May 18, 2006

VIA EMAIL AND FACSIMILE

The Honorable Kevin DeWine
Ohio House of Representatives
77 South High Street, 14th Floor
Columbus, Ohio 43215-6111
Fax: (614) 644-9494

Re: H.J.R. 13 - Ohio Redistricting Bill

Dear Representative DeWine:

I commend you on your efforts to promote a more fair redistricting process for the State of Ohio. In my opinion, there is no more important issue facing this state’s democracy, than making sure that creation of legislative districts — and thus the process by which citizens elect their representatives — is free from the taint of partisan or incumbent self-interest. I think that your proposal does an admirable job of constituting a commission that will deal with redistricting more fairly. I also share with you the view that 2006 presents a golden opportunity, one that is not likely to emerge again in the next decade, for enacting real redistricting reform.

That said, I respectfully offer four suggestions as to how the existing bill might be improved. Given that I know the legislature aims to move forward on this proposal quickly, I will endeavor to keep my explanations here relatively brief, but would be happy to discuss any of them in greater detail. (I set forth some of my reasons for the first two suggestions below in a post on my weblog last night, entitled “The New Ohio Redistricting Proposal,” which may be found at http://moritzlaw.osu.edu/blogs/tokaji/2006/05/new-ohio-redistricting-proposal.html.) Please be advised that these and any comments that I make on pending legislation are solely on my own behalf, not on behalf of the Ohio State University, the Moritz College of Law, or the Election Law @ Moritz project.

1. My most significant concern with the bill in its present form is that it appears to prioritize compactness and correspondence with existing geographic boundaries over competitiveness. I make this observation based on the language in § 6(E), providing that the commission shall make its “best efforts” to maximize competitive districts, and only where doing so does not conflict with other principles set forth in the article. This suggests that competitiveness is a second-order value under the new proposal, when in my view it should be on at least equal footing with the other values mentioned.

There are at least two ways of dealing with this problem. One is to eliminate the “best efforts” language as to competitiveness; the other is to insert parallel “best efforts” language with
respect to all three values (compactness, correspondence with existing jurisdictional boundaries, and competitiveness), so as to avoid making competitiveness a second-order value. I favor the second option, since it will give the commission flexibility to reconcile these important and sometimes competing values. Accordingly, I suggest the following changes to Section 6:

§ 6(A), lines 200-06: Replace “Every congressional and general assembly district shall be compact and composed of contiguous territory ...,” with: “The Ohio apportionment commission shall make its best efforts to make every congressional and general assembly district compact. Every congressional and general assembly district shall be composed of contiguous territory ...” Replace the sentence that follows (“To the extent consistent...”) with the following sentence: “The commission shall also make its best efforts, consistent with the requirements of this article, to draw the boundary lines of districts so as to delineate an area containing one or more whole counties.”

§ 6(C), lines 213: Replace “such district shall be formed by combining...” with “the commission shall make its best efforts to form such districts by combining...”

§ 6(D), line 220-22: Replace “only two such units may be divided between [sic] per district ...” with “the commission shall make its best efforts to divide only two such units per district ....”

§6(E), lines 232-33: Eliminate the words “Where their formation does not conflict with other principles established by this article.”

§6(E)(3), lines 256-57: Eliminate the words “Unless the Ohio apportionment commission adopts a different definition,” at the start of this sentence. Allowing the commission to change the definition seems to me unnecessary, given the “best efforts” qualification, and would open the door to adoption of a more lax definition that would eviscerate the competitiveness requirement.

In my view, these amendments should be sufficient to ensure that competitiveness is given weight equal to compactness and correspondence with existing boundaries, rather than being a second-order value. The “best efforts” language will also give the commission some needed discretion, which will be particularly valuable to protect commission plans from unwarranted challenges in court.

2. My second concern has to do with what will happen, in the event that the commission stalemates. This seems to me to be a likely possibility, given the supermajority requirement in the current bill, and the requirement that at least one commissioner from each party approve a plan. It is quite possible that commissioners of one party or the other might withhold their assent, in the hopes that the state supreme court will be “friendly” to their position and will itself dictate a particular plan in the event of an unresolved stalemate. To my mind, this possibility exists despite the language in Section 5, providing that new commissioners shall be appointed in the event a current plan is determined invalid – even after new commissioners are appointed, one party’s
representatives may still prolong the stalemate by withholding consent, in hopes of a friendly state court intervening.

To avoid this problem, I would suggest that the following language be inserted at the end of the first paragraph of Section 12 (line 361):

No court of this state shall in any circumstances order the implementation or enforcement of any plan that has not been approved by the commission in the manner prescribed by this article.

This should be adequate to clarify that the court’s power with respect to the commission is limited to ordering it to write a new plan, and that the court does not have the power to write a plan in the commission’s stead in the event of a stalemate. An alternative would be to include language at the start of Section 12, prescribing that the state supreme court’s jurisdiction shall be limited to cases compelling commissioners or legislators to exercise their duties under the article, and does not include the power to draw lines itself.

3. My third concern has to do with the language regarding federal voting rights. Section 6(B) provides that: “Any plan adopted by the Ohio apportionment commission shall comply with all applicable Ohio and federal constitutional provisions, including but not limited to, those dealing specifically with the protection of minority voting rights.” As written, this language does not appear to include federal statutory law, such as the Voting Rights Act of 1965, even though there can be no question that the commission would be bound to respect federal laws (constitutional or statutory) under the Supremacy Clause of the U.S. Constitution. I therefore suggest that this sentence be rewritten to read:

Any plan adopted by the Ohio apportionment commission shall comply with all applicable Ohio constitutional provisions and with all applicable federal laws, including but not limited to the Voting Rights Act of 1965.

In my view, this language should be sufficient to ensure that the commission complies with federally mandated voting rights protections, including those in Section 2 of the Voting Rights Act regarding minority vote dilution.

4. My last suggestion has to do with Section 1(G), lines 106-09, vesting responsibility for defending any commission-adopted plan in the attorney general. I believe that this is a mistake. Given that the attorney general is a partisan elected official, it opens up the possibility that this office will not rigorously defend a plan (or certain districts within a plan) to the extent that he or she does not view it favorably. One of course hopes that this will not happen, but it is a possibility, and one that would be very difficult to prevent. Added to this is a concern that arises from the exceedingly complex nature of redistricting disputes, both legally and factually. The commission will have to negotiate a maze of federal and state law, that includes federal constitutional requirements like the one person, one vote rule and the Shaw v. Reno doctrine forbidding excessive consideration of race; the Voting Rights Act of 1965; and of course the new requirements of state law. These cases also
tend to involve very complicated social science evidence from expert witnesses. To be candid, I do not believe that the attorney general's office has the institutional capacity to provide the optimal level of legal advice and representation that such matters deserve.

For these reasons, I believe that the commission should have the authority to select and retain its own counsel. Furthermore, that should apply not only to defending an enacted plan in the event of a legal challenge, but to obtaining advice so that lawsuits can be avoided. I suggest language along the following lines in place of what is now appears in § 1(G):

The commission shall have the authority to select and retain its own legal counsel, for purposes of obtaining legal advice and defending any plan adopted by members of the Ohio apportionment commission.

The paragraph that follows, §1(H), should I think be sufficient to ensure that the general assembly appropriates the resources needed for the commission to obtain adequate legal advice and representation.

I appreciate the opportunity to make these suggestions. I hope that the end-product of your efforts will be a redistricting law that will at once make Ohio’s elections fairer and serve as a model for other states. Please do not hesitate to contact me at 614.292.6566 or tokaji.1@osu.edu if I can be of further assistance.

Sincerely,

Daniel Tokaji
Assistant Professor of Law