

## **Census Delay Presents Challenges for County Redistricting**

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As the state and local governments prepare for another once-a-decade redistricting, major questions surround the release of the 2020 census—the essential data source for any redistricting. The process cannot begin until the census results are released, and the quality of the data will drive how accurate and successful the redistricting process will be. Although the census has been conducted every decade since 1790, the 2020 census poses unique questions. Because it was taken just as the nation had entered a pandemic, data collection became much more difficult, which, in turn, produced both delays in release of the final product and concerns about the accuracy of the data. In a normal census cycle, the numbers would already be in hand or we would know that their release was imminent. Instead, in 2021 we are left with the question of when we can expect the data to be released and what type of product will we have.

Federal law sets two deadlines for release of decennial census data. First, the statewide counts are to be released no later than December 31, 2020. These are the numbers that are used to apportion congressional seats among the states. The Census Bureau did not meet that deadline. That data is particularly important to Texas as it is likely to show that the state will be entitled to three additional congressional districts.

The second deadline is for the release of what is known as the P.L. 94-171 data, which is the block-level data that is used to draw districts. Until this release occurs it is not possible to begin the task of drawing districts. By law, this information is to be released by April 1, 2021. In the past the Census Bureau has released the Texas redistricting data in mid-February or early March. At the time this article was written it was not clear when the redistricting data would be released, but it seemed highly unlikely that it would come out by the April 1, 2021, deadline.

As with much in the nation and the world, the census was affected by the pandemic. The bureau sends questionnaires to all the households in the country asking individuals to respond to

electronically, by mail, or by phone. In 2020, about two-thirds of the households completed the questionnaire in this fashion. Counting the remaining third that did not respond, requires a massive, labor-intensive, field operation whose workers knock on doors to interview non-respondents and otherwise seeks to count them. The problem for the 2020 census is that the time for door-to-door follow up came when health concerns limited the ability to engage in the usual personal contact associated with counting non-responders. Non-response follow up was suspended for three months. As a result, the census fell well behind schedule. Because of this delay, the Trump Administration asked Congress to pass legislation extending the deadlines for reporting the results of the census by four months. The House passed the legislation, but it never came to the floor in the Senate.

On July 21, shortly after the follow-up field work had resumed, President Trump issued a memorandum order directing the Department of Commerce, which oversees the Census Bureau, to provide the President with a count of undocumented immigrants so that they could be deducted from the census count before the numbers were submitted to the Congress for the apportionment of congressional seats. If implemented, the order would shift the allocation of congressional seats among the states with Texas likely receiving two rather than three new seats. After the order was issued, the administration abandoned the effort to extend the census release deadlines so that the proposed new method of allocating seats could be implemented before any potential change in administrations. The order was highly controversial and was quickly overturned by a three-judge district court in the District of Columbia. The Supreme Court, though, vacated the lower court decision finding the issue was not yet ripe for decision. The Court's hesitation to take the case was prescient as the count was not completed by the time the Biden Administration took office, and the Trump memorandum order was rescinded by President Biden on the afternoon of the Inauguration.

As rescission of the order was months in the future, the door-to-door field work proceeded until the Department of Commerce directed the Bureau to complete that work two weeks earlier than planned. It also cut the time the Census Bureau had allocated for processing the data roughly in

half in an effort to have the information ready for release by January 1. As the Bureau was preparing the data, it discovered data anomalies affecting about seven-tenths of one percent of the total. It is not clear at the time of this writing what the problems with the data were, but almost certainly the shortened time for field work and data processing added to the risk that there would be data accuracy issues. In any event, the count was not completed until after the change of administrations, so the apportionment numbers will include all residents just as they have in the past.

Because of the difficulty in resolving anomalies, it is likely the block-level data used to draw districts will not be released by March 31 and could be delayed until as late as July 31. Although we believe the data will likely be released before the end of July, we do not know at this time when the release will be. Until that information—the P.L. 94-171 data—is released, counties cannot begin the redistricting process. Similarly, the Legislature cannot begin, which may mean that a special session will be required to draw legislative and congressional districts. That delay will affect when counties can draw election precincts. It is possible that the Legislature will alter filing deadlines and perhaps even the date of the primaries if the process is significantly delayed.

The bottom line is that redistricting may begin somewhat later and the process may be compressed, requiring special diligence in order to complete the process in time for the 2022 elections.

*Bob Heath, one of the founding partners of Bickerstaff Heath Delgado Acosta LLP, has been involved in redistricting since 1971. He has represented scores of governmental entities in drawing districts and obtaining preclearance from the Department of Justice. In addition, he has represented many governments in federal voting rights litigation in Texas and in the District of Columbia district courts, in the Fifth Circuit, and in the U.S. Supreme Court. Mr. Heath has spoken throughout the United States at seminars on redistricting issues and has published several articles on redistricting. He has also been quoted on the subject by the U.S. Supreme Court.*