

## Redistricting Measure Doesn't Belong on Ballot

By Rick Hasen

In two cryptic rulings issued in the last few weeks, the state Supreme Court has made a mess of the law governing the initiative process. The result is going to be more lawsuits and greater injection of judges into the political thicket. If the court does not act soon to clarify the law, the Legislature should step in and help fix the problem.

Friday, by a 4-2 vote, the state Supreme Court decided to restore Proposition 77 to the ballot. *Costa v. Superior Court*, S136294 (Cal., petition for review granted, Aug. 12, 2005). Proposition 77 would take the redistricting process out of the hands of the Legislature and give the matter to a panel of retired judges. Lower courts had held that the proposition should be removed from the ballot because the official measure submitted to the attorney general differed in some relatively minor respects from the version circulated and signed by voters, and the law required that the versions be identical.

The question of whether to remove Proposition 77 from the ballot was a difficult one. Courts sometimes excuse minor deviations from the rules governing the initiative process when the measures "substantially comply" with the rules. In this case, adding up the votes of the judges at the trial, Court of Appeal and Supreme Court levels, five judges thought that the submitted version was close enough to constitute substantial compliance and five thought it was not. (My own view was that the measure should have been removed from the ballot, because the errors were entirely the fault of the initiative circulators and because they waited a long time before notifying election administrators about the problem.)

Although the state Supreme Court's decision to restore Proposition 77 to the ballot was a defensible one, the means by which it did so were not. Technically, the court did not decide whether the Proposition 77 circulators complied substantially with the law. Instead, a majority of justices (including Justice Dennis Aldrich, assigned to hear the case because of the vacancy created by Justice Janice Rogers Brown's departure) voted to grant review, thereby wiping out the lower-court rulings.

In lifting the previously imposed stay, which would have prevented Proposition 77 from appearing on the ballot, the court offered a single-sentence explanation. The court found no showing that the discrepancies between the two versions of the initiative "were likely to have misled the persons who signed the initiative petition." The court said it would decide after the election whether to consider the case further. In the meantime, it ordered Proposition 77 to appear on the ballot.

This ruling raises a host of unanswered questions: Does the court expect its interim order accompanying the grant of review, which ordinarily is not reprinted in the official case reports, to have precedential value?

If so, has the state Supreme Court now changed the "substantial compliance" doctrine to a new, previously unannounced test based on what likely will mis-

lead those who sign petitions? If this is the new test, how does one prove that voters likely will be misled? How many voters must have been misled before a court should remove a measure from the ballot?

We likely will not get answers to these questions any time soon. Although the court left open the possibility of invalidating the measure on substantial-compliance grounds after the election, I doubt the court would consider doing so. Even putting aside the fact that the majority has

80 case meant to change state law on pre-election review. The now-depublished Court of Appeal opinion chronicles the uncertainty that surrounds the question of the appropriateness of pre-election review and is required reading for anyone who practices in this area.

Before the cryptic Proposition 80 order, the last important word on pre-election review came in 1999, when the Supreme Court itself conducted a pre-election review and removed a different redistrict-

ing measure from the ballot on grounds that it violated the single-subject rule. *Senate v. Jones*, 21 Cal.4th 1142 (1999). In its order a few weeks ago in regard to Proposition 80, did the court intend to reverse or limit *Jones*? Is the *Jones* precedent limited to single-subject challenges? We don't know because the court's entire Proposition 80 order is five sentences, with only two sentences devoted to the appropriateness of pre-election review.

Part of the reason for the uncertainty created by these orders is the very tough timetable for Supreme Court review, necessitated by printing deadlines that come right at the end of the process for certifying initiatives to the ballot. In the Proposition 77 litigation, the Court of Appeal issued its order Aug. 9, the parties filed petitions and answers in the Supreme Court on Wednesday, Thursday and Friday, and the court ruled by Friday evening. There was no time for oral argument, a full consideration of the case and the writing of detailed opinions.

Given this strict time frame, the court had no choice but to issue cryptic orders. But the court should do more after the fact. In particular, the court should issue

full opinions (with unquestioned precedential value) within a few weeks of issuing these summary orders to explain more fully the basis for the rulings.

The Legislature should consider changing the time frame for the qualification and processing of initiatives to provide a reasonable window for Supreme Court review of initiative challenges and the writing of thoughtful opinions.



indicated that the measure substantially complies with state law, invalidation would occur only after voters have had a chance to examine and vote on a single version of Proposition 77. Ruling after voter approval of the measure would look like a decision nullifying the will of the people, who could not have been misled by the earlier errors.

Just weeks before the Supreme Court issued this unclear order, it issued another one that is causing uncertainty. *Independent Energy Producers v. McPherson*, S135819 (Cal., review granted July 27, 2005). The Court of Appeal had ordered Proposition 80 removed from the ballot on grounds that the energy regulation measure conflicted with the state constitution.

In its order accompanying the grant of review, the Supreme Court directed the secretary of state to place Proposition 80 on the ballot. The court further indicated that pre-election review was inappropriate because whether the measure conflicted with the constitution was not clear.

When the Court of Appeal was deciding the challenge to Proposition 77, the appellate justices debated whether the Supreme Court's order in the Proposition

I fear that the court has created the worst of all worlds. The uncertainty over pre-election review and "substantial compliance" invites even more litigation brought necessarily on an emergency basis before a court that works best with an opportunity for careful deliberation.

More-careful consideration of these issues would be good for the legitimacy of the court, as well. When justices issue these cryptic orders, especially in cases involving controversial political initiatives, justices sometimes are accused unfairly of letting their partisan biases affect how they rule. Indeed, Assembly Speaker Fabian Nunez, D-Los Angeles, commented that the court's decision in placing Proposition 77 back on the ballot "is reminiscent of the U.S. Supreme Court's opinion in the Florida election."

The effective way to answer such charges is for the court to explain itself, preferably with clear rules that remove both ambiguity and the discretion of judges when ruling on initiative challenges.

Richard L. Hasen is the William H. Hannon Distinguished Professor of Law at Loyola Law School.