

MEMORANDUM

TO: The Virginia Redistricting Commission

FROM: Legal Counsel to the Commission
H. Christopher Bartolomucci
Kareem Crayton
J. Gerald Hebert
Bryan P. Tyson

RE: Start Date for 45-Day and 60-Day Periods

DATE: August 21, 2021

INTRODUCTION AND SUMMARY

The United States Census Bureau released its 2020 census data—more than four months late—on August 12, 2021. Virginia law requires the Virginia Redistricting Commission (1) to submit its plans for Senate and House of Delegates districts within 45 days after “the receipt of census data” and (2) to submit its plans for congressional districts within 60 days after “the receipt of census data.” Va. Const. art. II, § 6-A(d); Va. Code Ann. § 30-397. At its meeting on August 16, 2021, the Commission unanimously decided that the 45-day and 60-day periods will start to run from the date on which the Commission receives census data that has been reformatted for redistricting purposes and adjusted by the Division of Legislative Services to reallocate prisoner populations pursuant to Virginia Code § 24.2-314. The Division has indicated that the Commission will receive the adjusted census data on August 26, 2021.

The Commission’s legal counsel all agree that the Commission’s decision to consider August 26 as the start date for the 45-day and 60-day periods is consistent

with the operative provisions of the Virginia Constitution and Code and achieves the purpose of those provisions.

BACKGROUND

The Virginia Constitution and the Virginia Code provide: “The Commission shall submit to the General Assembly plans for districts for the Senate and the House of Delegates of the General Assembly no later than 45 days following the receipt of census data.” Va. Const. art. II, § 6-A(d); Va. Code Ann. § 30-397(A). The Constitution also provides that “[t]he Commission ... shall submit to the General Assembly plans for districts for the United States House of Representatives no later than 60 days following the receipt of census data or by the first day of July of that year, *whichever occurs later*.” Va. Const. art. II, § 6-A(d) (emphasis added). *Cf.* Va. Code Ann. § 30-397(B).¹ The Virginia Code defines “Census data” as “the population data received from the United States Bureau of the Census pursuant to P.L. 94-171.” Va. Code Ann. § 30-391(B).

The Census Bureau released the 2020 census data on August 12, 2021, more than four months late. Federal law required the Census Bureau to release its 2020

¹ The Virginia Code conflicts with the language of the Constitution that we have italicized in the main text above. The Code provides “[t]he Commission shall submit to the General Assembly plans for districts for the United States House of Representatives no later than 60 days following the receipt of census data or by the first day of July of that year, *whichever occurs first*.” Va. Code Ann. § 30-397(B) (emphasis added). Given this conflict between the Constitution and Code, the Constitution must control. Therefore, the Commission’s congressional plans are due within 60 days after its receipt of census data or by July 1, *whichever occurs later*. It would have been impossible for the Commission to submit its congressional plans by July 1 of this year because the Census Bureau did not release its 2020 census data until August 12.

census data no later than April 1, 2021. *See* 13 U.S.C. § 141(c). The Census Bureau’s data is now in the process of being reformatted for redistricting purposes, and is being adjusted by the Division of Legislative Services² pursuant to Virginia Code § 24.2-314, the prisoner population reallocation statute. Under that statute, “[p]ersons incarcerated in federal correctional facilities and in state and local correctional facilities ... shall be counted and reallocated for redistricting and reapportionment purposes.” Va. Code Ann. § 24.2-314(A). “The Division of Legislative Services shall prepare adjusted population data ... in a manner that reflects the inclusion of incarcerated persons in the population count of the locality in which he is deemed to reside.” *Id.* § 24.2-314(D). “This adjusted population data shall be used for purposes of redistricting and reapportionment and shall be the basis for congressional, state Senate, House of Delegates, and local government election districts.” *Id.* “The Division of Legislative Services shall make the adjusted population data available no later than 30 days following receipt of population data from the United States Bureau of the Census pursuant to P.L. 94-171.” *Id.* § 24.2-314(E). The Division has indicated that it will provide the adjusted data to the Commission on August 26, fourteen days after the Census Bureau publicly released the population data on its website. The Division has not provided any unadjusted data to the Commission.

At its meeting on August 16, 2021, after discussion and after hearing from legal counsel, the Commission voted unanimously to adopt August 26 as the start date for

² The Virginia Code provides that “[t]he Division of Legislative Services shall provide staff support to the Commission. Staff shall perform those duties assigned to it by the Commission.” Va. Code Ann. § 30-395(A).

the 45-day and 60-day periods.

DISCUSSION

We conclude that the Commission's considered decision to adopt August 26, 2021, as the start date for the 45-day and 60-day periods is consistent with the text of the Virginia Constitution and the Virginia Code and achieves the purpose of the operative constitutional and statutory provisions.

We believe that the phrase "receipt of census data" as used in the Virginia Constitution and Virginia Code is best read to mean "receipt of census data" *by the Commission*. That phrase, "receipt of census data," appears in provisions addressing the duties of the Commission. *See* Va. Const. art. II, § 6-A(d) ("*The Commission shall submit to the General Assembly plans for districts for the Senate and the House of Delegates of the General Assembly no later than 45 days following the receipt of census data and shall submit to the General Assembly plans for districts for the United States House of Representatives no later than 60 days following the receipt of census data*") (emphases added); *see also* Va. Code Ann. § 30-397(A), (B).

Although the Census Bureau released its 2020 census data on August 12, the Commission has not yet received data from the Division of Legislative Services, which is still in the process of reformatting the data for use in redistricting and adjusting the data pursuant to the prisoner population reallocation statute. *See* Va. Code Ann. § 24.2-314. The Division has indicated that it will provide the reformatted/adjusted data to the Commission on August 26. Thus, the Commission's "receipt of census data" has not yet occurred. The Division has not provided any unadjusted census

data to the Commission, and our understanding is that the Division has decided against doing so.

The purpose of the 45-day and 60-day provisions in the Virginia Constitution and Code supports the Commission's construction of those provisions. The Virginia Supreme Court has stated that "[w]hen construing a statute, our primary objective is to ascertain and give effect to legislative intent, as expressed by the language used in the statute." *Va. Elec. & Power Co. v. State Corp. Comm'n*, 295 Va. 256, 262-63 (2018) (internal quotation marks and citations omitted). The evident purpose of the 45-day and 60-day provisions is to give the Commission sufficient, but not unlimited time, to prepare its redistricting plans, subject to a date certain by which the Commission must submit its plans to the General Assembly. We believe that it achieves the purpose of the 45-day and 60-day provisions to construe the start date as the date on which the Commission receives adjusted data from the Division of Legislative Services. It would make little sense to construe the 45-day and 60-day clocks as running before the Commission actually receives data that it may use to prepare redistricting plans.

Notably, the 45-day and 60-day provisions refer to "receipt of census data" without using a definite article before "census data." In other words, the provisions do not refer to receipt of *the* census data. They refer to receipt "of census data." The provisions thus may be read to refer to usable census data other than those released by the Census Bureau. In contrast to the 45-day and 60-day provisions, the prisoner population reallocation statute provides that "[t]he Division of Legislative Services

shall make the adjusted population data available no later than 30 days following receipt of population data *from the United States Bureau of the Census* pursuant to P.L. 94-171.” Va. Code Ann. § 24.2-314(E) (emphasis added). Thus, whereas this statute specifies that the time to act runs from the receipt of data *from the Census Bureau*, the 45-day and 60-day provisions in the Virginia Constitution and Code do not.

We note that Virginia Code § 30-396 also provides that “[a]ll data used by the Commission in the drawing of districts shall be available to the public on its website. Such data, including census data ... shall be posted within three days of receipt by the Commission.” Va. Code Ann. § 30-396(D). Although the Census Bureau released the 2020 census data on its website on August 12, the Division has not posted that unadjusted data to the Commission’s website—which is consistent with the view that the Commission has not yet received census data.

The Commission’s interpretation of the 45-day and 60-day provisions should receive considerable deference. The Virginia Supreme Court has “frequently said that the practical construction given to a statute by public officials charged with its enforcement is entitled to great weight by the courts and in doubtful cases will be regarded as decisive.” *Va. Elec. & Power Co.*, 295 Va. at 263 (internal quotation marks and citation omitted); *but cf. BASF Corp. v. State Corp. Comm’n*, 289 Va. 375, 403 (2015) (“While it is true that this Court gives great weight to the practical construction given to a statute by public officials charged with its enforcement, we are not inextricably bound to that construction. If such a construction is based on a

mistake of law, then this Court will not hesitate to reverse the decision of the public officials charged with the enforcement of the statute.”) (internal quotation marks and citations omitted).

We are aware that a petition for mandamus filed in the Virginia Supreme Court on August 13, 2021, challenges the constitutionality of the prisoner population reallocation statute. *See Adkins, et al. v. Virginia Redistricting Comm’n, et al.*, No. 210770. The filing of that petition does not affect the foregoing analysis.

CONCLUSION

The Commission’s legal counsel agree that the Commission may regard the start date for the 45-day and 60-day periods in the Virginia Constitution and the Virginia Code as the date on which the Commission actually is in “receipt” of the reformatted/adjusted census data from the Division of Legislative Services.

Timeline for Submission and Approval of Redistricting Maps (§§ 30-397 and 30-398 of the Code of Virginia)

Deadline	Date of Census Data Receipt					
	August 12		August 26		September 30	
	House / Senate	Congressional	House / Senate	Congressional	House / Senate	Congressional
45 days for Commission to submit House and Senate maps and 60 days to submit Congressional maps after receipt of census data	September 26	October 11	October 10	October 25	November 14	November 29
15 days for General Assembly to approve maps	October 11	October 26	October 25	November 9	November 29	December 14
	POSSIBLE TIMELINE FOR MAP ADOPTION					
If Commission fails to meet initial deadline for map submission, Commission has 14 additional days to submit maps	October 10	October 25	October 24	November 8	November 28	December 13
	COURT ESTABLISHES MAPS IF COMMISSION DOES NOT MEET THIS DEADLINE					
7 days for GA approval of maps submitted under extended deadline	October 17	November 1	October 31	November 15	December 5	December 20
	DEADLINE FOR GENERAL ASSEMBLY TO ADOPT MAPS SUBMITTED LATE; COURT ESTABLISHES MAPS IF NONE ADOPTED BY GENERAL ASSEMBLY					
If Commission submits initial maps on time but GA does not approve, Commission has 14 days to submit new maps	October 25	November 9	November 8	November 23	December 13	December 28
7 days for GA approval of second map submission	November 1	November 16	November 15	November 30	December 20	January 4
	DEADLINE FOR GENERAL ASSEMBLY TO ADOPT SECOND MAP SUBMISSION; COURT ESTABLISHES MAPS IF NONE ADOPTED BY GENERAL ASSEMBLY					

Re: Legal Opinion

K Crayton (CCS) <crimcard@gmail.com>

Mon, Oct 11, 2021 at 1:38 PM

To: Meg Lamb <mlamb@dls.virginia.gov>, Gerry Hebert <hebert@voterlaw.com>, "H. Christopher Bartolomucci" <cbartolomucci@schaerr-jaffe.com>, Bryan Tyson <btyson@taylorenghish.com>

Cc: virginia-redistricting@dlas.virginia.gov

Appreciate the follow up from Bryan. I'd ask that the following go to the entire Commission.

To reiterate my earlier view, which the additional thoughts from Chris and Bryan appear to me to confirm. The established law on the issue generally relies more upon what is written rather than what is said, since words can be understood differently by different people.

All counsel seem to agree that Co-Chair Harris' words and actions on Friday in the session are (at worst) ambiguous. But her email to Amigo Wade/DLS and others the same day, after leaving the meeting room leaves no such ambiguity about her meaning. Even if it did leave doubt, Co-chair Harr's appearance and participation in today's meeting -- including her very clear statement that she did not resign leave no reasonable space for a contrary interpretation.

Final point: as it appears to be the practice of the Commission in at least the one Commissioner resignation that I have been around to observe, it is important to limit resignations to those that come with written notice of intention. As I advised Co-Chair Babichenko on Friday, any lingering question of this type should follow with a request to receive any resignations in writing (email, text, or letter would suffice). In this case, obviously, it wasn't necessary given Co-Chair Harris' intention. But my best advice to the Commission is for everyone to hold to that prior practice.

Sincerely,

Kareem Crayton



Kareem Crayton, JD PhD (Political Science)

Founder & Managing Partner

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You received this message because you are subscribed to the Google Groups "Virginia Redistricting" group.

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Re: Legal Opinion

Greta Harris <gharris@dls.virginia.gov>
To: Meg Lamb <mlamb@dls.virginia.gov>
Cc: Mackenzie Babichenko <mbabichenko@dls.virginia.gov>

Tue, Oct 12, 2021 at 9:15 AM

Greta J. Harris
804-338-9436-mobile
Sent from my iPhone

Begin forwarded message:

From: "H. Christopher Bartolomucci" <cbartolomucci@schaerr-jaffe.com>
Date: October 11, 2021 at 12:58:30 PM EDT
To: Mackenzie Babichenko <mbabichenko@dls.virginia.gov>, Greta Harris <gharris@dls.virginia.gov>, Bryan Tyson <bytyson@taylorenchinese.com>
Cc: Kareem Crayton <kareem@crimcardconsulting.com>, Gerry Hebert <hebert@voterlaw.com>
Subject: Legal Opinion

Dear Co-Chairs,

At its meeting today, the Commission asked for our legal opinion by 1:00 p.m. on whether Co-Chair Harris resigned from the Commission on Friday, October 8. Mr. Tyson and I have concluded that Co-Chair Harris did not resign. That appears to be Mr. Crayton's view as well, based on a comment he made in the "chat" before he left today's meeting, although we have not discussed the matter with him.

Whether a person has resigned a position she holds "is a question of fact to be determined from the circumstances of each case." 2 Fletcher Cyc. Corp. § 346. It is true, as a general matter, that a person may resign through "verbal communications or an affirmative act of resignation." *Harvey v. Va. Emp't Comm'n*, 94 Va. Cir. 86, 2016 WL 11564873, at *5 (Va. Cir. Ct. Aug. 3, 2016). "When an expression of resignation has been made, the expression must clearly show an intent to resign." *Rinaldi v. CCX, Inc.*, WL 412966, at *8 (W.D.N.C. Feb. 18, 2009), *aff'd in part & rev'd in part*, 388 Fed. Appx. 290 (4th Cir. 2010). "Loose and ambiguous language will not be regarded as sufficient [to establish a resignation], at least where the subsequent acts and declarations of the [individual] are inconsistent with any such contention." *Hockessin Cmty. Ctr., Inc. v. Swift*, 59 A.3d 437, 458 (Del. Ch. 2012) (quoting *Lasher v. Inter-Continental Biologics, Inc.*, 1984 WL 137716, at *8 (Del. Ch. Jun. 14, 1984)) (brackets added by the court in *Hockessin*); *see also* 2 Fletcher Cyc. Corp. § 346 ("Oral declarations do not constitute a resignation where ambiguous and subsequent acts and declarations are entirely inconsistent with any intention to resign.") (citing *Hockessin*) (quoted with approval in *Rinaldi*, 2009 WL 412966, at *8).

Co-Chair Harris' statement and actions on October 8, were not clear; they were ambiguous. They could be interpreted as a resignation, and some members of the Commission reasonably interpreted them that way. But Co-Chair Harris did not say that she was "resigning" from the Commission. Furthermore, either that same day or the next day she clarified to DLS that she did not, in fact, resign. *See* Email from Amigo Wade to the Commission (Oct. 9, 2021 4:42 p.m.) ("We have received

three separate communications from Commissioners Greta Harris, Brandon Hutchins, and James Abrenio with each indicating that they did not resign from the Commission, but only left the meeting.”). Co-Chair Harris also told reporters on October 8 that she did not resign, according to press reports. See Gregory S. Schneider, *Virginia’s bipartisan redistricting effort breaks down over accusations of partisan stalemate*, WASH. POST (Oct. 8, 2021, 7:14 p.m.), <https://tinyurl.com/4ttbw7xu> (“There was confusion Friday night about Harris’s status, with some members believing she had stepped down. In an email, Harris said she did not resign, but had simply left the meeting along with other citizen members.”).

Because Co-Chair Harris’ statement and actions on October 8 were ambiguous, and because she promptly clarified that she did not resign, it is our legal opinion that she did not resign from the Commission.

-- Chris Bartolomucci & Bryan Tyson

H. Christopher Bartolomucci

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