South Carolina House of Representatives

Legislative Update

Robert J. Sheheen, Speaker of the House

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Legislative Redistricting

The following is reprint of the speech prepared for delivery by Assistant Attorney General John R. Dunne of the U.S. Justice Department's Civil Rights Division. These remarks, entitled "Reapportionment," were made in August at the annual meeting of the National Conference of State Legislatures held in Orlando, Fla. Thanks to the NCSL for providing a copy of this speech.

It's a distinct pleasure to address this conference on reapportionment -- a topic which has special meaning to me both in my present position and as a former state legislator who served a good long time in the New York State Senate. I remember well, having to endure with anxiety what seemed like an interminable wait while the practitioners of the arcane science -- electoral redistricting -- performed their mystical handiwork and determine my political survival. The outcome, as you well know, could, and did, cost a fair share of officeholders their jobs.

I was first elected during a special election held to implement a redistricting plan required by the Supreme Court's "one-man, one-vote" ruling. Later, I watched -- often quite nervously -- as my district was repeatedly redrawn to reflect the results of both the 1970 and the 1980 Censuses. Thus, although I now play a very different role, I have not forgotten what it's like to be in your shoes as you prepare for the legislative and congressional redistrictings that lie ahead -- a task which, due to legal and technological developments, is perhaps the most difficult and controversial that it has ever been.

To help you in that process -- and keep in mind, I am from Washington and I'm here to help you -- I want to talk about the Civil Rights Divisions and our role in enforcing the Voting Rights Act.

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The Voting Rights Act, was enacted over 25 years ago in response to a long and sorry history of oppression of racial minorities, was passed for one very special purpose: To eliminate the cornerstone of that system of oppression by outlawing all racially discriminatory voting rules, so that minorities in this nation would be able to attain their fair share of political power and thereby gain the ability not only to protect themselves from other forms of oppression, but to advance their interests through the political process, as well.

There are two sections of the Voting Rights Act which have a direct impact on the redistricting process and, by their combined effect, require compliance by every state in the Union:

First, under Section 5 -- the pre-clearance section -- redistricting plans from certain specific states */1/* or local jurisdictions */2/* must be reviewed -- either by a three-judge Federal District Court in Washington or by the Department of Justice -- to determine whether the state has proven, as it must, that the plan satisfies the mandate of the Voting Rights Act, namely, that it be free of racially discriminatory purpose and effect. Following the 1980 Census, we imposed Section 5 objections to and refused to pre-clear 24 statewide congressional and legislative redistrictings. Most of the objections involved the dilution of minority voting strength through either the fragmentation or the packing of a politically cohesive and geographically concentrated racial or language minority, coupled with the state's failure to prove that the dilution was not motivated, at least in part, by a racially discriminatory purpose. In not one instance has the three judge court reversed a pre-clearance objection issued by the Justice Department. Thus, the experience has clearly established that covered jurisdictions must satisfy the Civil Rights Division that their redistricting plans comply with the statutory and constitutional requirements for racial fairness before they can put them into effect. As a result, Section 5 have proven to be a potent weapon in fighting racially discriminatory reapportionment plans.

I should also tell you that if a jurisdiction were to commence a declaratory judgment action before a three-judge Federal District Court in Washington, D.C. in order to secure pre-clearance, rather than following the conventional, quicker, and less formal procedure of administrative pre-clearance, we would treat the action as we would any adversarial proceeding. We would be prepared to engage in extensive discovery, including interrogatories, requests for production of documents and depositions. We would force the state to meet its burden of proof at trial, subject its witnesses to extensive cross-examination, put on our own witnesses and experts and, in short, litigate the case to the fullest extent necessary to make certain that the submitting jurisdiction met its burden under the law.

With those basic principles in mind for Section 5 pre-clearance, let us look at Section 2 of the Voting Rights Act which requires that all redistricting plans across the country -- not merely in those that are subject to Section 5 -- provide minority citizens with equal opportunity to participate in the political process and the opportunity to elect representatives of their choice. As Congress made clear in the 1982 amendments to the Voting Rights Act, and as the Supreme Court reiterated in 1986 in Thornburgh V. Gingles when it first construed those amendments, this means that proof of intentional discrimination is not required to vitiate a plan -- a redistricting plan violates the Voting Rights Act if it simply has a discriminatory result. Thus, the relevant legal standard today is whether the redistricting plan **results** in discrimination, even if those who drew and approved the lines had no discriminatory intent and thought they were creating districts that were fair to all minorities. Either infirmity, discriminatory purpose or discriminatory result, is sufficient to condemn a plan. Clearly, then, the difficulty of the redistricting task is immense and we in the Civil Rights Division stand ready to help you in any way we can in this effort.

Let me turn first to some practical considerations in the administration of the Voting Rights Act. Our best estimate is that the department will receive over 1,000 submissions of redistricting plans before the end of the year, with an even greater number in the years that follow. At the same time, we plan to exercise our authority under Section 2 and examine plans adopted in states that are not subject to Section 5 review. Although redistricting in response to a decennial census is hardly new, the process, this time around, is unlike any other we have seen, due to all of the legal, social and technological advances that have occurred during the past decade. In preparation for reviewing these plans, we have acquired the most up-to-date, state of the art computer hardware and software. Thus, we are prepared to handle what could be an avalanche of complex proposals. In addition, we have a seasoned team of Voting Rights experts, led by two veterans each with 30 years experience, who have been though two rounds of decennial redistrictings. Thus, we have the troops and the equipment to take on what might be dubbed: "Redistricting Storm!"

Let me just note a few of the changes that will affect virtually every reapportionment plan in the nation.

First: In most parts of the country, the question is no longer whether the voices of racial and language minorities will be heard in the redistricting process. They will. As a result of the progress that has been made since the passage of the Voting Rights Act, black, Hispanic and other minority legislators have taken their

rightful place firmly in the legislative halls that will fashion the political boundaries for the 1990's. Consider that in 1970, only 1,469 blacks held elective office. By January of 1990, there were five times that number of black elected official in this country. We have already seen, from early submissions that the input of minority legislators and their constituents affected redistricting proposals and alternatives as they were developed and examined and debated.

Second: Due to the wonders of computer technology, legislators, as well as those outside the legislative process, will have a much wider selection of alternative districting plans than in the past. These alternative plans will be susceptible to faster and more specific political analysis, not only by legislative players, but also by those players on the outside trying to influence the process. Everyone involved will have access to more knowledge about the political and racial implications of every redistricting option. And the states must be prepared to explain and defend their plans in light of that heightened scrutiny. That means justifying their rejection of certain alternatives as well as the adoption of a specific plan. Every group or any concerned citizen with a home computer and basic software will be able to draw its own alternative plan. Moreover, all will have access to sophisticated programs and illustrative graphics ready to reveal the political and minority impact of every permutation that you do -- or do not -- consider. Move a district line one block north or one block south and I assure you that someone will have a color chart and tables of statistics to show the impact. And you'll see similar presentations analyzing the failure to move that same district line one block north or south.

Third: The substantive standards for enforcing Section 5 clearance of the Voting Rights Act have become clearer. We have gone through two sets of decennial redistrictings under the act and have received guidance from the courts on how the 1982 amendments to Section 2 apply to redistricting plan. The Supreme Court's landmark decision in Thornburg V. Gingles provides exhaustive guidance on interpreting the Voting Rights Act. And in 1987, the department issues guidelines under Section 5 detailing the substantial standards we apply.

Basically, these guidelines set forth three inquiries that we pursue in our Section 5 analysis. First, we ask whether the jurisdiction has met its burden to prove that the plan does not have a retrogressive effect, that is, that the plan does not reduce minority voting strength from the level that minorities enjoyed under the prior plan. As a practical matter, we see few if any plans that are retrogressive.

Second, we ask whether the jurisdiction has proven that the plan was not motivated, in whole or in part, by a racially discriminatory purpose. Because the concept of discriminatory purpose is so central to our work, let me pause here for a minute and explain what I mean. A discriminatory purpose means a design or desire to restrict a minority group's voting strength, that is, the ability of that group to elect candidates of its choice, below the level which that minority group might otherwise have enjoyed. Discriminatory purpose does not mean racial animus. As Judge Kozinski of the 9th Circuit noted in the Garza case, legislators who harbor no ill will at all toward minorities would nevertheless be engaging in purposeful discrimination if they fragmented a minority community in order to protect incumbents who might be voted out of office if the minority voters were able to elect the candidates of their choice.

On the other hand, discriminatory purpose does not mean the intentional adoption of a plan that gives a minority group control of less than a proportional or maximum number of districts. A minority group is not automatically entitled to a proportional redistricting plan. Disparate effects alone, even when they are totally foreseen, do not equal discriminatory purpose under Section 5, although they may be a problem under Section 2.

Disparate effects, however, do need to be explained in a Section 5 submission so that we can be sure that the state has satisfied its burden of proving the absence of racially discriminatory purpose. If, for example, a minority group's proposed plan is rejected, we must be satisfied that the jurisdiction made its decision for a valid, non-racial reason and that the plan was not rejected because it was favorable for the minority group.

Third, we ask whether the jurisdiction's plan clearly violates Section 2 of the act under the standards set forth by Congress and the courts.

Without attempting to be exhaustive, let me just outline for you some of the redistricting practices we look for in deciding whether there may be a violation of the Voting Rights Act:

1. Packing a racial or ethnic minority group into only one district where that minority might have been able to elect candidates in two or three less concentrated districts.
2. The obverse side of that issue: Fragmenting or splitting a geographically compact minority group into two or more districts where they will constitute an electoral minority.
3. Reducing the percent of minorities in a district where the minority voters have previously been able to elect candidates of their choice by only a very slim margin.

4. Maintaining the re-election chance of those in control of the redistricting processing by preserving the old district lines to the greatest extent possible at the expense of minority voters.
5. Altering district boundaries to shore up, for the majority group, previously marginal or competitive districts where minority voters were almost, but not quite, able to elect a preferred candidate.
6. In open districts, where there is no incumbent, drawing the boundaries of the district so that the minority group is at a distinct disadvantage in electing its preferred candidate.
7. Inexplicably deviating from the redistricting criteria that the state claims it used in drawing the boundary lines.
8. Excluding minority groups from the process of drawing the plan, or merely paying "lip service" to them by soliciting, but then ignoring, the minority groups's input and then providing no rationale for rejecting the minority group's redistricting proposal, and, finally,
9. The unexplained or arbitrary use of multi-member districts.

This is neither a hard-and-fast list nor an exhaustive one. I offer it merely as a helpful guide in evaluating redistricting plans. Many plans that suffer from one or more of those indicators may be accepted; but the presence of too many should lead you to re-examine the impact that a proposed plan may have. It is my hope that the states will insist that any plan submitted to them for consideration complies with the Voting Rights Act.

Let me describe some recent decisions that we have made under Section 5 which illustrate how we apply the principles I have just outlined.

In Louisiana, the proposed maps for the State House and Senate fragmented black population concentrations in two areas in the Senate and seven in the House, despite proposals by the minority community that would have kept those concentrations intact and created viable minority districts. We interposed an objection because our analysis revealed that, on balance, the evidence as to each of these areas suggested that the legislature's decisions had been motivated by a desire to protect incumbents at the expense of minority representation. Obviously, protecting incumbents is not illegal in and of itself, but the law is clear that it is not a valid reason for rejecting feasible alternatives that would give minority voters an opportunity to elect candidates of their choice. Again, as Judge Kozinski noted in the Garza case, "Where, as here, the record shows that racial or ethnic communities were split to assure a safe seat for an incumbent, there is a strong inference -- indeed a presumption -- that this was the result of intentional discrimination..." */3/*

But these calls can be close ones. In another area of the Senate plan in Louisiana we did not object to the state's rejection of a proposed minority district in Jefferson Parish. It appeared that, among other things, the proposed district would have had an odd, somewhat tortured shape; its creation would have divided the community of Algiers among three districts, even though Algiers had traditionally been maintained in a single district and the people of Algiers wanted it to remain that way. It would not be appropriate to say the Legislature in that instance acted with an invidious racial purpose.

Last Sunday evening, the Louisiana Legislature passed, and Gov. Roemer, signed new plans for each House and we are currently reviewing them with an eye toward the legislative election scheduled for this October.

In Mississippi, we objected to the plans for the state House and Senate because the evidence indicated that the Legislature had deliberately fragmented black population concentrations in order to dilute minority voting strength. In reaching this conclusion, we relied in part on the fact that compact and contiguous minority districts could easily have been created but were not and the Legislature had no plausible, non-racial explanation for its actions. We also relied on evidence that support for the submitted plans and opposition to the principal alternative plans often were characterized by overt racial appeals.

In several instances, the state argued that its plan did in fact create viable minority districts where blacks comprised 60 percent or more of the voting age population. But raw numbers alone can be misleading. We looked, as we also do, behind the numbers to the underlying facts. We uncovered evidence that blacks in those districts would not be a majority of the likely voters. In one district, for example, a critical number of blacks were inmates in a state prison who, of course, cannot vote. In another, they were college students who would not be in the area at the time of the August primary. In others, critical numbers of blacks had low turnout rates because they lived in isolated rural areas, far from the polls and without cars or access to public transportation.

After our objection, the Mississippi Legislature failed to agree on a new plan and a three-judge court was convened to fashion a map. That court, which is still working on a new districting plan, recently decided to hold elections in 1991 under the districting lines and to hold special elections under a new map in 1992.

In Virginia, the state plan created 11 minority House districts. Alternatives proposed by the NAACP, the Republican Party and the ACLU would have provided for 13 minority districts. The state's main justification for refusing to create the two additional districts was that the state plan had been drafted by the Legislative Black Caucus. We were not convinced, however, that the decision to reject the two additional minority districts originated entirely with the Black Caucus or that their endorsement of the state plan negated the possibility of a deliberate design to protect incumbents at the expense of minority representation.

The state also argued that it had refused to create a proposed minority district in the Richmond area because the creation of that district would have endangered a minority incumbent in Richmond. Our analysis indicated that the minority incumbent would still have been in a viable minority district under the alternative plan -- albeit not one as much to her liking. Under those circumstances, we concluded that protection of the incumbent minority legislator was not a valid reason for rejecting an alternative that would have given minority voters outside of her district an opportunity to elect candidates of their choice.

Along the southern border of Virginia the circumstances were different and, although it was a close question, we concluded that the state did have valid reasons for not creating yet another proposed minority Senate district in the Danville area. Among other things, the district lines under the alternative plan for that area would have fractured two independent cities.

I should add that our objection in Virginia was very narrowly focused. The state was able to remedy the problem quickly and without disrupting other parts of its plan. We gave the state's revised submission priority attention and, I am happy to say, we were able to pre-clear it within 24 hours of its submission.

In New York City, the situation was not simply black and white. Rather, due to large numbers of Asians and Hispanics, the situation was black, brown, yellow and white, which immeasurably complicated our task and the task of the New York City districting commission. We found that blacks and Asians had been treated fairly but that Hispanic voting strength had been diluted, apparently as the result of an effort to augment black voting strength.

The proposed map for the New York City Council created only six viable Hispanic districts out of a total of 51, even though Hispanics constituted approximately one quarter of the city's population -- but only 15 percent of the registered voters. There

were two other districts in which Hispanics constituted a majority of the voting age population but only a slim plurality of the registered voters. Our analysis indicated that there was a significant risk that Hispanics would not be able to elect candidates of their choice in those districts because of a number of factors, including their lower turnout rate.

These concerns had been brought to the attention of the districting commission by members of the Hispanic community but the districting commission had rejected proposals to add Hispanic voters to those districts. Our task was to decide whether the commission had been motivated, in whole or in art, by a discriminatory purpose or whether the commission had acted for a valid, non-racial reason. The commission argued that it has a valid reason, namely to avoid weakening Hispanic majorities in adjacent areas. Our analysis, however, revealed that changes could be made that would not endanger the adjacent Hispanic districts. There was also evidence that Hispanics had not been treated as fairly as other groups in the districting process and that the commission appeared to be making choices throughout its plan, including areas of the city not covered by Section 5, that consistently disfavored Hispanics. Based on the totality of the circumstances, we concluded that the commission did not have valid reasons for rejecting the proposals to strengthen the marginal Hispanic districts and giving the Hispanic voters in those districts a real opportunity to elect candidates of their choice. Accordingly, we interposed an objection.

Again, I would like to note that our objections in New York were very narrowly focused and easily remedied. Within a week, the commission was able to agree upon changes that met our objections without significantly disrupting the remainder of the plan. As was the case with Virginia, we gave the revised submission priority attention and we were able to pre-clear on the same day it was submitted.

Let me hasten to add that these examples are given not to highlight the racial discrimination in Louisiana, or in Virginia, or in Mississippi or in New York City. Rather, I offer these examples merely to help guide you as you wrestle with various aspects of the very difficult process of redistricting in your own state.

In closing, let me say that we understand the problems that you face in attempting to devise and enact new districting plans. Census data may be late and not as complete or accurate as we all would like. Tight time frames will govern the redistricting process. Various interest groups and commentators will be pulling you in different directions as once. But I believe that together we can ensure that

the coming round of redistricting efforts will produce plans that provide the full measure of fairness to racial and language minorities required by the Voting Rights Act and the Constitution.

As President Johnson said when the act was passed 26 years ago, discrimination in voting is a wrong which no American, in his heart, can justify. The right to vote is one which no American, true to our principles, can deny.

Let us all work hard -- and together -- to achieve that cherished goal. I think we can do it.

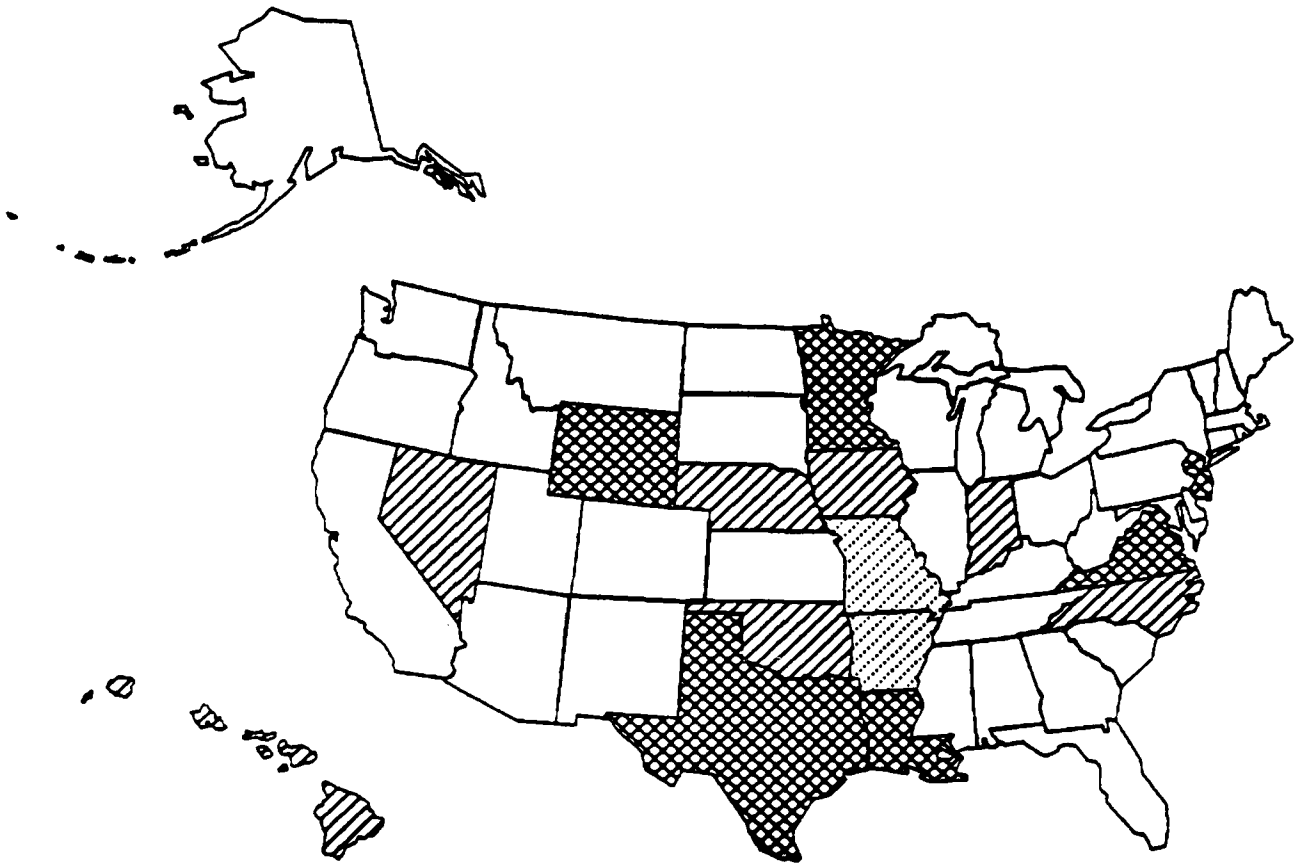
Footnotes

1/ Covered states are Alabama, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia. In addition, New Mexico is covered by the pre-clearance requirement of Section 3 (c) as a result of litigation successfully challenging its post-1980 legislative redistricting plan.

2/ Certain counties in the following states are covered: California, Florida, Michigan, New Hampshire, New York, North Carolina and South Dakota.

3/ Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990) (Opinion of Kozinski J. concurring in part and dissenting in part.)

REDISTRICTING PROGRESS REPORT



Notes:

- AK, DE, MT, ND, SD, VT, WY do not draw Congressional districts because they only have 1 representative
- TX, NC and LA plans must be pre-cleared by U.S. Justice Department
- As of August 5, 1991

Source: NCSL *Reapportionment Law Update*, Summer 1991

Status of Reapportionment Legislation

The following are the reapportionment bills introduced last session and pending before the General Assembly.

House Reapportionment Bill (H.3834, Rep. Wilkins). This legislation reapportions the S.C. House of Representatives in accordance with the 1990 U.S. Census figures. According to the Census figures, each House district should have a population of 28,118 in order to comply with the federal court "one man, one vote" rulings. Although the total number of House districts stays at 124, two new districts have been created -- one in Dorchester and the other mostly in Horry County.

Status: Passed the House 5-29-91; pending in the Senate Judiciary Committee.

House, Senate and Congressional Reapportionment (S.1003, Senate Judiciary Committee). This legislation would reapportion the state Senate, House and U.S. Congressional districts according to the 1990 U.S. Census figures. All three redistricting plans would be incorporated into this one bill, instead of separate legislation for each. The bill contains descriptions of the Senate and congressional redistricting plans, as passed by the Senate. The House redistricting section is left blank.

Status: Passed the Senate 5-28-91; pending in the House Judiciary Committee.

Congressional Reapportionment (H.3836, Rep. Wilkins). This bill provides for the reapportionment of the congressional districts according to the 1990 U.S. Census. Unlike other states whose population changes requires them to add or lose a congressional district, South Carolina will continue to have six congressional districts.

Status: Pending in the House Judiciary Committee.