

July 11, 2013

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Dear Members of the Independent Redistricting Commission:

Several of you were kind enough last night to inquire about the change in my travel plans. My wife and I are going to Iceland. For various reasons our departure was delayed until August 3d.

Last night this commission asked for the city legal department to provide its opinion on several matters. I thought that the city's lawyers might want my thoughts on these matters as the initial author of the charter amendment wording. I am not furnishing a legal opinion for this commission. Nor am I an attorney for AGR or any other organization or group. The following thoughts are solely my own.

The Deadline for Commission Action. Commissioner Costello appropriately expressed concern about the provision in Section 3 (G) that provides that the commission shall adopt a redistricting plan by December 1, 2013. This timetable was initially set when the next city elections were to occur in May 2014 and was intended to leave at least six months between the final adoption of the plan and the election to allow time for candidates to file, to raise money and to campaign for the election. It recognizes the reality that if this commission fails to adopt a plan in time for elections, a court must do so.

The provision for a court acting if this commission does not do so is recognition of what really happens when a legislature, governing board or commission charged with adopting a redistricting plan fails to do so. Austin city elections in 2014 must go ahead on the basis of ten single-member districts. If this commission has not adopted a plan for the districts, the court (not the council) steps in. Events at the state level in Texas show how this works. On some occasions in the past, the legislature simply could not pass a plan. The courts stepped in to adopt one. In 2011, the legislature effectively failed to enact a congressional or state legislative plan because the plans never received preclearance under the Voting Rights Act and never took effect. A federal court in San Antonio ended up adopting a an "interim plan" for use in the 2012 election. For obvious reasons, Austin does not want to become caught in this Charybdis.

I pointed out to Commissioner Costello that the December 1, 2013 date was no longer a firm deadline. Once it became clear that the council would propose moving the 2014 election, a sentence was added to Section 3 (B) to recognize that "If the date of the city election is moved, then the dates in this article shall be adjusted to ensure the commission has sufficient time to draw the lines prior to the election

date.” Commissioner Costello then asked what amount of time should be adjusted “to ensure the commission has sufficient time.”

I emphasized that it has always been my firm belief that this commission should finish its work by the end of 2013 to allow prospective candidates adequate time to consider whether to start raising money for a campaign for council office. However, on the legal question posed by Commissioner Costello, it would seem that the following factors are relevant:

1. The purpose of the adjustment of time is “to ensure the commission has sufficient time to draw the lines prior to the election date.” The emphasis is on the commission having time to finish its work – not on taking responsibility for the task of redistricting from the commission and giving it to a court.
2. Having litigated dozens of redistricting cases over the past 40 years, I am confident that, if the issue actually reaches court (doubtful), the court will defer to the reasonable judgment of the commission on the amount of time it needs to finish its work.
3. Section 3 (G) expressly recognizes that a court plan is only used “until a final plan is adopted by the commission to replace it.” In other words, the commission is not deprived of jurisdiction over redistricting even with passage of the date in question.
4. Finally, the city election has been moved six months into the future (i.e. from May to November). Assuming that the six months originally existing from the date of adoption of the plan (December 1, 2013) to city elections (May, 2013) was a minimum time allowable for a smooth election, the comparable date for allowing six months prior to November elections would be May 2014.

I repeat that I think this commission can and should adopt a final plan by at least the end of 2013. The best option would be to adopt a plan before December 1, 2013 to remove any doubt about the outcome. I have purposefully not speculated on a later date because, if such a date is mentioned, it might encourage a delay in the commission’s work. As a legal matter, however, I do not think that the need for court intervention under the charter arises until the spring of 2014.

Public Hearings. Section 3 (k) of the charter amendment requires that this commission conduct at least 14 public hearings before final adoption of a plan. These hearings are divided between at least eight before the initial plan is adopted, four after the initial plan is adopted, and two after preliminary passage of a final plan.

Commissioner Costello suggested that this commission might make this task easier and more efficient by splitting the commission into 2-4 separate groups to conduct public hearings perhaps simultaneously during the hearing process. He asked for a legal opinion from the city staff as to whether this action is possible.

Section 3 (k) (7) does not explicitly prohibit the commission dividing itself for the public hearing process. The Texas Legislature uses a committee to conduct its “outreach” hearings across the state. In many instances, there is not even a quorum of the committee in attendance at these hearings, but they proceed anyway ostensibly as a “courtesy” to the witnesses that have appeared to testify.

However, from my experience, these legislative hearings are a sham. From the perspective of the legislators, the shape of the districts is being determined by political deal-making behind the scenes, not the public testimony. The legislative hearings are primarily for show. The hearings themselves have been largely captured by the political parties and potential litigants that orchestrate the often repetitive witness testimony.

One of the strengths of an independent commission is that it can consider testimony outside the prism of personal or political self-interest. However, this requires actually having familiarity with the public testimony. I think Section 3 (k) (7) anticipates that a quorum of this commission is present at all hearings.

At the same time, I suggest that you explore means of making the hearings more helpful to your task and less repetitive. For example, this commission might consider advising potential witnesses (before the hearing) to avoid repetitive and irrelevant testimony because (unlike in a political process) the volume and quantity of testimony will not be helpful to the witnesses or this commission. Any limits on a speaker's time or testimony must be enforced (cordially of course) by this commission.

Committee Meetings. I fear that I cannot add to the analysis of the question of whether committees of the commission can meet, at least without a quorum, without publishing notice and convening in open session. This is one of the circumstances in which the commission is actually bound to city regulations because Section 3 (k) (1) requires that the commission "comply with all state and city requirements for open meetings." It now appears that the members of this commission have discovered ad hoc an alternative that allows more efficient progress by having a single commissioner draft an initial proposal (e.g. ads for an executive director or assistant executive director, or possible locations for hearings), compile all suggested changes for the proposal, and present it to the full commission for adoption or rejection.

Legal Counsel. The suggestion of moving as soon as possible to obtain legal counsel is a good one. However, legal advice and help can easily become very expensive. Therefore, let me offer a few thoughts from within the legal community.

There are essentially two ways to go – either to hire or contract with an attorney to work as part of the commission staff or to contract with outside counsel (an attorney or law firm). There are advantages and disadvantages to each route.

A law firm or experienced outside counsel can often provide legal expertise in many different fields. However, the cost of such expertise can be enormous both because of the high hourly rates of experienced counsel and the tendency of a law firm to "overwork" a question. A smart, diligent, confident executive director (or commission member) is essential to managing the cost of legal services

by making certain that only essential legal questions are asked to the counsel, that an appropriate cost is set for each inquiry and that the outside counsel stays within the appropriate budget.

There are plenty of attorneys seeking work; so finding an attorney for the commission staff is definitely doable. Moreover, a staff attorney can be hired (or through a professional services contract) for a fixed salary and would probably cost less than the other option. However, in the vernacular of the legal profession, these attorneys are mostly “baby lawyers” (i.e. they have limited experience). There are exceptions, but this commission should be prepared for the possibility that it may find a staff attorney unable to handle difficult legal questions and may then incur the expense of also hiring outside counsel with expertise on the particular issue.

I have experienced both circumstances. As the founder in 1980 of the law firm now known as Bickerstaff, Heath, Delgado, Acosta and as an active practitioner and competitor with other law firms for 25 years, I know the workings of a law firm. On the other hand, my first job as a “baby lawyer” back in 1973 was as a counsel for the Texas Constitutional Revision Commission (a “blue-ribbon” commission of thirty members including Leon Jaworski, Bob Calvert [Chief Justice of the Texas Supreme Court], Peter Flawn [President of the University of Texas], Page Keeton [Dean of the Texas Law School], and others of similar caliber). My colleagues on the commission staff were some of the smartest and hardest working lawyers that I have ever known even though we were all “baby lawyers” at the time. We were supervised by a law professor.

Under either scenario, this commission must refer only the most important issues for a legal opinion. An attorney on staff can only reliably research a limited number of issues in the time available. The uncontrolled use of an outside lawyer or firm easily leads to “runaway” legal expenses. An executive director is a key to proper management of legal services.

Maybe it is my age and my fond remembrances speaking, but I prefer that this commission try to find a smart, hard-working, conscientious attorney with whom to contract for the staff. As was suggested, this is an issue on which you would want help from the executive director.

Also please recall that under the charter this commission must also hire legal counsel that “has demonstrated experience and expertise in implementation and enforcement” of the Voting Rights Act. This legal assistance must almost certainly come from outside counsel because of the complexity of the law, the need for expertise and the possibility of litigation.

Technology. I have recommended to Ms. Gutierrez the names of two possible local sources for a demonstration of the redistricting technology.

Good luck. Please recall that I am not providing legal advice.

Steve Bickerstaff