

**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

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<p>ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL December 5, 2007</p>	<p>No. I07-011 (R06-030)  Re: Authority of Independent Redistricting Commission; Commissioners' Terms of Office; Effect of Commissioner Change of Party Affiliation</p>
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To: Steven W. Lynn, Chairman  
Independent Redistricting Commission

**Questions Presented**

The Arizona Constitution establishes the Independent Redistricting Commission (“Commission”) to redraw legislative and congressional district boundaries following each decennial census. Ariz. Const. art. IV, pt. 2, § 1. You have asked the following questions concerning the Commission:

1. The Commission “shall not meet or incur expenses after the redistricting plan is completed, except if litigation or any government approval of the plan is pending.” Ariz. Const. art. IV, pt. 2, § 1(23). Is litigation pending as long as a party may possibly file a notice of appeal, a motion for reconsideration or a petition for review? If a petition for review is denied, is litigation pending until the mandate issues?

2. If a new legal challenge to legislative or congressional district boundaries is filed after the Commission returns surplus monies to the general fund, how will the Commission control the defense of the challenged redistricting plan?

3. May the Commission properly use any of its existing appropriation to enter into an interagency service agreement with another state agency to collect and prepare election data for elections through 2010 in order to prepare for the next redistricting or to continue working with the United States Census Redistricting Data Office?

4. During a Commissioner's term and "for three years thereafter," a Commissioner is "ineligible for Arizona public office or for registration as a paid lobbyist." Ariz. Const. art. IV, pt. 2, § 1(13). Does an "Arizona public office" include all local, state, or federal offices or just those offices that the Commission redistricted? Is the ban on holding public office during a Commissioner's term of office and for three years thereafter shortened if a Commissioner resigns?

5. No more than two members of the Commission may be members of the same political party, and each member must have been continuously registered with the same political party or registered as not affiliated with a political party for three or more years "immediately preceding appointment." Ariz. Const. art. IV, pt. 2, § 1(3). What happens if a Republican or Democrat member of the Commission re-registers as an independent during his or her term of office or if the independent re-registers with one of the two major parties?

### **Summary Answers**

1. The Commission may continue incurring expenses and meeting while litigation is pending. The litigation will not end until the time frame for all appeals has expired and the mandate has issued.

2. Any funding for future litigation concerning redistricting should be provided through legislative appropriation.

3. The Commission may not transfer its funds to another agency to enable that agency to continue work to prepare for next decade's redistricting. If this continuing work needs to be accomplished, it is a policy issue for the Legislature to address.

4. Commissioners are not eligible for any state or local office in this state for three years after their term on the Commission. If a person resigns from the Commission before the new Commission is appointed, the three-year prohibition begins to run from the date on which the person's term would have ended if he or she had not resigned, which would be the date upon which the first member of the new Commission is appointed.

5. If a Commissioner changes party affiliation and, as a result, the Commission no longer satisfies the constitutional requirement that no more than two Commissioners are members of the same political party, the Commissioner whose change of parties caused the disparity should resign or be removed from office.

### **Background**

In 2000, Arizona voters passed an initiative, Proposition 106, amending the Arizona Constitution to establish an Independent Redistricting Commission to redraw congressional and state legislative district boundaries following each decennial census. Ariz. Const. art. IV, pt. 2, § 1. Before this constitutional amendment was approved, the Legislature was responsible for legislative and congressional redistricting in Arizona.

Under the constitutional amendment, a new Commission is established every ten years beginning in 2001. *Id.* § 1(3). The five-member Commission must have no more than two Commissioners who are members of the same political party. *Id.* A Commissioner's duties expire upon the appointment of the first member of the next redistricting Commission. *Id.* § 1(23).

The constitutional amendment mandated that the Treasurer transfer six million dollars to the Commission following the 2000 census. *Id.* § 1(18). Any unused funds were to be returned to the general fund. *Id.* For the redistricting work in subsequent decades, the Department of Administration is to submit a recommended appropriation to the Legislature and the Legislature is to “make the necessary appropriations by a majority vote.” *Id.* Once the redistricting plan is finished, the Commission may not meet or incur expenses unless litigation or government approval is pending. *Id.* § 1(23).

The Commission has spent the six million dollars appropriated in the constitutional amendment. Because the Commission was still involved with litigation concerning the legislative districts, the Legislature appropriated an additional \$4,203,000 in fiscal year 2004. 2003 Ariz. Sess. Laws, 2d Spec. Sess., ch. 3 (appropriating \$1,703,000 to the Commission); 2004 Ariz. Sess. Laws, ch. 118 (appropriating \$2,500,000 to the Commission); *see also* Joint Legislative Budget Committee, Fiscal Year 2007 Appropriations Report 218 (July 2006). Litigation concerning the legislative districts is still pending as of this date. In 2004, a trial court determined that the legislative districts did not comply with state constitutional requirements. In 2005, the court of appeals reversed this decision and remanded the matter to the trial court. *Ariz. Minority Coal. for Fair Redistricting v. Indep. Redistricting Comm'n*, 211 Ariz. 337, 121 P.3d 843 (2005). On remand, the trial court again ruled that the plan did not comply with the requirements of the Arizona Constitution, and that decision is presently on appeal.

### Analysis

#### **I. An Action Is “Pending” Until the Court’s Decision Becomes Final and No Other Appeal or Motion for Reconsideration Is Permitted.**

The State Constitution prohibits the Commission from meeting or incurring expenses after the redistricting is completed “except if litigation or any government approval of the plan is pending, or to revise districts if required by court decisions or if the number of congressional or legislative districts is changed.” Ariz. Const. art. IV, pt. 2, § 1(23). Your question asks when litigation is “pending” for the purposes of this constitutional provision. Specifically, you ask

whether litigation is considered “pending” during the thirty-day period of time for the filing of a notice of appeal, or, if a petition for review is filed from a court of appeals decision, whether the litigation is “pending” until the mandate issues after a denial of review.

In *Pima County Assessor v. Arizona State Board of Equalization*, the court held that “an action or suit is ‘pending’ from its inception until the rendition of final judgment.” 195 Ariz. 329, 334, ¶ 18, 987 P.2d 815, 820 (App. 1999). The court quoted the definition of “pending” in *Black’s Law Dictionary* as “[b]egun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Awaiting an occurrence or conclusion of action, period of continuance or indeterminacy.” *Id.* The court of appeals has also noted that “the word ‘action’ refers to the entire judicial process of dispute resolution, from invocation of the courts’ jurisdiction to entry of a final judgment that is not subject to further appeal.” *Sw. Airlines Co. v. Ariz. Dep’t of Revenue*, 197 Ariz. 475, 477, ¶ 7, 4 P.3d 1018, 1020 (App. 2000). Applying the plain meaning of the language in the constitutional amendment and the guidance in the case law, an action is no longer “pending” when the court’s decision becomes final and no other appeal or motion for reconsideration is permitted. The action is “pending” as long as the time for an appeal or a motion to reconsider is running, and with appeals, the action is pending until the mandate issues.

If no motion for reconsideration or petition for review is filed after the court of appeals issues a decision, then the clerk of the court issues a mandate “at the expiration of the time for the filing of such motion or petition.” Ariz. R. Civ. App. P. 24(1). If a motion for reconsideration has been filed, the mandate does not issue until after the motion has been decided and the time for filing a petition for review has expired. *Id.* at subsection (2). If a petition for review is denied, the court of appeals clerk issues a mandate fifteen days after the denial of review; if the supreme court issues a decision that requires the issuance of a mandate, then the supreme court clerk issues the mandate fifteen days after the decision is filed. *Id.* at subsections (3) & (4). The delay is to allow a party to file a motion for reconsideration, which a party must do within fifteen days after the appellate court files its decision. Ariz. R. Civ. App. P. 22(b). If a

case is not remanded, the case is pending until the mandate issues. If the case is remanded, the litigation is pending until the trial court issues a final judgment and the time to file a notice of appeal has expired.

Your letter expresses concern that litigation may end abruptly if, for example, the Commission prevails in the trial court and the opposing party unexpectedly fails to file a notice of appeal. Nevertheless, because the litigation is over when the time for filing an appeal expires, the Commission may not meet or incur expenses after the deadline to appeal passes, even if this results in an abrupt end to the Commission's operations.

## **II. After Commission Expenses Are Paid, Unused Monies Are Transferred to the General Fund.**

Your letter asks how the Commission can fulfill its responsibilities if a lawsuit is filed after the Commission's unspent monies have reverted to the general fund. The Arizona Constitution prescribes the Commission's authority; the Commission has no implied powers. *See Ariz. Corp. Comm'n v. State*, 171 Ariz. 286, 293, 830 P.2d 807, 814 (1992). If the language of a constitutional provision is clear, no further “judicial construction is required or proper.” *State v. Roscoe*, 185 Ariz. 68, 71, 912 P.2d 1297, 1300 (1996) (quoting *Pinetop-Lakeside Sanitary Dist. v. Ferguson*, 129 Ariz. 300, 302, 630 P.2d 1032, 1034 (1981)); *see also Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 405, ¶ 10, 111 P.3d 1003, 1005 (2005) (stating that if a constitutional provision is unambiguous, a court gives it its plain meaning and effect). The constitution sets forth the Commission's responsibilities. Ariz. Const. art. IV, pt. 2, § 1(14)-(17).

The Arizona Constitution provided the Commission with six million dollars for the redistricting work necessary following the 2000 census. Ariz. Const. art. IV, pt. 2, § 1(18) (“The treasurer of the state shall make \$6,000,000 available for the work of the independent redistricting commission pursuant to the year 2000 census.”). The following sentence of the constitution provides that “[u]nused monies shall be returned to the state’s general fund.” *Id.* In context, this reference to “unused monies” appears to encompass any portion of the six million

dollars that is not used. The remainder of the paragraph describes legislative appropriations and office space for future redistricting work, but that portion of the paragraph does not include the requirement that monies be returned to the general fund.<sup>1</sup> *Id.* To the extent that the Commission is expending legislative appropriations, the obligation to return those monies to the general fund would be governed by the appropriation's specific language, or, if the appropriation does not address the issue, the monies would be subject to the lapsing provision in A.R.S. § 35-190. The lapsing requirement provides that monies revert to the general fund at the end of a fiscal year.

The Commission's present funding is provided through two legislative appropriations approved in fiscal year 2004. 2003 Ariz. Sess. Laws, 2d Spec. Sess., ch. 3; 2004 Ariz. Sess. Laws, ch. 118. Both appropriations provided that they were "exempt from the provisions of section 35-190, Arizona Revised Statutes, relating to lapsing, except that all monies remaining unexpended and unencumbered after payment of fees, costs and expenses of the commission revert to the state general fund."

If a lawsuit were to be filed after the Commission's unspent monies were returned to the general fund, an additional legislative appropriation would be necessary to provide funds to defend the plan. The Commission has standing in legal actions regarding the plan and has "sole authority to determine whether the Arizona attorney general or counsel hired or selected by the independent redistricting commission shall represent the people of Arizona in the legal defense of a redistricting plan." Ariz. Const. art. IV, pt. 2, § 20. Although the Commission has discretion regarding its choice of legal counsel, its work still requires a legislative appropriation.

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<sup>1</sup> The paragraph regarding funding and office space for the Commission reads as follows:

Upon approval of this amendment, the department of administration or its successor shall make adequate office space available for the independent redistricting commission. The treasurer of the state shall make \$6,000,000 available for the work of the independent redistricting commission pursuant to the year 2000 census. Unused monies shall be returned to the state's general fund. In years ending in eight or nine after the year 2001, the department of administration or its successor shall submit to the legislature a recommendation for an appropriation for adequate redistricting expenses and shall make available adequate office space for the operation of the independent redistricting commission. The legislature shall make the necessary appropriations by a majority vote.

**III. The Commission May Not Enter into an Interagency Service Agreement for the Purpose of Collecting and Preparing Election Data for the Next Succeeding Commission.**

You also asked whether the Commission may enter into a contract with another state agency to enable that agency to collect and prepare election data to aid the next Commission in its redistricting duties or whether it may enter into a contract with another state agency to enable that agency to continue working with the United States Census Redistricting Data Office. Your opinion request noted that the present Commission has faced many challenges in acquiring reliable data from past elections to help it to draw new districts and that allowing this Commission to enter into an agreement with another state agency to continue to collect election data after this Commission's redistricting duties are completed would greatly assist the next Commission.

As noted in the previous section, the Arizona Constitution prescribes the Commission's authority, and the Commission has no implied powers. *See Ariz. Corp. Comm'n*, 171 Ariz. at 293, 830 P.2d at 814. The constitution sets forth the Commission's responsibilities. Ariz. Const. art. IV, pt. 2, § 1(14)-(17). Legitimate, practical reasons exist for continuing the data collection process for the next Commission's benefit or for continuing to work with the United States Census Redistricting Data Office, but the constitution does not give the Commission the authority to do so. If this continuing work needs to be accomplished, it is a policy issue for the Legislature to address.

**IV. A Commissioner Is Ineligible for Any State or Local Public Office in Arizona.**

Commissioners are ineligible for an "Arizona public office" "during their term[s] of office and for three years thereafter." Ariz. Const. art. IV, pt. 2, § 1(13). The constitution does not define "Arizona public office." You ask whether the term "Arizona public office" includes all local, state, or federal offices or just those offices that the Commission redistricted.

Another paragraph of this section of the Arizona Constitution uses the term "public office" when describing Commissioners' qualifications. It provides as follows:

Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.

*Id.* § 1(3). This language differs in that it refers to a “public office,” rather than to an “Arizona public office.” The language about prohibited conduct after appointment as a Commissioner also does not contain the language that specifically includes precinct committeemen and women and excludes school board members or officers. Using the plain meaning of the words and examining them in the context of the entire constitutional amendment, the term “Arizona public office” includes all public offices—state or local—in Arizona.

The phrase does not, however, include federal offices because the State cannot add to the qualifications for federal office. *See U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (holding that “[a]llowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States”).

**V. If A Commissioner Resigns, the Prohibition on Holding Public Office During a Commissioner’s Term and for Three Years Thereafter Expires Three Years After the First Member of the New Commission Is Appointed.**

A Commissioner’s duties “expire upon the appointment of the first member of the next redistricting commission.” Ariz. Const. art. IV, pt. 2, § 1(23). A new Commission is appointed in “each year that ends in one.” *Id.* § 1(3). Therefore, the next Commission will be appointed in 2011. There is an argument that the Commissioner is ineligible until three years after the new Commission is appointed, even if the Commissioner resigned from the Commission several years earlier.

Constitutions are to be construed to give effect to the intent and purpose of the framers and the people who adopted them. *See State ex rel. Jones v. Lockhart*, 76 Ariz. 390, 398, 265 P.2d 447, 452 (1953). A Commissioner cannot hold an “Arizona public office” “during the

commissioner’s term of office and for three years thereafter.” Ariz. Const. art. IV, pt. 2, § 1(13). If a Commissioner “does not complete the term of office for any reason,” a new Commissioner is appointed to “serve out the remainder of the original term.” *Id.* § 1(11). It is not clear whether the constitutional period during which a Commissioner may not hold a public office is calculated from the date that the person ceases to be a Commissioner or from the date that would have marked the end of the person’s term as Commissioner if the person had not resigned.

The prohibition on holding other public offices after serving on the Commission prevents attempts to use, or appearances of having used, the Commission to gain another public office.<sup>2</sup> The language should be interpreted with this purpose in mind. *See Calik v. Kongable*, 195 Ariz. 496, 498, ¶ 10, 990 P.2d 1055, 1057 (1999) (holding that in construing meaning of initiative purpose is to effectuate intent of electorate who adopted it).

In light of the foregoing purpose, the three-year prohibition can reasonably be interpreted to run from the date that would have marked the end of the person’s term as Commissioner if the person had not resigned. If it were otherwise, a Commission could finish its redistricting work in two years, and a Commissioner could resign at that point and still have five years to run for office in the district he or she created. This would not be in keeping with the purpose of the provision prohibiting holding other public offices after serving on the Commission—namely, to prevent attempts to use, or appearances of having used, the Commission to gain another public office. However, if the three-year gap runs from the end of the ten-year period, there is no chance that a Commissioner could run for Arizona public office in a district that he or she had created.

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<sup>2</sup> Although Proposition 106, like most initiatives, did not contain a formal statement of intent, the statements in support of the initiative in the “Arguments ‘For’ Proposition 106” section of the Publicity Pamphlet repeatedly advocate for passage of the initiative on the basis that, by taking redistricting out of the hands of political incumbents, it constitutes a more politically neutral and fairer method of redistricting. *See* Ariz. Sec’y of State, *Ballot Propositions and Judicial Performance Review for the November 7, 2000, General Election* (“Publicity Pamphlet”), at 56-58; *see also* *Calik v. Kongable*, 195 Ariz. at 500, ¶ 16, 990 P.2d at 1059 (noting that courts may rely on publicity pamphlets or voter guides to determine intent). Moreover, the fact that commissioners may not have held public office within the three years preceding their appointments as commissioners further bolsters the conclusion that the purpose of the prohibition on holding public office for three years after serving as a commissioner is to negate any appearance of having used the commissionership for personal political gain.

**VI. A Republican or a Democrat Commissioner’s Re-registration or an Independent’s Re-registration As a Member of One of the Two Major Parties During His or Her Term of Office May Affect the Commissioner’s Ability to Continue to Serve on the Commission.**

The Commission’s structure and appointment process is designed to ensure that no political party dominates the Commission. No more than two Commissioners may be members of the same political party. Ariz. Const. art. IV, pt. 2, § 1(3). Each member must be “a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment, who is committed to applying the provisions in an honest, independent and impartial fashion . . . .” *Id.* The House and Senate majority and minority party leadership make the first four appointments. *Id.* § 1(6). The first four Commissioners select a fifth member who serves as chair and cannot be registered with any party already represented on the Commission. *Id.* § 1(8).

The constitution does not address what happens if a Commissioner changes party registration while serving on the Commission. It provides that the Governor may remove a member, with the concurrence of two-thirds of the senate, “for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.” *Id.* § 1(10). It also establishes a process for filling vacancies if “a commissioner or chair does not complete the term of office for any reason.” *Id.* § 1(11). Any nominees to fill vacancies “shall be of the same political party or status as was the member who vacated the office at the time of his or her appointment.” *Id.* The language in the provision regarding vacancies suggests that the drafters recognized that a member may not have the same political affiliation at the time that a vacancy occurs as he or she had at the time of appointment.

Assuming that the Commission has two Democrats, two Republicans, and one independent, as the current Commission does, if a Democrat or Republican becomes an independent, the Commission would still comply with the requirement that it have no more than two members from the same political party. *Id.* § 1(3); Ariz. Att’y Gen. Op. 77-139. If,

however, the independent on the Commission registers as a Republican or Democrat, the Commission would no longer comply with the requirement that no more than two members be from the same party. If the independent registers as a member of a major party, the Commission would have a three-member majority party, a two-member minority party, and no third party or independent representation. Similarly, if a Republican on the Commission re-registers as a Democrat, or if a Democrat re-registers as a Republican, the requisite political balance would be lost.

Therefore, if the independent Commissioner becomes a Republican or Democrat, he or she should either resign or be removed from the Commission, in accordance with constitutional procedures, so that the Commission's political balance can be restored. Likewise, if a Republican Commissioner becomes a Democrat, or a Democrat Commissioner becomes a Republican, he or she should resign or be removed.

### **Conclusion**

The Commission may continue incurring expenses and meeting while litigation is pending. Litigation is pending until the court's decision becomes final and no other appeal or motion for reconsideration is permitted. Any funding for litigation involving future redistricting should be provided through legislative appropriation. In addition, the Commission cannot transfer funds to another agency to do work to help prepare for the next decade's redistricting. If this continuing work needs to be accomplished, it is a policy issue for the Legislature to address.

Commissioners are not eligible for any state or local office in this state for three years after their term on the Commission. If a person resigns from the Commission before the new Commission is appointed, the three-year prohibition begins to run from the date on which the person's term would have ended if he or she had not resigned, which would be the date on which the first member of the new Commission is appointed.

Finally, if a Commissioner changes party affiliation and, as a result, the Commission no longer satisfies the requirement that no more than two Commissioners are members of the same political party, the Commissioner whose change of parties caused the disparity should resign or be removed from office.

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