

Attorney/Client Communication
Attorney Work Product

TO:	Michigan Independent Citizens Redistricting Commission
FROM:	Fink Bressack
DATE:	June 8, 2022
SUBJECT:	Memorandum Regarding Commission Dormancy

The Michigan Independent Citizens Redistricting Commission (“MICRC” or “the Commission”) has requested that Fink Bressack provide guidance regarding the language in Const 1963, art 4, § 6(18) related to the expiration of the terms of the current Commissioners. The provision states “[t]he terms of the commissioners shall expire once the commission has completed its obligations for a census cycle but not before any judicial review of the redistricting plan is complete.” In short, this language—read together with other provisions in § 6—is quite clear regarding expiration of the current Commissioner’s terms. Unfortunately, the Constitutional Amendment does not explicitly address the operations of the Commission after the expiration of the terms of the current Commissioners. It is, of course, difficult to predict how a court may interpret the relevant provisions. Nevertheless, in this memorandum we seek to provide guidance to the Commission regarding its dormancy upon the conclusion of any judicial review of the redistricting plan.

I. Expiration of the Terms of the Commissioners

The Constitutional language regarding the expiration of the terms of the current Commissioners is clear: “[t]he terms of the commissioners shall expire once the commission has completed its obligations for a census cycle but not before any judicial review of the redistricting plan is complete.” Const 1963, art 4, § 6(18).

The Michigan Supreme Court “in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their respective duties...” Const. 1963, art 4, § 6(19). Because the language at issue relates to the duties of the Commission, the Michigan Supreme Court is the court most likely to ultimately adjudicate any legal challenges regarding interpretation of the Amendment. The Michigan Supreme Court interprets Constitutional text in “the sense most obvious to the common understanding; the one which reasonable minds, the great mass of people themselves, would give it.” *Soap & Detergent Ass’n v Natural Resources Comm*, 415 Mich 728, 745; 330 NW2d 346 (1982). (citations and quotation marks omitted). The Supreme Court frequently looks to the dictionary definition of a word to determine the common understanding of a word’s meaning. In a recent decision, the Michigan Supreme Court stated that “[e]xpire’ means ‘to come to an end.’” *People v Vanderpool*, 505 Mich 391, 399; 952 NW2d 414, 418 (2020) (citing *Merriam-Webster’s Collegiate Dictionary* (11th ed.)).

With this clear authority that “expire” means “to come to an end,” the next question is: what comes to an end? Based on the plain text of § 6(18), the *Commission* does not expire, but rather the *terms*

of the Commissioners “come to an end” when the Commission has completed its obligations for a census cycle and any judicial review of the adopted maps concludes.

The Commission’s “obligations for a census cycle” are primarily set forth in § 6(7)-(17). After the Commission has adopted a redistricting plan for the state senate districts, the state house of representative districts, and the congressional districts, and after the Commission issues its report and any Commissioners’ dissenting reports, the Commission’s obligations for the census cycle have been completed.

“[J]udicial review of the redistricting plan is complete” when any pending legal challenges to the maps have been fully adjudicated, including any appeals. Completion of judicial review triggers the expiration of the current Commissioners’ terms pursuant to § 6(18).

Alternatively, an argument could be made that “any judicial review” includes lawsuits not yet filed, so the terms of the Commissioners do not expire until all lawsuits which have been or could be filed challenging the plan are complete, regardless of when any particular lawsuit is filed. Thus, it could be argued that a lawsuit filed in, for example, 2026 could be deemed “judicial review,” under § 6(18) even if all other legal challenges (such as *Agee* and *Banerian*) have already concluded. § 6(18) contains no explicit temporal restriction; instead, it extends terms until “any judicial review” is “complete.” Although judicial review might *appear* to be complete after any currently pending legal challenges conclude, an argument could be made that if new litigation commences in 2026, for example, “any judicial review” is not actually complete until that new suit also is complete.

Further, § 6(18) references “the redistricting plan.” This, of course, refers to the plans adopted by a majority of the Commissioners whose terms § 6(18) addresses. Read in context, then, the phrase “judicial review” attaches to “the redistricting plan.” Again, a lawsuit commenced in 2026 challenging “the redistricting plan” could conceivably fit within that text. The language could be read to track this “census cycle,” as the text suggests.

However, we believe that when interpreting § 6(18), a court is most likely to conclude that the “common understanding” of the language is that the terms of the Commissioners expire when actually-filed lawsuits seeking judicial review of the redistricting plan have concluded. Any future legal challenges of the maps (and any court-ordered redrawing) prior to the seating of the next Commission could not be handled by the current Commissioners, as their terms will have expired. Had the drafters of the Amendment intended to extend the terms of the Commissioners until a new Commission was seated, they could have stated so explicitly. Indeed, the California Citizens Redistricting Commission Amendment, which has many similarities to the MICRC Amendment, states “[t]he term of office of each member of the commission expires upon the appointment of the first member of the succeeding commission.” Cal Const art. XXI, § 2. Similarly, the Arizona Independent Redistricting Commission Amendment contains explicit temporal guidance regarding the expiration of the terms of commissioners: “[e]ach commissioner’s duties established by this section expire upon the appointment of the first member of the next redistricting commission.” Ariz Const art. IV, Pt. 2 § 1(23). The Arizona Amendment also anticipates and explicitly addresses the possibility of mid-cycle legal challenges: “[t]he independent redistricting commission shall not meet or incur expenses after the redistricting plan is completed, except if litigation or any

government approval of the plan is pending, or to revise districts if required by court decisions or if the number of congressional or legislative districts is changed.” *Id.* The MICRC Amendment does not have the same or similar language. Rather, it has the more limiting language, which compels our conclusion that the terms of the MICRC Commissioners expire when the pending legal challenges conclude.

II. Operations of the Commission After Expiration of Commissioner Terms

While the terms of the current *Commissioners* expire as described above, the *Commission* itself does not expire. Under § 6, the Commission—and only the Commission—has the legal authority to adopt redistricting plans for this state. § 6(19) states that if the Supreme Court determines that a plan “fails to comply with the requirements” of the amendment, the Court “shall remand a plan to the commission for further action.” And, “[i]n no event shall any body, except the [Commission] acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state.” § 6(22) states:

for purposes of interpreting this constitutional amendment the people declare that the powers granted to the commission are legislative functions not subject to the control or approval of the legislature, and are exclusively reserved to the commission. The commission, and all of its responsibilities, operations, functions, contractors, consultants and employees are not subject to change, transfer, reorganization, or reassignment, and shall not be altered or abrogated in any manner whatsoever, by the legislature. No other body shall be established by law to perform functions that are the same or similar to those granted to the commission in this section.

§ 6(6) states “[t]he commission shall have legal standing...to defend any action regarding an adopted plan.” The Constitution does not confer standing to defend any action regarding an adopted plan upon any other body, suggesting that only the Commission has standing to defend an adopted plan.

a. The Commission Has an Ongoing Obligation to Defend Any Legal Action Filed Challenging the Adopted Plans

Pursuant to §§ 6(6), 6(19), and 6(22), the legal defense of any challenges to the adopted plans and the promulgating and adopting of any redistricting plan, is the responsibility of the Commission.

1. The Secretary of State Could Reconvene the Commission to Defend Future Legal Challenges by Drawing New Commissioners

In the event of a legal challenge to the adopted plans after the expiration of the current Commissioners’ terms pursuant to § 6(18), the Secretary of State may need to reconvene the

Commission.¹ The tension between § 6(6) and § 6(18) is one of process and pragmatism—not law. § 6(6) is clear that the Commission—not the current or prior Commissioners—is required to defend any action challenging an adopted map. § 6(18) is also clear that the Commissioners’ terms expire “once the commission has completed its obligations for a census cycle but not before any judicial review of the redistricting plan is complete.” If the Commission must be reconvened after the current Commissioners’ terms have expired, we must look to the Constitutional language beyond these two sections to understand how to proceed. § 6(3) provides a mechanism for reconvening the Commission with new Commissioners. The provision states:

(3) Except as provided below, commissioners shall hold office for the term set forth in part (18) of this section. If a commissioner’s seat becomes vacant for any reason, the secretary of state shall fill the vacancy by randomly drawing a name from the remaining qualifying applicants in the selection pool from which the original commissioner was selected. A commissioner’s office shall become vacant upon the occurrence of any of the following:

- (a) Death or mental incapacity of the commissioner;
- (b) The secretary of state's receipt of the commissioner's written resignation;
- (c) The commissioner's disqualification for election or appointment or employment pursuant to article XI, section 8;
- (d) The commissioner ceases to be qualified to serve as a commissioner under part (1) of this section; or
- (e) After written notice and an opportunity for the commissioner to respond, a vote of 10 of the commissioners finding substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.

Accordingly, the Secretary of State would be authorized under § 6(3) to “fill the vacanc[ies] by randomly drawing a name from the remaining qualifying applicants in the selection pool from which the original commissioner was selected.” While the administration of this will take time, § 6(3) explicitly addresses how to handle vacancies and requires the Secretary of State to select new Commissioners after the terms of the original Commissioners have expired pursuant to § 6(18), if the Commission must be reconvened.

If a lawsuit is filed challenging a map after the Commissioners’ terms have expired pursuant to § 6(18), and a future Secretary of State were to refuse to fill the vacancies under § 6(3), any interested party could bring an action to compel the Secretary of State to carry out her duties as the nonvoting secretary of the Commission under § 6. This is supported by § 6(19), which gives the Michigan Supreme Court original jurisdiction over actions seeking to “direct the secretary of state or the commission to perform their respective duties[.]” Accordingly, any interested party would likely have standing to bring a claim against the Secretary of State in the Supreme Court seeking an order to compel the Secretary of State to carry out her duties under § 6(3).

¹ The Commission may have an argument in response to such a future legal challenge that the people of this state approved the language in § 6(18) because they wanted finality, thus any legal challenge after the terms of the current Commissioners expire is simply too late.

2. Alternatively, the Commission May Have the Authority to Direct the Secretary of State to Defend Future Legal Challenges Without Reconvening the Commission

The Amendment does not explicitly address whether the convening of the full Commission (with a full set of new Commissioners) would be required to defend against a legal challenge to an adopted plan. § 6(4) states that “[t]he secretary of state shall be secretary of the commission without vote[.]” Moreover, “in that capacity, [the secretary of state] shall furnish, under the direction of the commission, all technical services that the commission deems necessary.” This could be read to suggest that before the current Commissioners’ terms expire, the Commission could direct the Secretary of State to defend a future legal action on behalf of the Commission, without the need for reconvening the entire Commission.

3. The Commission Could Retain its Subject Matter Experts and Legal Counsel for Anticipated Future Legal Challenges

Should the Commission face a future legal challenge, it will need to have legal counsel and other subject matter experts available very quickly to help defend against the challenge, and to possibly assist with any court-ordered revision of the maps. As the Commission is aware, the typical public procurement process takes substantial time. Further, there is significant value to the Commission in the institutional knowledge of its current professionals. In order to prevent the Commission from being compelled to retain entirely new counsel and subject matter experts in the future, before the Commissioners’ terms expire pursuant to § 6(18), the Commission could pass a resolution providing for a refundable retention payment to the Commission’s current professionals.² The terms of those agreements should explicitly state that the agreements expire upon the convening of the next Commission. This would ensure that these professionals are available to immediately provide services to the Commission, if necessary. If, however, no future legal challenge arises, the retention payments would be refunded. The Commission has the authority to enter into this type of contractual agreement, and the State of Michigan would be required to indemnify the Commission for all of its liabilities pursuant to § 6(5) (“[t]he State of Michigan shall indemnify commissioners for costs incurred if the legislature does not appropriate sufficient funds to cover such costs.”)

b. The Commission—and Only the Commission—May Redraw, Promulgate and Adopt a Redistricting Plan

There is no ambiguity about the Commission’s role if an adopted map is struck down by a court mid-cycle, after the current Commissioners’ terms have expired pursuant to § 6(18). In such an event, the Commission would have to be reconvened for “further action” regarding the affected plan. § 6(19) provides in pertinent part that “[i]n no event shall any other body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state.” And § 6(22) provides in pertinent part that “[n]o

² Fink Bressack acknowledges that this suggestion could be perceived as self-serving. Nevertheless, we feel it is appropriate to include this option for consideration as one potential strategy to facilitate the defense of future lawsuits.

other body shall be established by law to perform functions that are the same or similar to those granted to the commission in this section.” Accordingly, there are no avenues for the adoption of a remedial plan, aside from the Commission acting in accordance with § 6. Because the current Commissioners’ terms will have expired, the Secretary of State would need to draw new Commissioners as discussed in Section II(a)(1) above.

c. Financial Considerations for the Commission

The question of compensation for the Commissioners is controlled by § 6(5), which states that “[e]ach commissioner shall receive compensation at least equal to 25 percent of the governor’s salary.” An argument could be made that this guarantees each Commissioner compensation equal to 25 percent of the governor’s salary prorated on an annual basis for the entire term served by that Commissioner, but that would dictate extraordinary compensation for each Commissioner during extended periods of relative inactivity after all the obligations of the Commissioners have been completed other than the defense of ongoing litigation. In the alternative, because the text guarantees “compensation” of a certain amount, and not a “salary” of that amount, the guarantee appears more likely to provide minimum total compensation at least equal to 25 percent of the governor’s salary for one year. The governor’s salary is \$159,300; therefore, each Commissioner is Constitutionally guaranteed compensation of at least \$39,825. Because the current Commissioners have already received more than the guaranteed amount of compensation, the Commission could choose to reduce Commissioners’ current compensation as much as it deems appropriate. Any newly-selected Commissioners, however, would be entitled to compensation of at least 25 percent of the governor’s salary at the time of their appointments.

The Constitution provides for funding if the Commission must be reconstituted to defend against mid-cycle litigation. § 6(6) provides in pertinent part that “[t]he legislature shall provide adequate funding to allow the commission to defend any action regarding an adopted plan.” If the Legislature refuses to appropriate such funding, the Commission may pursue legal action against the Legislature “regarding the adequacy of resources provided for the operation of the commission.” Const 1963, art 4, § 6(6).

III. Conclusion

We are providing guidance to the Commission regarding anticipated dormancy issues through a legal analysis of relevant Constitutional language. We do not opine as to appropriateness of certain dormancy-related provisions from a policy perspective. We understand that the practical reality of reconvening the Commission with new Commissioners raises significant concerns, particularly considering the hard work the current Commissioners have put into the redistricting process and the depth of knowledge that the current Commissioners have acquired. Obviously, an argument can be made that the drawing of new Commissioners creates an odd set of incentives. Would citizens selected years after they tendered their names for the selection pool agree to participate at this late stage? Would they agree to participate to defend plans when their likely intent in seeking to serve on the Commission was to draw plans, not to defend plans drawn by others? What would be their duties in defending a plan or plans about which they know virtually nothing? And would new commissioners have a perverse incentive to allow judicial challenges to succeed so that they would be authorized to redraw the Commission’s redistricting plan? This could leave the question

of who defends the plan to the mere happenstance of when the suit is filed: a suit filed in 2022 would be defended by existing commissioners, but, if the same suit were filed in 2026, it could be defended by new commissioners less committed to supporting the plan. Nevertheless, the Commission is not empowered to substitute its policy preferences for directives in the Constitution of the State of Michigan.