

TO: Citizens Redistricting Commission

FROM: Governmental Affairs/Census Action Subcommittee, Commissioners Sadhwani & Toledo

DATE: April 24, 2021

RE: Potential Courses of Action regarding delayed Census Data

The delay of Census data for redistricting represents a stumbling block for our work, though the extra time allowed by the delay will allow the commission the opportunity to more fully carry out our mandate of public engagement and education on redistricting. Political participation, however, is not isolated to redistricting. In our last meeting, the governmental affairs subcommittee was asked to put together a memo outlining some of the potential courses of action that the commission might take given the delay in Census data. This memo both summarizes our discussions thus far, as well as links to many of the written public input we have received and also identifies three recommended actions and other possible courses of action for the commission to take in the future.

Recommended Actions:

(1) The CRC should formally adopt our intention to utilize the legacy format summary redistricting data (“legacy data”) files as released by the U.S. Census Bureau to begin its work as soon as practicable.

(2) The CRC should engage in a discussion about how much time we need to draw the maps, and ensure meaningful and transparent public input on the preliminary and final maps, as well as the impact of the holidays.

(3) The CRC should take a “wait and see” posture for at least the next month until additional information can be obtained from the U.S. Census Bureau and our legal strategy can be further developed in coordination with incoming counsel.

Background

During our meeting on March 29, 2021, we heard from representatives of the California Association of Clerks and Election Officials (CACEO), CA Common Cause, the Legislature and the Secretary of State’s office about how our delayed redistricting timetable impacts the establishment of the primary election (currently set for June 8, 2022) and the numerous legal requirements that must be met prior to the election.

At that time, California Common Cause was advocating that we all “share the pain” and the commission should be mindful of the impact that the delay in Census and consequent delay that delivery of the map would have on a broad set of stakeholders. As such a working document was shared that outlined potential scenarios for the delayed maps – some of which could result in the primary election date having to be moved. Commissioner Kennedy further distilled those timelines in a document he presented at our meeting on April 14th. Ultimately, the date upon which the commission certifies the final maps is consequential to setting in

motion a host of other benchmarks that must be met to ensure a free, fair, and accurate primary election.

Delayed Timeline from the CA Supreme Court

Prior to the seating of our commission, many of the same stakeholders referenced above, came together to bring a suit before the CA Supreme Court. The 2010 CRC was not a party to the case, but rather the suit was between the Legislature and the Secretary of State's office. The decision of the case was discussed at our first commission meeting on August 26-September 4, 2020.

Summary of the case prepared by CRC counsel, Ms. Marian Johnston (via email, April 10, 2021):

In *Legislature v. Padilla*, anticipating the release of census data would occur on July 31, 2021, the California Supreme Court set November 1, 2021, as the date to release the first draft maps and December 15, 2021, as the date to approve and certify the final maps to the Secretary of State, and then anticipated possible additional delay in the release of the census data. The critical language from *Padilla v. Legislature* is:

"If the federal government transmits the census data to the state later than July 31, 2021, the number of days of additional delay shall be considered to be the 'additional federal delay.' In the event additional federal delay occurs, the Commission is directed to release the first preliminary statewide maps by no later than the date following November 1, 2021, that extends the November 1 deadline by the additional federal delay, and to approve and certify the final maps by no later than the date following December 15, 2021, that extends the December 15 deadline by the additional federal delay."

I don't believe the language in the *Padilla* decision is ambiguous. If the census data is released on August 15, 2021, this would be 15 days after the expected delayed release on July 31, 2021, so the date to release the first draft maps would become November 1 plus 15 days, or November 16, 2021, and the date for the final maps would become December 15 plus 15 days, or December 30, 2021. The effect of any other release date later than July 31, 2021 would be similarly calculated.

As to the possibility of getting additional time from the California Supreme Court, I do not think this would have success, as the purpose was to give the Commission the same time to do its work as it would have had without the census delay caused by COVID.

The only possible option I see to get some additional time would be if the release of the legacy data is determined not be the release of the census data, but this would be inadvisable unless there is a court decision to this effect. I do not believe such a decision is possible given the information received from the SWDB that it is the same information.

Moreover, the advice of our counsel is that the ruling is unambiguous: the due date of our maps is tied to the date that data is released. Failure to deliver maps according to that timeline could result in additional litigation that would relinquish our authority to certify the maps and have the power taken over by the courts.

Usability of Legacy Data

One of the key issues is the usability of the "legacy data" that the U.S. Census Bureau has announced it would release sometime in August 2021, with the latest information suggesting

the release to be no later than August 16. On March 26, 2021, the commission received a memo from the director of the Statewide Database, Karin MacDonald, in which she outlined that the data would be usable for redistricting, after a 2 week timeframe in order to process the data and run accuracy checks. An additional 30 days would be needed to process the data and complete the reallocation of state inmates to their previous addresses, this 30 day delay would also be necessary after the delivery of the data the Census will release on September 31 at census.gov. The commission also received a letter from the Legislature, which strongly suggested that the date for the completion of the maps should be in accordance with the *Padilla* ruling (similarly outlined by CRC counsel above). They write:

“In *Legislature of the State of California v. Padilla*, the California Supreme Court granted an extension of Commission deadlines to December 15th for approval and certification of final maps. The Court also provided that the Commission shall adopt final maps no later than those dates plus any additional days of federal delay in transmission of census data after July 31st. The computerized redistricting database can be built from the legacy format data, which is expected to be transmitted in the second half of August. As a result, the deadline to adopt maps will **need to be extended two to four weeks from the original deadline set by the Court**, depending on the actual date the legacy format data is received.” (emphasis added)

On April 16, 2021 the CRC received a memo from 2010 Commissioner Angelo Ancheta, in which he suggests that the legacy data should not be accepted as the official Census data. He argues that the commission should be mindful of our mandate from the Voters FIRST Act and to set deadlines that do not compromise the public input process:

I conclude that the Commission’s court-ordered deadlines are **likely** to be the following: January 1, 2022 for preliminary maps and February 14, 2022 for final maps. These dates assume that the official P.L. 94-171 data set, the only data set considered by the California Supreme Court in *Legislature v. Padilla*, will become available on September 30, 2021. The Commission is, however, empowered to set its own deadlines within these limits, and, given the expected availability of the state redistricting database as early as the end of September, it should consider earlier target dates: for example, the beginning of December 2021 for completion of its preliminary maps and mid-January 2022 for completion of its final maps. (emphasis added)

As advised by our counsel, should the commission take the advice of Mr. Ancheta and simply deem the legacy data as inoperable, we would be leaving the commission open to potential legal challenges and potentially have the process taken over by the courts.

The Statewide Database, charged with delivery of the data to be used for redistricting purposes has consistently maintained that the legacy data being released by the Census Bureau is the same data as the P.L. 94-171 data that will be released at the end of September, simply in a different format. This data is being released so that states can engage in their redistricting process. While the underlying data is identical, to eliminate any risk, the legacy data will undergo a reconciliation process with the PL 94-171 redistricting data set for release by the Census Bureau by September 30, 2021. While some states may not have the data management infrastructure to utilize the legacy data, that is not the case for California.

RECOMMENDATION: The Commission should formally adopt the U.S. Census Bureau's legacy data and, pending processing by the Statewide Database and State Demographer, the Commission will plan to use these data to begin its redistricting work as soon as practicable.

Independence of the Commission

The purpose of the commission is to be an independent body - independent from the legislature who, as elected officials, have a self-interested stake in the redistricting process. We are charged with collecting input from all Californians. Interest groups can play an important role in guiding our process, but are not necessarily representative of the nearly 40 million Californians who call California home.

In our many discussions about the Census delay, we have identified a desire for the commission to be a reasonable partner, by being mindful that redistricting is one step - albeit a decennial and highly consequential step - in the overall process of political participation. We have learned that our timeline will impact the work of the Secretary of State and county clerks and elections officials who also have a mandate to administer a free and fair election. We have acknowledged that a delay in our timeline of delivery of the maps will result in a ripple effect for other processes and *could* necessitate moving the primary election, currently scheduled for June 8, 2022.

At the request of Common Cause, the CRC governmental affairs subcommittee convened a second meeting of stakeholders on April 21, 2021, to further discuss the census timeline. Many of the same individuals who attended an initial meeting (March 23, 2021) were present, including representatives from the Secretary of State's office, the California Association of Clerks and Election Officials (CACEO), the Statewide Database, Democrat and Republican representatives of the Legislature, and Common Cause. Also joining the April 21st meeting were representatives of the Black Census and Redistricting Hub and Robin Johansen, a partner at the law firm Olson Remcho, who litigated in the *Padilla* case. The meeting became heated with the varying interests of the stakeholders becoming more clear - the community advocates pushing the commission to adopt a deadline in later January to avoid adopting maps during the holiday time period, and others pushing us to abide by the ruling in *Padilla* in order to keep the primary date fixed. While the governmental affairs subcommittee was hopeful that there could be a compromise date in which all parties could return to the court and ask for an extension, thus far no compromise appears possible.

To be sure, there will be legal ramifications to consider if the CRC does not abide by the *Padilla* ruling. What we haven't done, however, is engage in a concrete conversation about how much time we actually need to draw the maps given the new August 16th timeline and weighing the pros and cons of working on the maps through the holiday season.

RECOMMENDATION: Engage in a discussion of how much time will be needed to draw the maps, and ensure meaningful public participation. This should include a review of the required waiting periods of the draft maps and a second round of input on draft maps, as has been captured in the Gant chart. We should additionally discuss how we intend to work and engage the public during the holiday season, regardless of what timeline is established.

Potential Courses of Action to Consider moving forward:

1. **Set the timeline based upon the CA Supreme Court Ruling.** This would mean that if the data is released on August 16, 2021 our timeline for completion of the maps is December 31, 2021. If the data is released earlier such as on August 9th, our timeline for completion of the maps would be December 24th.
2. **Return to the State Supreme Court to seek an extension to our timeline.** Community groups have begun to weigh in with their concerns that the December 31st timeline falls during the holidays and therefore might limit the input from communities. However, returning to the court would be a complicated option for the reasons laid out below:
 - a. **The CRC was not party to the original *Padilla* lawsuit.** The suit was brought as an agreement between the Secretary of State and the Legislature and other key stakeholders. Attempting to return to the court would likely require their participation. To that end, if the CRC wanted to request additional time from the court, the best possible scenario for doing so would be to have an agreed upon date by all the relevant parties and stakeholders. It is not clear that all parties would be in agreement.
 - b. **The legal basis for requesting additional time: Option 1 Constraints due to the holidays.** A legal argument would need to be made as to why we are seeking additional time. One possible argument is that state holidays represent a constraint on our ability to get community input. CRC Counsel does not believe this would be a particularly strong or compelling argument.
 - c. **The legal basis for requesting additional time: Option 2 Constraints due to the legality of legacy data.** The legacy data is a new phenomenon, the result of a difficult situation created by the pandemic. As such, there is no explicit authority given under the law as to who can determine whether the data is usable and suffices to fit the expectations of the court in the *Padilla* ruling. However, Government code 8253 7(b) places delivery of data with the Legislature. It reads: *The Legislature shall take all steps necessary to ensure that a complete and accurate computerized database is available for redistricting, and that procedures are in place to provide the public ready access to redistricting data and computer software for drawing maps.*

Upon the commission's formation and until its dissolution, the Legislature shall coordinate these efforts with the commission.

It may be possible to argue that the legacy data is not usable, however the Statewide Database in the memo that we have received did deem the data usable, in addition states nationwide are all assessing the usability of the legacy data, so if other states deem the data usable, then we would have to argue why California would not use it. CRC counsel does not believe this would be a particularly strong or compelling argument.

3. Wait for additional information (Recommended). We do not have to make a final decision today. We could continue to wait until more information is available from the Census Bureau. However, we will need to make a decision in the near future. As we heard during our March 29th meeting, many legally mandated activities stemming from the primary will be dependent upon the delivery of the maps, such as the signature in lieu candidate filing period, the establishment of the precincts and the mailing out of international and military ballots. Even more importantly, if our timeline is delayed and the date of the primary election needs to be moved, the legislature would need to enact the change.