



June 24, 2011

BY EMAIL: [REDACTED]

Honorable Commissioners
California Redistricting Commission
[REDACTED]
Sacramento, CA 95814

Dear Commissioners:

In March 2011, the California Republican Party and others recommended that the Commission hire bi-partisan line drawing experts and Voting Rights Act counsel to assist it in order to avoid the obvious perception that the ideology or partisan affiliation of such consultants could affect the Commission's constitutional mandate to draw fair and impartial district lines for Congress, State Legislature and Board of Equalization districts.

The Commission declined to do so, hiring instead Q2 Data & Research, whose principals were either Democrats or unaffiliated persons with obvious liberal ideological leanings, for its line drawing consultant. The Commission hired the law firm of Gibson, Dunn & Crutcher, LLP ("Gibson Dunn") as its Voting Rights Act consultants. Gibson Dunn had a facially bi-partisan appearance, with partners George Brown (a liberal Democrat) and Daniel Kolkey (a Republican) as co-counsel. It's no secret, however, that Mr. Brown was asked to lead the effort and Mr. Kolkey has remained largely invisible at Commission meetings where counsel were present, largely fulfilling some commissioners' expressed desire to "firewall" him away from actual representation.

This is to call to your attention two very troubling decisions to hire additional consultants. Both consultants have obvious conflict of interests and one of the two also is a high level Democrat partisan in the redistricting field.

1. Professor Michael P. McDonald

Now the Commission has as its sole applicant Professor Michael P. McDonald of George Mason University. Professor McDonald's resume reflects his active participation on behalf of Democrats in many roles during the current redistricting cycle, including work for Governor Andrew Cuomo of New York and the Democratic National Committee. He has also co-

authored at least three and maybe four papers with Professor Bruce Cain (about whom I have written you in the past) and Karin MacDonald of Q2 Data & Research, whose work he may be hired to review.¹ There is simply no way Professor McDonald can be characterized other than as a partisan Democrat with an apparent conflict of interest in reviewing the work product of his frequent co-author, Ms. MacDonald. His only “non-partisan” credentials are where he has paired with partisans or ideological opposites on other projects, including his involvement with the Virginia redistricting panel in 2011, the Illinois Senate redistricting in 2010 and Governor Schwarzenegger’s activities relative to Prop 11 in 2008. His activities in connection with the Virginia redistricting can hardly be characterized as non-partisan. (See <http://www.nationalreview.com/corner/262107/bipartisan-redistricting-va-targets-cantor-other-republicans-hans-von-spakovsky>.)

Should the Commission hire Professor McDonald, all pretense of fairness and impartiality in its assistance would be stripped from the process.

2. Professor Matt Barreto

Recently, the Commission retained a consultant, Professor Matt Barreto of the University of Washington,² to evaluate “racially polarized voting” issues for its 2011 district maps.

¹ Micah Altman, Karin MacDonald, and Michael P. McDonald. 2005. "From Crayons to Computers: The Evolution of Computer Use in Redistricting." *Social Science Computing Review* 23(2) 334-46; Michael P. McDonald. 2008. "Reforming Redistricting." in *Democracy in the States: Experiments in Elections Reform*, Bruce Cain, Todd Donovan, and Caroline Tolbert, eds. Washington, DC: Brookings Press; Bruce Cain, Karin Mac Donald, and Michael P. McDonald. 2005. "From Equality to Fairness: The Path of Political Reform Since Baker v Carr." in *Party Lines: Competition, Partisanship and Congressional Redistricting*, Bruce Cain and Thomas Mann, eds. Washington, DC: Brookings Press; and, Brookings Briefing: [Redistricting Reform After the Ohio and California Initiatives](#), November 15, 2005. Featuring Thomas E. Mann, Bruce E. Cain, and Michael P. McDonald.

² Matt A. Barreto is an Associate Professor in political science at the University of Washington, Seattle and currently the director of the Washington Institute for the Study of Ethnicity and Race (WISER). He is also the director of the annual Washington Poll. He received his Ph.D. in political science from the University of California, Irvine in 2005. His biography is set forth in more detail on the Commission’s website. This is not a question of qualifications or expertise. Professor Barreto is well qualified to provide the Commission with a “racially polarized voting” analysis. However, he is not free from conflict of interest in this matter, and the Redistricting Commission is obliged as much if not more than other California state and local agencies, to avoid both the actuality and appearance of conflict of interest in its retained consultants for this project.

Barreto's report on "racially polarized voting" was submitted to the Redistricting Commission by the Asian Pacific American Legal Center (APALC)/Coalition of Asian Pacific Americans for Fair Redistricting (CAPAFR) on May 27, 2011. (See <http://wedrawthelines.ca.gov/downloads/meeting_handouts_may2011/handouts_20110526_alpac_pdf.zip>, last visited June 9, 2011.)

The Commission's retention of Professor Barreto, who will be a public officer as a consultant to the Commission, appears to constitute a common law conflict of interest under California law. The fact that Professor Barreto prepared statistical and factual analysis to support the advocacy position of an interest group that submitted proposed redistricting plans to the Commission less than two weeks ago, and then will be hired to evaluate whether "racially polarized voting" evidence exists or does not exist with respect to districts drawn by the Commission, unfortunately places Professor Barreto in an obvious common law conflict of interest.³ To be clear, this is a non-financial conflict of interest, one of common law, not the Political Reform Act.

Barreto would be disqualified from presenting or commenting upon "racially polarized voting" issues where his engagement by a private advocacy group to provide expert analysis and opinion is concerned.

The California Attorney General's 2010 Conflict of Interest Handbook (Ch. XIII, p. 101):

"The common law doctrine requires a public officer "to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public." (*Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51 (citations omitted).) Therefore, actual injury is not required. . . . Stated another way, "[p]ublic officers are obligated, . . . [by virtue of their office], to discharge their responsibilities with integrity and fidelity." (*Terry v. Bender* (1956) 143 Cal.App.2d 198, 206.) For example, in *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, the court concluded that in an adjudicatory hearing, the common law is violated if a decision maker is tempted by his or her personal or pecuniary interests. In addition, the doctrine applies to situations involving a *nonfinancial personal interest*. (*Id.* at p. 1171, fn. 18; 92 Ops.Cal.Atty.Gen. 19 (2009).)

...

"If a situation arises where a common law conflict of interest exists as to a particular transaction, the official "is disqualified from taking any part in the discussion and vote regarding" the particular matter. (26 Ops.Cal.Atty.Gen. 5, 7 (1955); 70 Ops.Cal.Atty.

³ I understand that the Commission's solution to this problem was to firewall Professor Barreto's CAPAFR "racially polarized voting" analysis off from the areas he would do new analyses for the Commission. This is not an appropriate way to "cabin" off a conflict of interest.

Gen. 45, 47 (1987).)

Under analogous Fair Political Practices Commission rules, a consultant is a decision-maker if his or her recommendations, findings and conclusions are not subject to independent, intervening substantive review by a higher level decision-maker. See 2 Cal. Code Regs. § 18701(a)(2) & 18702.2⁴) In this case, the Redistricting Commission has no internal decision-makers with expertise to make such intervening, substantive review of Professor Barreto's findings, conclusions, opinions and recommendations. The Commission's retained Voting Rights Act consultant, the law firm of Gibson, Dunn & Crutcher, LLP, has no such expertise or decision-making role. Neither the Commission's line drawing consultant, Q2 Data & Research, nor Q2's in-house lawyer, Ana Henderson of the Earl Warren Institute at the University of California, Berkeley, has the expertise to make such independent, intervening substantive review of Professor Barreto's decisions. Nor does any Redistricting Commissioner have such expertise. Thus, the Commission cannot claim Professor Barreto is or will be insulated from conflict of interest in this situation.

The Commission should immediately rectify the situation by declining to hire Professor McDonald as a "peer reviewer" consultant and by finding another "racially polarized voting" consultant without Professor Barreto's conflict of interest.

Very truly yours,



Tom Del Beccaro
Chairman
California Republican Party

⁴ FPPC Regulation 18702.2 states that an official participates in making a governmental decision when, acting within the scope of the official's position, the official:

(a) Negotiates, without significant substantive review, with a government entity or private person regarding a governmental decision referenced in Regulation 18701(a)(2)(A);

(b) Advises or makes recommendations to the decisionmaker either directly or without significant intervening substantive review, by:

“(1) Conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in [Regulation 18701\(a\)\(2\)\(A\) 1](#); or

“(2) Preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in [Regulation 18701\(a\)\(2\)\(A\)](#)].”