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Illinois Senate Redistricting Committee

Hearing on
The Voting Rights Act and Other Legal Requirements in Redistricting

December 8, 2009

The Voting Rights Act and Redistricting

Founded under the direction of Thurgood Marshall, the NAACP Legal Defense and Educational Fund (LDF) is the nation's oldest civil rights law firm and has served as legal counsel for African Americans in a significant number of important federal voting rights and redistricting cases over the course of the last several decades. From the early white primary cases to the present day, the quest for the unfettered political participation of African Americans has been and remains an integral part of LDF's mission. I currently serve as the Co-Director of LDF's Political Participation Group. Prior to joining LDF, I served for several years in the Civil Rights Division of the U.S. Department of Justice. I am pleased that the Illinois Senate Redistricting Committee is holding this hearing which focuses on the role of the Voting Rights Act in the redistricting process.

We now stand on the threshold of the upcoming round of decennial redistricting. Over the course of the past decade, a number of critical cases have come before the Supreme Court that impact the redistricting choices of officials who will be responsible for redrawing legislative boundaries. Among the most important of these cases is *Bartlett v. Strickland* – a case which interprets Section 2 of the Voting Rights Act. Section 2, a key provision of that Act, is the focus of my testimony.

Although the right to vote is widely recognized as a constitutionally-protected right, it can be rendered meaningless by redistricting plans that do not fairly reflect minority voting strength. The Voting Rights Act, and Section 2 in particular, plays an important role in shielding and protecting the vulnerable status of minority voters.

Section 2 of the Voting Rights Act

The Voting Rights Act plays a central role in protecting minority voting rights during the redistricting process. Section 2 of the Act applies nationwide and requires that officials, to the extent possible, draw plans that do not dilute minority voting strength.[1] In 1982, Congress amended Section 2, incorporating a results standard into the Act. The amended and current version of Section 2 requires consideration of both discriminatory intent and effect, as it prohibits practices "imposed or applied ... in a manner which results in a denial or abridgment" of the right to vote. 96 Stat. 134, 42 U.S.C. § 1973(a) (2000 ed.). This results standard remained in place and untouched during Congress's recent 2006 reauthorization of certain expiring provisions of the Act.

The 1982 amendments also incorporated a test for determining whether a Section 2 violation has occurred. The Supreme Court first interpreted and applied this amended version of Section 2 in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In *Gingles*, the Court identified three "necessary preconditions" for to help determine whether a contested

[1] The goals and purpose underlying Section 2 of the Act, in large part, track the text of the Fifteenth Amendment. See U.S. Const., Amdt. 15 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude").

redistricting plan violates the vote dilution prohibition under Section 2:(1) The minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group must be "politically cohesive," and (3) the majority must vote "sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." Id., at 50-51. There, the Supreme Court set forth three preconditions a minority group must prove in order to establish a violation of Section 2 of the Voting Rights Act. If the minority group can establish those three preconditions, the inquiry then turns upon whether, under "the totality of the circumstances," the minority group had less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of their choice.[2] The Court's recent ruling in *Bartlett* (discussed below) clarifies the standard imposed by the Court pursuant to the first *Gingles* requirement.

Bartlett v. Strickland

Last term, in *Bartlett v. Strickland*, the Supreme Court addressed the question of whether minority voters must constitute at least 50 percent of a district in order to present a claim of vote dilution under Section 2 of the *Act*. Some districts, often called "coalition districts" or "influence districts" have provided minority voters opportunities to elect candidates of choice when they have been able to form a coalition with non-minorities. The lawsuit concerned the legality of a state legislative district in the North Carolina House of Representatives, in which African Americans comprised 39 percent of the voting age population. Along with cross-over support from a limited number of white voters, the District at issue in the case had historically provided opportunities for African Americans voters to elect candidates to the state legislature over the last two decades.

The Court ruled, in a 5-4 decision, that Section 2 of the *Voting Rights Act* does not apply when a minority group's population does not meet the 50 percent threshold in a single member district (a numerical majority).

As the Illinois Senate Committee prepares for redistricting, it is important to realize the limitations of *Bartlett*. First, *Bartlett* did not eradicate the importance or need to comply with Section 2 of the *Voting Rights Act*. Section 2 remains a key statutory provision that remains available as a valuable tool to prevent those practices and procedures deemed to have a discriminatory effect on minority voters. Second, the *Bartlett* decision should not be interpreted as an invitation to dismantle districts that have provided an opportunity to elect a representative of choice for minority groups (i.e. influence or coalition districts that combine minorities with reliable white voters who will vote for a minority representative of choice). Such efforts could be deemed motivated by discriminatory purpose and, in turn, become subject to future challenge.

Moreover, state legislatures throughout the country remain free to create affirmative opportunities for minorities to elect a candidate of choice even if a substantial minority population does not meet the 50 percent threshold. This is particularly true in

[2] See, e.g., Black Political Task Force v. Galvin, 300 F. Supp. 2d 291, 315 (D. Mass. 2004) (striking down the state's redistricting plan for reducing black voting strength).

those areas of the country that have experienced a significant increase in their minority population over recent time. In fact, *Bartlett* acknowledges that legislatures have the option of creating minority opportunity districts (when other redistricting factors are considered) even if a substantial minority population does not meet the 50 percent threshold. In that way, *Bartlett* does not bar the voluntary creation of a district where a minority group less than the 50 percent threshold can have the opportunity to elect a representative of choice.

Finally, it is important to note that the *Bartlett* Court recognizes that voting discrimination remains a part of the political reality in the United States, even after the election of Barack Obama. Specifically, the Court observes that "racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions." These observations should guide this Committee as it approaches the upcoming round of redistricting.

LULAC v. Perry

The Court's 2006 decision in *League of United Latin American Citizens v. Perry* ("*LULAC*"), clarified that partisan justifications are not acceptable explanations for minority vote dilution. In *LULAC* the Court found that the state legislature wrongfully dismantled a voting district that contained substantial numbers of politically cohesive Latino voters who were growing in size and better poised to exercise their increased voting strength. The Court emphasized the fact that it was only when Hispanics had organized into a cohesive group and gained in population enough to defeat the incumbent that the state chose to divide them. [3] The Court found that these actions almost rose to the level of an equal protection violation. In addition, the Court rejected the state's proposed substitute for the elimination of a viable minority district: a district that would have combined two disconnected Hispanic communities located miles apart. The Court determined that this trade-off district did not offset the resulting voting dilution in the district at issue because of both the distance between the two Hispanic communities that were joined and the differences in their "needs and interests."[4]

LULAC v. Perry clarifies that state legislatures cannot resort to certain redistricting criteria, such as incumbency protection, to justify dilution of minority voting strength. Jurisdictions must vigilantly comply with the Voting Rights Act during redistricting and officials will not be able to point to "traditional" districting principles as an excuse for their failure to do so.[5] Moreover, courts will look closely at efforts to divide and substitute viable minority opportunity districts – even those replaced by districts that, on their face, appear to preserve minority electoral opportunity.

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[3] LULAC, 548 U.S. at 438-39.
[4] LULAC, 548 U.S. at 435.
[5] League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 475 (2006) (Stevens, J., dissenting, joined by Breyer, J.) (citing King v. Illinois Bd. of Elections, 979 F. Supp. 619 (ND Ill. 1997), summarily aff'd, 522 U.S. 1087 (1998)) (noting that "compliance with § 2 of the Voting Rights Act" is a compelling state interest

The Dangers of Packing and Cracking in the Redistricting Process

While there are a number of ways in which a redistricting plan might be found to dilute minority voting strength, some of the most common pitfalls include unnecessary "packing" and "cracking."

Packing is a term used to refer to the act of compressing minority communities into a small number of districts. Packing can occur when districts are created with unnecessarily high minority population. This kind of packing might be found to violate Section 2 when, for example, more majority minority districts could be drawn if the minority population was not unnecessarily concentrated and instead spread out more evenly across three districts.[6] Here, it is important to determine the point at which minority voters are able to exercise the ability to elect candidates of choice. Determinations about the viability point for a district are ones that must be made on a case-by-case basis as various factors impact the ability to elect, including the presence of racially polarized voting. Packing minority voters into a district well above this point of viability could expose a redistricting plan to challenge under Section 2.

The terms cracking, fracturing or splitting are used to refer to the act of spreading cohesive groups of minority voters across a large number of districts. For example, cracking can occur if two districts are created that have 30% Latino population in each. Such splitting could be found to violate Section 2 if, for example, it were possible to draw a combine the Latino population into a single district where they would form a majority and could have a better opportunity to elect a candidate of their choice.

Both packing and cracking are illustrative of the ways in which plans can be found to dilute minority voting strength and deny minority voters an equal opportunity to elect candidates of their choice.

The Dangers of Racially Polarized Voting

The underlying purpose of the third *Gingles* prong is to determine whether a redistricting plan or other contested practice or procedure interacts with high levels of racially polarized voting to make it particularly difficult for minority voters to participate equally in the political process. To that end, the third *Gingles* factor inquires whether there is some consistent relationship and significant correlation between a voter's race and voting preference in elections, leading to non-minority voters generally being able to defeat minority voters' preferred candidates.

The question of whether racially polarized voting exists in a given jurisdiction is best answered by statistical analysis of election data to determine whether non-minority voters in some particular area (precincts or districts) vote differently from minority voters. The preferred candidate among minority voters need not be minority; rather, the

[6] For a recent example, see, e.g., Bone Shirt v. Hazeltine, 461 F.3d 1011 (8th Cir. 2006) (rejecting South Dakota's statewide redistricting plan for packing one district with 90% American Indians next door to a district with 30% Indian population).

key question is whether minority voters are politically cohesive in their support for a particular candidate. "'Political cohesion' is generally when the members of a protected minority group tend to vote . . . consistently or regularly . . . [for] a "clear candidate of choice."

In the course of litigation, plaintiffs generally rely upon political scientists and statisticians to measure the level of racial polarization in a contested jurisdiction, while courts make the ultimate determination as to whether the level of polarization is of legal significance. Comparing precincts or districts containing high percentages of non-minority voters with those precincts or districts containing high percentages of minority voters—a process called homogenous precinct analysis—is one particularly useful way of analyzing voting patterns. Ecological regression analysis, which determines the correlation between race and voting preference by examining voting patterns in all precincts regardless of their particular racial composition, is another prevailing methodology. Comprehensive exit polling conducted as voters leave polling sites has also proven to be a reliable indicator of voting patterns in a jurisdiction, although experts retained to present evidence of racial polarization in Voting Rights Act litigation often use other methodologies.

It is important that this Committee give adequate attention to the levels of racially polarized voting that may persist across the state. This can help determine at what level a district should be drawn to provide minority voters a real and meaningful opportunity to elect and can also help determine whether a district has been unnecessarily "packed" in violation of Section 2.

Conclusion

While redistricting requires the consideration of a number of factors and requires the balance of many competing interests, protection of minority voting rights pursuant with the requirements of the Voting Rights Act must remain a critical component of any successful redistricting process.[7] Given this, it is important that legislators retain the broad latitude and flexibility necessary to ensure proper compliance with the Act's federal requirements. Moreover, redistricting officials must take into account the political reality that racially polarized voting persists across many communities throughout the state and the nation more generally. Problematic redistricting plans adopted in the context of racially polarized voting may further limit meaningful minority voter access to the political process and come under challenge under Section 2 of the Voting Rights Act.

[7] Redistricting plans that violate Section 2 could be subject to litigation under the Act. Section 2 cases may be brought by the Attorney General of the United States, who bears primary enforcement responsibility under the Act, or by private individuals and organizations. Redistricting-related litigation can prove both costly and protracted, preventing the implementation of a final plan for several years. Thus, line drawers should seek to comply to comply with this important federal law during the course of redistricting.