

## “It’s messy”: The ups and downs of Michigan’s inaugural Citizens Redistricting Commission



February 1, 2024  
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For six days in November, 88-year-old Susan Smith sat on a polished wooden bench in a windowless federal courtroom in Kalamazoo as judges heard hours of testimony on the future of Michigan's legislative maps.

The testimony, as is the case with redistricting, was more granular than grand: Census Bureau data. Voting precincts. Racial voting age population. The location and the lore of Eight Mile.

For Smith, most of it was familiar.

She's part of a group, the League of Women Voters of Michigan, that nearly toppled the last set of legislative maps drawn under a Republican majority. When that lawsuit fell short at the U.S. Supreme Court, she helped to collect signatures in 2018 for a ballot initiative she thought would be the solution to past partisan gerrymanders.

After the six-day trial and a court-ordered redraw, Smith still said the voter-approved Independent Citizens Redistricting Commission is the answer to Michigan's controversial history with the decennial redraw of congressional and state legislative maps. Even if the first go wasn't pretty.

"The maps that result from redistricting – I think not everybody in the general public understands how much that determines the outcome of elections, the policies that are approved. It's everything," Smith said. "And we're convinced the only way to have fair maps is to have them drawn by independent citizens."

But the commission made up of randomly selected citizens hasn't been without its flaws.

The learning curve for the group was steep. Moments of infighting abounded; lawsuits were filed and filed and filed; commissioners attempted at least three times to give themselves raises; three commissioners resigned; and a December federal court order triggered a rushed redraw of Detroit legislative seats that judges said were based predominantly on race.

"I know it's been a little messy," said Katie Fahey, the woman who launched the 2018 ballot initiative creating the commission. "But governing, making decisions – it's messy. And so rarely do you have to do everything in public."

Over the last three years, Commissioner Steve Lett has compared the commission's task to "building a plane while flying it," a construction process and flight complicated by the pandemic, late census data and litigation. The challenge has been real, commissioners Lett and Cynthia Orton said Wednesday, but the commission has attempted to be as transparent as possible as they worked through thousands of public comments and constitutional mandates governing the process. "They don't think we're listening, and we are," Lett said. "It doesn't seem that way, but I think the commissioners on a whole certainly try to integrate those thoughts into what we do."

Others were less forgiving of the new system, arguing the commission's increasingly insular behavior led it to ignore pleas to depart from expert advice and listen to everyday Detroiters concerned about the districts taking shape. "They became very protective," said Tony Daunt, a Republican critic of the commission's work and leader of a group helping to finance litigation challenging the maps. "In a process that is meant to be responsive to the citizens and is meant to take input and adjust based on that input, they did the exact opposite of that."

### The problem with race

Fahey launched the 2018 ballot initiative with the intent to stop partisan gerrymanders that occurred when Republicans or Democrats in control of the Legislature drew maps behind closed doors. Instead, the voter-approved constitutional amendment gave that map-drawing authority to a 13-member panel of randomly selected citizens tasked with conducting the entire process in public.

As it turned out, the gerrymander that would eventually bring down the new commission's maps wasn't partisan. It was racial.

On Dec. 21, a federal panel of judges ruled the redistricting commission violated the 14th Amendment's Equal Protection Clause because it used race as a predominant factor in drawing 13 Detroit House and Senate seats. The panel stopped short of ruling whether the commission also violated the Voting Rights Act, though it took issue with the analysis performed to that end.

The court's decision surprised Fahey, who was betting on the federal judges upholding the maps as they had with citizens redistricting commissions in other states. It also surprised Orton, who told the commission's lawyers this week that she couldn't remember ever receiving training on the 14th Amendment. "I think some training more on all of the federal law that is applicable might have helped or might help in the future," Orton told The News Wednesday.

Orton's memory didn't fail her. One of the groups tasked with educating the commission on the rules that intersect with redistricting couldn't recall touching on the 14th Amendment, nor did it know of other materials or advice provided to the commission that would have addressed the Equal Protection Clause. "The fact that their maps are being thrown out based on that is a pretty glaring oversight," said Tom Ivacko, executive director for the Center for Local, State and Urban Policy at the University of Michigan's Ford School of Public Policy.

Still, Ivacko disagreed strongly with the court's decision, arguing it pinned the commission hopelessly between two competing interests: To draw race-blind maps in compliance with the 14th Amendment while meeting Voting Rights Act requirements mandating racial minority-majority districts in some areas of Detroit. The ruling, he argued, used voluminous transcripts produced under the commission's transparency mandate as proof that the redistricting commission was considering racial data it shouldn't have been.

"I think the deliberation, the debate, the ongoing discussion is a feature of Michigan's new commission, not a bug," Ivacko said. "And the courts seem to be treating it as a bug."

Fahey said the judges' decision came as a surprise and seemed to depart from how other courts have handled maps produced by citizens redistricting commissions. "Traditional redistricting logic and what has been used in other states would not have said that was bad advice," said Fahey of the commission's consideration of race and the decision to divvy Detroit's Black population into multiple districts. "It was a way for Black Detroiters to get more representation, not less representation," she added.

### **Missing primary data**

But even if the commission's public discussions of race hadn't spelled its doom, the criteria used for ensuring certain racial makeups in Detroit districts had clear flaws that might have also provided grounds for rejecting the maps, said Doug Spencer, a professor of law at the University of Colorado and manager of All About Redistricting, a website that tracks the redistricting and subsequent litigation in all 50 states.

One of the issues harped on at the federal trial in Kalamazoo last fall was the fact that the commission's experts failed to base their minority benchmarks on crucial primary election data. In Democrat-heavy Metro Detroit, where most races are won or lost in the primary, the primary is key to understanding a racial minority's ability to get a preferred candidate elected.

But the commission's experts, unable to find helpful primary data, set their measures on largely meaningless general election data.

"It was a miss by the experts to not dive more into that," said Spencer, who specializes in redistricting and election law. "Somebody needed to recognize that, and they didn't. And I don't think that was born out of racism or born out of anti-big city feelings, but born out of someone making a mistake and learning about it in a very public way."

Ivacko agreed to a certain extent. But he also argued there wasn't much experts could do when the primary data simply didn't exist; Ivacko himself had been asked to assist in finding relevant primary data but came up empty.

"Because they did not have the primary data available, I think they probably should have built in a cushion of higher Black voting age population, just because they don't know about primary data," he said.

### **Expert advice questioned**

The expert guidance gave teeth to a critique that emerged in the early days of the ballot initiative: That a group of citizens uneducated in the complicated body of law and data used in redistricting would rely on experts to a fault. "This is not a sexy topic. This is very complicated," said Natalie Bien-Aime, a Black Detroit resident and plaintiff in the case challenging the Detroit districts. "When you don't know something, you go to the experts and you hope they lead you to the truth. Unfortunately, that was not the case."

Daunt pointed to the advice of Voting Rights Act expert Bruce Adelson, whose counsel guided the drawing of the Detroit districts later overturned, as a prime example of the influence he and others warned of early in the process. "He really did them a huge disservice," Daunt said of Adelson. "What's surprising is there's still a segment of them on the commission who feel like they did nothing wrong and are intent on protecting their work despite a federal court saying they did this wrong."

During the November trial, Adelson, an attorney, defended the advice he gave to commissioners, arguing his influence over the group had been exaggerated and that commissioners were encouraged to and did consider several other factors outside of race while drawing district lines.

Lett rejected implications that experts were driving the bus during the map drawing, but he acknowledged the federal court ultimately disagreed with the advice given by the group's consultants. "Our goal was to unpack Detroit, and we did, and the court said we went too far," Lett said. "OK, so we'll go back and do it differently this time."

Fahey also dismissed the idea that the commission relied too much on its experts. But she acknowledged she had envisioned the re-districting commission hiring multiple consultants, including Democrats and Republicans whose advice could be weighed against each other to find a happy medium. "There were some things we thought they would do differently," Fahey said.

### **Under pressure**

In recent months, the pressures of three years of map redraws, litigation and public scrutiny have begun to pull at the threads of the citizen commission. Commissioner Rebecca Szetela largely testified for the plaintiffs and against her own commission in November's six-day trial, then later called for the removal of three re-districting commissioners. Three commissioners resigned – one unprompted by Szetela's calls for removal – and a meeting is scheduled in the coming weeks to decide whether a third accused by Szetela should be removed.

The infighting was such in meetings and in the formal calls for removal that federal judges questioned the group's ability to pull itself together and redraw the Detroit maps found to be unconstitutional. Both Ivacko and Spencer recognized the fraying of the commission as, in part, a symptom of Michigan's uniquely hyper-politicized climate – especially when compared to other states with similar commissions, such as Arizona and California. While some might view Michigan's political pressures as a citizens commission pressure cooker, Ivacko argued it also served as a "laboratory of democracy." "Our politics have become hyperpartisan," Ivacko said. "I think the commission succeeded in avoiding that. But not perfectly."

While the divisions are "disappointing," the League of Women's Voters' Smith is hopeful for some consensus moving forward. "Enough of the commissioners care about doing their job and doing their job correctly that, while it's disconcerting, it's not going to prevent the commission from finishing the job," Smith said.

Szetela argued some of the infighting could be avoided if the constitutional amendment creating the commission had stricter standards for who could apply.

Fahey acknowledged Michigan's standards were less stringent than other states where some minimum standards in experience are required. But she also argued that was part of the appeal of Michigan's 2018 proposal. "We took a chance on people being able to take whatever skills and expertise they had," Fahey said.

### **Did the maps work?**

For all its faults, the commission succeeded by most measures in delivering maps that achieved better partisan fairness than any have for decades, experts said. The maps the commission drew gave Democrats narrow majorities in the state Legislature for the first time in 40 years, largely mirroring statewide voter makeups and causing a "dynamic shift" in state policy, Fahey said. "The maps they drew worked," Fahey said. "They shouldn't be getting the criticism they are."

Bien-Aime and other Detroiters challenging the maps have questioned the emphasis on partisan fairness, arguing the commission had prioritized an increase in Democratic seats over Black representation in the Legislature. "When it comes to partisan fairness, if it disenfranchises one ethnic group or another, we're still not empowered," Bien-Aime said. "The Democrats or Republicans are empowered, but the Black people are not."

There's a lot that went right when it comes to the commission, Ivacko said. The panel engaged the public in a process that's been closed to them for decades. Its members considered communities of interest, however vague the term, for the first time in Michigan's history. And they made advances in the partisan fairness of Michigan's district maps.

"These current maps will allow either party to control government in any election," Ivacko said. "That clearly has not been the case in decades."

But there is room to improve, Ivacko and Spencer said, in training, in transparency, in analysis of community input, in the tools available to the commission while mapping, in the selection of experts for the panel.

"To me, that is probably the headline of Michigan's commission," Spencer said. "It was the first time out of the gate. They had growing pains. They learned as they went, and the next time they meet, it will be better."