Testimony of Professor Ann M. Lousin before
The Illinois State Senate Committee on Redistricting
Chicago-Kent College of Law
December 8, 2009

Ladies and Gentlemen, Fellow Illinoisans:

Today is the fortieth anniversary of the convening of The Sixth Illinois Constitutional Convention, in Springfield, on December 8, 1969. One of the significant issues facing the convention was how to draft a redistricting plan for the Illinois General Assembly.

I imagine most of you are familiar with the history, especially in the 1960's. In Illinois, as in most states, it was almost impossible to implement a decent redistricting system for the legislature--or indeed for Congressional districts. Baker v. Carr, in 1962, followed by its progeny, made it imperative to find a way to redistrict.

Although Illinois had been able to redistrict the legislature in 1955, it was unable to draft a comprehensive plan after 1962. Actually, the Senate redistricted itself into 58 districts, but the House was totally unable to do so. As a result, a federal court ordered that the House elected in 1964 be elected "at-large." If you are as old as I am (that was the first year I could vote), you remember the infamous orange bed sheet ballot. If you don't remember it, you would not believe what happened.

One of the prime goals of the convention was to avoid another bed sheet ballot at all costs.

One of the effects of the 1964 forced redistricting was that many Senate districts were not coterminous with the House districts. At that time and until 1981, the House was elected on the basis of three Representatives from each House district, with each voter able to cast one, one and a half, two, or three votes for any given candidate---the "cumulative voting" system. Consequently, four people---one Senator and three Representatives--- "represented" a given district. After 1964, only the districts within Cook County were coterminous, i.e., the House district (with three members) and the Senate district were identical in limits.

When the convention met, the Downstate delegates were unanimous in wanting to end the confusion over non-coterminous districts. The county clerks were adamant that the new constitution should provide for coterminous districts.

Another goal of the convention was to make Senate and House districts coterminous.

The proposal that came out of the convention tried hard to achieve those two goals. Let me add that in 1970 there was very little guidance on redistricting from the federal courts. Case law was sparse; the literature was also sparse. The 1965 Voting Rights Act, which at that time applied essentially to African-Americans, was renewed in 1970. Nobody knew where the VRA was going. I had to research some of these issues that summer and remember that we were only guessing what would happen after the data from the May 1, 1970, census came in.

Today it is easy to criticize the creation of the tie-breaker, a person chosen by lot by the Secretary of State from among two nominees selected by the Illinois Supreme Court. But, given the case law of the time, I think it was impossible to devise a better way.

The experience with the 1970 constitution has shown how difficult redistricting is in a state that has a strong two-party tradition and factions within each party, not to mention racial and ethnic diversity unknown in Iowa and other "almost white" states.

In 1971 I advised the Speaker of the House during the first redistricting. Although the Supreme Court later declared the redistricting map invalid because of the way commissioners were appointed, the Court said the map itself met all the constitutional criteria. There was no need to resort to a tie-breaker because the eight commissioners (really four factions) were able to compromise on dividing the state into fifty-nine legislative districts.

In 1981, there was a new wrinkle: the Cutback Amendment of 1980, which eliminated one-third of the House seats and replaced multi-member districts elected by cumulative voting with a single member district system. The commission had to eliminate one-third of the incumbents' seats. Worse, it had to divide the state into fifty-nine districts and then divide each district again. It was like cutting up a pie into fifty-nine slices and then dividing each slice into two sub-slices.

In 1981 the tie-breaker was former Governor Samuel H. Shapiro. It is my understanding that before he cast the deciding vote for the "Democratic map," he made a small change in the map. This showed the power of the tie-breaker.

In 1991 the tie-breaker was Al Jourdan, Chair of the Illinois Republican Party. When Secretary of State George H. Ryan pulled the name out of Lincoln's hat, he said that there had to be a better way to redistrict the state and that he would appoint a commission to come up with a constitutional amendment.

From 1992 to 1999 the Redistricting Process Review Commission met. The Chair was Jeffrey R. Ladd, a Republican and former con con delegate. Many members were former legislators. I was a member. The President of the League of Women Voters was another member. We struggled with the plans in the forty-nine other states.

The plan we submitted as Secretary Ryan was leaving office and Secretary Jesse White was assuming office allowed each house to redistrict itself. The map would not mandate coterminous districts. The process would make extensive use of computers, a device not available---indeed, scarcely on the radar screen---during the Sixth Illinois Constitutional Convention. The plan was dead on arrival in January, 1999.

Since then several groups have called me about various plans. I give my best advice to each one. In my view, no officeholder outside the legislature should be involved in the process. The Governor should not be involved----therefore, if possible, we should not provide for a "bill" that would be sent to the Governor. The Attorney General should not be involved---therefore,

the Attorney General should not represent either the commission or its work product. The two factions within the commission should each choose their own counsel. The Illinois Supreme Court should not choose the two nominees for the tie-breaker position. The Secretary of State should not be pulling a name out of anybody's hat.

I think we must address certain factors:

Is it possible to avoid the legislature as a whole and proceed immediately to a commission or any other method of redistricting?

So far as I know, every state allows the legislature a first crack at redistricting itself. It has been suggested to me that the federal constitution, which guarantees every state a "republican form of government," requires that the corporate body of the state, the state legislature, be allowed an opportunity to redistrict itself. I know of no litigation on this issue and express no opinion on "republican form of government." But any attempt to amend the Illinois constitution by circumventing this power of the General Assembly must take this possibility into account.

Federal legislation and case law, which no state constitution can override, must be taken into account.

As mentioned earlier, the Voting Rights Act was only five years old in 1970. About four years ago, Congress extended its life for an unprecedented twenty-five years. Although the Northwest Austin Utility District case, decided by the U.S. Supreme Court last term, suggests that Section 5 of the VRA is on life support, Section 2 is still viable. Section 2---which generally mandates election systems that are fair to minorities---is applicable to Illinois. Some observers think it is possible that the Supreme Court will extend Section 5 to all states, including Illinois.

Beyond the VRA and other Congressional Acts, there is no way to predict what the case law will say over the next generation. Clearly, Congress and the federal courts have moved beyond insuring the rights of freed slaves and their descendants under the Fifteenth Amendment to facilitating voting by other racial and ethnic groups.

Now, as to the amendment proposed by the League of Women Voters of Illinois and others, I have several major concerns and several comments upon the draft presented to me recently.

First, the proposed amendment may violate Article XIV, Section 3 of the Illinois Constitution, which requires citizen-initiated amendments to contain both "structural and procedural subjects."

For better or worse, the Illinois Supreme Court has interpreted this provision narrowly. The first court case arose in 1976, Gertz v. State Board of Elections. I was a co-plaintiff along with five delegates at the convention. The chief organizer of the amendments was a political activist named Pat Quinn and his Coalition for Political Honesty. The Court established a high standard for the provision, one extremely difficult to meet.

In subsequent litigation, the only successful amendment was the Cutback Amendment of 1980, described above. The organizers of that petition drive were Pat Quinn's Coalition for Political Honesty and the League of Women Voters of Illinois. In all subsequent litigation, including the 1992 case, Lousin v. State Board of Elections, the court held the amendments invalid. I have reason to believe that at least some of those circulating the petitions did so, at least in part, because they wanted to obtain signatures of voters to use as targeted mailings in future political campaigns.

When people have asked me about using Article XIV, Section 3 to create a new redistricting process, I have strongly suggested that the amendment should contain a clearly "structural" change. One way would be to increase or decrease the number of legislative districts, say from 59 to 57 or 61. None of the proposals I have seen, including the one we have before us, does that.

There is evidence in the constitutional convention record that the delegates thought a simple "redistricting process" proposal would suffice---no "structure" change might be necessary. The Supreme Court noted that in discussing the Cutback Amendment case in 1980. So I am not certain if the proposal before us would pass muster in Article XIV, Section 3.

Clearly, however, there would be a court challenge to the proposal based on that section.

Second, it is folly to "de-nest" the Senate districts and the House districts.

As mentioned before, the county clerks and the delegates in 1970 wanted to end the confusion caused by non-coterminous districts. Also, the "de-nesting" provision in the 1999 proposal of the Redistricting Process Review Commission was cited as one reason that the proposal was DOA in 1999. Why revive non-coterminous districts?

Third, the proposal of a Special Master appointed by two members of the Illinois Supreme Court, especially under the procedures outlined in the amendment, would simply replace one type of tie-breaker with another.

In fact, it would be a more insidious tie-breaker system because two members of the Court---the Chief Justice and another justice chosen by unstated means---would choose the tie-breaker. That tie-breaker would be empowered any time that the commission failed to meet one of the deadlines set out in the amendment.

One can envision the tie-breaker, probably already chosen by the two justices, standing around waiting for the commission to miss a deadline; according to the language of the amendment, that tie-breaker, called a Special Master, would then immediately assume the power of drafting the map. Or am I missing something here?

Fourth, due to the Special Master provision, the effective control of redistricting would pass to the Illinois Supreme Court, the court which would then exercise original jurisdiction over any state court challenge to the map.

One could argue that the two justices who chose the Special Master would recuse themselves during any court challenge. They might do so, but they might argue that since the constitution itself required them to appoint the Special Master they had no duty to recuse. I believe there is no way to mandate recusal except by the constitutional text.

In any event, it takes four votes to issue an opinion in the Illinois Supreme Court. (Article VI, Section 3.) If two justices recuse themselves, four of the five remaining justices (currently three Democrats and two Republicans) would have to agree before there was a decision.

These are my major objections and questions. I also prepared the following questions and comments, which are in bullet form due to time constraints:

Art. IV, Sec. 2: This seems non-controversial.

Art. IV, Sec. 3: Let me try to go through this line by line.

(a)

"On the second Tuesday in"----why not "on or before," or "no later than?"

"may each"---should really be "shall," indicating a "mandatory directive." Let me jump ahead a bit here: sometimes the drafter uses "must." I do not believe that "must" appears anywhere else in the Illinois constitution; the words are "shall" (for a mandate or "mandatory directive") and "may" (for an empowering act that is not mandatory). Consider what would happen if the actors didn't meet the deadline---would the Illinois Supreme Court really intervene and appoint a Special Master immediately after the "second Tuesday" passed? (See below on the Special Master.)

"considering the diversity of the State"---an interesting idea, but there is no definition, no guidance. Racial? ethnic? gender? diversity of viewpoint? diversity of geography?

Temporary Redistricting Advisory Commission is a weak title. It seems to indicate that this is nothing but a fact-gathering group with no real power to enact a valid map? If so, who would want to be on it?

"any office of the State for ten years after completion"----does any other state do this? What is "any office of the State?"

I served as the paid Chairman and Member of the Illinois State Civil Service Commission from 1977 to 1983---would that be covered? I also served as an "expenses only," not even a *per diem*, member of the Redistricting Process Review Commission from 1992 to 1999, and a similar member of the Adult Advisory Board of the Department of Corrections from 1994 to 2003. Would those two positions be covered? And what about representing Illinois on interstate compacts and commissions, such as the National Conference of Commissioners on Uniform State Laws? Why ten years---because the next redistricting could occur then?

"an employee or contractor of the State"---very interesting. No state university professors (or their immediate family members, see below) could serve. Quaere: what if I present a talk to the Illinois Appellate Judges, as I did in September, 2006? I was paid expenses and a few hundred dollars. That was a contract with the State. Would I then be barred?

"immediate family members"---There is a definition but I don't really understand it. How close is "close?" If my sibling works at a public university, is that covered? my in-laws? my nieces and nephews and their spouses? And in this day and age, we'd better consider the live-in partners of any sex.

"majority of a quorum"---I am assuming that five is a quorum, right? Did I miss that somewhere? Then if three members talk with each other, must they give the public twenty-four hours' notice?

"the commission shall conduct..."---I don't think this is a complete sentence. And why space the hearings and add in "after receipt of the data?" When do we expect the data to arrive? Is it wise to draft a constitutional provision referring to something that may well change with federal census practices?

"within three days after"---I notice that sometimes the drafter says "days" and sometimes "business days" throughout this draft. What if the data arrive on a Friday before a three-day holiday weekend? and, as to "that data," call me an unregenerate Latinist, but I think "data" is a plural noun. Say "those data" or even better "the data."

(b)

"majority vote of its members"---Do you mean five out of the eight, a "majority of the members appointed? or a majority of those voting on the question? or a majority of a quorum?

Reference to "minorities:" are you incorporating the ever-changing federal definitions of "minorities?" Or do you think that the Illinois Supreme Court should have the independent power to define them?

"visible geographic features and municipal boundaries"----This is extremely vague. Do you mean just rivers? or hills or some other geography? What are "municipal boundaries?" Just cities? counties? other units of local government? See Article VII, Section 1 of the Illinois constitution.

"any political party or group?"---Just Democrats and Republicans, or are you including the Greens, the former Solidarity party, and the LaRouchies? What is a group? Is it a faction within a party? You have already referred to "minorities" above, so what are you referring to here?

"The commission shall establish definitions..." In other words, absolutely rewrite the definitions? Unless there is judicial review by the state courts, this clause will be the commission's "escape hatch" for ignoring the previous criteria.

"a Representative District..."---As I said before, this is the *quietus*, the *coup de grace*.

(c) and (d)

The list of dates by which public hearings should be held, etc, mystifies me. Presumably the hearings would begin in March, but could they be held if the census data report is still being litigated? (A census taker tells me they expect major litigation in 2010-2011.) Is it humanly possible to hold hearings and consult with experts during the time frame set forth? And remember that if the commission starts missing dates, the Special Master may jump in.

"by the third Monday in May"---Note the short time frame. And then to the House---remember what I said about "business day" and "must?" Why two-thirds, an almost impossible number to meet? As I recall, the only time a two-thirds requirement appears in the Illinois constitution is the removal of an officer by the Senate after impeachment by the House. Otherwise, the super-majority is three-fifths. This is a guarantee that the House won't be able to redistrict itself.

Same with the Senate.

I note that neither chamber can amend the map. It's a straight up-or-down vote. (And the constitutional term is "house", not "chamber".) But each house can debate the map, which takes time away from consideration of the state budget, which, as a practical matter, should be approved by May 31st.

I think it will be a dead certainty that neither house will be able to approve a plan by two-thirds. This will move us into June. Meanwhile, both houses may be trying to finish up a state budget.

(e)

This brings us to the first Monday in July. Sometimes that will be July 1st and sometimes July 4th, a national holiday. I gather that the commission has no discretion to amend any of the submitted plans, right? Even if new census data arrive?

(f)

This is the Supreme Court provision. I am absolutely adamant about keeping the Illinois Supreme Court out of the process until it assumes original jurisdiction during a map challenge. The Chief Justice and one other justice are the sole parties who appoint the Special Master. It is not clear, moreover, how the "minority party" justice would be chosen.

For example, at the moment, there are four Democrats on the Illinois Supreme Court, one of whom is the current Chief Justice. Who among the three Republicans would be the co-appointer with Chief Justice Fitzgerald? The draft amendment does not say, yet I can predict a terrific battle among the three Republican justices as to who would have the co-appointing power.

"software"---Is it wise to put a technical term into the constitution? The 1999 proposal used the word "algorithm," presenting a similar situation.

(g)

Why is the Attorney General involved? The litigation in the four redistricting procedures (1971, 1981, 1991, and 2001) has shown that the Attorney General is the wrong party to defend the commission or its work product. Attorneys General are partisan-elected state officers; most have gubernatorial aspirations. If the work product is a "Republican" map and the Attorney General is a Democrat, you can be sure that he/she will be accused of not defending the map vigorously. (One could reverse the party names, of course.)

I assume that the Schedule at the end is taken from the Cutback Amendment of 1980, right? That is not clear.

These are my remarks. I regret that I have not had more time to analyze the provisions and present them in a more formal fashion.

Respectfully submitted,

Ann M. Lousin, Professor of Law
The John Marshall Law School