



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE LEGISLATIVE BRANCH AND EXECUTIVE BRANCH COMMITTEE

OHIO CONSTITUTION PROPOSED ARTICLE XIX

CONGRESSIONAL REDISTRICTING

The Legislative Branch and Executive Branch Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding a proposed new Article of the Ohio Constitution concerning the creation of a commission for the purpose of drawing Congressional districts. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that the Ohio Constitution be amended to add Article XIX for the purpose of creating a redistricting commission for the purpose of drawing Congressional districts to commence following the next United States Census that is set to occur in 2020.

Background

Authority for the drawing of Congressional districts is granted generally to the state legislatures by the United States Constitution, which requires that the representatives be apportioned according to the number of persons in each state without specifying how districts must be drawn.

Under current Ohio statutory law, the state's 16 Congressional districts are subject to review and revision every ten years, in years ending in the numeral "1," based upon United States Census figures. In Ohio, Congressional district plans are enacted by the General Assembly and codified in section 3521.01 of the Revised Code.

The information in this section sets out the procedure for how Ohio draws its Congressional districts as outlined in a 2011 Ohio Legislative Service Commission "Members Only Brief."¹

Timeline

The initiation of the timeline for adopting new Congressional districts, as set out in the Members Only Brief, is as follows:

The federal census determines the population as of April 1, in each year ending in the numeral “0.” Within one week after the opening of Congress the following year, the President reports the census counts, and the number of Congressional representatives to which each state is entitled, to the Clerk of the United States House of Representatives. Within 15 days of receiving that information, the Clerk notifies each state governor of the number of representatives to which the governor’s state is entitled.²

The detailed census reports, along with the apportionment determination delivered by the Clerk of the U.S. House, form the basis for Congressional redistricting.³

The filing deadline for nominations for the office of Congressional representative in the year after census data is released serves as the practical deadline for Congressional redistricting. Thus, the General Assembly generally enacts the Congressional districting plan between April 1 of the year ending in the numeral “1” (when census data is officially released) and the primary filing deadline for the following year, which is the first year elections will be held under the new districts.

Under some circumstances a state may redraw Congressional districts between censuses, such as, if a districting plan is determined to be unconstitutional. For instance, in 2006, the United States Supreme Court permitted the Texas Legislature to redraw, in the middle of the decade, a districting plan that had been adopted by a federal court. However, the Court did not determine whether a legislature may draw a new redistricting plan mid-decade if the prior plan was adopted by the legislature.⁴

Criteria

The U.S. Constitution is silent regarding the specific criteria that Congressional districts must meet. However, the U.S. Supreme Court has identified the necessary criteria for fulfilling the requirements of the Fourteenth and Fifteenth Amendments to the U.S. Constitution. Further, applicable provisions of the Voting Rights Act of 1965 set out additional requirements for drawing districts.

One of the principal criteria in drawing Congressional districts is population equality. As stated in the Members Only Brief: “Unlike General Assembly districts, which may vary in population by up to five percent above or below the ideal population, Congressional districts must be as equal as possible. Absolute population equality has been identified as the paramount objective of apportionment in establishing Congressional districts. *Karcher v. Daggett*, 462 U.S. 725, 732 (1983).”

Other criteria are set by the Voting Rights Act of 1965.⁵ As noted in the Members Only Brief:

Section 2 of the act applies to all jurisdictions, prohibiting any state or political subdivision from imposing a voting qualification or a standard, practice, or procedure that results in a denial or abridgment of the right to vote on account of race, color, or status as a member of a language minority group. Under this

section, Congressional districting plans cannot dilute the voting strength of certain minorities. Some practices that have been questioned under the section include multimember districts, the packing of minority voters into a limited number of districts, and the fracturing of minority voting strength by dividing minority voters into a large number of districts.⁶

In addition to the criteria noted above, the courts have recognized several goals as traditional redistricting principles, including compactness; contiguity; the preservation of political subdivisions, communities of interest and cores of prior districts; protection of incumbents; and compliance with Section 2 of the Voting Rights Act.

Process

The Members Only Brief makes note of the lack of a specific process for creating districts when it states:

Although some states have enacted a statutory process for adopting Congressional district plans, such as having those districts determined by a board or commission, existing Ohio law does not specify a particular process for adopting Congressional districts. Traditionally, those districts have been adopted by a statutory enactment of the General Assembly. The bill establishing those districts is enacted according to the same process as other bills are enacted by the General Assembly and is subject to gubernatorial veto in the same manner as other bills.

Recent Legislative Activity

In January 2011, General Assembly members were appointed to redistricting committees for the purpose of drawing district lines following the 2010 Census. At that time, the House redistricting committee was comprised of three Republicans and two Democrats, while the corresponding Senate committee was comprised of three Republicans and two Democrats. These committees were aided by the Ohio Legislative Task Force on Redistricting, Reapportionment, and Demographic Research, a six-member body that was created under the authority of R.C. 103.51. The statute indicates that three members each are appointed to the task force by the president of the Senate and by the speaker of the House. The statute further requires the president and speaker each to appoint no more than two members who belong to the same political party, and to appoint one member each who is not a member of the General Assembly. Among its other duties, the task force is charged with providing “such assistance to the general assembly and its committees as requested in order to help the general assembly fulfill its duty to establish districts for the election of representatives to congress.” R.C. 103.51(C)(1).

In 2012, a citizen initiative was placed on the ballot as Issue 2, proposing to create a 12-person citizen commission to draw legislative and Congressional district maps.⁷ Arguments submitted by proponents of the measure included that the existing system was not balanced or transparent, and was too tied to political interests.⁸ Opponents asserted the measure would create an unelected commission that would be unaccountable to voters and would have access to unlimited funding.⁹ Opponents also criticized that the measure required judges to make political decisions,

and that it ignored separation of powers considerations.¹⁰ Issue 2 ultimately failed at the polls, by a vote of 64.73 percent to 37.73 percent.¹¹

The 130th General Assembly (2013-2014) saw the introduction of two joint resolutions that, if approved, would have altered Ohio's method of drawing Congressional districts. Both Senate Joint Resolution 1, introduced by Senators Tom Sawyer and Frank LaRose (with co-sponsors Senators Nina Turner, Keith Faber, and Joe Uecker), and H.J.R. 11, sponsored by Representative Matt Huffman, if adopted, would have created a redistricting commission to draw district lines.¹² In addition, at least one other proposed resolution, prepared by Representative Vernon Sykes but not introduced, would have created a redistricting commission for the purpose of drawing both legislative and Congressional lines.¹³

Although the subject of Congressional redistricting received considerable attention in the last months of the 2013-2014 session, it was H.J.R. 12, reforming the procedure for legislative apportionment, that successfully made it to the November 2015 ballot as Issue 1. Unofficial results from the November 3, 2015 general election indicate that Issue 1 passed by a margin of 71.49 percent to 28.51 percent.¹⁴

Amendments, Proposed Amendments, and Other Review

Ohio Constitutional Revision Commission

The 1970s Constitutional Revision Commission ("1970s Commission") considered whether to recommend a change to Ohio's method for drawing legislative and Congressional districts. In its final report, the 1970s Commission stated as follows:

The What's Left Committee, after considerable study of the methods used in Ohio and other states, and the advantages and disadvantages of each, and after lengthy discussion of the problems of drawing legislative districts, concluded that the standards set forth in the Ohio Constitution for drawing districts need not be altered, that congressional districts should be drawn by the same commission that draws legislative districts, and only once every 10 years, and that the composition of Ohio's present apportionment body should be changed. * * *

The apportioning persons are considered of primary importance in the apportionment provision. One of the first conclusions reached by the committee was that the three elected executive officials presently designated by the Constitution should not be on the apportionment board. The committee proposal provided for a five member apportionment commission, with four members appointed by the legislative leaders of both parties in the General Assembly. The fifth member, who would be chairman, and would be a key person, would be selected by a majority agreement of the four; if they fail to agree, the secretary of state would select the chairman by lot from nominees submitted by the commission. All meetings, including those to nominate a chairman and draw the apportionment plan, would be open to the public, and at least four weeks would be provided for public inspection of a tentative plan, in order to provide for public

comment and input before final adoption of the plan. Under the present constitutional language, the public does not see the plan until after it is approved by the apportioning persons. Elected or appointed public officers other than members of the General Assembly could serve as members of the apportionment commission, which, in addition to redistricting for state legislators every 10 years, would be responsible for districting for the election of United States congressional delegates. The proposal was defeated by the Commission by a vote of 13 in favor, 13 opposed, and 2 passes.¹⁵

Dissenting members of the 1970s Commission's What's Left Committee filed a Minority Report in which they asserted a change in the makeup of the apportionment board was necessary in order to "lessen the influence of partisan politics as much as possible."¹⁶ The minority summarized its recommendations as follows:

1. The Apportionment Commission replaces persons designated by the present constitutional provision: Governor, Auditor, Secretary of State, and two persons chosen by the House and Senate minority and majority leadership. The proposed Commission consists of five persons: the majority and minority leaders in the House and Senate each select one, and a fifth member, who shall be chairman, is selected by the four members. If they cannot agree on a chairman, the Secretary of State will select the chairman by lot from names of persons previously nominated submitted by the four members prior to the lottery meeting.
2. Elected or appointed public officers other than members of the General Assembly may serve as members of the Commission.
3. The Commission will be assisted in the preparation of an apportionment plan by staff, and the General Assembly is required to appropriate funds to support the work of the Commission.
4. The first plan published by the Apportionment Commission is a tentative plan. At least four weeks are provided during which the Commission shall consider comments, criticisms, and alternate proposals submitted by any person or group to the tentative plan.
5. All meetings of the Apportionment Commission are open to the public. Communications to the Commission, criticisms, plans, alternate proposals, etc., relating to the adoption of the tentative and final plans are open to public inspection and must be retained for 180 days after the completion of the Commission's work.
6. The Apportionment Commission shall be responsible for dividing the state into districts for the election of representatives to the United States Congress.¹⁷

The Minority Report concluded:

The recourse of the lottery, for the selection of the chairman if the four members cannot agree, is intended to provide strong incentive for the members of both parties to come to some agreement on a fair and competent person to be chairman, rather than leave that important position to chance. The extensive requirements dealing with publication and public inspection of both the tentative and final plans, as well as the opportunity for public input, are intended to make the process as open as possible. As it is presently done, apportionment is a very closed process giving the public the opportunity to comment only after the plan is adopted.¹⁸

House Joint Resolution 2 (131st General Assembly)

At the beginning of the 131st General Assembly, Representatives Kathleen Clyde and Michael Curtin introduced House Joint Resolution 2, a proposal for Congressional redistricting reform that mirrors the content of H.J.R. 12 from the 130th General Assembly.

Presenting to the Legislative Branch and Executive Branch Committee in April 2015, Rep. Clyde identified key points of H.J.R. 2's redistricting proposal as being that it:

- Creates a seven-member bipartisan panel with a least two members from the minority party;
- Indicates the panel is comprised of four legislative members – two of whom are members of the minority party in each chamber – the governor, the auditor of state, and the secretary of state;
- Requires two minority votes to adopt the legislative boundaries for a 10-year period;
- If the panel cannot agree, requires the maps to be drawn after four years, during which time, elections could bring new members to the panel;
- If the panel cannot agree a second time, requires the new map to go into effect for the remaining six years, but the map must adhere to tougher standards;
- Gives the Ohio Supreme Court guidance on how to determine if the maps are drawn properly;
- Requires the panel to draw the maps that minimize the number of splits of counties, municipalities, and contiguous townships; and
- Explicitly states that “No General Assembly district plan shall be drawn primarily to favor or disfavor a political party.”

Also presenting remarks to the committee, Rep. Curtin, as co-sponsor of the resolution, expressed that the bipartisan support for H.J.R. 12 in the 130th General Assembly was the impetus for the current effort to apply the same principles to Congressional redistricting, and encouraged reform to continue.

Senate Joint Resolution 2 (131st General Assembly)

Also introduced in the 131st General Assembly is Senate Joint Resolution 2, a proposal for Congressional redistricting reform sponsored by Senators Frank LaRose and Tom Sawyer.

As described by the senators, S.J.R. 2 is modeled off of H.J.R. 12 with some minor differences. S.J.R. 2 would require Congressional districts to be drawn by the seven-member Ohio Redistricting Commission, established in H.J.R. 12 and approved by voters as Issue 1 in the November 2015 election.

This commission would consist of the governor, auditor of state, secretary of state, and one person each appointed from the speaker and minority leader in the House and the president and minority leader in the Senate. S.J.R. 2 further indicates that approval of the map requires the votes of four members of the commission, including two votes from the minority party. If a bipartisan map is passed, the legislative districts would be in effect for 10 years, until the next census. If the map is not approved by the necessary threshold of four votes – including two from the minority party – an “impasse” provision is triggered by which the map is effective for only four years, after which the commission would reconvene to redraw and pass a new map effective for the remaining six years. S.J.R. 2 indicates that maps drawn under the impasse procedure would be subjected to more stringent standards, with the aim of constraining possible partisan excesses.

Comparison of the Two Joint Resolutions

As compared by the Legislative Service Commission, S.J.R. 2 and H.J.R. 2 are similar in many ways.¹⁹ Both proposed joint resolutions describe a redistricting commission that would be comprised of the governor, auditor of state, secretary of state, one person appointed by the speaker of the House, one person appointed by that president of the Senate, and one person each appointed by the minority leaders of the House and the Senate, for a total of seven members. Both proposals indicate that the House and Senate legislative leaders of the two largest parties in the General Assembly, acting jointly by political party, would appoint a co-chairperson of the commission. The two joint resolutions also propose an identical timeline that would have the commission meet in a year ending with the numeral one unless the commission is judicially required to reconstitute and reconvene to redraw judicially invalidated districts following the expiration of a plan adopted under the impasse procedure. Both plans require the commission to adopt a final district plan no later than September 1 of a year ending in “1,” or, if that does not occur, by September 15 of that year using the impasse procedure.

Relating to the organizational procedures of the commission, both proposals would have the meetings be open to the public, would have the commission adopt procedural rules, and would require a simple majority of members for any action by the commission. However, the two proposals differ in that S.J.R. 2 specifies that if voters approve a redistricting commission for the purpose of drawing legislative districts, the commission is to be dissolved four weeks after the adoption of a final Congressional district plan or a final General Assembly district plan, whichever is later.

The two proposals are identical in their descriptions of the method of selecting district plans, including the requirements for bipartisan support, as well as the procedure for breaking an impasse. The proposals also are the same with regard to district population requirements, although S.J.R. 2 requires the commission to minimize the extent to which each district's population differs from the ratio of representation, as is practicable, while taking into account other legitimate state objectives, as well as allowing the commission to include an explanation of the reason that a district contains a population that is not equal to the ratio of representation. By comparison, H.J.R. 2 only requires the population of each district to be as equal to the congressional ratio of representation as practicable.

Both proposals specify that each district meet various requirements for Congressional districts, including that the plan comply with applicable provisions of the U.S. and Ohio Constitutions, as well as with federal law. The two proposals do differ with regard to specific requirements for contiguity in relation to the boundaries of counties, municipal corporations, and townships. The two proposals identically require that a congressional district plan should not be drawn primarily to favor or disfavor a political party, that the statewide proportion of districts whose voters favor each political party must correspond closely to the statewide preferences of Ohio voters, and that Congressional districts be compact.

The proposals also both require the commission to create boundaries by using political subdivision boundaries as they exist at the time of the census.

With regard to the judicial resolution of disputes, while both proposals specify that the Ohio Supreme Court has exclusive, original jurisdiction of all cases arising under the article, S.J.R. 2 has the additional requirement that if the court finds it necessary to amend not fewer than two congressional districts to correct violations of the listed requirements, the court must declare the plan invalid and order the commission to adopt a new plan.

H.J.R. 2 differs from S.J.R. 2 in that it contemplates that if a court issues an unappealed final order that the General Assembly must be responsible for congressional redistricting, then the General Assembly would be constitutionally bound by the same requirements set forth in the proposed article.

The two proposals also identically address changes to district plans between censuses, provide for appropriations to the commission to allow it to operate, and have a severability provision that indicates that the invalidity of one or more of the provisions does not affect the rest. Finally, both proposals have an effective date of January, 2021.

Litigation Involving Congressional Redistricting

On June 29, 2015, the U.S. Supreme Court decided *Arizona State Legislature v. Arizona Indep. Redistricting Comm.*, 576 U.S. ____, 135 S.Ct. 2652 (2015), upholding the use of an independent redistricting commission to draw boundaries for congressional districts. The case involved a challenge by Arizona state legislators to an initiated constitutional amendment that transferred responsibility for congressional redistricting from the state legislature to a five-member commission.

The suit alleged that the use of a congressional redistricting commission, which was adopted in Arizona in 2000 by an initiative, violated the Elections Clause of the U.S. Constitution, Article I, Section 4, which provides: “The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.”

The decision in the case turned, in part, on whether the word “Legislature” in the Elections Clause refers literally to the representative body that makes the laws, or more broadly to the legislative process. In upholding the use of the initiative to create the redistricting commission, the Court ruled that the delegation of congressional redistricting to an independent commission did not violate the Elections Clause.

The Court relied on three of its decisions involving the relationship between state legislatures and the U.S. Constitution, two of which arose in Ohio.

In *Davis v. Hildebrant*, 241 U.S. 565 (1915), a 1915 case involving the use of Ohio’s newly-minted referendum, the Court agreed with the decision of the Ohio Supreme Court that the referendum “was a part of the legislative power of the State,” and held that “[f]or redistricting purposes, *** ‘the Legislature’ did not mean the representative body alone. Rather, the word encompassed a veto power lodged in the people.” *Arizona State Legislature*, 576 U.S. at ___, 135 S.Ct. at 2666 (quoting *Davis*, 241 U.S. at 569).

In *Hawke v. Smith*, 253 U.S. 221 (1920), which also involved the Ohio referendum, the issue involved Ohio’s ratification of the Eighteenth Amendment (Prohibition). In holding that the referendum could not be used to reject the ratification, the Court ruled that Article V, governing ratification, had lodged in “the legislatures of three-fourths of the several States” the sole authority to assent to a proposed amendment. *Id.* at 226. The Court contrasted the ratifying function, exercisable exclusively by a state’s legislature, with “the ordinary business of legislation.” *Id.* at 229. *Davis v. Hildebrant*, the *Hawke* decision explained, involved the enactment of legislation, *i.e.*, a redistricting plan, and properly held that “the referendum [was] part of the legislative authority of the State for [that] purpose.” *Id.* at 230.

Finally, in *Smiley v. Holm*, 285 U.S. 355 (1932), the Court addressed whether legislation that redistricted Minnesota’s Congressional districts was subject to the governor’s veto. The Minnesota Supreme Court ruled that it was not, but the U.S. Supreme Court disagreed and held that the Elections Clause did not place redistricting authority exclusively in the hands of the state’s legislature. Thus, the Court held that under the Elections Clause “Legislature” was not limited to the two houses of the legislature but also included the Governor. In so holding, *Smiley* pointed out that state legislatures performed an “electoral” function “in the choice of United States Senators under Article I, section 3, prior to the adoption of the Seventeenth Amendment,” a “ratifying” function for “proposed amendments to the Constitution under Article V,” *** and a “consenting” function “in relation to the acquisition of lands by the United States under Article I, section 8, paragraph 17.” *Smiley*, 285 U.S. at 365-66 (footnotes omitted).

In *Arizona State Legislature*, the Court determined that state legislatures do not have exclusive

authority for adopting policies concerning federal elections, including policies governing Congressional redistricting. In holding that the Elections Clause did not bar the use of the initiative to set up a commission-based procedure for drawing district lines, the Court pointed to the implications a contrary decision would have on other aspects of election laws:

Banning lawmaking by initiative to direct a State’s method of apportioning congressional districts would do more than stymie attempts to curb partisan gerrymandering, by which the majority in the legislature draws district lines to their party’s advantage. It would also cast doubt on numerous other election laws adopted by the initiative method of legislating.

Arizona State Legislature, 576 U.S. at ___, 135 S.Ct. at 2676.

Presentations and Resources Considered

Beck, Foley, and Stebenne Panel Discussion

In July 2013, three professors from The Ohio State University, Paul A. Beck, Edward B. Foley, and David Stebenne, participated in a panel discussion regarding the history of gerrymandering and redistricting, both generally and in Ohio.

Paul A. Beck, who is professor emeritus of Political Science, identified the three basic problems of gerrymandering. First, he said, gerrymandering results in a distorted translation of popular votes in terms of legislative seats. He described that modern computer technology has allowed specialists to get better and better at gerrymandering, and the problem with a distortion is that voters become more alienated from the political system and can conclude the system is not responsive to their political wishes. Second, he said gerrymandering protects incumbents by making the districts uncompetitive, with the unfortunate effect being that incumbents are more fearful of the primary than the general election, are driven more to the extreme of their party, and become more vulnerable to outside money and interest group influence. The third problem Professor Beck described is gerrymandering’s destruction of political communities, creating artificial communities that lack any commonality. He said these problems are not party-specific and occur regardless of who gerrymanders the lines. Professor Beck recommended that any new redistricting plan should “minimize self-interested redistricting by people who are political insiders.” He said a specialized redistricting commission is best, and, if it is partisan, it must require enough bipartisan support for a plan so as to avoid a situation in which incumbents protect seats and the majority party gets its way. He emphasized that the procedure needs to have an unattractive alternative if the commission fails to come up with a plan. He added the commission needs to have guidelines under which to operate when drawing the lines. He concluded that whatever plan is implemented, Ohio citizens are not served if representational fairness and competitiveness are not the results of a new redistricting commission’s work.

Professor David Stebenne of the Moritz College of Law at The Ohio State University then addressed the committee, emphasizing that there is no “gold standard” regarding redistricting. He said adding four “neutrals” chosen by the seven members of the redistricting commission

would assist in creating a more fair system for drawing the district lines. He identified a system used in Iowa as being the closest to the ideal.

Professor Edward B. Foley of the Moritz College of Law at The Ohio State University encouraged the committee to take a long-term approach to changes made regarding reapportionment and redistricting, recommending changes to the seven-member reapportionment board as well recommending its replacement with a new singular body.²⁰ He said the key is to develop a redistricting institution that cannot be controlled by one political party.

In follow-up correspondence, the professors addressed committee members' questions about how to design a redistricting authority for which the balance of power is held by members who do not act on behalf of any political party or candidate but endeavor in good faith to apply constitutionally appropriate redistricting criteria impartially. The professors clarified that the key attribute of "neutrals" is that they can be expected by both parties to act fairly and impartially. The professors further advocated for a process whereby members of the public could nominate individuals to be considered for the role of neutrals on a redistricting commission. They also noted that it is crucial to give the members of the redistricting panel guidance on the appropriate criteria for drawing the maps. They noted those criteria include compliance with federal law, compactness, respect for the boundaries of political subdivisions, and competitiveness.

Henkener Presentations

Ann Henkener, First Vice President of the League of Women Voters of Ohio ("League"), presented to the committee on several occasions.

In August 2013, Ms. Henkener appeared before the committee to advocate a set of standards that she said would result in competitive districts and fair representation. She asserted that Ohio's districts should be representative of its population, and that gerrymandering had produced unfair districts.

In November 2014, Ms. Henkener again presented to the committee on behalf of both the League and Catherine Turcer of Common Cause Ohio, emphasizing the importance of the redistricting issue to these organizations and to Ohio voters.

In June 2015, Ms. Henkener presented on the topic of H.J.R. 2, Congressional Redistricting, the joint resolution introduced in the House by Representatives Clyde and Curtin. In her remarks, Ms. Henkener commented that current Congressional districts are more highly gerrymandered than the state legislative districts. She said that a good reform proposal should provide for strong input from both political parties when drawing maps, with the goal of having Ohio's General Assembly and Congressional delegations reflecting the even split between the parties in Ohio. She added that the districts should also be drawn to provide voters choices in general elections, and to have geographical shapes and boundaries that make sense to voters. Ms. Henkener expressed her support for H.J.R. 2, saying that the proposed resolution meets these goals, and urged the committee to approve the plan set forth in H.J.R. 2.

Ms. Henkener again appeared before the committee in October 2015 to express her support for Congressional redistricting reform. Ms. Henkener complimented the bipartisan effort that had resulted in Issue 1 on the November 2015 ballot, as well as S.J.R. 2 that was introduced by senators from both sides of the aisle. Ms. Henkener urged the committee to act soon on Congressional redistricting because “voters are getting educated about this topic from Issue 1.”

Gunther Presentations

The committee heard presentations from Richard Gunther, professor emeritus of Political Science at The Ohio State University, on several occasions.

In August 2013, Professor Gunther spoke to the committee regarding gerrymandering and the benefits of competitive districts. He emphasized the goals of competitiveness, community representation, and representational fairness, noting distortions in Ohio’s map that have the effect of “rig[ging] the election in favor of one set of candidates over the others, and deny[ing] the voters of Ohio a real choice.” Professor Gunther noted that a process that allows gerrymandering is detrimental to both parties because “gerrymandering is an equal-opportunity abuse of the democratic system.” He added that the “2011 redistricting process in Ohio may have been under the control of Republicans, and this enabled that party to secure major advantages for its candidates at both the state and federal levels. But what goes around comes around: if Democrats win two of three statewide offices in 2018 - governor, auditor or secretary of state – it is virtually certain that they will do unto Republicans in the 2021 redistricting process what was done to them over the previous decade. The pendulum will swing to the opposite extreme with equally negative consequences, not only for the candidates of that party, but for the voters of Ohio.”

Professor Gunther appeared again before the committee in November 2014, at which time he commented further regarding the legislative redistricting plan in H.J.R. 12.

In June 2015, Professor Gunther expressed his support for the Congressional redistricting plan described in H.J.R. 2, describing the problems he sees with the current district lines, such as communities fragmented into separate districts, and the dilution of voting power of citizens by the creation of districts that are not compact. He also described that the current map does not satisfy the interests of fairness, and noted that Ohio’s map “reflects a flagrant disregard of the core principle of representative fairness.”

According to Professor Gunther, H.J.R. 2 meets the goals he described because it uses much of the same criteria as was applied in H.J.R. 12. Professor Gunther concluded by stating that he regards H.J.R. 2 as “an excellent vehicle for achieving meaningful redistricting reform for the foreseeable future.”

Jacobsen Presentation

On October 10, 2013, Attorney Lynda J. Jacobsen, a division chief with the Legislative Service Commission, presented to the committee on “Guiding Principles of Redistricting and Re-Appportionment.” Ms. Jacobsen described Ohio’s method for Congressional redistricting,

indicating that the districts are adopted by the General Assembly by the adoption of a bill that is subject to the Governor's veto, and the resulting districts are codified in R.C. 3521.01 using census geographical data. She said a new plan, adopted every 10 years, must be in place by the filing deadline for the primary election. Ms. Jacobson said the plan is drawn with a goal of having population equality between districts as well as to comply with Section 2 of the Voting Rights Act of 1965. She then described the practices of "packing" and "cracking," identifying several districts in other parts of the United States whose unusual configurations suggest an attempt to gerrymander by concentrating widespread minority populations into one oddly-shaped district. Ms. Jacobsen identified the traditional redistricting principles as being compactness, contiguity, the preservation of political subdivisions, communities of interest, and cores of prior districts, as well as the protection of incumbents.

Brunell Presentation

In February 2013, the committee heard a presentation by Thomas L. Brunell, Professor of Political Science at the School of Economic, Political and Policy Sciences at the University of Texas at Dallas. Professor Brunell provided an analysis of the unsuccessful redistricting initiative that had been placed on the ballot in November of 2012, comparing it with a proposed legislative joint resolution that also would have created a commission to redraw district lines.

Professor Brunell indicated his preference for maps that match the partisanship of the state, as well as maps that don't strictly follow county or city boundaries, indicating that partisan fairness is more important than keeping counties or cities whole. He said he prefers a smaller redistricting commission that would be made up of partisans, rather than independent members. He recommended lowering the allowable level of population deviations for state legislative districts to either zero, or as close to zero as the commission feels comfortable with, because population deviations are often used for partisan purposes.

With regard to competitiveness, Professor Brunell recommended against adopting a provision that would encourage more competitive districts because he believes the costs associated with using redistricting to induce electoral competition are higher than the alleged benefits that competition might bring. He continued, explaining that competitive elections waste votes because an election won by a single vote means just less than half the voters have wasted their vote, and losing voters are less likely to trust in government. He said a district that is won by a single vote maximizes the number of losing voters, which, in his thinking, is not a democratic "good." He said competition also works against partisan fairness because, in times where there are "macro partisan tides," the existence of many competitive districts makes it likely that one party's candidates can dominate, leading to "very lopsided state delegations that are far from representative of the underlying partisanship of the state."

Professor Brunell did support allowing primary elections to be competitive because, regardless of who wins, at least most of the voters will have someone from their preferred party representing them. He said, "the key feature of elections is for a representative to have at least a small sense of worry about getting re-elected and that can sense can be generated at the primary stage just as well as the general election."

Steinglass Presentation

In September 2015, Senior Policy Advisor Steven H. Steinglass presented to the committee on the U.S. Supreme Court decision in the *Arizona State Legislature* case, indicating that the Court's decision signaled that a Congressional redistricting panel need not be part of a state legislature or comprised of legislative members, but could operate apart from the state legislature without violating the U.S. Constitution's Elections Clause.

Wimbish Presentation

In October 2015, Camille Wimbish a representative of the Ohio Voter Rights Coalition, testified in support of Congressional redistricting reform, saying her organization works to make voting easy and convenient in Ohio, and that they regularly hear from community members who don't vote and don't believe that elected officials represent their interests. She said that the perception is that one's vote doesn't count and that the process is rigged against voters. Ms. Wimbish urged the committee to support efforts to create fair districts and fair elections for both state and federal legislatures.

Discussion and Consideration

The committee began its work in 2013 with discussions regarding both legislative and Congressional redistricting. In 2013 and 2014, the committee heard presentations and considered several proposed joint resolutions introduced in the 130th General Assembly, including S.J.R. 1, sponsored by Senators Tom Sawyer and Frank LaRose (with co-sponsors Senators Nina Turner, Keith Faber, and Joe Uecker), and H.J.R. 11, sponsored by Representative Matt Huffman. The committee also considered a draft resolution by Representative Vernon Sykes (LSC 130 1364-1) that was not introduced. These legislative efforts at the end of the 130th General Assembly to place a Congressional redistricting measure on the November 2015 ballot concluded without results. At the beginning of 2015, there was support in the committee for waiting for the results of the *Arizona State Legislature* case before again addressing Congressional redistricting, and the committee turned its attention to other matters.

In April 2015, the committee heard from Representatives Clyde and Curtin regarding H.J.R. 2, as well as hearing in June 2015 from interested parties on the subject (see presentations by Ann Henkener and Professor Richard Gunther, described *infra*). When the U.S. Supreme Court issued its decision in the *Arizona State Legislature* case at the end of June 2015, upholding the constitutionality of Congressional redistricting commissions such as are contemplated by H.J.R. 2 and S.J.R. 2, members of the committee expressed an interest in returning to the topic of Congressional redistricting, and discussions continued.

Conclusion

The Legislative Branch and Executive Branch Committee concludes that

Date Adopted

After formal consideration by the Legislative Branch and Executive Branch Committee on November 12, 2015, and _____, the committee voted to issue this report and recommendation on _____.

Endnotes

¹ Legislative Service Commission, “Adopting General Assembly and Congressional Districts,” Members Only Brief, v. 129, Issue 1 – Revised (July 15, 2011), <http://www.lsc.ohio.gov/membersonly/129congressionaldistricts.pdf> (last visited Nov. 10, 2015).

² 2 U.S.C. Section 2a.

³ National Conference of State Legislatures, *Redistricting Law 2010* (2009): pp. 7-10, <http://www.ncsl.org/research/elections-and-campaigns/redistricting-law-2010742.aspx> (last visited Nov. 10, 2015).

⁴ *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).

⁵ Public Law No. 89-110 (codified as amended at 42 U.S.C. Sections 1971, 1973 to 1973bb-1).

⁶ National Conference of State Legislatures, *Redistricting Law 2010* (2009): pp. 54-55.

⁷ State Issue 2 on the 2012 General Election ballot read as follows:

State Issue 2

To create a state-funded commission to draw legislative and congressional districts
Proposed Constitutional Amendment

Proposed by Initiative Petition To add and repeal language in Sections 1, 3, 4, 6, 7, 9 and 13 of Article XI, repeal Sections 8 and 14 of Article XI, and add a new Section 16 to Article XI of the Constitution of the State of Ohio

A majority yes vote is necessary for the amendment to pass.

The proposed amendment would:

1. Remove the authority of elected representatives and grant new authority to appointed officials to establish congressional and state legislative district lines.

2. Create a state funded commission of appointed officials from a limited pool of applicants to replace the aforementioned. The Commission will consist of 12 members (4 affiliated with the largest political party, 4 affiliated with the second largest political party, and 4 not affiliated with either of the two largest political parties) who will be chosen as follows:

A. On or before January 1 of the year that the decennial census is conducted, the Chief Justice of the Supreme Court of Ohio shall select by lot a panel consisting of eight judges of the courts of appeals of Ohio, no more than four of whom may be members of the same political party. This panel of judges shall be responsible for selecting potential members of the Commission. On or before April 1 of the year that the decennial census is conducted, this panel of judges shall appoint an independent auditor who shall assist the judges in determining the eligibility of potential members of the Commission.

B. Eligible persons may submit applications for membership on the Commission to the Secretary of State by May 1 of the year that the decennial census is conducted. The Secretary of State shall make available an appropriate application form designed to help determine the eligibility and qualifications of applicants and shall publicize the application process. The Secretary of State shall provide the panel of judges with the applications and any other records necessary to determine eligibility of the applicants.

C. On or before August 1 of the year that the decennial census is conducted, the panel of eight judges described in subparagraph A shall select from the applicants forty-two individuals to serve as potential members of the Commission. The judges, after adopting a selection procedure, shall select applicants who have the relevant skills and abilities, including a capacity for impartiality, and who reflect the diversity of Ohio. These shall include the fourteen most qualified applicants affiliated with each of the two largest political parties, and the fourteen most qualified applicants who have been unaffiliated with either of these political parties during the prior five years. The selection of potential members shall require the affirmative vote of at least five of the eight judges. The two largest political parties shall be determined based on the votes received by the candidates for Governor in the most recent gubernatorial election.

D. On or before August 15 of the year that the decennial census is conducted, the speaker of the Ohio House of Representatives and the highest ranking member of the House not of the same political party as the speaker may each respectively eliminate up to three of the fourteen potential members affiliated with the largest political party, up to three of the fourteen potential members affiliated with the second largest political party, and up to three of the fourteen potential members not affiliated with either of these parties. This shall result in a final pool of not less than twenty-four potential members of the Commission.

E. From the final pool of potential members, the panel of eight judges, or their designee, shall choose by lot, and in public, three individuals affiliated with each of the two largest political parties and three individuals not affiliated with either of these parties to serve as members of the Commission. On or before October 1 of the year that the decennial census is conducted, these nine members shall meet to select from the final pool of potential members three additional members, which shall include one member affiliated with the largest political party, one member affiliated with the second largest political party, and one member not affiliated with either of these parties. In selecting the final three members, the members of the Commission shall seek a total commission membership that reflects the diversity of Ohio and that has the relevant skills and abilities, including a capacity for impartiality, which will allow the Commission to fulfill its responsibilities. The nine members selected by lot and the three additional members selected by the original nine members shall comprise the full Commission.

F. No member of the Commission shall be subject to removal by the general assembly or any member of the executive branch.

3. Require new legislative and congressional districts be immediately established by the Commission to replace the most recent districts adopted by elected representatives, which districts shall not be challenged except by court order until the next federal decennial census and apportionment. Affirmative votes of 7 of 12 Commission members are needed to select a plan. In the event the Commission is not able to determine a plan by October 1, the Ohio Supreme Court would need to adopt a plan from all the plans submitted to the Commission.

4. Repeals current constitutional requirements for drawing legislative districts that avoid splits to counties, townships, municipalities and city wards where possible, and when not possible, limiting such divisions to only one division per governmental unit, and also repeals requirements to form as many whole legislative districts solely within a county as possible. The foregoing would be replaced and require the Commission to adopt a plan that complies with all applicable federal and state constitutional provisions, federal statutory provisions, and the contiguity requirement and that most closely meets the factors of community preservation, competitiveness, representational fairness, and compactness. The Commission would also be required not to draw or adopt a plan with an intent to favor or disfavor a political party, incumbent, or potential candidate.

5. Mandate the General Assembly to appropriate all funds necessary to adequately fund the activities of the Commission including, but not be limited to, compensating:

- A. Staff
- B. Consultants
- C. Legal counsel
- D. Commission members

If approved, the amendment will be effective thirty days after the election.

⁸ “Argument and Explanation in Favor of State Issue 2,” available at: <http://www.sos.state.oh.us/sos/upload/ballotboard/2012/2-for.pdf> (last visited Nov. 6, 2015).

⁹ “Vote NO on Issue 2,” available at: <http://www.sos.state.oh.us/sos/upload/ballotboard/2012/2-against.pdf> (last visited Nov. 6, 2015).

¹⁰ *Id.*

¹¹ Source: Secretary of State’s website; State Issue 2: November 6, 2012 (Official Results); <http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2012Results.aspx> (last visited Nov. 6, 2015).

¹² http://archives.legislature.state.oh.us/res.cfm?ID=130_S.J.R._1 (last visited Nov. 6, 2015); http://archives.legislature.state.oh.us/res.cfm?ID=130_H.J.R._11 (last visited Nov. 6, 2015).

¹³ See <http://www.gongwer-oh.com/public/130/redistproposal.pdf> (last visited Nov. 6, 2015), as referenced by Representative Vernon Sykes at the August 8, 2013 meeting of the Legislative Branch and Executive Branch Committee of the Ohio Constitutional Modernization Commission, http://ocmc.ohio.gov/ocmc/committees/leg_exec_branch (last visited Nov. 6, 2015).

¹⁴ Source: Secretary of State’s website; State Issue 1: November 3, 2015 (Unofficial Canvass).

¹⁵ Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Vol. 11, Final Report, Index to Proceedings and Research, Article XI, 74, 78 (June 30, 1977), <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (last visited Nov. 6, 2015).

¹⁶ *Id.* at 81.

¹⁷ *Id.* at 80.

¹⁸ *Id.* at 81.

¹⁹ Legislative Service Commission, Memorandum, “Comparison of Congressional Redistricting Reform Proposals,” R-131-2022 (Oct. 7, 2015).

²⁰ A video of the meeting, including the panel discussion, is available online at: <http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=139489> (last visited Nov. 6, 2015).