yours,

Charles T. Munger Jr.

Proposed: A Protocol for Auditors appointed to the Applicant Review Panel.

In drafting a protocol for the auditors appointed to the Applicant Review Panel to conduct an open and transparent public process, I have lifted language from the parts of the initiative that enable members of the Citizen's Review Commission to do the same. Such language I have rendered in italics, and quoted the parallel text within the initiative. There are five parts to the proposed code.

- (1) Panel members *shall conduct an open and transparent process enabling full public consideration of and comment on the selection of its pool of recommended applicants for the Citizen's Redistricting Commission.*
- (2) Panel members *shall comply with the Bagley-Keene Open Meeting Act (Article 9 commencing with Section 111 20 of Chapter I of Part I Division 3 of Title 2), or its successor. The panel shall provide not less than 14 days public notice for each meeting, except that meetings held on or after September 1 in the year ending in the number zero may be held with three days' notice.*
- (3) Panel members *shall establish and implement an open hearing process for public input and deliberation that shall be subject to public notice and promoted through a thorough outreach program to solicit broad public participation in the applicant review process. The panel shall display a proposed applicant pool for public comment in a manner designed to achieve the widest public access reasonably possible. Public comment shall be taken for at least 14 days from the date of public display of any proposed applicant pool.*
- (4) Panel members *and staff may not communicate with or receive communications about applicants, the composition of an applicant pool, or other matters related to the selection of the panel's pool of recommended applicants, from anyone outside a public hearing except as a public record.*
- (5) If the Panel is to approve an applicant pool on a divided instead of unanimous vote, it shall do so only after holding a second public hearing and vote to approve that pool.

Proposed: A Protocol for the State Auditor for conducting the review of applications for conflicts of interest.

Unlike the four parts of the protocol for the auditors appointed to the Applicant Review Panel, the following three-part protocol for the State Auditor has weaker roots within the text of the Voter's FIRST initiative.

- (1) The State Auditor *may not communicate with or receive communications about applications or applicants from anyone outside a public hearing, except as a public record.*
- (2) The State Auditor shall send a letter to each applicant the Auditor proposes be removed from the applicant pool because of a conflict of interest of the nature of that conflict.
- (3) Not less than 14 days after the letters are posted, the State Auditor shall conduct a public meeting, *that shall comply with the Bagley-Keene Open Meeting Act (Article 9 commencing with Section 111 20 of Chapter I of Part I Division 3 of Title 2), or its successor.* The purpose of this meeting is for applicants whom the Auditor has proposed be removed from the applicant pool to be able to show cause why they should not be removed.

Citations within the initiative supporting the five parts of the proposed protocol for the Audit Review Panel, with comments.

Part (1) Article XXI Sec. 2. (b) [the commission] shall ... conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines...

Comment: None.

Part (2) Sec. 8253.5 (a) (1) The commission shall comply with the Bagley-Keene Open Meeting Act (Article 9 commencing with Section 111 20 of Chapter I of Part I Division 3 of Title 2), or its successor. The commission shall provide not less than 14 days public notice for each meeting, except that meetings held in September in the year ending in the number one may be held with three days' notice.

Comment Sec. 8252(e) reads, "By October 1 in 20 10 and in each year ending in the number zero thereafter, the Applicant Review Panel shall present its pool of recommended applicants to the Secretary of the Senate and the Chief Clerk of the Assembly." To allow for enough meetings for the Applicant Review Panel to complete its business, in the month before (in September of years ending with the digit zero) meetings may be held with but three days notice. This flexibility is taken from the parallel situation with the Citizen's Redistricting Commission, which is required to deliver its maps by September 5 of years ending in 1, and is allowed to call public meetings in September with three days notice instead of the usual 14. Therefore I have given this flexibility to the Applicant Review Panel in its final weeks of work as well; I elected to make the number of weeks four instead of two, because the requirement that possible applicant pools be posted for 14 days requires very frequent meetings in the first two weeks of September, not the last two, if the Panel is to complete its business on time.

Part (3) The relevant text within the initiative reads,

8253(7) The commission shall establish and implement an open hearing process for public input and deliberation that shall be subject to public notice and promoted through a thorough outreach program to solicit broad public participation in the redistricting public review process. The hearing process shall include hearings to receive public input before the commission draws any maps and hearings following the drawing and display of any commission maps. In addition, hearings shall be supplemented with other activities as appropriate to further increase opportunities for the public to observe and participate in the review process. The commission shall display the maps for public comment in a manner designed to achieve the widest public access reasonably possible. Public comment shall be taken for at least 14 days from the date of public display of any map.

Comment. The applications for consideration by the Applicant Review Panel are required to be tendered by no later than August 1, and the Applicant Review Panel is to submit its pool of applicants by October 1, which gives two months for the Panel's work. The Citizen's Redistricting Commission, by contrast, is complete no later than December 31 and is to submit its maps by September 15 of the following year, and so has 9 ½ months to complete its work. Having to post a possible applicant pool for 14 days, amounting to about a quarter of the time that the Applicant Review Panel has to do its work, might seem unduly burdensome; however the Panel is allowed to have meetings with but three days' notice the first two weeks of September, and can therefore complete several proposed pools, receive comment, and then make a final selection among these pools at the end of September.

Part (4) The relevant text within the initiative reads,

8253(3) Commission members and staff may not communicate with or receive communications about redistricting matters from anyone outside a public hearing.

Comment. It is, of course, paramount that the public be able to follow, and if need be refute, allegations made about applicants under consideration by the panel; be as apprised of matters brought before the Panel as the panel members themselves, and be assured that there are no backroom deals being made.

Part (5) The relevant texts within the initiative are:

SEC.2.(c)(2) The Citizens Redistricting Commission shall consist of 14 members, as follows: five who are registered with the largest political party in California based on registration, five who are registered with the second largest political party in California based on registration, and four who are not registered with either of the two largest political parties in California based on registration.

SEC. 2.(a)(5) ...The three final maps must be approved by at least nine affirmative votes which must include at least three votes of members registered from each of the two largest political parties in California based on registration and three votes from members who are not registered with either of these two political parties.

8252(b) The State Auditor shall establish an Applicant Review Panel... The State Auditor shall draw until the names of three auditors have been drawn including one who is registered with the largest political party in California based on party registration, one who is registered with the second largest political party in California based on party registration, and one who is not registered with either of the two largest political parties in California.

Comment: It is the clear intent of the authors of this initiative that no map be drawn that does not have support from all three parts of the political spectrum, both in its specification of the composition of the Citizen's Redistricting Commission by party, and its requirement that no map be approved that lacks support from representatives of any of the three types of party representatives. The authors were careful to stipulate that the Applicant Review Panel have one of its three members from each of the three types, but were not careful to specify that no applicant pool be accepted that did not have support from each of the three types. Certainly the Applicant Review Panel, at least, has the authority to set a higher quorum rule for approval of the final applicant pool than the usual simple majority (here two members of the three). Certainly the authors of the initiative, and the public, do not want an applicant review panel selected over the vehement objections of any part of the political spectrum, with the nominal "independent" allying with the representatives of either major party, or having the representatives of the major parties allying to freeze out the political center. Indeed, the function of the Applicant Review Panel is surely to prevent the appointment of anyone whose views or philosophy are so extreme that the applicant cannot receive the respect of any of the three auditors, or at least the acquiescence in the appointment as part of a balanced group of 60. While insisting on unanimity in a large and diverse group is a recipe for paralysis, here we deal with a panel of but three members, all selected from the same profession and so having professional standards in common. The website for the Bureau of Audits (<http://www.bsa.ca.gov/aboutus/mission.php>) has as its mission,

“The staff of the Bureau of State Audits (bureau), who are under the direction of the State Auditor, understand and respect the importance of their position as the State’s independent auditors. The staff of the bureau will conduct their reviews in a nonpartisan manner, free from outside influence, including that of the Legislature, Governor, and the subjects of their audits and investigations. Bureau staff will base their findings, conclusions, and recommendations upon reliable evidence and will not allow preconceived notions or personal opinions to influence their work. The staff will strictly adhere to the standards of the auditing profession and exercise the highest standards of ethics. The bureau and the staff will lead by example, holding the organization and themselves to the same or higher standards that they use to evaluate others.”

An applicant pool that is not recommended by a 2 to 1 vote among the auditors is very much in the public interest. Against simply requiring unanimity among the three members of the Applicant Review Panel is the possibility that one auditor may refuse to let any panel go forward unless that auditor’s individual preferences are met in every detail. The suggested rule is a compromise, that allows a pool that receives the assent of all three members of the Applicant Review Panel to go forward at once, but requires a repeated vote at a second meeting if it is to go forward on a 2 to 1 vote, to allow for cooling off and reconsideration, reconsideration, and to allow notice for members of the public and the press to weigh in. If a pool must go forward with a 2 to 1 vote after that, so be it: but let us not rush to that result.

Comment on the proposed protocol for the review of applications by the State Auditor for conflicts of interest.

The intent of this protocol is to prevent the powers that be from weeding the applicant pool by pressuring the State Auditor to reject applications for alleged but not real conflicts of interest. Because the initiative grants the Auditor power to reject applications for conflicts of interest "including," and therefore not limited to, those detailed in the initiative in section 8252(a)(2), the Auditor's power is potentially wide. It is in the public interest that the Auditor be able to justify his or her decisions, that rejected applicants have a public venue in which to seek redress for errors, and that the public be able to see that the Auditor is applying assessments of conflicts of interest uniform across all the applications. Given that the Auditor must "initiate" (section 8252(a)(1)) the application process by January 1 at the latest, and that the applications that are to remain in the pool are to be sent to the Auditor Review Panel no later than August 1 (section 8252(c)), the Auditor has at least 7 months in which to work, and so requiring at least 1 public meeting on 14 days' notice is not a burdensome requirement. While the Auditor may arrange for more than one public meeting, it seems unnecessary to require more than one; obviously any applicant the Applicant Review Panel proposes for the final pool of 60 who can be shown to have a conflict of interest can simply be removed from that pool before it is finalized, and the Applicant Review Panel will, if the proposed protocol for that panel is adopted, have public hearings in which the necessary information will come to light. I have also avoided requiring public hearings on the subject of which of the applicants for which the Auditor has found no conflict of interest might be argued by some member of the public to have a conflict. It is far more efficient for the public to look for such unremarked conflicts in a pool of 60 proposed by the Audit Review Panel than to look for them in the several hundreds of applications received by the State Auditor, the vast majority of which will never receive much attention from the Applicant Review Panel in any event.

Specific matters about which comment from the public was solicited for the meeting of January 26, 2008:

The application process for the selection of members of the Commission as discussed in Article XXI, Section 2(c)(3) of the California Constitution and Section 8252(a)(1) of the California Government Code.

Aside from blanking out personal contact information such as telephone numbers and e-mail addresses, the names and completed applications should be public documents. If the public cannot see the information on which the Applicant Review Panel is basing its decisions, how can inaccurate information be disputed? So consequential politically are the decisions of the Redistricting Commission that some coordinated attempt to slip in "ringers" of one sort or another is only to be expected. Many die-hard Republicans in Democratic districts, and die-hard ^{Democrats} ~~Republicans~~ in Republican districts, already register as independents so that they may vote in the party primary of the party that dominates their district. Similarly it may be expected that people who have known and very decided views on other important matters—such as whether to respect communities of interest over county boundaries, or the reverse—may choose not to volunteer that information on their applications.

The creation of the Applicant Review Panel to screen Commission applicants as discussed in Section 8252(b) of the California Government Code.

The members of the panel are to be selected by a random draw. It is necessary to publish the list of people among whom a random selection is to be made, so that those people and the public can know if someone has unwarrantably being included in the list or left off it. Some time after that, it is necessary to have the actual draw occur in a meeting with a sufficiently large number of disinterested witnesses and that is open to the public. If the draw occurs in private in the Auditor's office, and happens to fall on some auditor who is a personal friend of a legislator, the Auditor will look like he or she has been bought no matter how honest he or she is. Meetings of the State Board of Education are videotaped and the tapes are public documents; it would be wise to tape the draw.

The removal of individuals from the applicant pool based on conflicts of interest identified in the Act as discussed in Section 8252(a)(2) of the California Government Code.

The basic principles should be that individuals should be apprised of what their alleged conflict of interest is, should have a chance to protest, and that the hearing of the protest and the final decision about which names should be forwarded to the Applicant Review Panel should be made in a duly noticed public meeting so the public may see that the standards of what constitutes a conflict of interest are both fair and applied uniformly across all applicants.

The publication of the names in the applicant pool as discussed in Section 8252(c) of the California Government Code.

The publication should certainly include posting on the internet as soon as the pool of 60 is determined, along with information allowing for the sending of information from the public about the individuals in the pool to the four members of the legislature who have the authority to delete some names from the applicant pool before the draw that establishes the first eight who will serve on the Redistricting Commission. In a manner similar to the preemptory challenges given to the prosecution and the defense

to remove jurors as a jury is impaneled, these challenges are supposed to allow the removal from the applicant pool of that small fraction that is politically, ideologically or politically so extreme that they should not have a chance to serve on the commission. Why should members of the general public who know the members of the pool not advise on this? Political insiders will anyway---let us choose to empower the man on the street.

The random selection of eight members of the Commission as discussed in Section 8252(f) of the California Government Code.

The draw must occur in a public meeting, with some number of required and disinterested witnesses, e.g., a few judges, perhaps. No one will believe in the fairness of an allegedly random draw that occurs behind closed doors. The meeting should be videotaped and copies made available as public records. As far as the mechanics go, do something simple the public understands; for example, if there are fewer than 52 members remaining in the pool, assign each of them an ordinary playing card, have someone shuffle and lay out an ordinary deck, and have someone else turn over cards. Another way would be to assign each of 60 members a number 1 to 60 and pick a number at random by rolling an ordinary six-sided die to give the ten's place and a ten-sided die (such are available in a gaming store) to give the unit's place. What you don't want to use is any random number generator on a computer—who knows who programmed what?---or to have the draw not occur in public.

The creation of a new pool of qualified applicants in the event of a vacancy on the Commission with no qualified person left in the pool previously established by the State Auditor to fill vacancies as discussed in Section 8252.5(b) of the California Government Code.

I have no suggestion for this.

Charles Munger, Jr.

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