

May 3, 2021

To: California Citizens Redistricting Commission
From: Angelo Ancheta
Subject: Comments Re Census Delays and Map Deadlines

Several issues involving the 2020 Census data delays and the Commission's map deadlines arose during the Commission's meetings beginning on April 26, 2021. These include the legality of a proposal to extend final-map deadlines to January 28, 2022; the outcomes of "stakeholder" meetings held by the Governmental Affairs subcommittee; and broader dynamics involving the Commission's institutional roles relative to the Legislature and to the California Supreme Court. I comment on these areas of concern below.¹

Proposed January 28, 2022 Deadline for Final Maps

Legal Bases. In its April 25 letter to the Commission, the IVE Redistricting Alliance proposed a deadline for final maps of January 28, 2022. Without having discussed its merits in depth, some commissioners questioned the legal basis for the proposed deadline, which was not stated explicitly in the letter. I cannot speak for the groups, but if, as I have proposed previously,² the correct reading of *Legislature v. Padilla* is to use the projected September 30, 2021 release date of official data as the trigger for calculating extended deadlines, then the January 28 proposal falls well within an outside deadline of February 14, 2022 for final maps. (I offer no opinion on the letter's recommendation for changing the primary date to no later than June 21, 2022, because this determination is outside the Commission's powers.)

The IVE Redistricting Alliance and others supporting this deadline have offered a thoughtful analysis of why deadlines ought to be set in January 2022 to allow for sufficient public input, particularly among low-income communities and communities of color. Their analysis takes into account the unique circumstances caused by the COVID-19 pandemic, including data delays and the Commission's need to process maps during multiple holiday periods; it also accommodates the large amount of time that the Commission will need to process pre- and post-draft information from the public, a consideration that has been underscored by former Commissioners. The IVE proposal deserves careful consideration and should not be dismissed out of hand because its legal underpinnings were not stated explicitly.

Inherent in any proposal for January 2022 final-map deadlines is a conservative legal position. Conservativeness has somehow been equated with earliness in Commission memoranda and

¹ The research, analysis, and recommendations contained in these comments are my own, do not represent those of any other individuals or entities, and were not produced for compensation or in consultation with any client or prospective client. I disclose this information to assure the Commission that my appearance in this communication is not subject to any prohibitions under the state's "revolving door" law applicable to former members of the California Citizens Redistricting Commission. See Cal. Reg. Code § 18746.2.

² Public Comments of Angelo Ancheta to California Citizens Redistricting Commission (Apr. 16, 2021).

discussions. But relying on what the *Padilla* Court had in front of it in 2020 – the official data release dates proposed by the Census Bureau – is more conservative and risk-averse because the Court had no facts before it that dealt with legacy-format data, its reliability, the capacity of the Statewide Database to properly format the data, or the likely dates of completing the reformatting prior to the usual 30 days to process the redistricting database.

To argue (1) that the Court would interpret a preformatted legacy-format data set to be necessarily identical to a formatted and official data set, and (2) that the Court would approve a particular set of deadlines because of that interpretation, is conjecture based on mere assertions, not on actual evidence before the Court. This would pose a more perilous legal position for the Commission. Indeed, if it forms the basis for shortening the public input and processing periods that the Commission has duties to uphold, it could expose the Commission to greater not lesser risk. Setting a deadline for final maps that falls in mid- to late-January, such as January 28, 2022, limits the Commission’s exposure to a possible petition for writ of mandate designed to remedy a breach of its constitutional and statutory duties.³

Historical Precedents. There are also historical precedents for using a January 28 deadline as a basis for producing final maps in time for a June primary. In *Wilson v. Eu*, the California Supreme Court adopted January 28, 1992 as its own deadline in the 1990s cycle, when it had to produce final maps because of the deadlock between the Governor and the Legislature.⁴ Moreover, as the Supreme Court noted in *Wilson v. Eu*, the January 28 deadline paralleled the Court’s timing of its opinion in the prior redistricting cycle in *Assembly v. Deukmejian*,⁵ which was issued on January 28, 1982, to set district lines for the June 1982 primary.

Although the line-drawing process, public input requirements, and draft-map deadlines were markedly different compared to the current cycle, the Court’s orders in *Wilson v. Eu* are instructive because they came at the recommendation of the Secretary of State. The Secretary was well-aware of electoral deadlines and the impact of the Court’s ruling on the June 2, 1992 primary. That primary was held, as scheduled, 126 days after the Court’s deadline. The Secretary of State recommended alterations to numerous filing deadlines, as well as early review of the draft maps by counties and the U.S. Department of Justice. The Court made clear that while the Secretary had assumed that draft maps produced by the Special Masters might not be extensively revised, the Court still had final say. And the Court did in fact make modifications to the maps in its final opinion, which was issued one day before the deadline.

There are numerous laws, such as the top-two open primary act and the Voters FIRST Act itself, that are now in effect, but the calendaring of redistricting deadlines can be based on lessons drawn from past cycles. The proposed January 28, 2022 deadline is one example, since the

³ Among these duties is the Commission’s constitutional duty to “to “conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines.” Cal. Const. art. XXI, § 2(b)(1).

⁴ 54 Cal. 3d 546, 817 P.2d 890, 286 Cal. Rptr. 625 (1991).

⁵ 30 Cal. 3d 638, 639 P.2d 939, 180 Cal. Rptr. 297 (1982).

period between the transmission of final maps on that date and the June 7, 2022 primary would be 130 days, four days more than the period from the comparable calendar in 1992.

Stakeholders and Deadline Compromise

I am especially concerned about the Governmental Affairs subcommittee's work, which appears to be seeking consensus or compromise among interested parties to inform the Commission's setting of its own deadlines. It is very important to understand the consequences of the Commission's deadline options from different angles – and to have a balanced set of perspectives that does not give outsized influence to the Legislature – but this is different from holding closed meetings that are limited to particular “stakeholders” and become “heated” because of differences among them.⁶

When it comes to the Commission's draft and final deadlines, who isn't a stakeholder? And why have discussions in a closed meeting? Why not simply make the fact finding more transparent by calendaring an open hearing, inviting interested parties and the public to participate through testimony and written comments, digesting the input, and making recommendations to the full Commission? Then, the Commission could deliberate and reach a decision by vote.

I offer no criticisms of those who actually attended the meetings, since they came at the subcommittee's invitation. But these types of meetings can be both underinclusive and overinclusive. There are many governmental entities, groups, and individuals whose interests might not be fully represented among those attending the meeting. At the same time, the Legislature had multiple representatives, including one of its attorneys, at an April 21 meeting.

Limiting the stakeholders is especially problematic because of the Commission's default structure of two-person subcommittees and its narrow interpretation of “redistricting matters” that must be discussed in public meetings.⁷ This means that stakeholder discussions have been held outside of public view, and could be perceived as backroom dealing, especially with the Legislature involved. There have been no apparent violations of the Bagley-Keene Open Meeting Act, but there could be Bagley-Keene violations if the meetings become more formal and regularized and there are three or more participants. It does not matter if only two of the attendees are Commissioners; the meetings would still need to be noticed and held in public.⁸

⁶ Memorandum of Governmental Affairs/Census Action Subcommittee, Commissioners Sadhwani & Toledo to California Citizens Redistricting Commission (Apr. 24, 2021).

⁷ The 2020 Commission's interpretation of “redistricting matters” under section 8253(a)(3) of the Government Code is not entirely clear, but it appears to be limited to map-specific input, which is considerably narrower than the interpretation held by 2010 commissioners. In the previous cycle, this section of the Voters FIRST Act was enforced largely through self-policing; in 2011, I would have interpreted any discussion of Commission map deadlines as a “redistricting matter” that would have prohibited discussions with individuals and representatives of non-Commission entities outside of public meetings.

⁸ See Cal. Gov. Code § 11121(c).

The transparency problems are further compounded by what appears to be the Commission's attempts to go beyond basic information gathering, and instead to foster some "compromise" position on deadlines. It seems obvious that the positions of the Legislature and its allies are becoming irreconcilable with the positions of those who argue to extend timelines into January 2022 in order to preserve public input and processing time. Notwithstanding the near-futility of this effort, the Commission's basic role is problematic. The Commission itself must be prepared to set its deadlines independently, subject to discussion and compromise within its own membership; it is not the Commission's role to broker compromise among a limited number of stakeholders, especially the Legislature, which the Voters FIRST Act makes clear is a self-interested body when it comes to redistricting.

From its memorandum for the April 26 series of meetings, the subcommittee also appears to be relying on questionable assumptions to justify reaching consensus among multiple interests. In particular, they seem to be charting a course based on the need to engage with the same "stakeholders" who participated in *Legislature v. Padilla*, namely the Legislature and the Secretary of State. But the alignment of the parties and the procedural stance of the *Padilla* petition grew out of a unique set of circumstances, when the announcements of Census Bureau data delays were coming during the same period when the terms of the 2010 commissioners were about to expire and the 2020 commissioners had not yet been seated.

I was the chair of the 2010 Commission at that time and have firsthand knowledge of discussions leading to the filing of the petition. If the Court had not granted the petition and extended the deadlines, the only alternative would have been a constitutional amendment that needed to go before the voters in the November 2020 election. This placed extreme time pressure on the petition for writ of mandate. The 2010 Commission was involved largely for informational and historical purposes, since it was about to dissolve within a few weeks; however, the Court did invite us to file opposition papers and those were filed, along with declarations in which Vice-Chair Gil Ontai and I highlighted the Commission's work in 2011.

The 2020 Commission was thus not a party in *Legislature v. Padilla* because **it did not exist** at the time of filing, and judicial relief needed to be secured before the Commission was seated, **not because of any essential or lasting alignment of the parties**. In any case, the 2020 Commission exists now, and it could easily be a petitioner or a respondent in a writ petition, depending on the issues at stake and the alignment of the parties and interests. By design, the Legislature has a limited statutory role at this point in the redistricting cycle, and it has already plotted its course in creating the redistricting database and in creating a computer infrastructure for public access. It is the Secretary of State, as the process extends further out in time, who is becoming the more critical state actor.

But context is key. Hypothetically, the Commission itself could file a petition for writ of mandate against the Legislature if the Commission determined that the use of a particular data set did not produce a "complete and accurate" database required by law.⁹ And, any number of

⁹ Cal. Gov. Code § 8253(b).

parties, including individuals and groups seeking to participate meaningfully in the public input process, could file a petition for writ of mandate seeking relief against the Commission were it to set deadlines that overly abbreviate the process established by the Voters FIRST Act and in doing so breach the Commission's constitutional and statutory duties.

This is not to say that the Legislature's positions and interests should not be given voice and weighed accordingly. The interests of the Secretary of State, local elections officials, major and minor political parties, redistricting advocates, and anyone else who might have opinions on the Commission's mapping deadlines should be considered as well. Ultimately, it is the Commission's independent analysis and decision making that should reflect any compromises in setting deadlines; the Commission is not accountable to any particular set of "stakeholders."

Institutional Roles

I am also concerned that the Commission's analyses and discussions of deadlines have been overly narrow up to this point, and they have not given sufficient consideration to institutional roles and the allocation of redistricting powers envisioned by the Voters FIRST Act. In particular, commissioners seem to be underestimating the influence of the Legislature in Commission deliberations and overestimating the role of the state Supreme Court in the overall redistricting scheme laid out in the Voters FIRST Act.

The Commission and the Legislature. The Legislature should be credited for taking steps and allocating resources to push the redistricting process forward by considering the use of legacy-format data, as should the Statewide Database for its expertise and experience that make the use of legacy-format data to create the redistricting database a viable option. On the other hand, the Legislature has not been especially forthcoming with the Commission, and a number of its determinations have come by fiat.

The Legislature is not required to work with the Commission on constructing the database, and the Legislature appears to have made the decision to use legacy-format data unilaterally, without having consulted the Commission ahead of time. The Legislature's leadership has also issued a letter that tries to lock in the Commission's deadlines and proposes timelines that do not factor in the extra processing time necessary to prepare the legacy-format data for use in constructing the 2021 database. And, in interaction with the Governmental Affairs subcommittee and in a memorandum to the Commission, the Legislature's attorneys have played a strong role in pushing legislative positions.

What should be central continues to be largely unstated and unexamined in Commission deliberations: when it comes to redistricting, legislators are self-interested. This is the core finding of the Voter FIRST Act and the very reason for the Commission's existence. **Legislators have an unmistakable interest in the Commission's maps being finalized as early as possible because, once they are completed, the maps provide clear guidance to incumbents, candidates, and parties on who can run, where candidates can run, whom they can win against, and where scarce campaign resources can be allocated to maximize electoral gains.**

Self-interest is endemic to the electoral process, so there is nothing surprising about politicians' advocating for early maps. But the voters changed the balance of power in 2008 and 2010 to make sure that redistricting powers were transferred from the Legislature to the Commission. Beyond budgeting, an area where no state agency can escape legislative influence, the Legislature's formal roles in redistricting have been limited largely to the Leaders' strikes during commissioner selection and the creation of the redistricting database and the public-access computer system. The Commission needs to keep at more than arm's length from the Legislature, and to privilege the Legislature beyond this, whether in meetings, litigation strategies, or deadline setting, only serves to undermine the public's confidence in the Commission's independence.

The Commission and the Supreme Court. At the same time, the Commission needs to dismiss the argument that it will lose its redistricting authority if it does not get its deadlines right. As long as the Commission does not reach an impasse, the California Supreme Court will remain highly averse to taking on redistricting. It made that absolutely clear in the *Padilla* case. I would suggest that, for both institutional and practical reasons, the Court would further extend the Commission's deadlines and alter filing and other electoral timelines before it would take on redistricting responsibilities itself.

The Court comprehends its own role, the role of the Commission, and the role of the public – as well as the highly limited role of the Legislature – in the allocation of powers under the Voters FIRST Act. As it stated in *Padilla*: “For this court to undertake to draw maps in the first instance would both displace the role voters envisioned for the Commission and preclude opportunities for the public to participate in the process as the voters intended. Adjusting the August 15 deadline, by contrast, gives effect to the voters’ intent that the Commission play the lead role in drawing new district maps, with input from the public received in a timely manner.”¹⁰

There are also clear practical impediments: if the Supreme Court were to take on redistricting, the date of the primary election would probably have to be pushed back even further. The Court could not produce new maps overnight, and it would have to appoint special masters to develop draft maps for the Court to review. If the special masters or the Court allowed for any public input on the draft or post-draft maps, that would extend the timelines for certification even more. If it were merely deadlines – not deadlocks – that were at issue, why would the Court create any additional delay when it would be more efficient and institutionally cleaner to simply accept a writ petition and then mandate that the Commission finish its work in accordance with a new deadline?

The argument that the Commission ought to be nervous about losing its authority to the Court should simply be put to rest.

Thank you for your consideration.

¹⁰ 9 Cal. 5th at 880 (citations omitted).