

## Koy Kunkel\_SC

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**From:** applications.administrator@capitol.local  
**Sent:** Saturday, January 23, 2021 10:31 PM  
**To:** Senate Redistricting  
**Subject:** INETMAIL: Redistricting Public Input  
**Attachments:** Letter to Senate Redistricting Comm 1-23-21.pdf

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Regarding: ALL

Message:

Please see the attached PDF letter. Call me at the above number if you cannot access this document. Thank you.

Tim Dowling

1/23/21

[REDACTED]

January 23, 2021

To the Senate Special Committee on Redistricting:

Thank you for this opportunity to share with you my thoughts regarding the upcoming redistricting process for Congress, the Texas Senate and House, and other state boundary lines.

#### Introduction

My nearly 40 years as a Texas lawyer have taught me that “process drives policy.” How the process works is where the “rubber meets the road,” and is what produces the end result. Texas’s “end result” regarding redistricting has been historically shrouded in mystery, mired in litigation, and has resulted in legislators not being as representative of our great State as they should be. A prominent Republican member of the Texas House last year correctly noted that Texas’s redistricting process has been “an annuity plan for lawyers” because of the litigation it engenders. I will focus my remarks below on some short-term and long-term aspects of the redistricting process. But first some very relevant recent background.

#### The federal court’s shot across the bow of the Texas Legislature regarding 2021 redistricting

A July 2019 ruling by a three judge federal district panel noted that the last time the Texas Legislature redrew the boundaries for the Texas House and Senate, it did so in a racially discriminatory manner, including in seven populous Texas counties (including my own ; Nueces). *See* “Perez Ruling” at 14-15 (Perez v. Abbott, SA-11-CV-360; Western District of

Texas; Document No. 1632). The Court noted that race “was used as a proxy for party affiliation, and that this was done intentionally to dilute minority voting strength.” Id. at 16, *see* 18. The Court ruled that the redistricting plans initially drawn up by Texas based on the 2010 Census violated the Fourteenth Amendment, and this was a sufficient basis to potentially trigger “bail in,” whereby Texas could be required once again to have “pre-clearance” under the federal Voting Rights Act (“VRA”) because Texas engaged in purposeful discrimination affecting voters statewide. Id. at 17, 21. The Court stated that it “has grave concerns about Texas’s past conduct. During the 2011 legislative session, Texas engaged in traditional means of vote dilution such as cracking and packing in drawing districts, and also utilized newer methods of dilution and suppression such as using the ‘nudge factor’ and passing voter ID requirements. The existence of high levels of racially polarized voting across Texas cannot be disputed, nor is there any indication that the levels of racially polarized voting are decreasing.” Id. at 25. The Court expressly warned the Texas Legislature that “given the record produced in 2011, the State must implement a [redistricting] process that, by any reasonable definition, is ‘fair and open.’” Id. at 26 (emphasis added). The Court sent a second very clear shot across the bow of the Texas Legislature regarding upcoming redistricting when it stated that “Texas must still comply with the requirements of the Fourteenth Amendment and § 2 of the VRA in the upcoming redistricting cycle, and undoubtedly its plans will be subject to judicial scrutiny. Texas would be well advised to conduct its redistricting process openly, with the understanding that consideration of bail-in is always an option for whatever federal court or courts may be tasked with review of future legislative actions.” Id. at 26-27.

In the current redistricting process, complying with the demands of the United States Constitution and the federal Voting Rights Act must be given. “Legislator protection” in

redistricting may be constitutional, but for the good of the citizens of our great State, it should not be any part of any redistricting decisions. I will now direct my attention to matters relevant to the short-term-the 2020 redistricting process that meets the Perez Court's mandate of a "fair and open" redistricting process. I will then discuss how to address a long solution to proper redistricting.

#### The short-term: 2021 Redistricting

In order to have the "fair and open" process the Perez court indicated is required for lawful 2021 redistricting (and the concomitant possible result if there is no such process-- Texas again being subject to federal pre-clearance under the VRA), there clearly are certain minimum requirements in order to have such a process.

**First**, after all 2020 Census data is received, additional public hearings must be held. Hearings before that data is received (and fair time given to analyze it), can only be conceptual, since the necessary granular data to actually draw boundaries is missing. Therefore the current Senate hearings are helpful background, but additional Senate hearings will be required in order to receive public input once both this Committee and the public have the necessary factual data to draw actual boundaries. There must be a sufficient number of hearings after the Census data is available so that you can hear from each distinct geographical area of Texas and its different cultural and ethnic communities.

**Second**, holding these additional hearings must be held via Zoom as the current public hearings are commendably being held so that it is easy for Texans to participate in the process and not have to put their health at risk to participate.

**Third**, widely solicit, and then fairly consider, proposed maps submitted by others as part of the process. Do not limit your consideration to “Committee maps.”

**Fourth**, before any hearings are held in the relevant Texas Senate, and Texas House, Committees, any map any Committee proposes must be made available for review by the public at least 14 days before the first Committee hearing is held so that there is adequate time for each such map to be intelligently and fairly evaluated.

**Fifth**, when a map is proposed by a Committee, but before the map is voted on by the Committee, there should be at least five full days of hearings about each relevant map: one day for the Congressional map, one day for the House map, one day for the Senate map, one day for any other relevant maps, and one day for any “cleanup points” from the first four days. If this turns out this is not enough time for public comment, have more hearing days as required for any particular map. If more special sessions are necessary to get this done, do it. It is too important to do otherwise.

**Sixth**, when any Committee publishes a proposed map, it must explain in detail the criteria used in coming up with the map. This means at a minimum addressing how each proposed map would affect the ability of historically poorly served groups in our state to elect candidates from their community. It should be made clear that no part of the criteria the Committee considers is achieving a particular partisan result or ensuring that any member of the Senate or the House has a “safe” district.

**Seventh**, after the relevant Committee’s vote to approve any particular map, but before the entire Senate or House votes on a particular map, follow the same process so the entire

Legislature votes on these critical process points that will define how well Texans are represented, or not, in the next ten years.

**Eighth**, before any Committee hearings, or votes by the Senate or the House, the underlying data used draw a proposed map must be made available to the public and not merely the maps themselves. Otherwise it will not be possible, or at a minimum very difficult, to know if the conclusions drawn that are reflected in each map are legitimate. If you fail to make this data available, the public input will only be abstract and will have been just a show to try to present a good face in a lawsuit to follow. If you do not follow this process--public hearings for general input, public input before any specific map is approved, adequate time for input before Committee and House and Senate votes, and access to all the data used to draw the maps--the Legislature will just be figuratively patronizingly patting Texans on the head. "Thank you for your input. Now we are going to go to the closed committee room to horse trade among ourselves and do what we want." To prevent such horse trading, all communications by legislators need to be exclusively in public hearings. There should be no "legislative privilege" to shield communications about redistricting. Amend the rules of the Senate and the House to require this, and have real consequences if they are violated, such as you are off the Redistricting Committee for a single violation, and if you have been found to have violated this transparency requirement more than once, you are off all of your other committee assignments for the 2021 legislature.

**Ninth**, if any House approved map, and the correspondingly Senate approved map, are not the same, the conference committee appointed to resolve the differences must follow the same timelines and data production requirements outlined above.

Long term: Use an independent redistricting commission to draw the boundaries

The current way of drawing boundaries in Texas produces grievous problems. When lines are drawn to ensure that legislators have “safe districts,” the “real election” often moves from where it should be-- the general election-- to the primary election. This in turn means that there are no, or fewer, compromises between the political parties to attempt to garner votes. That leads to polarization. When legislators have drawn safe districts for themselves, recruiting a competent challenger from the other party is difficult, and races either go uncontested or are contested only by a weak candidate. This means there is little or no real choice at the ballot box, which in turn generates low voter turnout. Fewer Texans participate in our supposed democracy. Lines should be drawn so that voters choose who represents them. Lines should not be drawn so that legislators choose who their voters are so they may continue their legislative careers more easily.

The way Texas’s Congressional lines are drawn present a vivid example of partisan unfairness. In the 2018 Texas Congressional elections, 47% of the votes went to Democrats, but they only have 37% of the Congressional seats. Republicans received 50.4% of the Congressional votes, but have 63% of the seats. It is almost surely impossible to draw lines that have the percentage vote for a particular party exactly equal the percentage of members of Congress from Texas from that party, but certainly Texas can do much better than this this dismally unrepresentative result.

Even worse, the way lines are now drawn means that Texas legislators are not genuinely reflective of the population of our state. Only 36% of the members of the last Texas Legislature were people of color, although people of color at that time were 58% of our state’s population. A

link to where these figures came from can be found here: [https://0f1c66a2-2e43-4a43-921f-ec1443ec1725.filesusr.com/ugd/2a8eca\\_00b40bb185954c9495fd5201f83628cd.pdf](https://0f1c66a2-2e43-4a43-921f-ec1443ec1725.filesusr.com/ugd/2a8eca_00b40bb185954c9495fd5201f83628cd.pdf)

Many states have wisely decided to have their legislators get out of the business of drawing boundaries. Red states, blue states, and purple states have done so. Texas badly needs to do so. Regrettably each member of this Committee has a direct conflict of interest when drawing Senate boundaries. House members have the same problem when drawing House lines. Congressional lines are drawn to favor the dominant political party in the state. I am sure that when drawing lines for Senate boundaries most, and perhaps all, members of this Committee will be endeavoring to ensure that he or she has a “safe” district. That should not be any part of the process even though it is constitutionally permissible. The benchmark should not merely be “is it legal?” That is a bare minimum. Your true guide star should be “How can we set boundaries so that our Texas House, Senate, Congressional representatives best represent all the people of our state?”

To achieve this very desirable result, I urge you to hold a hearing in the Senate (and the House do the same) on House Bill 282 (and any similar bill in the Senate) regarding establishing an independent redistricting commission (“IRC”). You do not need an amendment to the Texas Constitution to have an IRC draw the lines for Congress, so start by enacting a statute this legislative session so that an IRC draws the 2022 Congressional boundaries. And start the process now to amend the Texas Constitution to use an IRC to draw the Texas Senate and House boundaries.

Your legislative time also would be much more productively used by focusing on the everyday concerns and needs of your constituents, rather than devoting any of your valuable time

to be hyper- partisan process of redistricting. Let other competent individuals do this work who do not have conflicts of interest that each of you have that should disqualify you from redistr

Gerrymandering can produce awful legislators: Exhibit A: Congressman Michael Cloud

Bad line drawing can very easily produce terrible legislators. A living example of the horrible results that gerrymandering can produce is Congressman Michael Cloud (TX—27; R), who I have the misfortune to have as my Congressman. Mr. Cloud is from Victoria although the major urban area in the District is Corpus Christi. Prior to the 2011 redistricting, the “Corpus Christ district” went south from Corpus Christi, which was very much in line with communities of interest in South Texas. After 2011, however, this District had Corpus Christi at the south, when north a long way, and then took a deep dive into Central Texas to ensure a very safe Republican district. In November 2020 Representative Cloud got 63% of the vote against a very weak Democratic opponent. That result did not happen without a very deliberate decision having been made to create an extremely safe Republican district. Then in turn means that recruiting a credible Democratic opponent is very difficult. Representative Cloud’s only current risk regarding getting re-elected is drawing a primary opponent. So that means he operates at the far in the right of the political spectrum because partisans rule primaries. So how does Congressman Cloud his spend time? Instead of focusing all of his time in trying to improve that lives of his constituents, he has recently engaged in the following hyper-partisan grandstanding:

1. He sent a letter to former Attorney General William Barr challenging his supposed lack of diligence in ferreting out supposed fraud in the presidential election that would have been sufficient to deprive Mr. Biden of 270 Electoral College votes. General Barr did not find, and nor have dozens of courts, found such fraud. It is very fair to say that Mr. Barr was not reticent in defending Mr. Trump’s interests. Representative Cloud did not

disclose what evidence HE had that neither the Attorney General nor Mr. Trump's lawyers had. He just tossed off this red meat fact-free hyper-partisan allegation to try to score political points.

2. Mr. Cloud followed this up by signing off on the constitutionally absurd lawsuit filed by Texas's own Attorney General in the United States Supreme Court contending that Texas could somehow have a legitimate say in how other states conduct their presidential elections (consider the converse: Would you as a Texan not be offended if Pennsylvania's Attorney General filed suit alleging that the results of Texas's election for president should be ignored?). Even a former Attorney General of Texas, and now Texas's senior Senator, John Cornyn, stated that he could discern no legal basis for this suit.
3. Even after insurrectionists shamefully overran our Nation's Capitol on January 6, 2021, Representative Cloud voted to not accept the Electoral College lawfully certified votes from Arizona and Pennsylvania under the law of each of those states although of course he still had no evidence that there was sufficient irregularities or fraud to overturn the results of the election in either state. Why would Representative Cloud engage in such conduct? Because he is afraid of drawing a primary challenger to his right in 2022. If the 27<sup>th</sup> Congressional District had been drawn in a less partisan way, the citizens of that District would not have to be subject to such hyper-partisan stupidity that is so dangerous to our Republic.
4. During the January 6, 2021 rioting at the Capitol, when Representative Cloud was hunkered down in close quarters with many other members of Congress in an inside space, he was offered a mask. He refused it. No person with any respect for the safety of

his colleagues would do so. Yet Representative Cloud did so. Perhaps because at the time he did so he was apparently within feet of two of the crazier members of Congress, Representatives Paul Gosar and Marjorie Taylor Greene (a QAnon promoter), and he did so presumably to maintain his apparent friendship and credibility with these right wing nut cases who also refused the proffered masks.

In 2021 please do not again draw any hyper- partisan gerrymandered lines. After the 2022 election no Texan should be subject to being represented by atrocious legislators like Michael Cloud. Please let us be governed by people more within the reasonable range on the political spectrum rather than by partisans who can freely ignore many of those who live within their districts because all they need to do to get re-elected is be chosen by dedicated partisans in the primary election.

### Conclusion

I implore you to use the processes, both short-term and long-term, I have outlined above when drawing our political boundaries. If you do so, our politics will begin to move from their current hyper-partisan dangerous and poisonous atmosphere we now endure (which produced the shattering spectacle in our Nation's Capitol on January 6, 2021), to a politics that is fairer, more representative of the people of our great state, and more reasoned. A politics that is designed to bring us together rather than to continue to pull us apart and produce inflammatory partisan gridlock. It was such partisanship that produced the shameful spectacle of our Nation's Capitol on January 6, 2021 being overrun with crazed zealots that had people around the world wondering what has happened to the United States of America. What type of politics we end up with in Texas, and the Nation, for the next ten years is in your hands. Please do the right thing for our State and Nation even if that is the wrong thing for you personally or your political party.

You are all capable people who have other jobs, so it will not be a big deal for you personally if you lose the next election. But we cannot get another democracy if you do your job poorly and unfairly when drawing the boundary lines for that democracy.

Thank you for considering my comments.

Sincerely yours,

*/s/ Timothy P. Dowling*