

May 28, 2013

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Dear Members of the Independent Redistricting Commission:

Congratulations! You were selected from among over 450 eligible applicants based on your relevant analytical skills, ability to be impartial, residency in various parts of our city, and appreciation for the city's diverse population. I am envious of your opportunity to serve on behalf of the residents of Austin at this historical time. Your task will be challenging, but the result will be important because it not only will establish the ten districts to be used in 2014, but will establish the baseline for decades thereafter.

I retired in 2012 after teaching election law for over 20 years at the University Of Texas School Of Law. During the past 38 years, I have represented and advised hundreds of public officials during redistricting. I am not asking for consideration as legal counsel for the independent commission because I am old and probably not up to the demands of another contested redistricting process. However, my extensive prior experience provides me with the capability of identifying and assessing most of the issues that will affect the redistricting process in Austin. I hope you will consider the following suggestions and will find them useful. They are not legal advice.

When I drafted the provision that became part of the Austin city charter through Proposition 3 (2012), I modeled it on the independent citizen redistricting in California that successfully redrew that state's legislative and congressional district lines for the 2012 election. The decision to use the California model came after my review (as part of my law school work) of all of the autonomous redistricting commissions used by the various states (22 commissions) and fifty largest cities (five commissions). There are many reasons why I felt that an independent commission was essential and that the California commission provided the best model for Austin. My reasoning is explained in detail in the manuscript, *Redistricting Need Not Be a Quintessentially Political Process: Independent Redistricting Commissions for Cities* that is awaiting publication in the Election Law Journal. (I will gladly provide a copy of the manuscript if wanted).

My suggestions are directed at how the commission might begin its organization. I am confident that you can read the provisions of the charter so I am not repeating them in this letter. Other issues can be addressed later as the commission proceeds.

Learning From California. In May, the law school, LBJ School and AGR jointly hosted a panel discussion that included a member of the California Redistricting Commission. I moderated this discussion. Our guest, Mr. Angelo Ancheta, assured me that he is willing to return to Austin to meet with the Austin Independent Commission. I urge that you consider inviting him (or another member of the California

Redistricting Commission) to meet with you in open session and answer questions about the California experience.

Rotation of the Commission Chairmanship. One of the novel procedures used in California was the rotation of the commission chairmanship among the members of the commission interested in serving in that office. An effective redistricting commission requires a good working relationship among the members of the commission. Rotating the office of commission chairman helps sustain a positive relationship by reducing internal power struggles and centralization of power. Proposition 3 provides for selection of a chair and vice-chair for the commission, but does not explicitly prohibit a rotation of these offices among members of the commission as occurred in California under similar wording in that state's controlling law.

Confirming the Continuing Interest of Selected Commission Members. The success of this endeavor depends on the willingness of the members of the independent redistricting commission to find the time and to make the effort to meet their duties under Proposition 3. Those duties can be significant. If anyone feels that he or she is unable to fully discharge the duties of the office over the next 4-8 months, he or she should resign now when it is possible to conveniently choose a replacement from the pool and when the chosen replacement shall have the full advantage of all of the commission's hearings and proceedings. There is nothing shameful about resigning at this point. An individual's circumstances may have changed since he or she first submitted an application to serve on the commission. Two of the independent auditor applicants selected for the Applicant Review Panel resigned or refused to serve (and were replaced by alternates) because, on reconsideration, they did not feel that they had time to carry out the duties of that office. If any one of the eight commissioners has similar doubts about his or her ability to fully meet the obligations of a commission member, now is the time to act for the benefit of the process. (Under Proposition 3, missing half of the commission's meetings in a three (3) month period constitutes a "substantial neglect of duty.")

Interviewing Applicants for the Remaining Six Positions on the Commission. The screening process for selection of commission members in California was more drawn out than in Austin (the provision for the commission was approved by the voters in 2008 – three years before the commission began its work). This additional time allowed applicants for the commission to be interviewed. There was not time for the City Auditor or Applicant Review Panel to interview applicants as part of the process in Austin. California officials feel that the interviews were useful. Please consider whether you think it desirable to interview the finalists for the six slots on the commission to be filed by you.

Diversity on the Commission. Each of you probably knows that Proposition 3 "is designed to produce a commission that . . . is reasonably representative of this City's diversity." It requires that the final membership of the independent redistricting commission reflect the diversity of Austin "including, but not limited to, racial, ethnic, and gender diversity." Geographic diversity should be ensured on the commission by a final makeup that "to the extent feasible" includes "at least three commissioners from each existing Travis County Commissioner's precinct." Complying with the requirements of Proposition 3 is absolutely necessary, but the way in which the requirements are met is your task. However, it is

apparent that, given the importance of the Voting Rights Act, one or more African-Americans should be added to panel. Also, under Proposition 3, there must be a student selected. The six additional members of the commission must be approved by the affirmative vote of at least five of you. In California, the six additional commission members were selected as a slate rather than individually. The Austin commission has this option.

Although diversity is important and required for the makeup of the commission, it is important to not lose sight of the overriding objective of having a commission that has the necessary analytical skills and impartiality to produce a districting plan that fully complies with the law and is fair to all Austinites. Among the apparent assets of a citizen commission are that individual and group politics will be avoided and redistricting decisions will be less motivated by self-interest or provincial concerns. All commissioners must “conduct themselves with integrity and fairness” and are expected to be impartial.

Staggered Terms. Some persons have asked about how the election of 10 council members under Proposition 3 will work in conjunction with the Proposition 2 requirement for staggered terms. The solution is easy. At the first city council meeting after the 2014 election, the 10 council members draw lots for two and four year terms for the first election cycle. This is the process that has been followed successfully in the Texas Senate for 150 years. Under Proposition 2, the city council has the authority to provide for this transition by ordinance. Earlier this year I sent such a possible ordinance to the city council.

Commission Staff. The authority for the commission to retain staff, legal counsel, and consultants is expressly provided in the charter amendment. Approval of the hiring of such staff requires nine affirmative votes. The city council is charged with providing “sufficient” funds to meet the operational costs of the commission.

What staff is necessary? There are essentially four roles for commission staff. These are:

1. Administration. The commission will require staff to assist on routine, but nevertheless essential tasks, such as facilitating communication among the members and with the public, scheduling meetings and locations for hearings, maintaining records, etc.
2. Legal Counsel on Operational Matters Such As State Law and City Policies Affecting Meetings and Records. There are many aspects of the day-to-day operation of the commission that are governed by state law and city policy other than those specifically concerning redistricting or set out in the city charter provision added by Proposition 3. The commission must assure its compliance with these requirements.
3. Legal Counsel on Redistricting and Compliance with the U.S. Voting Rights Act and U.S. Constitution. These legal issues are complex and require special expertise. Both the California Redistricting Commission and the San Diego Redistricting Commission lamented in 2011 that they did not hire such special counsel at the beginning of their work. Both commissions later retained such counsel and recommended that future commissions retain such counsel from the beginning to help avoid early errors. Virtually every local government that has single-member districts uses special outside redistricting counsel even when the local governing board (instead

of a commission) bears ultimate responsibility for approving the final district lines. Every major local government (cities, counties, school districts, special districts) in Texas with single-member districts has used such special counsel. Proposition 3 mandates that the commission hire legal counsel that has demonstrated “extensive experience and expertise in implementation and enforcement of the Voting Rights Act.”

4. Technical Experts That Are Accustomed to Working with Census Data and Can Display Proffered Districts and Potential Changes in Real Time. It is essential that the technical members of the staff possess the ability to work with census data, have experience in redistricting, and be able to display the redistricting options in a form that is available and understandable to the members of the commission and the general public. It is equally essential that this technical staff is objective, apolitical, and avoids favoring any member of the commission, or member of the general public, or member of the city council. A major issue will be whether the demographers for the city can fill this role. As discussed below, there are legal issues under Proposition 3 about using city employees. I think use of city employees for the technical map drawing is sailing too close to the wind.

Options for Securing Staff. The selection of staff is critical. At the same time, it poses a dilemma.

The term of each commissioner technically begins at the time of his or her appointment (now) and expires only with the appointment of the first member of the succeeding commission (2021). However, Proposition 3 assumes that the commission “shall remain inactive except when necessary to comply with its duties” under the charter. Any compensation of staff is limited to the period in which the commission is active. Thus, the need for staff beyond 2013 is unclear and anyone “hired” by the commission will only have short term employment. The California commission is reportedly operating at this stage with only a single, part-time employee.

The decision about retaining staff is further complicated by the requirement that the commission apply the conflicts of interest in Section 3(l) (3) (e.g. the same requirements that applied to commission applicants) in its staff selection process. Among these disqualifications is being a paid employee of the city.

A final complication is monetary cost. Thus far, the selection process has avoided major expenses thanks largely to City Auditor Kenneth Mory and his staff. Operating the commission on a reasonable budget is prudent, but it is wrong to think that the retention of redistricting consultants and legal counsel is an expense that arises only with the use of a commission. As explained above, virtually all major local governments retain special consultants and legal counsel for redistricting. They would be foolish not to do so. Retention of such expert staff by this commission need not be more costly than it would be if the city council was drawing the districts. The temporary retention of other staff for routine matters might be an additional expense when otherwise the staff work could be done by city employees. However, any such expense should be modest.

In California, the commission began by hiring an executive director. He then hired most of the staff for routine matters. The technical and special redistricting experts were hired directly by the commission.

The following are some options for technical redistricting consultants and special legal counsel:

1. The Texas Legislative Council. There is no group in Texas with more experience in providing quality redistricting services than the Texas Legislative Council. It has redistricting professionals and one of the most sophisticated redistricting computer systems in the country. While the redistricting plans passed by the Texas Legislature have appropriately been attacked for their partisan and self-interest, none of these attacks have questioned the objective and professional work of the Legislative Council. In fact, the federal courts (including in 2011) have consistently used the attorneys and staff at the Legislative Council to help them draw remedial maps to replace the redistricting plans passed by the legislature for the state legislative and congressional districts. Council attorneys, such as David Hanna and Jeff Archer, are very professional and would provide this commission with the best possible assistance. I am not confident at this point that the Legislative Council can be convinced to allow its staff to help or that the renewal of the state redistricting litigation will allow the Legislative Council time to assist Austin, but an intergovernmental arrangement might be possible. I urge this commission to pursue this option.
2. Private Redistricting Consultants. There are several individuals and firms that routinely furnish redistricting services to local governments in Texas. Many of these persons are identified with particular political parties or factions and thus probably are inappropriate for an independent commission's staff. The best and most objective person is my former law firm, now Bickerstaff, Heath, Delgado, Acosta. I have had no business or professional relationship with the firm since 2001, but the firm represents the City of Austin on certain matters and may be ineligible for that reason.
3. Professors at the University of Texas. I am familiar with several of my former colleagues at the law school and elsewhere at the university that might be convinced to help this commission, especially over the summer. Professor Joseph Fishkin at the law school is very knowledgeable and might help.
4. Experts from California. I have spoken with several law professors from California schools that might be willing to travel on one or more occasions to Austin to assist.
5. City of Austin Employees. The charter prohibits the commission from hiring current or former city employees. Some persons see the involvement of any city employees as inconsistent with the concept of an independent commission. It is possible, however, to argue that Proposition 3 allows city employees to be used to provide assistance on routine administrative matters and operational matters of state law. While I think that the use of city employees for legal advice and technical assistance on redistricting would be unwise and contrary to Proposition 3, I see the potential "necessity" of using city employees for some routine matters (especially in the beginning) so long as those employees cannot influence the drawing of district lines.

Conclusion. I hope these comments and suggestions are helpful. Neither I, nor AGR, nor anyone else owns Proposition 3. The charter provisions now belong to the residents of Austin. You are charged under Proposition 3 with applying the charter provisions “in a manner that is impartial and that reinforces public confidence in the integrity of the redistricting process.” I am confident that you will do so.

I regret that I cannot attend your meeting on May 31, 2013. I will be in College Station attending the graduation of one of my granddaughters. Good luck.

Sincerely,

Steve Bickerstaff

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