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January 7, 2008

Hon. Eliot Spitzer
Governor of the State of New York
The Capitol
Albany NY 12224

Dear Governor Spitzer:

I write on behalf of the Committee on Election Law of the Association of the Bar of the City of New York.[1]

In March our Committee issued a report, *A Proposed Constitutional Amendment to Emancipate Redistricting from Partisan Gerrymanders: Partisanship Channeled for Fair Line-Drawing*. You subsequently proposed a constitutional amendment, *Governor's Program Bill No. 26*, which is modeled in part on our proposal.[2] We are pleased to see that your approach to this important reform agrees with ours on two fundamental issues:

- Reform of the redistricting process requires a constitutional amendment, and cannot be accomplished by enactment of a statute.

- Partisan manipulation of redistricting can best be constrained through a *bi*-partisan, as distinct from *non*-partisan, process, forcing the partisan actors to moderate their self-serving designs in a sort of last-best-offer arbitration. We refer in particular to § 3 (a) and (b) of your proposed amendment.

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[1] The within letter of course reflects the views of the members *qua* Committee members, and does not reflect our views as practicing lawyers, members of the judiciary or as government employees. The letter was drafted by Redistricting Subcommittee members Ira Blankstein, Richard Emery, Peter Hein and Hugh Weinberg. After revision, it was adopted unanimously at our meeting on December 20, 2007.

[2] We refer below to your Program Bill No. 26 simply as the "*Bill*," and to our Committee's report as the "*Report*" (although that word is not in our title). All page/line references (pp:ll) are to the *Bill*. In references to our Committee's proposed amendment (*Report* Appendix A), the page numbers will be prefixed with the letter "A." The *Report* can be found at: http://www.nycbar.org/Publications/index.htm.

It is clear that several members of your staff have already devoted a good deal of effort and careful thought to this reform. We believe, however, that there are several difficulties with your proposed amendment as it now stands, and we hope that you and your staff will find our discussion of these points useful. In a postscript, we also call attention to what we believe are several drafting errors of the *Bill*.

You are certainly aware of the fact that if the redistricting process is to be reformed in time for the 2010-2012 redistricting round, a constitutional amendment must receive first passage by the Legislature prior to the 2008 general election. *See* NYS Constitution Art. XIX, § 1 (discussed in the *Report* at 36). If an amendment is first approved by the Legislature after the 2008 election, it could not receive second passage until after the 2010 general election, and could not become effective until January 1, 2012. That is approximately the date when new redistricting plans ought to be enacted, and far too late to begin setting up a new districting commission.

SUMMARY

The points of difference may be highlighted as relating to the redistricting process; the requirements for districts; and judicial review.

I. REDISTRICTING PROCESS: QUALIFICATIONS OF COMMISSION MEMBERS

1. **Barring persons who formerly had a conflict of interest**

2. **Barring relatives of judges**

3. **Barring persons with a partisan interest, but no personal conflict**

II. CRITERIA FOR DISTRICTS

1. **Minority voting rights**

   (a) Minority voting rights in relation to other criteria

   (b) Other problems with the minority voting rights provisions

2. **Preventing regional discrimination in the apportionment of legislative districts**

3. **Incumbency: whether protection of incumbents should be specifically addressed**

III. JUDICIAL REVIEW

1. **Standard for judicial review: "violate" or "clearly erroneous"**

I. THE REDISTRICTING PROCESS: QUALIFICATIONS OF COMMISSION MEMBERS

To prevent conflicts of interest and to preserve the separation of powers, the *Bill*, at 2:12-18, would bar several categories of persons from serving on the Commission – while they are members of that category, and for some time thereafter.

We believe it inappropriate to bar persons who had a conflict of interest in the recent past, but no longer do so, or to bar the relatives of judges. This provision of the *Bill* seems to have been inspired by a vague sentiment in favor of nonpartisanship. That is inconsistent with the *bi*-partisan process envisioned by both the *Bill* and the *Report*, in which the legislative leaders are expected to appoint partisan advocates. (*See* the discussion of the bi-partisan arbitration model in the *Report*, at 4-8.) A significant conflict would arise only if a member had a strong *personal*, not merely partisan, interest in the configuration of a particular district.

It is consistent with this principle to bar current members of the Legislature or Congress. They have a particular, personal interest in their own districts, and an incentive to sacrifice their party's interests to their own. But former legislators and members of Congress are no longer subject to such a conflict of interest. It may be appropriate to bar sitting judges from exercising a kind of legislative function, but former judges might be excellent choices, and there is nothing about a commissioner's having recently been a member of the judiciary, or being married or closely related to a sitting judge, that compromises the separation of powers.

We also believe that the *Bill* would extend the bar to service on the commission too broadly insofar as it includes relatives to the third degree of consanguinity or their spouses. For example, if "S" (a hypothetical potential member of the commission residing in Suffolk County) were the spouse of "H", who in turn was the nephew of the receptionist in the district office of an assembly member from Buffalo, "S" would be disqualified. Our concern is two-fold. First, as a practical matter, it may be unreasonable to expect potential commission members with such an attenuated "relationship" with a disqualified person to necessarily even be aware that they are thereby disqualified. This runs the risk of a retrospective challenge to the qualification of commission members (or, if an attenuated relationship was known but not clear-cut, the risk of a prospective challenge to a commission member's qualification). Second, there is a question about the fairness of applying a bar to relatives in the third degree of consanguinity and their spouses. In the context of the bi-partisan arbitration model, attenuated "relationships" should not preclude partisan nominees nor should they preclude an individual being chosen (by definition, as a result of a bi-partisan consensus) as one of the three members selected by the partisan appointees.

II. CRITERIA FOR DISTRICTS

1. Minority Voting Rights

(a) Minority Voting Rights in Relation to Other Criteria

The Bar Association's proposed amendment establishes three *sine qua non* requirements for districts, which are not ranked in relation to one another, but placed, as it were, "side by side":

1. A population equality standard (approximate for legislative districts, exact for congressional districts)
2. Contiguity
3. Protection of minority voting rights.

These are, respectively, § 5 (a), (b), (c), and (e) of the Bar Association's proposed amendment (*Report* at A3:22-36 and A3:45-A4:7). These criteria are distinguishable from others, in that there are federal constitutional rules establishing population equality standards and protecting minority voting rights, as well as a federal statute – the Voting Rights Act of 1965, as amended – further protecting minority voting rights. Although contiguity is not a federal mandate, it has never been suggested that it need be set aside to satisfy the federal mandates, and it is implicitly recognized as a crucial factor in evaluating reapportionment plans when they are challenged on racial grounds.

Further requirements – enumerated in our proposed § 5 (f) *(Report, at* A4:9-A5:2) – are then ranked in subordination to the *sine qua non* requirements. These address such concerns as compactness and preservation of existing subdivisions.

The Bar Association, while tentatively proposing a 2% total deviation rule for legislative districts, warns (*Report,* at C3):

> We cannot state too strongly, however, that our suggestion of a 2% total deviation rule is tentative, and must not be adopted until its possible effect on minority representation has been tested by the drawing of experimental plans of senate and assembly districts, and by the appropriate expert statistical analysis of such plans. The effect of a somewhat less restrictive total deviation standard (*e.g.*, 4% or 5%) should also be studied.

Since it appears that no one is going to undertake such studies or analyses during the coming year, we firmly oppose the adoption of a 2% total deviation rule at this time. We would feel more comfortable with a 5% total deviation rule,[3] although we would still prefer to have the matter carefully studied as we recommend in our *Report*.

Your proposal attempts to address this problem by adopting a 2% total deviation rule, but placing the population equality standard for legislative districts (proposed § 5 [e] [1], at 7:6-13) in the rank ordering of subsection (e), and explicitly subordinate to the minority voting rights provisions – rather than as parallel and equally important, as in the Bar Association proposal

A constitutional provision reflective of this approach, and any redistricting plans that may be adopted pursuant to it, would be highly vulnerable to attack under the Equal Protection doctrine established in *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995). Rather than establish a population equality standard, and then allow for departure from it *only* to provide for representation of minority groups (but not for such racially neutral purposes as keeping local government units intact or preserving communities of actual shared interest), New York should provide a population standard that is consistent with fair representation of minority groups, and suitable also in other respects, and state it as a *sine qua non. See* the discussion of the *Shaw/Miller* doctrine in the *Report,* at 27-29. As it now stands, we are concerned that the *Bill*'s approach is a red flag for reverse discrimination challenges.

(b) Other Problems with the Minority Voting Rights Provisions

The *Bill*, § 5(d), at 6:24-28, reads in its entirety:

> Senate, assembly, or congressional districts shall not be established that are intended to or result in a denial or abridgement of minority voting rights including the opportunity of minority voters to participate in the political process, and to elect the candidates of their choice.

[3] The plaintiffs in *Rodriguez v. Pataki* (the challenge to the 2002 State Senate redistricting) prepared a plan for evidentiary purposes (the 'Revised Plaintiffs' Plan'), showing what the Legislature could have done within a 4.87% total deviation, and a second plan that the court might impose in case of an impasse (the 'Plaintiffs' 62-District Impasse Plan') with a total deviation of less than 2%. (This was based on the principle that a court-ordered legislative plan – as distinct from one enacted through the political process – should have a total deviation of no more than 2%. *See* the *Report, at* n.48 for the basis of this principle.) It was not possible in the 2% plan to create as many compact Senate districts in which members of minority groups would constitute a majority of the voting-age population. There was one less such district than in the 4.87% plan. The 4.87% plan, on the other hand, had more such districts than were actually created in 2002. We know, however, of no similar analysis showing how a less-than-10% total deviation might affect minority representation in the Assembly.

The parallel provision in the Bar Association proposal, § 5 (e) *(Report, at* A3:45-A4:7), reads:

> Senate, assembly, or congressional districts shall not be established that result in a denial to members of racial and linguistic minority groups of an equal opportunity with other citizens to participate in the political process and to elect the representatives of their choice. The principles stated in subsection (f) of this section shall be used to create districts that will afford fair representation to the members of those racial and linguistic minority groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be able to elect representatives of their choice.

One difference between our proposal and the *Bill* – the insertion of "are intended to or" – may be unobjectionable, although as a practical matter it is the "results test" that will be really effective. The *Bill's* language is, however, a departure from 42 U.S.C. § 1973 (a) and (b), upon which our proposal is modeled. We believe it is far safer to mirror the statute.

Other aspects of the *Bill*'s proposed § 5 (b) are troubling:

1. "minority voters" The Bar Association proposal speaks of "members of racial and linguistic minority groups." It is intended to apply to the 'protected classes' of the Voting Rights Act, settled at the federal level in *UJO v. Carey*, 430 U.S. 144 (1977), concerning which groups qualify for protection.

2. "minority voting rights including ..." No other minority voting rights are to be preserved, besides "an equal opportunity with other citizens to participate in the political process and to elect the representatives of their choice." Thus "including" is not necessary.

3. "denial or abridgement of ... the opportunity of minority voters to particpate in the political process, and to elect candidates of their choice" The Bar Association proposal follows 42 U.S.C. § 1973 in providing for "an equal opportunity with other citizens." We think the language of the *Bill* may lead to confusion, and language that mirrors the VRA is safer.

As explained above, the most important departure from the Bar Association's proposal is the omission of the second sentence of our proposed § 5 (e). As explained in the *Report,* at 28-29, this provision is adapted from language in *UJO* that is quoted approvingly in *Shaw*. It is intended to prevent the New York State Constitution, and the redistricting plans adopted pursuant to it, from running afoul of the 'racial gerrymandering' doctrine established in *Shaw* and *Miller*. We believe that the omission of this sentence is a serious mistake, and that rather than strengthening the proposed amendment's protection of minority voting rights, this omission will actually make that protection vulnerable to attack.

2. Preventing Regional Discrimination in the Apportionment of Legislative Districts

We strongly urge you to delete the second sentence of the *Bill*'s proposed § 5 (e) (1), at 7:10-13:

> In no event shall the commission advantage any region of the state over any other by creating multiple districts therein exceeding, or lower than, the mean population by more than one percent.

We are quite unable to determine what arithmetical formula this is intended to describe. What is a "region"? Is it a permanent, recognized part of the state (a group of counties, perhaps), and if so, where

are the boundaries defined? Or could it be any cluster of two or more contiguous districts? And what mean population is referred to here? Is it the statewide mean, the mean of the "region," or the mean of the "multiple districts"? Finally, what population must be within one percent of that mean: each of the "multiple districts," the mean of the "multiple districts," or all but one of the districts in the region? Such incoherence would be inadvisable in any circumstances, but we find it particularly worrisome that the indeterminate meaning of the sentence makes it impossible to assess its possible effect on minority voting rights.[4]

The only reason to limit the total deviation of a Senate or Assembly redistricting plan to less than 10% is to address a specific evil: to prevent the population deviations from being manipulated to produce a large cumulative deviation, as in the current Senate plan (all the upstate districts underpopulated, and all the districts in the New York City and its northern suburbs overpopulated, so that cumulatively the upstate region gets an extra seven-tenths of a district at the expense of the downstate region). But such a manipulation would be sufficiently constrained by the 5% total deviation rule we suggest above.[5] (It would also, of course, be sufficiently constrained by a 2% total deviation, but we think that goes too far, for the reasons already stated.)

3. Preventing Incumbency Protection from Becoming the Paramount Value

The Bar Association has proposed (§ 5 [f] [6] of the proposed amendment, *Report,* at A4:40-A5:2) that to prevent the pairing of incumbents, and to keep each in the district with the largest number of his or her existing constituents, be made a constitutional requirement, but explicitly and emphatically subordinated to all other requirements. Your proposal rejects this idea, presumably in the belief that it would inappropriately protect incumbents or preserve existing gerrymanders.

As explained in the *Report*, at 35-36, the purpose of this proposed rule is not to protect incumbents (except to provide a basis for the "neutral members" to reject the arbitrary, malicious discomfiture of incumbents), but to place incumbency considerations firmly where they belong: explicitly below all other legitimate criteria. In practice, protection of incumbents has already been elevated above constitutionally mandated redistricting rules, and we fear that such practices are bound to continue – and even to receive the sanction of case law (*see Report* at n.43) – if the New York State Constitution remains silent on this subject.

III. STANDARD FOR JUDICIAL REVIEW OF REDISTRICTING PLANS

The Bar Association proposal would establish a new standard for judicial review – "clearly erroneous" – to replace the "good faith" standard erected by the Court of Appeals in *Schneider v. Rockefeller*, 31 N.Y.2d 420, 429 (N.Y. 1972) and *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 77 (N.Y. 1992).

Your proposal is significantly different. The *Bill* reads, at 6:3-6: "... or if the court of appeals finds the establishment or alteration of any such districts to violate any provisions of this article, or of the constitution or laws of the United States ... ." Instead of "to violate any provisions of," the Bar Association's proposed amendment reads: "to be clearly erroneous under ... ." *See* the *Report*, at A3:12-15.

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[4] Appendix D of the *Report* presents a formula for constraining regional discrimination while maintaining a 10% total deviation rule. We cannot recommend that approach, however, as it is not only without precedent in the constitution of any other state, but also without any support that we know of in case law or the academic literature. The sentence we urge you to delete from the *Bill* is similarly unsupported by precedent.

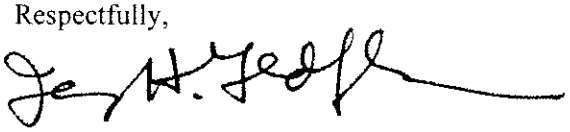
[5] Note that the *Rodriguez* plaintiffs cited the 1992 Senate plan (total deviation 4.29%) as being significantly fairer than the 2002 plan (total deviation 9.78%) in the regional apportionment of districts. They faulted the 2002 plan as a departure from the fair apportionments of 1972, 1982 and 1992.

The reasons for inserting the clear error standard in the Constitution are explained in the *Report*, at 22-23. The "good faith" standard makes it virtually impossible for objectors to prevail, even when they can demonstrate a clear and avoidable departure from constitutional requirements. "Clearly erroneous" specifies a high, yet definable, burden.

The language of the *Bill* – "in violation of" – is not really a standard at all. Existing Art. III, § 5, does not state a standard for judicial review, but presumably it contemplates judicial intervention in case of the violation of a constitutional requirement. Your proposal would apparently permit the "good faith" standard to continue, or to be erected again by the Court of Appeals, and is in that respect inadequate. This is a matter of great importance, and should be carefully considered.

The members of the Committee trust that these comments will be useful.

Respectfully,



Jerry H. Goldfeder
Chair, Committee on Election Law

Postscript – Technical Drafting Errors

1. Regarding persons barred from appointment to the Commission.

As the *Bill* now reads at 2:12-18, four categories of persons would be barred from serving on the commission – both while part of that category, and for some time thereafter:

1. members of congress or the Legislature, political party chairs, and employees of any of these
2. judicial officers and their employees
3. relatives of persons in categories (1) and (2), to the third degree of consanguinity (*i.e.*, parents, children, siblings, grandparents and grandchildren, aunts, uncles, nieces, and nephews)
4. spouses of persons in categories (1), (2), and (3).

The qualification, at 2:13-14, "in the two years prior to appointment," applies only to category (1), and not to categories (2), (3), or (4): members of the latter three groups would apparently be barred from such an appointment for life. This distinction can hardly have been intended. Presumably the sentence beginning at the end of 2:12 should read:

> No member of the districting commission shall be, or shall have been within the two years prior to appointment, (1) a member or employee . . . .

As we discuss above, we question whether some of these categories of persons should be barred from service at all, but that is a matter of substance, not a technical error.

2. Two technical points on language.

At 3:6, "including one from each appointing authority" should probably be changed to "including one appointed by each appointing authority." The *Bill*'s language is taken from an early draft of our own proposal. We now believe that our phrasing was awkward, and that the change suggested here would be clearer.

At 3:15, "subdivision" should read "subsection." "Section" might do just as well.

3. Failure to provide for designation of the commission chair.

The Bar Association proposes a single "neutral member" – to use the language of the *Bill* – to be appointed by agreement of the legislative appointees, with the Governor's assent, who is to chair the commission, and whose assent is to be required for the adoption of any redistricting plan. The *Bill* provides for three 'neutral members' (2:3-4), two of whom must approve any plan (3:25). Under your proposal, the success of the system would not depend so much on the judgment of a single person. This is reasonable, and addresses a possible problem that was raised during our Committee's deliberations. The arbitration model, discussed in the *Report,* at 4-8 and 18, would be preserved. We do not consider this difference between your proposal and our own to be objectionable.

The Bar Association proposal provides, however, that the "neutral member" shall be the chair of the commission. Your *Memorandum*, at 1, indicates that one of the neutral members is to be the chair, but the *Bill* itself is silent on the designation of a chair. This oversight should be corrected by specifying that the chair shall be selected from among the three "neutral members" chosen by the legislative appointees.

4. The role of the Legislature relating to the budget and duties of the Commission.

The *Bill* provides (§ 3 [c] at 4:26-5:5): "The state budget shall ... assign to the commission any additional duties ... and require other agencies to provide ... ." This is adapted from the Bar Association proposal that has the *Legislature* appropriating, assigning, and requiring (*Report*, at A2:22-29). If "state budget" is to be substituted for "Legislature" at the beginning of the sentence, in reference to appropriation, then the sentence should be divided into two, with a period replacing the comma at the end of 4:28. The state budget would provide any necessary appropriation. The Legislature would be mandated to assign and require – in the sense that this is to be done by statute, but not necessarily in a budget bill. Perhaps it would be clearer if the new second sentence began: "The Legislature shall, by law, assign ... ." The rest of 5:1-5 would then follow.