Statement by Commissioner Webb | 7/25/2011

It seems that at the beginning, middle and end of every Reapportionment Commission meeting we were treated to a lecture regarding Justice Hobbs' 2001 reapportionment decision and "how the Court will decide" whether a map presented to it will meet judicial scrutiny. In response, and for the record, I offer a more nuanced view of the Court's role in the reapportionment process and our charge.

Article V, section 48 of the State Constitution authorizes the Supreme Court to adopt rules for proceedings for the production and presentation of evidence in support of a reapportionment plan. Our plan will come to the court *sui generis,*[1] where the Reapportionment Commission is the fact-finder charged with creating a record. The record we develop is not a part of an adversarial proceeding, nor is the factual basis for our reapportionment plan subject to sworn testimony or the crucible of cross-examination.[2] Because a typical court claim requires a fact-specific record that can only be adequately developed in the evidentiary framework of an adversarial proceeding, our Supreme Court cannot resolve issues in the same way it would a normal civil or criminal matter.

When judgment day comes and the Supreme Court reviews our plan, we don't know how this court will judge it. I do not pre-suppose that the Court will adopt the Hobbs decision or Chief Justice Bender's dissent. Ten years ago, the Hobbs decision received 4 out of 7 votes; and since that time, the court received 2 new justices – a 28.5% turnover. This is a different Court that may yield different results. We do not know how the new justices will vote; we only know that all 7 justices will be thorough, fair and just.

I cannot in good conscience assume, as some on this Commission do, that the Hobbs decision will be applied in the same way by the current Court. Nor will I bind my votes based upon a hope and a dream of how the constitutional criteria will be applied to the maps we ultimately submit for review. Even if the Court were the exact same, our commission is much different than it was in 2001. A decade ago, the commission was made-up of 6 Democrats and 5 Republicans, where nearly every vote was made 6-to-5. This Commission is much different.

We are 5 Democrats, 5 Republicans, our Chairman is Unaffiliated with either party, and very few prior votes came to 6-5 result. With this in mind, we are much more like the Commission of 1991 that had the same political makeup as today. The Supreme Court gave a presumption of good faith and validity to the 1991 Commission, noting:

> "[I]f neutral decisionmakers developed the [reapportionment plan] on the basis of neutral criteria, if there was an adequate opportunity for the presentation and consideration of differing points of view, and if the guidelines used in selecting a plan were explained, a

[1] Meaning: unique in its kind, a legal aberration; *In re Reapportionment of the Colorado General Assembly*, 828 P.2d 185, 189 (Colo. 1992).

[2] *Id*, at 205 (Quinn, J., Concurring).

> strong presumption of validity should attach to whatever plan such a process produced."[3]

With all of this in mind, I am sure that Mr. Nicolais will point out, again, that *stare decisis* binds our Commission to act consistent with the Hobbs decision. While I didn't go to law school, I did learn a few things along the way; including that the concept of *stare decis* requires *judges* to respect the validity of prior decisions. As the legislators among us know, *stare decisis* does not bind non-judicial and semi-legislative bodies, like our Commission, in the same way. We are certainly bound by our constitutional obligations, but we cannot be bound by the Court's prior decision. To do so would rob this commission of its ability to act as fact-finder and apply our own judgment regarding competing constitutional criteria.

Simply put, the Court's limited role in the reapportionment process is a narrow one: to measure the reapportionment plan against the constitutional standards. The choice among alternative plans, each consistent with constitutional requirements, is for *our* commission and not the court.[4]

With this in mind, I turn to the preliminary state house and state senate maps adopted by this commission. First, let me expand the record to reflect the basis for my vote in favor of the preliminary state senate maps adopted.

In the metro area there are several largely populated counties with enough population for multiple state senate districts, including: Denver, Jefferson, Adams, Arapahoe, Douglas, Boulder, Weld and Larimer counties. Of those populous counties in the front-range, only the City and County of Denver is completely surrounded by other populous counties. Within the Denver limits there is enough population for approximately 4 complete senate districts and enough population for about another 1/3 of a district beyond that. It is surrounded by Adams, Arapahoe and Jefferson Counties each of which contain enough population for several senate districts. Our Commission had to decide which County should be combined with the Denver based upon the fact that in order to equalize population, the top-constitutional criterion, in a single state senate district.

I looked at the senate plan as a whole and within the plan did not view this particular county-combination in isolation. The Court granted all prior Reapportionment Commissions deference when drafting the plan as a whole and when making particular splits between counties. As the Court noted upon its review when Matt Jones was on the Commission, "Substantial equality of population and avoidance of splitting counties cannot always be met simultaneously. When they cannot, the avoidance of split counties must yield. The area of the state in which these conflicts occur is subject to adjustment, and the Commission must have the discretion to choose where the necessary and constitutionally permissible compromises are made."[5]

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[3] *Id.* at 190, n.4, *citing Karcher v. Daggett*, 462 U.S. 725, 759 (Stevens, J., concurring).

[4] *Id.* at 189, *citing, In re Reapportionment of the General Assembly*, 647 P.2d 191, 194 (Colo. 1982).

[5] *Id.* at 194.

Two weeks ago, citizens presented this Commission with testimony regarding the Denver-metro area where we heard, time and again, "do not combine the City of Lakewood with Denver." In particular, Lakewood's Mayor Murphy asked that Lakewood and Denver remain apart as there were numerous competing interests and Lakewood had stronger community ties with Wheat Ridge and the communities to the west. We also heard testimony that the Denver Tech Center should remain whole in a Senate District. The Tech Center self-identifies as southern Denver County and Greenwood Village. Additionally, it should be noted that densely populated islands of Arapahoe County, Glendale apnd Holly Hills, are wholly within the boundaries of Denver.[6]

The testimony and facts were and are compelling and therefore I voted to adopt a map that combines Denver and Arapahoe County in Senate District 26. The result is that Denver is combined with only one county, Arapahoe, minimizing the combination of counties among senate districts, and keeping the Denver Tech Center whole. The alternative proposed was to combine Lakewood with Denver in Senate District 20. This was a bad idea. It flew in the face of the testimony of the Mayor and combined Denver with Jefferson County as well as Arapahoe County in two different senate districts.

Mr. Nicolais argued that as a result, Arapahoe County was "denied" its full four senate districts under the Hobbs mandate. That dog doesn't hunt. In the same breath that he decried that Arapahoe County was denied four full districts, he proposed an alternative plan that denied Jefferson County 3 full districts. If the adopted plan is unconstitutional under Hobbs, then Nicolais' alternative plan is unconstitutional too.

Mr. Nicolais' alternative to the senate map is a partisan ploy under the guise of constitutionality. He unsuccessfully tried to manipulate the constitutional criteria for partisan purposes in the senate.

A similar disagreement came to pass over the composition of Senate District 16 in Western Jefferson County and Senate District 19 in Northeastern Jefferson County. The Commission was presented with two choices that each split the same number of counties and which had the same number of districts wholly within each county. Both maps were on equal footing under the constitutional provisions of Section 47, regarding county splits. However, Section 46 states "within counties whose territory is contained in more than one district of the same house, the number of cities and towns whose territory is contained in more than one district of the same house shall be as small as possible."[7] The adopted senate map kept Arvada within 2 senate districts, 19 and 16, while the alternative plan put Arvada within 3 senate districts. Additionally, in the adopted map, the City of Coal Creek which spans into Gilpin, Boulder and Jefferson Counties was kept whole within Senate District 19, while Coal Creek would be split into 2 districts in the alternative map.

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[6] *See In re Interrogatory of the House of Representatives Presented by House Joint Resolution No. 1011*, 177 Colo. 215 (Colo. 1972) (noting that the non-contiguous portions of Arapahoe County, Glendale and Holly Hills, must be included in a contiguous Senate District comprised of Denver County).

[7] Colo. Const. Art. V., § 46.

If Mr. Nicolais was a strict adherent to the Hobbs opinion, he had no choice but to vote for the adopted map; he did not. Therefore, Mr. Nicolais either believes that there are cases when the Hobbs' analysis must yield, or he is playing fast and loose with Hobbs' decision for partisan purposes...again.

Second, I note for the record my disappointment in the adoption of the state house plan for the Denver-metro area – specifically, Boulder, Broomfield, Adams, Jefferson and Arapahoe counties. Both sides agreed that there were competing constitutional issues in regards to County splits, city splits and the combination of communities of interest. That conversation became extremely focused around Aurora in Adams and Arapahoe counties.

Again, Mr. Nicolais was pushing for a map that had "high numbers" of overall minorities in the particular house districts in Aurora. We disagreed on the way in which we could arrange the districts in such a way to maximize minority influence in the house districts. As a person familiar with this area and in touch with the Latino and African American communities I helped draft plans that reflected the way the community organizes itself today. That plan was rejected for a plan that may have looked better on paper, but ignored the testimony we heard and the factual evidence I presented in favor of my maps.

One of the things that caught me off-guard last week was the assertion that the Southern Aurora district, District 37, was now a minority influence district at nearly 20% minority population. I was under the impression that, while this area was becoming more integrated, that its makeup was overwhelmingly non-minority. After closer inspection, I came to find out it was the inclusion of the Arapahoe County jail, with thousands of black and brown inmates that gave this district its "minority influence." While counted for the census, these inmates are certainly not voting for the candidate of their choice nor influencing the outcome of the election. At best, the proponents of the alternative plan are so out-of-touch with the minority community that their assertions could be categorized as insensitive. At worst, the proponents unapologetically used the minority community as pawns for political advantage.

Mr. Nicolais continued to show his naiveté regarding the minority community. As was reported yesterday by Mr. Hoover in the Denver Post,

> Though it only has a Latino population of less than 10 percent, Nicolais pointed to House District 29 as one where the commission should be mindful of protecting a Latino incumbent, in this case Rep. Robert Ramirez, R-Westminster, the only Latino Republican in the legislature.[8]

When drawing legislative districts our charge is not to protect incumbents, regardless of race or ethnicity. There is no constitutional mandate to do so. When we draw districts that have a high minority population, it is done so to protect the minority community of interest a community particularly singled out in our Constitution mandate. I hope that you will come to

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[8] *In Colorado Parties Bicker Over Redrawing of Legislative Districts*; The Denver Post; Hoover, Tim; July 24, 2011, http://www.denverpost.com/legislature/ci_18538819

realize that the reapportionment of districts is about the *people in the district* and their ability to elect the candidate of their choosing. Reapportionment is not about incumbent protection.

Ignoring the reality of the minority population on the ground was consistent in the adopted house maps in the metro area, where the African American influence is diminished in Arapahoe County. It is impossible to create a majority-African American district in Arapahoe County; therefore, as a second choice it is preferable among the community to achieve a more even disbursement among districts to hold more representatives accountable. The adopted map does not reflect that stated desire.

Beyond the minority community, the adopted house map also ignores the Constitutional requirements that we are so often reminded of. Somehow in the adopted plan, Aurora, a city with 325,000 people, contains only 1 whole house district inside its boundaries. One rationale given to fracture Aurora was to artificially create competitive districts. Competitiveness is not one of the constitutional criteria I remember taking an oath to uphold.

The Republicans on the commission are pushing for competitive districts only in Democratic strongholds, like Aurora...appealing to a sense of fairness. The result of creating competitive districts is a move away from the constitutional criteria and the creation of Republican leaning strongholds where none existed before. The state is split between Democrats, Republicans and Unaffiliateds at 1/3, 1/3 and 1/3. Mr. Chairman, I believe it was not your intent to create a supermajority for the Republican Party, however, in a desire for fairness that is the consequence.

The reality of an unwarranted Republican supermajority certainly got the attention of the press; however, this isn't the first time that the Republicans ignored the constitutional criteria in order to gain a partisan advantage. When this Commission was considering the adoption of house districts in El Paso County, a map was proposed that placed southern Colorado Springs with Northern Colorado Springs in a way that the only path to traverse the district is to summit Pikes Peak on one side and belay down the other side of the Peak. This configuration made no sense to any person from Colorado Springs, but was convenient to fracture the minority community in Southern Colorado Springs for political advantage.

This Commissioner is especially sensitive to the minority population in Southern Colorado Springs. While this was before Mr. Nicolais was born, El Paso was required to seek pre-approval of any changes in election laws or voting practices in accordance with the Voting Rights Act based upon past discrimination. In prior Reapportionment Commission crafting of boundaries, those commissions began dividing the county by drawing district[s] primarily to insure that minority voting strength would not be diluted in a discriminatory fashion.[9] While it is my hope that the discriminatory practices of the past do not impede the future of the County, we must remain vigilant.

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[9] *In re Reapportionment*, 647 P.2d at 196 (Colo. 1982).

East of the continental divide, the map adopted by this commission is shameful. First, the City of Grand Junction can be kept whole within one state house district, but was not. Either this accommodation was made for political purposes, or, again, the Hobbs decision can bend when there are competing and valid interests. This Commission should either revise the Grand Junction area or recognize that the Hobbs decision has only been used as a partisan tool thus far.

To emphasize the point, one needs look no further than the composition of House Districts 59 and 61. In the adopted plan and the alternative plan presented by Commissioner Salazar, there was the same number of County split among districts. However, the adopted plan splits Gunnison County in a way that makes it impossible to drive from the town of Crested Butte to the Eastern part of the district in Delta without crossing into an adjoining district. According to the Gunnison Times, both the local Democrats and Republicans oppose the district as the Gunnison split occurs along census blocs and not along and geographic or well-known boundary. As reported, the Republican county chair stated that, "Dividing the county would not logistically be the best thing to do."[10] When faced with an equal number of county splits, consideration of communities of interest must be considered as a part of our constitutional charge. The map adopted for Gunnison does violence to the community. I can only surmise that the map was crafted for partisan advantage instead of out of respect for the community that lives and votes in Gunnison County.

For the forgoing reasons, I urge this Commission to apply the constitutional criteria as it sees fit. It is evident that the most partisan Republicans apply the criteria only when it is politically convenient. I would ask that they back away from that stance. Instead, we should apply the criteria in a firm, but responsible way that will make those that appointed us confident in their decision. This application should appeal to all 7 justices of the Court, not just Justice Hobbs. Even if I were to agree with every last sentence in Hobbs' decision, I respect Justice Hobbs too much to see his words twisted to further a particular partisan point of view.

As we move forward, as I said last week, the Court is not monolithic over time. The U.S. Supreme Court came to very different conclusions when applying the law in the 1954 in *Brown v. the Board of Education* than the 1896 *Plessy v. Ferguson* case. One of the underlying principles of this reapportionment process and the application of the constitutional criteria were are sworn to uphold is the concept of fairness – especially in a State where those registered to vote identify themselves equally 1/3, 1/3, 1/3 among political parties. Fairness, I believe, is also a Colorado value, not a map that artificially creates a supermajority for any one party. When it comes time to vote on a final map, I hope we equate the principle of fairness as much as we talk about the principle of competitiveness...neither of which is explicitly outlined as a consideration under the State Constitution. If we hold to the Constitution and these principles, together we can achieve a unanimous 11-0 vote, as opposed to a 6-5 vote, with a minority plan and outside interveners.

Thank you for listening.

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[10] *A County Divided, Proposal Splits Valley into Separate Legislative Districts; Opposition Forming*; Gunnison Times; Times Editor; July 14, 2011; http://www.gunnisontimes.com/index.php?content=C_news&newsid=7058 .