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Memorandum

From: J. Gerald Hebert, Executive Director
To: Interested parties
Date: June 29, 2016
Subject: Constitutionality of the ballot initiative proposed by Support Independent Maps in Illinois

The Campaign Legal Center has endorsed the Independent Map Amendment in Illinois because it is good policy and because it is a constitutional use of the state ballot initiative process.

The Campaign Legal Center

Founded in 2002, the Campaign Legal Center (CLC) is a nonpartisan, nonprofit organization, based in Washington, D.C. that defends and protects our democracy in the areas of campaign finance, redistricting, voting rights, political communication and government ethics. CLC works every day to attack laws and regulations that undermine the fundamental rights of all Americans to participate in the political process and to defend laws that protect these interests. Working in administrative, legislative and legal proceedings, CLC shapes our nation's laws and policies so that the right to have a voice in a free and democratic society remains the foundation of our political system.

The Independent Map Amendment in Illinois

The constitutionality of the ballot initiative ("IM Amendment") proposed by the group Support Independent Maps in Illinois has been challenged in the Circuit Court of Cook County (*Hooker v. ISBE*).[1] This short memo is intended to be read in conjunction with the more detailed briefing provided by both parties in that case.

This memo concludes that the IM Amendment is constitutional under Illinois State Law.

Regardless of what partisans on either side may say, letting the people of Illinois determine the structure and procedure for the election of their state representatives is exactly the type of ballot amendment that the framers of the 1970 Illinois State Constitution envisioned. The IM Amendment fits within the text of the Illinois Constitution's requirements for amendment by ballot petition.

Illinois Constitution

The delegates at the 1970 Constitutional Convention set out three ways that the Illinois Constitution could be amended: by the state legislature, a Constitutional Convention, or a citizens' ballot petition.[2] Rather than establishing a broad right to direct-democracy, the delegates favored a "limited constitutional initiative proposal for the Legislative Article"[3] because "members of the General Assembly have a greater vested interest in the legislative branch of government than any other branch or phase of governmental activity" and therefore are less likely to reform democracy in a way that conflicts with their vested interests.[4]

The Supreme Court's first interpretation of this provision came in 1976, in which the Court quoted from Delegate Perona at the Constitutional Convention of 1970. Delegate Perona noted in response to

[1] Hooker v. Illinois State Board of Elections, No. 16 CH 6539 (Cir. Ct. Ill. June 3, 2016).
[2] ILL. CONST. Art. XIV.
[3] Coalition for Political Honesty v. State Bd. of Elections, 65 Ill.2d 453, 467 (1976) ("Coalition I").
[4] Legislative Committee Report on ILL. CONST. Art. XIV, *Record of Proceedings, Sixth Illinois Constitutional Convention Proceedings of the Constitutional Convention*, at 1399-1400 (1970).

questioning about the types of change that the initiative process would allow:[5]

- "the report indicates that we intend to limit this to…the type of sections present in the legislative article;"
- "The attempt has been made here to prevent it being applied to ordinary legislation or to changes which do not attack or do not concern the actual structure or makeup of the legislature itself;"
- "This provision has been structured to apply only to the legislative article and to be limited to the area of government which it is most likely will not be changed in the constitution by amendment. The legislature, being composed of human beings, will be reluctant to change the provisions of the constitution that govern its structure and makeup, the number of its members, and those sort of provisions."

Taking redistricting out of the hands of the legislators is precisely the kind of amendment that is limited to the legislative article of the Constitution; that concerns the structure and makeup of the legislature; and that the legislators are unlikely to change because of their vested interest in keeping the district lines drawn for their own benefit.

Illinois Caselaw

There is no Supreme Court case directly on the issue of whether a change to the procedure for redistricting is considered a structural and procedural subject. Judge Mikva's decision at the Circuit Court level in 2014 is entirely on point as it dealt with, *inter alia*, a constitutional amendment to implement an independent redistricting commission.[6] Under Judge Mikva's reasoning, an amendment related to redistricting is "fair game" for ballot proposals to amend the Constitution.[7]

There are only four Supreme Court cases that deal with the question of what subjects may be included in a statewide ballot initiative, and those cases provide ample support for Judge Mikva's decision in 2014. In *Coalition I*, the Court focused on the Convention proceedings, and explained that an amendment must include both structural *and* procedural changes to be valid.[8] In *Coalition II*, the Court found that Article XIV "was drafted and adopted as a check on the legislature's self-interest,"[9] and thereby signaled that proposals that will not be adopted by the legislature due to their preservation of self-interest are amendments that the Constitution drafters envisioned being enacted through ballot initiative. In *Chicago Bar I* the Court found that an initiative to increase the legislative majority requirement for tax bills "contains substantive matters found outside of Article IV,"[10] suggesting that amendments with a substantive aim (even if they also have a structural and procedural one) may not be made through a ballot initiative. Finally in *Chicago Bar II*, the Court found that term limits cannot be imposed through ballot amendment because they do not involve "the structure of the legislature as an *institution,*"[11] suggesting that amendments that relate to the qualifictions of individual legislators cannot be made through a ballot initiative.

If the Constitution does not allow a change to be made to the structure and procedure of electing its members (that is, the body used to conduct redistricting, and the rules on which it relies) then it is hard to see that there could ever be a future ballot initiative that would remove the blanket of power in which incumbents have wrapped themselves. Even an amendment like the successful "cutback" amendment of 1980 could, under future jurisprudence, fall short of being both structural and procedural, in that it may be determined to relate only to the structure of the Illinois legislature, not also the procedure by which it governs.

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[5] Coalition I, 65 Ill.2d 470 (1976).
[6] Clark, No. 14 CH 07356 (Cir. Ct. Ill. June 27, 2014).
[7] Clark, No. 14 CH 07356 (Cir. Ct. Ill. June 27, 2014), slip op. at 7.
[8] Coalition I, 65 Ill.2d 466 (1976).
[9] Coalition for Political Honesty v. State Bd. of Elections, 83 Ill.2d 236, 247 (1980).
[10] Chicago Bar Ass'n v. State Bd. of Elections, 137 Ill.2d 394, 406 (Ill. 1990).
[11] Chicago Bar Ass'n v. State Bd. of Elections, 161 Ill.2d 502, 509 (Ill. 1994).

Hooker v. ISBE

The IM Amendment proposes to change the Illinois Constitution in the manner provided for in Article XIV, section 3 of the Illinois Constitution. Article XIV, § 3 of the Constitution requires that amendments proposed by ballot petition be "limited to structural and procedural subjects contained in Article IV." Article IV of the Constitution includes Section 3, "Legislative Redistricting," which sets out the current procedure for the redistricting process. The IM Amendment proposes to alter section 3.

As Judge Mikva noted in 2014, "redistricting appears to be fair game for amendment by Article XIV."[12] The plaintiffs in *Hooker* have alleged essentially the same claims as the plaintiffs in *Clark*, which were ruled by Judge Mikva to be inapplicable to a ballot amendment aiming to establish a redistricting commission Illinois.

Further, there are two key differences between the 2014 case and the IM Amendment. First, the signatures for the IM Amendment have been approved (reflecting the will of well over 300,000 Illinois citizens who want redistricting to be taken out of the hands of state legislators), and therefore it will appear on the ballot in November, 2016 (unless any opposition filing, such as the *Hooker* claim, is successful). Second, the language of the IM Amendment does not include the single problematic clause identified by Judge Mikva in the *Clark* decision.[13]

Thus, given the findings of Judge Mikva in 2014, the fact that the *Hooker* plaintiffs have raised the same arguments that were unsuccessful in the *Clark* case, and the changes the IM Amendment drafters made to the amendment in light of Judge Mikva's ruling, the IM Amendment has a strong chance of remaining on the November 2016 ballot.

Conclusion

The IM Amendment is exactly the type of amendment that the drafters of the 1970 Constitution would have supported being put to the citizens of Illinois at a general election: it relates only to Art. IV of the Constitution (the state legislature), and it will allow the citizens of Illinois to determine the political structures and procedures that govern their democracy, without the overpowering influence of self-interested incumbents.

[12] Clark v. Illinois State Board of Elections, No. 14 CH 07356 (Cir. Ct. Ill. June 27, 2014), slip op. at 7.
[13] Judge Mikva found that a ballot initiative could not impose restrictions on who could run for office in the future, and therefore the conflict of interest provisions in the 2014 amendment could not include that anyone who is on the Commission cannot run for office in the following ten years. This provision is not included in the IM Amendement.