

Legislative Reapportionment Commission

Opening Statement of Commission Chair Mark A. Nordenberg

December 16, 2021

Good afternoon, everyone. My name is Mark Nordenberg. As Chair of the Pennsylvania Legislative Reapportionment Commission, it is my privilege to call this meeting to order. Let me begin by welcoming the interested citizens who are in attendance today, either in person or through our livestream. As has been my custom, I want to explicitly note that I am extending that welcome not only for myself but also on behalf of the other four Commission members – Senator Kim Ward, the Senate Majority Leader; Senator Jay Costa, the Senate Democratic Leader; Representative Kerry Benninghoff, the House Majority Leader; and Representative Joanna McClinton, the House Democratic Leader.

I now have been working closely with these four caucus leaders for almost seven months. Those experiences have left me with deeper feelings of respect for each of them. It quickly became clear to me why they have been selected as leaders by their caucus colleagues. Let me also say, then, that while there are variations in their leadership styles, as well as in the approaches taken by the teams that support them, each Leader has been fully attentive to the responsibilities that have been thrust upon all of them under the provisions of the state Constitution.

I also want to note, once again, that two of the four caucus leaders are women and that one of those women is African American. The composition of this Commission, then, is historic in the sense that it is barrier-breaking.

The Legislative Reapportionment Commission was created under the authority of Article II of the state Constitution, as that Constitution was amended a little more than a half-century ago. Until then, legislative reapportionment was done by the Legislature itself, which still is the case with Congressional redistricting. After careful thought, including an assessment of the Legislature's performance in its legislative reapportionment role over time, the members of the Constitutional Convention created this Commission. It is a one-of-a-kind entity, independent of the Legislature as a whole, but with four of its five members being key legislative leaders.

Through their participation, the caucus leaders are positioned to contribute distinctive perspectives on both the Commonwealth itself and on the legislative processes. Their participation also means that the work of this Commission almost certainly will be influenced more directly by partisan objectives than would be true of the independent commissions that have been created in other states. After all, it is hard to be a majority leader without being focused on how to protect or expand your majority. Similarly, it is hard to be a minority leader without being focused on how to build a majority. I am

sure I would feel the same way if I held one of those roles, so that is an observation, not a criticism.

To be clear, this also is not an endorsement of the independent commission model. To date, in fact, those commissions have not produced an enviable record of success. So, it will be interesting to see how their efforts are assessed once this cycle of redistricting efforts has come to an end. What I can say, more personally, is that I have enjoyed, and learned from, my contact with these four legislative leaders.

In sharing what should be a helpful sense of context, let me first provide an overview of our processes and then turn to the plan that will be presented for consideration by the Commission today. To underscore a fundamental point, what is under consideration today is a preliminary plan. If that plan is approved, it will be filed with the Office of the Secretary of the Commonwealth before the day is done, which will trigger a thirty-day period within which “any person aggrieved by [it can] file exceptions,” which the Commission will consider. During that same thirty-day period, the Commission also will hold public hearings to receive input.

Sometime shortly after that thirty-day period has run, the Commission will meet again to consider possible changes before filing a final reapportionment plan with the Office of the Secretary of the Commonwealth. Once that part of the process has been completed, persons still aggrieved can file an appeal from the final plan with the state Supreme Court, and the

disposition of any such appeals obviously then becomes the Court's responsibility.

In making our way to this point, the Commission's calendar has been squeezed because the delivery of census data was significantly delayed, and because 2022 primary-election deadlines are looming. Under the Constitution, we had ninety days to get to this point, but we cut that period down to just over sixty days, as our contribution to the goal of expediting the process to minimize interference with the primaries.

What I have reported to this point is the basic framework set forth in Article II of the state Constitution. Let me add some observations about what have become customary practices of the Commission, as well as some of the ways in which this year's process departed from those customs of the past.

- One thing that has not changed is that the caucus teams, by choice, focus exclusively on their own chamber. So, the Senate caucuses focus on the Senate, and the House caucuses focus on the House. Of course, the Commission team must focus on both.
- Every caucus is represented by a very capable team, many of whom have extensive experience in this work. That means, of course, that the Commission Chair also must be supported by a team of capable, committed professionals,

and I have been blessed to work with a team of all-stars. Among many other qualities, they possess great stamina, which has been important because recent weeks have brought a succession of 7:00 a.m. to 10:00 p.m. work days, for them and, giving credit where it is due, also for the caucus teams.

- This Commission team includes a redistricting consultant, who holds a Ph.D. in political science with expertise in election law. He also has experience drawing maps to support the work of a master in federal court litigation. This is the first time that a Pennsylvania commission has retained a person with such skills, and we would have been greatly disadvantaged without him.
- Because the legal framework is so important, both in crafting a good plan and in addressing the challenges that inevitably will come, retaining top legal talent also was a very high priority for me, and our Chief Counsel is a former Commonwealth Court Judge who is an expert in election law and a highly respected appellate lawyer.
- Even at that, I probably should add, many of the caucus leaders are supported by larger teams that include multiple mappers, as well as both inside and outside legal counsel, and in some cases, by subject-area experts.

- The nature of interactions between the caucus teams – with each other and with the Commission staff -- varied dramatically from chamber to chamber. In the Senate, the Majority Leader and the Democratic Leader had regular reapportionment interactions with each other – dating back to a time even before I was named Chair -- and so did the members of their teams. They wanted to have the first opportunity to come to agreement on essential features of as much of the plan as possible – and, in fact, they shaped most of the Senate map. For an extended time, then, our contact with them was more limited. The teams from the House caucuses, on the other hand, had contrasting approaches and very limited interactions with each other. Instead, they focused on presenting their ideas to the Commission team and being guided by our reactions.
- The four caucus leaders' early perception of the Chair's role was described in a letter sent by them to the Chief Justice before I was appointed to the position. That letter asked the Court to appoint someone who would serve essentially as an umpire, calling balls and strikes as the caucus teams competed against each other. To be sure, one important part of the Chair's role is to ensure that the advocacy process is fair. However, that description is fundamentally incomplete, because the main goal of the Constitution is not to ensure that there is a fair fight

between the leaders of the two political parties every ten years but, instead, to facilitate what will be a good reapportionment result for the people of Pennsylvania.

- Reapportionment, of course, is tied to the federal census, and the constitutional principle of “one person / one-vote.” Population trends do vary from census-to-census. In this year’s process, the key factors were a significant shift of population from the West and North, to the South and East and a significant increase in minority population.
- Legally, the specific standards of Article II of the Pennsylvania Constitution – compactness, contiguity, and the minimization of border splits -- must be met. In addition, the standards of the federal Voting Rights Act and the requirements of the U.S. Constitution’s Equal Protection Clause and the Pennsylvania Constitution’s Free and Equal Elections Clause must be satisfied. These constitutional requirements have been interpreted in a string of landmark cases from Baker v. Carr, decided by the U.S. Supreme Court in 1962, to The League of Women Voters v. The Commonwealth, decided by the Pennsylvania Supreme Court in 2018. These legal requirements have been the subject of presentations in prior Commission hearings.

- The League of Women Voters opinion, which dealt with Congressional redistricting, underscored the fact that the Pennsylvania Constitution's requirements must be considered together, with due attention being paid both to what it called the neutral "floor" criteria of Article II, Section 16 and to the Free and Equal Elections Clause.
- That same opinion also specifically acknowledged "the possibility that advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these neutral 'floor' criteria [of Article II of the PA constitution] nevertheless operate to unfairly dilute the power of a particular group's vote . . .".
- Of course, technology also has made possible the development of tools for detecting and measuring partisan bias. I do not pretend to understand the math behind each of these analytics. However, I tend to think that, in somewhat different ways, they essentially tell us how close we have come to the democratic ideal that a party attracting about 50% of the popular vote, also ought to be winning about 50% of the contested seats.

This, then, may be a good point to begin talking about the proposed preliminary plan, beginning with the point that independent assessments indicate that both maps before the Commission today favor the Republican party. To some extent that is a product of “political geography,” particularly the fact that so many of Pennsylvania’s Democratic voters live in the Philadelphia area – which is “hemmed in” by our borders with New Jersey and Delaware, meaning that they cannot easily be spread out to have a broader geographic impact.

That tilt also probably is a product of the fact that it is very difficult to address political advantages that have been embedded in legislative district maps over an extended period of time, particularly without the ability to just start over with an entirely new map. I say that because, whatever might be conceptually possible, there is no practical avenue to starting with a totally new map in a Commission dominated by caucus leaders whose members live in, and have won elections from, existing districts.

I probably also should state directly that this Commission staff is neither partisan nor anti-incumbent. Indeed, as I pointed out at the time of their hiring, our Chief Counsel was appointed to the Commonwealth Court as a Republican, and our Executive Director was an elected Republican mayor. With respect to incumbency, it is inescapably true that, when population changes require new maps, those new maps invariably will affect incumbents, though that was not our goal.

In fact, in our first-stage efforts, we focused on the “neutral” requirements of Article II and did not use partisan information. Such information was used when we subsequently focused on issues of fairness under state and federal law. We also did have later discussions with caucus leaders about the impact of emerging plans on incumbents, whose districts were reshaped mainly by population losses and flows.

A striking example of an approach that extended no deference to incumbents can be seen in the plan adopted by the Virginia Supreme Court last week. It paired 50% of the legislative incumbents against each other, which means that at least 25% of its members will be new. That plan, to return to an earlier point, was recommended by special masters when Virginia’s new independent commission failed to come to agreement on either legislative or congressional plans.

Over the course of recent months, I regularly have heard how easy it is to draw legislative maps. One compelling form of contrary evidence is the fact that when Pennsylvania’s good governance groups sponsor map-drawing contests, the overwhelming majority of citizen-mappers draw seventeen-district Congressional maps. A much lower number draw fifty-district Senate maps, and only a few brave souls tackle the 203-district House maps.

My own recent experience suggests that there is nothing easy about drawing these maps. That task is even more difficult when those maps must be drawn in ways that capture majority

support from a small group of leaders who have competing interests in the shape of the outcome.

To prepare for this challenge, the Commission held nine hearings, which included 29 presentations by experts and 51 presentations by interested citizens. We also benefited from 724 website submissions, and the submission of 19 Senate maps and 10 House map by individuals, as well as organizational submissions from such groups as Draw the Lines, Fair Districts PA and PA Voices.

Here are some thoughts on the proposed preliminary map for the Pennsylvania House of Representatives, which is now on the screen and which will be posted on the Commission's website in a readily useable form shortly after the conclusion of this meeting.

Looking at the chart that is now appearing on the screen, you will see that this map compares favorably to the current map on almost all measures except for overall deviation, which is considerably higher. That higher number is affected by two aspects of the process that work against equal population across all districts. First, the reduction of splits in counties and municipalities drives larger deviations in some instances, and second attention to racial equity means that some districts may approach the 10% limit allowable under federal standards. This is something that we will want to work on, but it also is telling that the average absolute deviation is only 2%, reflecting the

fact that, across the map as a whole, the district-to-district deviations have been kept at a markedly lower level.

Let me turn to just one feature of the new House plan that might not be immediately apparent from a quick review of the map. This plan includes seven minority opportunity districts – true VRA districts, minority influence districts, and coalition districts – in which there is no incumbent, creating special opportunities the election of minority representatives. Just to review those districts quickly, they include:

- District 9, which is in a fast-growing area of Philadelphia and has a Black population exceeding 58%;
- District 22 in Lehigh County, which has a Hispanic population exceeding 50%;
- District 54 in Montgomery County, a compact district which has a minority population in excess of 50%;
- District 104 in Harrisburg, which has a minority population exceeding 50%;
- District 116, where the current incumbent has been elected to serve as a judge, has been redesigned as a district containing parts of Luzerne and Schuylkill Counties which have a Hispanic voting-age population over 37% and a total Hispanic population of 43%, so the growth trends are clear and positive; and
- District 203 in Philadelphia, a district with a population that is 42% Black, 22% Hispanic and 13% Asian.

Again, there is no incumbent-advantage that will need to be overcome in any of these districts, which should give the minority communities residing in them a special opportunity.

Here are some companion thoughts on the preliminary map for the state Senate, which is now on the screen and which will be posted on the Commission's website in a readily useable form shortly after the conclusion of this meeting.

Looking at the chart of quantifiable factors, the Senate map in this plan also fares well compared to the current map – except, again, on deviations, and here the both the overall deviation and the absolute deviation are higher than the enacted map, so that is one feature of the plan that is weaker than the House map and will require further attention.

The Senate map, too, includes a new minority influence district in Lehigh County that has no incumbent. Because they have a larger population base, such districts are harder to create in the Senate, and credit belongs to Majority Leader Ward and her counsel Carlton Logue for envisioning this one. This new district has a voting-age Hispanic population of 27.9%, a total Hispanic population of 32.3%, and a Black population of 7.5%.

I am only going to show one measure of comparative partisan fairness, and to do so, I will rely on the testimony given by Carol Kuniholm, the Chair of Fair Districts PA, at our November 15 hearing. At that time, she compared Fair District PA's People's maps with Pennsylvania's current legislative maps, using the Mean-Median Difference as calculated by PlanScore as the

measure, so it seemed easiest to stick to that measure and just add our preliminary maps to the Fair Districts PA graphics.

Looking first at our preliminary House map, you will see that the current map is scored at 4.9%, which is very high. The FDPA People's Map of the House is 1.2%, and our preliminary House map is scored by PlanScore at 1.0%. And to be clear, the lower score is the better score.

The comparison involving our preliminary Senate plan is not quite as positive but still shows a positive trend. Here the current map is scored at 3.1%, the FDPA People's Map is scored at 0.8% and our preliminary Senate map is scored by PlanScore at 1.3%.

It frequently has been said that no map is perfect. In fact, in her testimony on November 15, Dr. Kuniholm took pains to declare, "We do not claim that our People's Maps are perfect." Her testimony also highlighted the tension that can exist between particular standards. This is part of what she said, and now I am quoting.

In Pennsylvania, the constitutional values of compactness and contiguity work in opposition to each other. Our counties and municipalities are rarely compact. Some are not contiguous, so to make districts contiguous can take some ingenuity.

Minimizing splits to the exclusion of other concerns can yield unresponsive districts and lock in partisan bias across

the map as a whole. Maximizing the influence of racial and language minorities can work in opposition to compactness and minimized splits. Maps that excelled in one area often did poorly in others.

Members of the Commission certainly make no claim that these preliminary maps are perfect. Instead, almost every time we take another look at them, we find something to improve. Just last night, in fact, as our team was reviewing legal descriptions, we found a number of unnecessary splits that can, and will be changed.

And, to underscore an earlier point, if we had taken the full ninety days authorized under the Constitution to complete our preliminary plan, we almost certainly could have made it better. However, given the impending pressure of primary election deadlines, we did not feel we had that choice.

In a very real sense, that makes the next thirty days even more important than usual. As I indicated earlier in my remarks, any person who is “aggrieved” by this preliminary plan (to use the language of the state Constitution) is entitled to file exceptions with the Commission, which we then will consider. Assuming this preliminary plan attracts majority support within the Commission, then, I would urge those who are interested to review the plan and make suggestions for its improvement.

The Commission may not accept every idea that is submitted, but we will consider each of them, just as we have tried to be attentive to good ideas that were shared, either in our hearings

or through submissions to our website portal, as we traveled down the path that has taken us to this point. It probably would be hard to find more compelling evidence of that fact than the way in which we have responded to testimony regarding Pennsylvania's Hispanic communities. We moved from compelling citizen testimony, to invited testimony, to what I hope will be welcome additions in the preliminary plan.

To push this process forward, I would like to ask if any Commission member wishes to move the adoption of this preliminary plan. If there is a motion and a second, the matter will be on the table, and we will proceed to opening statements by the Commission members.