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TO:	Julianne Pastula, General Counsel, Michigan Independent Citizens Redistricting Commission
FROM:	Fink Bressack
DATE:	November 3, 2021
SUBJECT:	**Memorandum Regarding Renumbering of Electoral Districts**

The Michigan Independent Citizens Redistricting Commission (MICRC) has requested that Fink Bressack provide guidance as to (1) whether the renumbering of districts affects Michigan's constitutionally-established legislative term limits; and (2) whether renumbering of districts could unconstitutionally "favor or disfavor an incumbent elected official or a candidate." While there is no explicit constitutional guidance regarding the MICRC's authority to renumber districts, it appears that the Commission has the ability to renumber districts as it sees fit as part of its authority to redistrict. Renumbering districts should not violate any constitutional, statutory or common law restrictions regarding term limits or favoring or disfavoring of incumbents.

Governing Law

The MICRC's authority to redistrict flows from the Michigan Constitution, as amended by Proposal 2, which was approved by Michigan voters in 2018. Specifically, Const 1963, art 4, § 6 establishes the Commission and describes its authority to propose and adopt redistricting plans. This section is silent as to the Commission's authority to renumber districts. However, the Commission is expressly authorized to "adopt a redistricting plan" for Michigan's congressional and state legislative districts. Const 1963, art 4, § 6(1). The Commission's express authority to adopt redistricting plans appears to include the authority to renumber districts by implication.

The Michigan Constitution explicitly establishes certain criteria that the Commission must follow in proposing and adopting redistricting plans. Const 1963, art 4, § 6(13)(a)-(g). All of these criteria involve considerations for the drawing of district boundaries and do not include any guidance as to the Commission's authority to renumber districts. Const 1963, art 4, § 6(13)(e) provides that "[d]istricts shall not favor or disfavor an incumbent elected official or candidate." Const 1963, art 4, § 6(13)(a) provides that all proposed maps must comply with the Voting Rights Act (VRA) and other federal law. Neither the VRA, nor any other federal law, includes a requirement that states maintain continuity in the manner in which electoral districts are numbered or otherwise identified.

The authority to create districts for the election of members of the U.S. House of Representatives is committed to the Michigan Legislature by the Federal Constitution. US Const, art 1, § 4. Prior to the 2018 amendment of the Michigan Constitution, the Michigan Legislature enacted Public Act 221 of 1999, which included guidelines for the drawing of federal congressional districts. This

Act contained a "secondary guideline" that "[e]ach congressional district shall be numbered in a regular series, beginning with congressional district 1 in the northwest corner of the state and ending with the highest numbered district in the southeast corner of the state." MCL 3.63(c)(ix). [1] It does not appear that there are any statutory guidelines requiring that state legislative districts be numbered in a similar manner.

Term limits for members of the Michigan Legislature are imposed by Const 1963, art 4, § 54, which provides "[n]o person shall be elected to the office of state representative more than three times. No person shall be elected to the office of state senate more than two times."

Historical Practice

The history of redistricting efforts in Michigan suggests that the ability to renumber districts inheres in the authority to redraw districts. Prior to the U.S. Supreme Court's establishment of the "one person, one vote" principle in *Wesberry v Sanders*, 376 US 1; 84 S Ct 526 (1964) and *Reynolds v Sims*, 377 US 533; 84 S Ct 1362 (1964), Michigan followed the "federal" model of determining representation, with state senate districts determined by jurisdictions (counties) and state house districts determined by a combination of land and population. Const 1908, art 5, § 2-3. In 1964, the state senate districts established by the Michigan Constitution of 1908 were mostly renumbered when the Michigan Supreme Court adopted the Austin-Kleiner redistricting plan in order to bring Michigan into compliance with *Wesberry* and *Reynolds* in *In re Apportionment of Mich State Legislature*, 373 Mich 250; 128 NW2d 722 (1964). For example, under the 1908 Constitution, state senate District 22 was coextensive with Saginaw County. Under the Austin-Kleiner plan, Saginaw County was split between the 34th and 35th state senate Districts, and District 22 was moved to the southwest corner of the state, covering Berrien, Cass, and St. Joseph counties.[2] Under the current state senate districting scheme, Berrien, Cass and St. Joseph counties are in state senate District 21, and the 22nd District covers Livingston County and the western portion of Washtenaw County.

Michigan's federal congressional districts have also been renumbered over time, although they have mostly followed the MCL 3.63(c)(ix) numbering scheme, with the lowest numbered district in the northwestern corner of the state and the highest in the southeastern corner.

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[1] This memo does not address whether the Commission is bound in any way by MCL 3.63. See *LeRoux v Secretary of State*, 465 Mich 594, 615-620; 640 NW2d 849 (2002) (holding that legislature was not bound to follow redistricting guidelines enacted by prior legislature); *Parise v Detroit Entertainment*, 295 Mich App 25, 28; 811 NW2d 98 (2011) ("a more recently enacted law has precedence over the older statute").

[2] Compare Const 1908, art 4, § 2 with Austin-Kleiner Senate Plan map, available at https://digmichnews.cmich.edu/?a=d&d=IsabellaSA19640624-01&e=-------en-10--1--txt-txIN----------

Analysis and Recommendation

A. Term Limits.

The renumbering of Michigan state legislative districts does not create issues with term limits. Const 1963, art 4, § 54 bars persons serving more than three terms in the Michigan House of Representatives, or more than two terms in the Michigan Senate. The section makes no reference to which district a candidate is elected to represent.

B. Prohibition on Favoring or Disfavoring Incumbents or Candidates.

It also does not appear that renumbering districts would violate Const 1963, art 4, § 6(13)(e), which provides that "[d]istricts shall not favor or disfavor an incumbent elected official or a candidate." While no Michigan court has directly interpreted this provision, it would be inconsistent with the very nature of redistricting if this prohibition precluded any potentially adverse impact on an incumbent. On the other hand, it clearly prohibits actions undertaken for the purpose of favoring or disfavoring an incumbent or candidate. Such an interpretation is consistent with the Michigan Constitution's "purity of elections" clause, which the courts have interpreted as "requiring fairness and evenhandedness in the election laws." Const 1963 art 2, § 4(2); *McDonald v Grand Traverse County Election Com'n*, 255 Mich App 674, 693; 662 NW2d 804 (2003). Such an interpretation is also consistent with the purpose of redistricting itself, as the redrawing of district lines in accordance with constitutional requirements will inevitably have the side effect of disadvantaging or advantaging some incumbents.

Our review supports the conclusion that the Commission's authority to propose and adopt redistricting plans carries with it the authority to renumber districts. As noted above, the 2018 Constitutional amendment that authorized the creation of the Commission is silent as to its authority to renumber districts. However, the Constitution does authorize the Commission to "adopt a redistricting plan." Const 1963, art 4, § 6(1). The authority to redraw the boundaries of districts rationally carries with it the authority to change the way the districts are labeled, and the numbering of Michigan's electoral districts has been changed in previous redistricting efforts. While there has been significant litigation concerning redistricting in Michigan over the years, the issue of renumbering districts has not been addressed in any published case, suggesting that the power to renumber inheres in the power to redistrict. Notably, in 1992 a federal three-judge panel renumbered Michigan's congressional districts in a "more logical sequence." *Good v Austin*, 800 F Supp 557, 567 (ED and WD Mich 1992)(three-judge panel). The panel decided to do so after finding that "[t]he old numbering, which saw the 1st district adjoining the 13th, was the residue of several decades of court-ordered changes in the number and location of districts." *Id*. The *Good* court did not attempt to justify its renumbering of the districts by any authority, but did so pursuant to its "equitable power to adopt a congressional districting plan for the State of Michigan…that not only complied with the mandatory constitutional and statutory criteria but also properly balanced the relevant secondary criteria in a way that advanced the collective interests of the citizens of the State of Michigan." *Id*.

In other states, renumbering has been rejected for reasons that do not apply here.[3] For example, in 2012 the Florida Supreme Court was asked to review the renumbering of the Florida state senate districts. *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So 3d 597 (2012). In Florida, elections for state senate are staggered and the year in which a seat is up for election is determined by whether the district has an odd or even number. *Id*., at 658. The court determined that the renumbering of the state senate districts violated the state constitution, because the legislature had renumbered the districts in a way that gave advantage to certain incumbents by moving back the date of their next election and allowing them to exceed the state's term limits. *Id*., at 659. A similar issue would not be caused by the renumbering of districts in Michigan, because Michigan does not stagger its elections for the state legislature, and no statutory rights are tied to the number assigned to a district. Const 1963, art 4, § 2-3.

In conclusion, the absence of any restriction on renumbering districts, together with the fact that past redistricting plans have renumbered districts suggests that the power to redraw districts carries with it the power to renumber districts. Renumbering districts does not affect term Michigan's legislative term limits and does not violate the constitutional prohibition on favoring or disfavoring an incumbent elected official or a candidate.

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[3] See also, *State ex rel Steinke v Lautenbaugh*, 263 Neb 652; 642 NW2d 132 (2002) (holding that county election commissioner exceeded his authority when he renumbered school board election districts based on political advantage in staggered elections); compare *In re Lackawanna County Bd of Elections*, unpublished opinion of the Court of Common Pleas of Pennsylvania, Lackawanna County, issued January 13, 2005 (Docket No. 04 CV 4650), 2005 WL 4867630, at *9 (holding that consolidation and renumbering of districts under apportionment plan was lawful in absence of political considerations).