

Barbara Paget

From: Rosalind Gold [mailto:rgold@naleo.org]
Sent: Wednesday, February 18, 2009 11:33 AM
To: Barbara Paget
Cc: Arturo Vargas; Sofia Gomez
Subject: Submission of comments regarding Prop. 11 application and selection procedures
Attachments: NALEO Comment letter to BSA on Prop 11 fin 02-09.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Ms. Paget:

Attached, on behalf of the National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund, is our letter setting forth our comments on Proposition 11's Redistricting Commissioner application and selection process.

Our Executive Director, Arturo Vargas, intends to provide comments in person at the Feb. 23 hearing in Los Angeles. Is there any particular order in which persons who are appearing will be heard? My understanding from the Sacramento hearing is that persons were essentially called up row-by-row, with those sitting in the front being called the earliest. Please let me know if the procedures for Los Angeles will be any different.

Thank you for your attention to this matter, and please do not hesitate to contact me with any questions about the attached.

Sincerely,

Rosalind Gold
Senior Director, Policy Research and Advocacy
NALEO Educational Fund

www.naleo.org

The NALEO Educational Fund is the leading organization that facilitates full Latino participation in the American political process, from citizenship to public service.

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February 18, 2009

Ms. Barbara Paget
Bureau of State Audits
555 Capitol Mall, Suite 300
Sacramento, CA 95814

Dear Ms. Paget:

On behalf of the National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund, we are writing to provide comments about the processes that should be established for individuals to apply to become members of the Redistricting Commission established under Proposition 11, and for the selection of an Applicant Review Panel (ARP) to assess the applicants and create an applicant pool of 60 qualified members.

The NALEO Educational Fund is the leading national organization that facilitates full Latino participation in the American political process from citizenship to public service. Our constituency includes the more than 6,000 Latino elected officials nationwide, including nearly 1,300 from California. We are regularly requested by the U.S. House and Senate to provide expert testimony on voting-related issues, including electoral reform, voting rights and the Census. As a national organization headquartered in Los Angeles, we have a particular interest in ensuring the civil rights of Latinos in this state are preserved and not violated.

The NALEO Educational Fund is prefacing our comments by informing you that California cannot implement Proposition 11 until the measure is "pre-cleared" under Section 5 of the Voting Rights Act of 1965 ("VRA"), which has not happened yet. Accordingly, this hearing and the other hearings being conducted by the Bureau of State Audits are premature, and we are participating only because we have no assurances that the Bureau of State Audits will provide future opportunities for input. In addition, the NALEO Educational Fund has joined with four other leading civil rights organizations in submitting a letter of objection urging the U.S. Department of Justice (DOJ) not to pre-clear Proposition 11 because it will have a retrogressive impact on the ability of California minority voters who are protected by the VRA to elect the candidates of their choice in federal and state elections.

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† deceased

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Moreover, in October 2005, the NALEO Educational Fund articulated principles that we believe should guide redistrictings, whether conducted by state legislatures, commissions, or some other entity (the principles are attached). Essentially, we believe that the redistricting process should be constructed in a way that guarantees adherence to the Constitution, federal law and the VRA, and the full and meaningful participation of the public. One of our principles emphasizes that the membership of any redistricting commission must reflect the geographic, racial, ethnic, gender, and age diversity of the political jurisdiction involved.

Based on our principles, we actively opposed the passage of Proposition 11 because we believe the measure will jeopardize minority electoral opportunities in California. We continue to be extremely troubled by the measure's fundamentally-flawed selection process for Commissioners which will not ensure that the Redistricting Commission reflects the full diversity of California's population and possesses the expertise needed to do its job effectively. Thus, while we offer the following recommendations for consideration by the State Auditor, we believe they can only minimally mitigate the serious and fundamental problems with Proposition 11's selection process, and implementation of these recommendations will not mitigate the retrogressive impact of any of Proposition 11's provisions.

I. The State Auditor Should Ensure that the Commissioner Application and Selection Process is Open and Transparent

The NALEO Educational Fund strongly believes that all stages of the redistricting process should be conducted in an open and transparent manner, including the application and selection process for Commissioners. We offer two types of recommendations to achieve this goal. The first relates to the regulations the State Auditor should promulgate with respect to the application and selection process, and the second relates to the actual application and selection procedures.

The State Auditor's Regulations:

The State Auditor should promulgate regulations governing all aspects of the selection process, including the process by which members of the ARP are chosen, the procedures for submitting applications to the ARP, the procedures and criteria that the ARP uses to select candidates for the applicant subpools, and the procedures and criteria used by the State Auditor to remove candidates from the subpools for conflicts of interest. The State Auditor should conduct this rulemaking in a manner that provides a meaningful opportunity for the public to provide comment on the regulations.

We offer two specific recommendations with respect to the type of information the State Auditor should include in the regulations. These regulations should include the actual application form for Commissioner candidates that the State Auditor proposes to use. The regulations should also specifically describe the State Auditor's procedures for determining whether candidates should be disqualified from the applicant subpools. There are several approaches the State Auditor could adopt to make this determination. For example, the State Auditor could accept a general

attestation or affirmation of individual applicants that no circumstances exist that would warrant their disqualification. Alternatively, the State Auditor could require applicants to answer specific factual questions, and then use that information to make a judgment about whether applicants are subject to disqualification. In some cases (such as the determination of individuals' party affiliation and voting history), the State Auditor could attempt to independently verify individuals' qualifications from information in public records. We believe the regulations should specifically articulate which of the foregoing approaches the State Auditor will adopt with respect to the different grounds of disqualification in Proposition 11.

With respect to the adoption of the State Auditor's regulations, we also note that those regulations will be subject to the pre-clearance requirements of Section 5 of the VRA. We recommend that the State Auditor take the time required for pre-clearance into account when developing its calendar for the promulgation of the regulations.

Application and selection procedures:

In order to enhance the transparency of the application and selection process, we believe that the State Auditor should make public the list of all auditors employed by the State of California who meet the definition of "qualified independent auditor" under Proposition 11, and who are thus eligible to serve on the ARP.

For the applicant subpool selection process, we recommend that the members of the ARP should conduct their deliberations on candidates, including any votes taken to select candidates, in public. We recommend that the State Auditor consider explicitly making meetings of the ARP relating to such deliberations subject to the open meeting requirements of the Bagley-Keene Act. In addition, the State Auditor should provide members of the public with an opportunity to comment on the qualifications of the candidates. Thus, we recommend that the State Auditor establish a public comment period of 60 days subsequent to the publication of all of the candidates' names. This will assist the ARP in compiling information that is relevant to the agency's assessment of the candidates.

Proposition 11 prohibits the ARP from communicating with members of the State Board of Equalization, the California legislature, the U.S. Congress, or their representatives during the applicant nomination and selection process. We recommend that the State Auditor prohibit any *ex parte* communications between the ARP and any members of the public during the same period. In addition, the State Auditor should clarify that Proposition 11's ban on any communication between the ARP and state and federal officials does not apply to local elected officials, so long as the communications are not *ex parte*.

II. Provide Compensation and Expense Reimbursement for Members of the Applicant Review Panel (ARP)

Under Proposition 11, the State Auditor establishes the three-member ARP to screen Redistricting Commissioner candidates by conducting a random drawing from a pool of qualified

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independent state auditors. Individuals whose names are drawn can decline to serve on the panel.

The members of the ARP have several important responsibilities with respect to the screening of Commissioner candidates. They must review applications, and create subpools of applicants based on certain criteria. It is likely that members of the ARP will need to spend a considerable amount of time and effort to carry out these responsibilities effectively. In order to ensure that capable and committed auditors are willing to serve on the ARP, we recommend that the State Auditor provide them with reasonable compensation for their work, and reimbursement of reasonable personal expenses incurred in connection with their ARP duties.

III. The State Auditor Must Pursue Strategies to Achieve Diversity Within Both the Commission Candidate Pool and Applicant Pool

Proposition 11's random selection process for eight of the 14 Redistricting Commissioners will make it extremely difficult for the composition of the Commission to fully reflect the geographic, ethnic, racial, gender and age diversity of California's population. In order to increase the probability that Commissioners from diverse communities will be selected, the group of candidates for the applicant pool must be as diverse as possible. To achieve this, the State Auditor must actively recruit candidates through vigorous and effective outreach efforts. These include publicizing the commission openings in ethnic media, and working closely with ethnic civic, professional and business organizations to encourage members of their constituencies to apply.

In addition, we recommend that the State Auditor should work with organizations that serve diverse communities to conduct other forms of outreach, including workshops or other presentations across the state which provide participants with information and technical assistance about the selection process. These should cover the importance of the redistricting process, how the selection process will work, the qualifications for Redistricting Commissioners, Proposition 11's conflict of interest provisions, and other relevant information. The State Auditor should also disseminate outreach information through on-line and electronic formats, such as webinars.

In addition to working to ensure that the candidate pool is diverse, we also believe the ARP should work to ensure that the subpools of qualified applicants from which the Redistricting Commissioners are chosen are also diverse. Under Proposition 11, these subpools must be created "on the basis of relevant analytical skills, ability to be impartial and appreciation for California's diverse demographics and geography." (emphasis added). Because of the construction of this guideline, it is possible to argue that its diversity requirement would be met merely if individual applicants evidence "appreciation" for diversity. However, proponents of Proposition 11 have frequently cited this selection guideline as one of the measure's provisions that would further the creation of a commission whose membership reflects California's ethnic,

racial, and gender diversity.¹ Consistent with this perspective, we believe that the State Auditor should interpret the selection guideline regarding diversity to require the ARP to pursue achieving actual diversity in the composition of the applicant subpools themselves, rather than merely trying to assess whether individual applicants have an “appreciation” for diversity.

IV. The State Auditor Must Articulate Specific Criteria for the Creation of the Applicant Subpools

Under Proposition 11, the Applicant Review Panel (ARP) established by the State Auditor must create three subpools of qualified applicants for the Redistricting Commissioner positions. As noted above, two of the criteria for determining applicants’ qualifications are whether they possess “relevant analytical skills” and the “ability to be impartial.”

With respect to the “relevant analytical skills,” we believe that it is critical that the Redistricting Commissioners possess certain specific skills and expertise in order to carry out their responsibilities effectively. They must be able to analyze complex demographic, political and geographic data, and they must be able to assess whether the maps they create comply with the criteria set forth in Proposition 11, including compliance with the VRA.

We are concerned that the standard of “relevant analytical skills” is too vague to provide the ARP with sufficient guidance on the expertise that qualified applicants must possess. We understand that the staff of the Redistricting Commissioners will be able to assist them with their responsibilities, and Proposition 11 requires that one of the legal counsel hired by the Commission have extensive VRA expertise. Nonetheless, it is ultimately the Redistricting Commissioners’ job to make final line-drawing decisions, and they must be able to effectively evaluate the recommendations offered by staff. Thus, we urge the State Auditor to articulate in its proposed regulations the specific criteria that will be used to assess whether applicants possess the skills that effective Commissioners would need. We believe the criteria should at least include the following:

- Demonstrated skill or experience with governmental redistrictings.
- Demonstrated skill or experience with analyzing complex geographic, demographic and political data.
- Demonstrated skill or experience with reviewing and assessing public testimony.
- Demonstrated experience and expertise in the implementation and the enforcement of the VRA, through the applicant’s work with, or on behalf of, any of the groups protected under Sections 4(f)4, 5 and 203 of the VRA.

¹ The other provisions include: 1) the overall statement that the selection process is “designed to produce a Citizens Redistricting Commission that is...reasonably representative of this state’s diversity;” 2) the specific requirement that the State Auditor initiate an application process that “promotes a diverse and qualified applicant pool;” and 3) the specific requirement that the six Redistricting Commissioners chosen by the first eight must reflect California’s diversity.

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We also believe that the State Auditor should articulate in its proposed regulations the specific criteria it will use in assessing whether applicants possess the “ability to be impartial.”

V. The State Auditor Should Ensure that the Applicant Disqualification Provisions Do Not Disqualify Individuals Unfairly or Where There Is No Meaningful Risk of Conflict of Interest

Proposition 11 requires the State Auditor to remove individuals with certain conflicts of interest from the applicant pool. The measure also sets forth the requirement that Redistricting Commissioners must have voted in two of the three last statewide general elections immediately preceding their application. We believe that several of the grounds for disqualification in Proposition 11 are vaguely defined or subject to varying interpretations. Thus, it is important that the State Auditor applies them in a manner that does not unreasonably disqualify capable candidates from the applicant pool where there is no meaningful risk of conflict of interest. In this connection, we recommend that the State Auditor construe definitions such as “immediate family” or “persons under a contract with” narrowly, so that only individuals with meaningful conflicts of interest are disqualified. We also recommend that the State Auditor clarify that working on a campaign as a volunteer will not in and of itself disqualify an individual under the conflict of interest provisions relating to service with a political party, campaign committee, or party central committee.

The application of the grounds for disqualification may also require the State Auditor to make highly technical factual determinations if the State Auditor becomes aware of information the agency believes should disqualify a candidate. To help ensure that qualified candidates are not disqualified because of factual errors or otherwise erroneous determinations by the State Auditor, the State Auditor should provide any applicants disqualified because of concerns about their voting behavior or conflicts of interest an explanation of the grounds of the disqualification and the information upon which the State Auditor relied in making its determination. The State Auditor should also provide applicants with an opportunity to request a review of their disqualification. This process should enable applicants to submit information that would ensure the ARP has made an accurate determination about their qualifications. In addition, the State Auditor should establish a process that allows disqualified candidates to appeal their disqualification.

Thank you for your consideration of our comments. If you have any additional questions, please do not hesitate to contact Rosalind Gold at

Sincerely,



Arturo Vargas
Executive Director



PRINCIPLES GUIDING REDISTRICTINGS OF POLITICAL SUBDIVISIONS AND INDEPENDENT REDISTRICTING COMMISSIONS

Adopted by the Boards of Directors of the National Association of Latino Elected
and Appointed Officials (NALEO) and the NALEO Educational Fund
October 2005

The process by which federal, state and local political jurisdictions draw their district lines has a significant impact on the ability of Latinos to have a meaningful opportunity to participate in our electoral process and to elect the candidates of their choice. The Boards of NALEO and the NALEO Educational Fund believe that in order to strengthen our democracy, the process and criteria used in redistricting must maximize the opportunity to achieve full Latino empowerment and representation. The Boards have adopted a set of principles which should apply to all redistrictings conducted by political jurisdictions, and a set of criteria to specifically assess independent redistricting commissions.

PRINCIPLES FOR REDISTRICTINGS

1. All districts must comply with the requirements of the U.S. Constitution and the Voting Rights Act of 1965. This principle must be the highest priority for any redistricting.

The remaining principles are important, equally ranked in priority.

2. To the extent practicable, district boundaries should respect existing political subdivisions and communities of interest. To achieve this objective, district lines should use the boundaries of political subdivisions and undivided census tracts; natural geographic features; and shared racial, ethnic, social and economic interests.
3. Redistricting plans should maximize Latino electoral opportunities. This includes maximizing districts where Latinos have the opportunity to elect the candidates of their choice, as well as districts where Latinos can influence the outcome of elections.
4. The process for developing redistricting plans must be transparent and provide interested parties and the public a meaningful opportunity to participate and be heard.
5. Redistricting should be limited to once following each decennial Census. This will ensure that redistricting is conducted with the most recent and reliable data on population growth and composition. It will also prevent opportunistic redistrictings between Censuses that are motivated by partisan considerations.

CRITERIA FOR INDEPENDENT REDISTRICTING COMMISSIONS

1. The membership of the independent redistricting commission must reflect the geographic, racial, ethnic, gender, and age diversity of the political jurisdiction. Thus, the size, composition, and criteria and process for selection of commissioners must further the achievement of this diversity.

2. A majority of the commissioners must be appointed by individuals or entities that are accountable to the public.
3. There should be reasonable requirements for the qualifications and conduct of commissioners to ensure that they avoid conflicts of interest and the appearance of impropriety.
4. The independent commission's appointment process should be subject to judicial review before the commission is officially sworn in. Jurisdictions should also establish a system that allows for judicial review of the plans developed by the independent commission, and for a clear process for timely review in the event of legal challenges.
5. An independent redistricting commission should have sufficient funding which enables it to carry out its responsibilities in an effective manner, including dedicated funding for commissioners, staff and consultants.