COMMENTS RE VOTING RIGHTS ACT COUNSEL AND LITIGATION COUNSEL

Commissioners:

I am writing to provide background information on the Commission's hiring of outside counsel in 2011, as well as to comment on candidates advancing before the full CRC. I have previously spoken to Legal Affairs Committee members, but present these written comments to the full Commission because of large gaps in the historical record and because I have not offered details on firsthand experiences with current applicants.

I believe a more thorough description of the 2011 cycle would be helpful to the CRC because questions continue to arise in Committee meetings and in full CRC meetings. Also, many of the same issues -- including treatment of out-of-state counsel, problems of adequate disclosure, and the viability of co-counseling -- have arisen in the current cycle. I focus largely on the leading candidates offered by the Legal Affairs Committee, and offer specific comments on the Gibson Dunn 2011 representation; however, I refrain from giving specific endorsements or rankings.

Because of the overall length of my comments, I offer the following points and recommendations up front:

* The 2011 hirings of VRA counsel and litigation counsel were separated by several months, and the timing of decisions posed no significant problems for effective representation. The 2020 CRC might consider an option of reissuing its RFI and postponing the hiring of litigation counsel, if there are still major concerns regarding the current pool of applicants.

* Problems of nondisclosure of potential conflicts of interest are serious -- potentially fatal to an application -- and have arisen in 2021, much as they did in 2011. Transparency and maintaining public trust are paramount values in the CRC's work, and they are values that applicants should be well-aware of and that they themselves should be expected to demonstrate, particularly when they have past experience working with the CRC or similar agencies.

* All of the VRA Counsel applicants appear well-qualified for the position, although the teams differ in terms of litigation experience and in-house social science expertise. Out-of-state location and licensure were issues in 2011, and logistical constraints (a time with far less videoconferencing) led to the elimination of well-qualified candidates. In 2021, out-of-state licensure should
not impede a legal team's ability to offer trainings, to analyze mapping decisions, and to develop written memoranda and other legal documents that can be presented by California lawyers.

But, the ability of the lead VRA specialist to offer on-the-spot, real-time legal advice in CRC meetings and in sessions with Q2/HaystaqDNA could be problematic, especially since VRA-related advice can require analyses of both federal law and California constitutional law. The CRC should confirm its need for immediate, real-time legal advice; if it is not essential, out-of-state options become more viable.

* The late substitution of a VRA specialist in the Strumwasser & Woocher application should not pose a limitation on their VRA application. Although David Becker is a new face for the CRC compared to Professor Justin Levitt, Mr. Becker has extensive experience in the field and has a long history as a voting rights litigator. (I know both Mr. Becker and Dr. Kareem Crayton, and know of Chad Dunn's work by reputation; I believe all are highly knowledgeable and qualified to advise on the federal VRA.)

* Having the same counsel serve as VRA and litigation counsel is not essential, nor should it be a barrier to effective representation at any stage. In 2011, the VRA counsel was retained as litigation co-counsel to ensure that there was continuity between the pre-litigation/line-drawing phase and the litigation phase of the CRC's work. We did discuss potential problems of lawyers serving as witnesses, but were confident that these would not compromise defense of the maps. Because of problems in Gibson Dunn's VRA representation (discussed below), we added co-counsel to increase litigation capacity and to gain a stronger advantage in defense of the maps.

* Co-counseling was successful in the 2011 cycle, as reflected in the 100% win rate in the California Supreme Court and in federal court. But, there were greater financial costs because of the need for coordination between the firms. And billable hours could have been much higher: the cases against the CRC were not especially complex or strong, and were resolved largely on the well-developed paper record, without the need for extensive discovery or trial.

Coordination issues could be even greater in this cycle. In 2011, the entry of Morrison & Foerster near the end of the line-drawing process meant that key mapping strategies had already been adopted and the record was close to settled. Should the CRC opt for co-counseling now, rather than later in the cycle, it needs to be prepared to reconcile potentially competing philosophies,
strategies, and risk-assessments among the lawyers. The CRC's new Chief Counsel would need to be deeply involved in this process.

* Litigation capacity is very important, but also needs to be considered in tandem with key CRC values, including maintaining public trust, ensuring public accountability, and exercising fiscal responsibility and restraint. Gibson Dunn, for example, is an international law firm with elite lawyers and a seemingly unlimited capacity to address the demands of litigation and appellate advocacy. And they have high success rates. However, the lawyering culture at many large law firms can also be top-down, lawyer-centered rather than client-centered, and designed to spare no expense -- and these expenses are ultimately borne by paying clients. During their 2011 representation, the Gibson Dunn lawyers evidenced many of these attributes in their work and in their interactions with the commissioners and the consultants.

On the other hand, a smaller firm such as Strumwasser & Woocher, while more experienced in representing governmental bodies and in conforming to public values, needs to be thoroughly queried on its capacity to ramp up its litigation resources and to juggle multiple clients who may be in the middle of the redistricting cycle.

* Public perceptions are also important, and the CRC needs to be prepared for controversy should it pursue particular options. It is well known that Gibson Dunn has been representing the City of Santa Monica in California VRA litigation and that an appeal is currently pending in the California Supreme Court. The City of Santa Monica is certainly entitled to a strong defense and zealous advocacy on its behalf, but perceptions do matter, and the work and values of a law firm can often be imputed to its clients. In this instance, the legal positions adopted by Gibson Dunn include ones that could significantly restrict the range of cases that are available under the CVRA, including ability-to-influence claims that may be beneficial to smaller racial and ethnic minority populations.

While the firm has represented both plaintiffs and defendants in past civil rights cases, its work on this case in particular could be seen as mercenary and, at worst, as hostile to racial minority interests. Even if this case does not pose an actual conflict in values between the firm and the CRC, mere perceptions and imputations could be harmful to the CRC's work with minority communities.

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As a reminder, my responsibilities on the 2010 CRC included (1) membership on the Legal Committee, composed of several commissioners who had experience as practicing attorneys, and (2) serving on the two-person team with Commissioner Stanley Forbes who, along with Chief Counsel Kirk Miller, had broad oversight over the CRC's litigation team. Other commissioners, particularly those on the Finance and Administration Committee, also oversaw budgeting and billing by the law firms.

2011 Hirings and Representation

The hiring of VRA Counsel and Litigation Counsel occurred in two stages. VRA compliance was considered an immediate need, so we initiated steps in February 2011 to recruit counsel, and hiring decisions were made in mid-March of 2011. Hiring for potential litigation was not considered as pressing, and recruitment and hiring decisions were delayed until July 2011.

VRA Counsel:

The hiring of the VRA Counsel involved the issuance of an RFI, the receipt of multiple applications, interviews by the Legal Committee and other interested Commissioners, recommendations from the Committee, and, ultimately, a vote by the full Commission. As the transcripts from the week of March 15, 2011 reveal, the process was contentious at times, and involved highly charged comments from the public, as well as disagreements among the Commissioners. Two law firms -- Gibson Dunn and Nielsen Merksamer -- emerged as the leading candidates. A number of strong candidates with VRA experience -- similar in ways to the current cycle -- were based outside of California and were ranked below the California firms; given the logistical challenges of the time, when videoconferencing was not as widespread as today, the in-state counsel were deemed better options.

Gibson Dunn brought advantages of large-firm capacity, experience in earlier redistricting cycles, and California VRA litigation experience, and they featured Republican and Democratic law partners as leads. Nielsen Merksamer was a smaller firm, but carried extensive experience in election law and defense work involving governmental entities. Concerns were raised, however, about Nielsen Merksamer's lobbying activities, its affiliations with the Republican Party, and its large amount of defense work in VRA cases.

Commissioners divided on which firm should be extended an offer, but, after Nielsen Merksamer withdrew its application, the Commission was able to select Gibson Dunn as the VRA Counsel. George Brown, a now-retired
partner in the firm's Silicon Valley office and a registered Democrat, was the lead attorney for Gibson Dunn throughout the process, and a number of associates who are current partners at the firm assisted in the representation. Another senior partner, registered Republican Daniel Kolkey was involved early in the representation but later phased out of the process.

An issue regarding disclosure of potential conflicts of interest did arise later in March 2011, because of Gibson Dunn's initial failure to disclose lobbying activities and political action committee contributions. I have been quoted in a number of public comments to the CRC regarding Gibson Dunn's current application, and I stand by my 2011 statements that any intentional withholding of information designed to evade inquiry or to deceive the CRC should be fully disqualifying. The nondisclosures in 2011 did not rise to this level, however.

I have commented previously on problems with Gibson Dunn's representation on VRA-related matters, but I offer more detail here. The firm's work was polished and professional, but I soon discovered that both the lead counsel and the associates assigned to us lacked the depth of knowledge on the VRA that we had expected. Voting rights work is a highly specialized area, with complex case law and an academic literature spanning both law and political science. Although counsel had relevant litigation experience, the firm's initial knowledge of case-law nuances and key works in the field was not as extensive as we had assumed.

In addition, the general approach taken by the firm was, in my opinion, overly risk-averse and placed too great an emphasis on strict compliance with the racial gerrymandering case law (Shaw/Miller) rather than exploring broader options under section 2 of the VRA. The firm also pushed to treat Dr. Matt Barreto's racially polarized voting analyses as attorney work product that would be outside of public review -- a litigation-friendly decision that, in hindsight, I would no longer endorse because of the overriding value of CRC transparency.

Other commissioners and members of the Q2 line-drawing team shared my concerns. Indeed, because a number of Q2 staff had greater experience with the law (including Ana Henderson, a former Justice Department attorney with several years of VRA experience), they assisted with getting firm lawyers up to speed. And, the firm billed for all of its hours. But time was short, deadlines loomed, and we continued with the representation: many of us thought that there was a sufficient understanding of the law on the Q2 team, as well as
among a number of the commissioners, and we felt that in-house knowledge could provide additional checks on the process.

I have more specific examples that I could share, and would be happy to speak with the Committee or the full CRC, if it would be helpful. I am also aware that members of the Q2 team had specific problems regarding the Gibson Dunn lawyers in their one-on-one meetings, but I leave it to the current CRC to explore those directly with Q2. In the end, the final maps were precleared by the U.S. Justice Department under section 5 of the VRA, and all of the districts were upheld in subsequent lawsuits.

Litigation Counsel:

The selection process for the litigation counsel occurred in July 2011, after we had published first draft maps and after the California Attorney General's office had declined to represent the CRC in defense of its maps. An RFI was issued and Chief Counsel Miller engaged in recruitment of several leading law firms. Two commissioners, Maria Blanco and Stan Forbes, interviewed the top candidates, and recommended to the full Commission that we consider an arrangement in which Gibson Dunn and Morrison & Foerster (MoFo), another major law firm, would serve as co-counsel.

As the transcripts for July 21-23 reveal, the co-counseling arrangement was designed to serve multiple ends. We considered continuity between the line-drawing process and subsequent defense of the final maps to be very important. This favored retaining Gibson Dunn, because of their knowledge of the line drawing process and their expected strengths in general litigation and appellate advocacy. MoFo brought comparable big-firm advantages to the legal team. Although Gibson Dunn and MoFo were considered equal players in the litigation, it was clear that MoFo's senior partner, James Brosnahan -- a nationally known trial attorney -- was considered by many commissioners to be a de facto lead and brought extra prestige to the defense team. He later argued on behalf of the CRC in oral arguments in the California Supreme Court.

Stan Forbes and I were tasked, along with Chief Counsel Miller, with oversight of the litigation team. At this stage, Mr. Forbes and I took a more hands-off approach and focused primarily on broad strategies rather than micromanagement, and we left more detailed oversight to Mr. Miller. Unlike the VRA representation, we felt that there was more than sufficient experience and firepower among the litigation team members; we could thus afford to
step back and focus on strategy and the review of near-final documents and filings.

Still, as former commissioners involved in budgeting and the review of billing statements can confirm, large numbers of billable hours by partners, associates, and staff accrued in short order. Concerns about inefficiencies and possible overbilling were raised by a number of commissioners, but the legal oversight team felt that litigation success for a first-time redistricting commission was also a paramount value. Representation by private counsel became the CRC's largest single expense during the 2011 cycle, but the Commission won all of its cases in both state and federal court.

A major glitch that did occur late in the litigation phase was a liquidity problem tied to the CRC's fiscal year budgeting and delays in the legislature's allocation of additional funds for litigation. (This is a very important consideration for the current Commission, particularly since its calendars and deadlines have been in flux.) Although it was not prejudicial to the CRC defense, the two law firms adopted different approaches in response to the temporary fiscal shortfall: Morrison & Foerster stayed with the CRC through the shortfall, while Gibson Dunn withdrew its representation because bills could not be timely paid.

Lessons for the Current Cycle

General Considerations:

As in 2011, there have been a number of problems dealing with incomplete disclosures of potential conflicts of interest. Transparency and public trust are core values in the CRC's work, and I believe that all applicants, consistent with their professional responsibilities, should share and be able to demonstrate those values. I still believe that willful or intentional nondisclosures designed to deceive the Commission are disqualifying, and that even non-intentional ones should be taken into account if they are uncorrected. Gibson Dunn, in particular, given its experiences with the CRC ten years ago, would be expected to be more sensitive about this issue. However, to the extent that ambiguities may have been created by the CRC itself in its RFIs or in other contacts with applicants, they should, out of fairness, be taken into account in favor of the applicants.

VRA Counsel:
In the current cycle, all of the VRA Counsel applicants appear highly qualified and could serve as effective counsel to the CRC. Each team offers distinct advantages and disadvantages that the Legal Affairs Committee has weighed in terms of VRA litigation experience and in-house social science experience. Collectively, their experience has been more plaintiff-oriented, which should be considered in your deliberations.

At present, none of the attorneys offered as the "VRA expert" is an active member of the California bar, but the Strumwasser team's attorney can easily reactivate his status; given CRC timelines and the absence of bar reciprocity in California, the licensure status of the other teams should be considered fixed. Out-of-state status should not be a barrier to a legal team's ability to offer VRA trainings, to analyze strategies and mapping decisions, and to develop written memoranda and other legal documents, since this type of work can be developed in tandem with the California attorneys.

But, the ability of the VRA expert -- as opposed to a less experienced or more junior member of a team -- to offer real-time legal advice in meetings could be highly problematic with out-of-state lawyers, assuming real-time advice is an essential need for the CRC. VRA-related advice might require analyses not only of federal law, but California state constitutional and statutory law as well. For example, in drawing a majority-Latino district to comply with section 2, there might be related questions regarding other racial or ethnic communities of interest or regarding compactness definitions that are based on state law.

The Legal Affairs Committee's recommendation to advance the Strumwasser & Woocher firm as VRA counsel is a sound one, but the CRC would be well-served with any one of these applicants.

Litigation Counsel:

As you can see from the 2011 process, once we realized that the Attorney General's office would not be representing us, we opted for a "big gun" private law firm strategy to defend our maps. This type of approach carries clear advantages, if the primary goal is to win lawsuits. But taxpayer dollars are at play, and commissioners did differ in the degree to which they thought this strategy was necessary, given the enormous expenses involved. And, costs were even greater because of the coordination necessary in a co-counseling arrangement.
The 2020 CRC faces similar choices. Gibson Dunn is applying only for the litigation counsel, and they do have the experience of having been one of the firms representing the CRC in its previous cycle. They are an example -- and the only one in the pool -- of a large international firm with extensive resources to confront practically any legal challenge. But, they will bill you at very high rates for all of their work. And in this round, there are also reputational issues at stake because of the pending Santa Monica CVRA litigation, and these issues should be taken very seriously.

The Strumwasser & Woocher and Renne Public Law Group applicants are also very experienced, and carry the advantage of specializing in governmental affairs and having deep understandings of the challenges confronting public agencies. If faced with the same types of lawsuits filed in 2011, I am confident that either of these firms would be able to successfully defend the Commission's maps.

But overall litigation capacity is an important consideration, particularly for Strumwasser & Woocher, which is one of the firms being advanced by the Committee. From information on their website, the total number of attorneys appears quite small, and they practice multiple areas of law. I have helped the citizens redistricting commission for Santa Barbara County this cycle, and I know that Strumwasser & Woocher is representing that commission, and they may be working with other jurisdictions.

The Legal Affairs Committee has not queried any of the firms regarding other redistricting clients or on projected workloads, so it would be important to obtain this type of information as you are moving forward.

As I mentioned earlier, hiring the litigation counsel is not essential at this stage, so you do have the option of delaying hiring if there are ongoing concerns with the applicants.

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Thank you again for your consideration -- and patience.

Angelo Ancheta
Member, 2010 California Citizens Redistricting Commission
San Francisco