REVERSING POLITICAL POWERLESSNESS FOR BLACK VOTERS IN SOUTH CAROLINA:

Will Single-Member Election Districts Lead to Political Segregation?

THE SOUTH CAROLINA ADVISORY COMMITTEE

TO THE UNITED STATES

COMMISSION ON CIVIL RIGHTS

This summary report of the South Carolina Advisory Committee to the United States Commission in Civil Rights was prepared for the information and consideration of the Commission. Statements and viewpoints in the report should not be attributed to the Commission or to the Advisory Committee, but only to individual participants in the community forum where the information was gathered.

A SUMMARY REPORT

MARCH 1991

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THE UNITED STATES COMMISSION ON CIVIL RIGHTS

The United States Commission on Civil Rights, first created by the Civil Rights Act of 1957 and reestablished by the Civil Rights Commission Act of 1983, is an independent, bipartisan agency of the Federal Government. By the terms of the Act, as amended, the Commission is charged with the following duties pertaining to discrimination or denials of equal protection based on race, color, religion, sex, age, handicap, or national origin, or in the administration of justice: the investigation of discriminatory denials of the right to vote; the study of legal developments with respect to discrimination or denials of equal protection; the appraisal of the laws and policies of the United States with respect to discrimination or denials of equal protection; the maintenance of a national clearinghouse for information respecting discrimination or denials of equal protection; and the investigation of patterns or practices of fraud or discrimination in the conduct of Federal elections. The Commission is also required to submit reports to the President and the Congress at such times as the Commission, the Congress, or the President shall deem desirable.

THE STATE ADVISORY COMMITTEES

An Advisory Committee to the United States Commission on Civil Rights has been established in each of the 50 States and the District of Columbia pursuant to section 105(c) of the Civil Rights Act of 1957 and section 6(c) of the Civil Rights Commission Act of 1983. The Advisory Committees are made up of responsible persons who serve without compensation. Their functions under their mandate from the Commission are to: advise the Commission of all relevant information concerning their respective States on matters within the jurisdiction of the Commission; advise the Commission on matters of mutual concern in the preparation of reports of the Commission to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public and private organizations, and public officials upon matters pertinent to inquiries conducted by the State Advisory Committee; initiate and forward advice and recommendations to the Commission upon matters in which the Commission shall request the assistance of the State Advisory Committee; and attend, as observers, any open hearing or conference which the Commission may hold within the State.

LETTER OF TRANSMITTAL

South Carolina Advisory Committee
to the
U.S. Commission on Civil Rights

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The South Carolina Advisory Committee submits this summary report of a Committee community forum conducted in Columbia on May 22, 1989. The report advises the Commission on the views of key political experts, regarding the long-term influence of governmental actions intended to help black voters in South Carolina. The Committee narrowed its attention to the Voting Rights Act Amendments of 1982, and local responses that often included redistricting plans, weighted to strengthen racial minority political power. In preparing the report the Committee made every effort to assure a balanced presentation of issues.

Following enactment of the 1982 amendments, many local jurisdictions ratified racially significant single-member election districts (SMD). Their responses often reflected community pressures or legal actions, designed to help black voters improve their ability to pick representatives of their choice. In several cases the U.S. Department of Justice or private plaintiffs, like the NAACP, sued for enforcement of the act and got racially weighted SMDs. Given political power, black voters often supported black candidates, adding black elected officials where there were few and choosing them where there were none.

A complex controversy arose, prompted by these developments, that was the crux of our forum. Critics charged that racially weighted election districts amounted to racially proportional representation because black voters tended to choose black candidates for office. In this view, Federal law that permitted racially weighted SMDs would have an undesirable long-term consequence. Racial proportion, contrary to the intent of the Voting Rights Act, would put black and white voters in political segregation, isolated into racially drawn election districts.

Supporters argued that racially significant SMDs were necessary to the process if past discrimination were to be redressed and true political representation restored to black citizens. They argued that racially weighted SMDs did not guarantee that black candidates would succeed in elections. SMDs would guarantee, however, that black voters would have the power to make their choice of candidates. In this view, the use of racially significant SMDs would serve the aims of the Voting Rights Act in both immediate and long-term results. The approach would enable previously ignored or poorly served racial groups an opportunity to exercise political power.

Despite the complexity of the issue, communities and news media often debated the appropriateness of SMDs. The Committee believes its forum contributed to an understanding of these questions by bringing together knowledgeable persons with divergent viewpoints into a nonpartisan forum. Local reactions for and against SMDs concerned many observers because the controversy increasingly carried a tone of racial polarization. The Committee hoped that its forum helped counteract these tensions by contributing to a better understanding of the issues and their implications.

We unanimously approved this report. We intended that it might stimulate Commission interest, encouraging a national review of current Federal voting rights enforcement methods and the long-term implications.

Respectfully,

Dennis W. Shedd

Dennis W. Shedd, *Chairperson*
South Carolina Advisory Committee

South Carolina Advisory Committee to the U.S. Commission on Civil Rights

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Acknowledgments

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BACKGROUND

The Voting Rights Act of 1965[1] gave meaning to the 15th amendment to the Constitution and is an important civil rights statute.[2] For 25 years, the act has protected the right to register to vote and have that vote counted.

Earlier Commission and State Advisory Committee Reports

The Commission published two reports that many consider primary references on the meaning of the Voting Rights Act of 1965, *The Voting Rights Act: Unfulfilled Goals* (1981), and *The Voting Rights Act: Ten Years After* (1975). Several State Advisory Committees (SAC) to the Commission also reported on voting rights protection within their State. SAC reports in California, Rhode Island, and Texas[3] provided information on racial minority[4] access to political participation and representation, and legislative reapportionment and redistricting. A recent South Carolina SAC briefing memorandum, "Minority Participation in the Electorial Process for County Commissions and City Councils of Orangeburg and Georgetown" (1987) reviewed how racial patterns changed in local jurisdictions that altered their electoral processes. That report illustrated how minority political power often improved where single-member district (SMD) electoral schemes replaced multimember and at-large electoral processes in local communities. Black voters and political candidates in South Carolina got new status in SMD elections, adding minority officeholders where there were few and electing them where there were none.

The Committee used, and appreciated, a monograph entitled "The Voting Rights Act and Single Member Districts,"[5] prepared by SAC Chairperson Dennis Shedd. The monograph outlined a history of the act, analyzed section 5 of the 14th amendment to the U.S. Constitution and section 2 of the 15th

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[1]42 U.S.C. §§1971-1974e (hereafter cited as Act).

[2]*See generally* U.S. Commission on Civil Rights, *A Citizen's Guide to Understanding the Voting Rights Act*, Clearinghouse Publication 84 (October 1984).

[3]Reported by the California Advisory Committee to the U.S. Commission on Civil Rights: *Political Participation of Mexican Americans in California* (1970), *Reappointment of Los Angels' 15 City Councilmanic Districts* (1973).
Reported by the Rhode Island Advisory Committee to the U.S. Commission on Civil Rights: *Redistricting In Rhode Island: Its Problems Practice and Promise* (1986).
Reported by the Texas Advisory Committee to the U.S. Commission on Civil Rights: *1982 Reappointment in Texas (1982).*

[4]Throughout this report "minority" means a racial or language minority rather than a political minority faction.

[5]*See app.* A.

amendment,[6] also the 1982 Amendments to the Voting Rights Act,[7] and the push for single-member districts, as these issues relate to South Carolina.

Differing Views on Single-Member Districts

The SAC observed since its earlier report that South Carolina citizens reacted to SMD redistricting plans with a mixture of criticism and support. In the view of some critics:

> The rejection of the sensible option of a mixed form of representation for South Carolina county councils stands as an indirect tribute to the clout of the black voter. Whether it serves the interest of the race in the long run is doubtful. Certainly, it will not foster the cause of the general public . . . . The normally Democratic black vote will be isolated for the most part, forcing white Democrats to compete for the increasingly Republican white vote . . . [T]he design of districts to ensure black representation results in white-dominated areas where politicians with less sensitivity to black causes may hold sway, undeterred by the need to seek black support.[8]

In support of SMDs, Dr. William F. Gibson, president of the South Carolina NAACP Conference of Branches and chairman of the NAACP's National Board of Directors, said the group aimed to convert all discriminatory at-large election schemes.[9] As the NAACP filed voting rights lawsuits simultaneously against five South Carolina cities,[10] Nelson B. River III, executive secretary

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[6]The Senate Report states:

> In a series of cases dating back more than fifteen years, the Supreme Court has recognized that Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment grant Congress broad power to enact appropriate legislation to enforce the rights protected by those amendments.
>
> In *South Carolina v. Katzenbach*, sustaining key provisions of the Voting Rights Act of 1965, the Supreme Court noted that 'Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.'
>
> Specially, the Court has long held that Congress need not limit itself to legislation coextensive with the Fifteenth Amendment, if there is a basis for the Congressional determination that the legislation furthers enforcement of the amendment. The Voting Rights Act is the best example of Congress' power to enact implementing legislation that goes beyond the direct prohibitions of the Constitution itself." S. Rep. No. 417, 97th Cong., 2nd Sess. 39, reprinted in 1982 U.S. Code Cong. and Admin. News 177 (footnotes omitted)[hereafter Senate Report].

[7]Pub. L. No. 97-205, 96 Stat. 131 (1982) (codified at 42 U.S.C. 1973, 1973b, 1973aa-6, and 1973aa-1a).

[8]"Parochialism Triumphs Over Statesmanship," *The State*, Feb. 18, 1989, p. 8–A.

[9]"State NAACP Files Five Lawsuits Against Cities," *Black News Weekly*, July 6, 1989, p. 12.

[10]"The lawsuits were filed against the city councils of Bennettsville, Gaffney, Kingstree, Saluda and Union . . . . Since November, 1988, the NAACP has filed lawsuits against Charleston County School Board and County Council and Lancaster City Council. In the past three years, through the efforts of the NAACP, the following jurisdictions have changed from at-large to single member districts: Abbeville City and County Councils, Aiken City Council, Cheraw City Council, Easley City Council, Greenwood City and County Councils, (continued...)

of the South Carolina NAACP, added, "[W]e cannot have discriminatory at-large election systems and NAACP branches co-existing in the same place — one must go!"[11]

Debate Mirrored on a National Level

The SMD controversy in South Carolina mirrored a national level debate. Critics charged that Federal implementation of the 1982 amendments all but guaranteed legislative seats for minority legislators, contrary to the intent of the legislation.[12] These so-called "safe seats," some believed, increased minority political power through affirmative action but also created a blatant system of racial gerrymandering.[13] Elizabeth McCaughey, a constitutional scholar at the Center for the Study of the Presidency in New York, N.Y., observed:

> The new goal of the Voting Rights Act — more minorities in political office — is laudable . . . . As is, blacks constitute 12% of the population, but fewer than 2% of elected leaders. But racial gerrymandering is not the best way to accomplish that essential goal . . . . Far from promoting a commonality of interests among black, white, Hispanic and other minority voters, drawing the district lines according to race suggests that race is the voter's and the candidates's most important trait. Such policy implies that only a black politician can speak for a black person, and that only a white politician can govern on behalf of a white one.[14]

The U.S. Department of Justice (DOJ) viewed SMDs as an effective remedy for racial discrimination in voting despite suggestions that a partisan political motive underlay its actions.[15] Critics pointed to an increasing partisan realignment, favoring the Republican Party. The changes occurred as some white voters, who were traditionally with the Democratic Party, apparently preferred to change their party affiliation than share political power with minority group members.

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[10](...continued)
Greer City Council, Horry County School Board, Kershaw Town Council, Laurens City and County Councils, Laurens School District 55 and 56, Ninety-Six Town Council, North Charleston City Council, Orangeburg City Council, Summerville City Council and Sumter City Council." Ibid.

[11]Ibid.

[12]*See generally* M. Thernstrom, *Whose Votes Count? - Affirmative Action and Minority Voting Rights*, A Twentieth Century Fund Study (Cambridge: Harvard University Press, 1987) (hereafter cited as Thernstrom).

[13] . . . [U.S. Senator Orrin G.] Hatch maintained that a 'results' test for methods of election would alter the American electoral landscape, instituting race-based gerrymandering wherever minority officeholding was disproportionately low. Thernstrom, p. 107.

[14]"Perverting the Voting Rights Act," by Elizabeth McCaughey, *Wall Street Journal*, Oct. 25, 1989, p. A15.

[15]Mark Posner, attorney, Voting Section, Civil Rights Division, U.S. Department of Justice, telephone interview, Jan. 17, 1989 (hereafter cited as Posner).

The DOJ explained that the requirements of the law motivated its voting rights enforcement effort. After considerable debate on specific portions, Congress determined that:

> A violation of . . . [voting rights] is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by . . . this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[16]

The 1982 amendments mandated that protected groups have an opportunity to participate in the political process and to pick representatives of their choice. While fulfilling these requirements in South Carolina, the DOJ weighed statistical data on numbers of black elected officials in State and local offices. It also asked whether the data showed signs of racial bloc voting or racial polarization obstructing minority access to the political process. These signs were significant flags among other indicators that prompted investigations.[17]

The Department considered that empowering formerly victimized voters by amassing their voting strength contributed significantly to their ability to integrate into the political process and to choose candidates.[18] It found that SMDs offered a better chance for reaching significant minority participation than mixed or at-large systems. The Department underscored favorable responses from minority advocate groups and renewed aspirations of minority candidates. It viewed these responses as substantiation that SMDs remedied discrimination against minority voters by offering greater opportunity.

Against a background of opposing viewpoints, the Advisory Committee recognized a need for a community forum on the DOJ's implementation of the 1982 amendments. The Committee's concern was not so much with specific matters of compliance because these were already closely followed in the media or in litigation. Members hoped to bring together particularly knowledgeable persons to consider the broad implications of current developments, and anticipate an unforseen influence on minority political power. With this perspective, the Committee conducted its forum.

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[16]Pub.L.No. 97.205§3, 96 Stat. 134 (1982)(codified at 42 U.S.C.§ 1973 (a)).

[17]Posner.

[18]Posner.

THE FORUM

The Advisory Committee held a community forum on the topic, "What Are the Long-Term Implications for Minority Rights of the Current Implementation of the Voting Rights Act?" The 4-hour session convened in the Thurmond Federal Office Building, Columbia, South Carolina, on May 22, 1989.[19]

The speakers included James E. Clyburn, commissioner, South Carolina Human Affairs Commission; Dr. Blease Graham, professor, University of South Carolina; John R. Harper, attorney, South Carolina NAACP; South Carolina State Senator Frank Gilbert; and Willie B. Owens, Orangeburg City community organizer and educator. The forum speakers represented a select group of knowledgeable persons and a diversity of viewpoints on the subject.

James E. Clyburn, Commissioner South Carolina Human Affairs Commission

James Clyburn[20] spoke from his experience as a former political candidate for State elective office and Columbia City Council member, and long-term observer of political developments in the region. In opening remarks, he noted that most civil rights groups, during debates over extension of the Voting Rights Act, focused on a simple extension of section 5.[21] He viewed this position as an insufficient response to developments in the region. He believed counteracting the U.S. Supreme Court's decision in *Mobile* v. *Bolden*[22] was a greater concern because it set legal precedent that made voting rights violations more difficult to prove. The Supreme Court ruled that to prove a violation of the act those who challenged electoral systems must show a defendant's intent to discriminate. He recounted comments he made before civil rights organizations and congressional hearings, in which he

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[19]Reported in "Transcription of audio tape of Forum on What Are the Long-Term Implications on Minority Rights of the Current Implementation of the Voting Rights Act of 1965?" held by the South Carolina Advisory Committee to the U.S. Commission on Civil Rights at Columbia, S.C. (May 22, 1989) (copy available at Eastern Regional Division Office) [hereafter cited as Transcription].

[20]Transcription, pp. A1–32.

[21]The Senate Report states:

> Following the dramatic rise in registration, . . . [from 1965 to 1972] . . . a broad array of dilution schemes were employed to cancel the impact of the new black vote. Elective posts were made appointive; election boundaries were gerrymandered; majority runoffs were instituted to prevent victories under a prior plurality system; at-large elections were substituted for election by single-member districts, or combined with other sophisticated rules to prevent an effective minority vote . . . Congress anticipated this response. The preclearance provisions of Section 5 were designed to halt such efforts. Senate Report, p. 6.

[22]446 U.S. 55 (1980) [hereafter cited as Bolden].

supported amendments to section 2 to offset the influence of *Mobile* v. *Bolden*.[23]

A debate in South Carolina over this issue mirrored national debate over restoring a results test to section 2. Proponents won passage of the 1982 amendments (the extension of the act covered a 14-year period, longer than ever) and extension of section 5.[24] An amended section 2 lifted the burden on plaintiffs to prove that a violation of section 2 resulted from intentional discrimination. The passage of this legislation marked a milestone victory for civil rights activists.

The Committee asked Mr. Clyburn whether the local response to section 2, a push toward SMDs, forced minorities to trade political influence to gain representation. They also asked his views on whether current implementation of section 2, as conducted in South Carolina communities, caused proportional representation, an outcome specifically disavowed in the legislation.

Mr. Clyburn acknowledged that court-ordered redistricting plans frequently used single-member districts, stacked with minorities, and in rough proportion to the percentage of minority population. He noted, however, that court-ordered plans and court-accepted plans are often

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[23]The Report states:

> The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system or practice in order to establish a violation. Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.
>
> The 'results' standard is meant to restore the pre-*Mobil* legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote. Specially, subsection (b) embodies the test laid down by the Supreme Court in *White*.
>
> If the plaintiff proceeds under the 'results test', then the court would assess the impact of the challenged structure or practice on the basis of objective factors, rather than making a determination about the motivations which lay behind its adoption or maintenance. Senate, p. 27.

[24]The Report states:

> S.1992 amends Section 2 of the Voting Rights Act of 1965 to prohibit any voting practice, or procedure [that] results in discrimination. This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restores the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to litigation involved in *Mobile* v. *Bolden*. The amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre-*Bolden* vote dilution case, *White* v. *Regester*.
>
> This new subsection provides that the issue to be decided under the results test is whether the political processes are equally open to minority voters. The new subsection also states that the section does not establish a right to proportional representation. Senate, p. 2.

different. He gave examples of Columbia and Aiken cities as recent instances of combination schemes that the courts accepted.

These plans were significant because they were examples of flexibility in section 2 remedies available to communities that develop acceptable strategies. He said that the courts probably would not have ordered plans like those he mentioned. Instead, the courts recognized community decisions to comply with the law and allowed them opportunities to tailor a plan to their liking.

Regarding court-accepted plans, the Committee noted that the courts often required parties to get approval from the DOJ before submitting proposals for the court to accept. This step was significant because DOJ was not likely to approve new schemes for combination plans which mix at-large and SMD representation. New DOJ regulations effectively excluded multimember or at-large plans (permitted under section 5) as acceptable remedies for violations of section 2. These developments suggested that the end was approaching for the sort of flexibility described in Mr. Clyburn's examples.

Mr. Clyburn said that flexibility may decrease in section 2 cases because the Congress restored a reliance on results as a test of discrimination. A return to pre-*Bolden* legal standards suggested that more plaintiffs would win court challenges, forcing more court-ordered plans. The burden of showing intent had been a formidable barrier to voting rights claims. He believed that it was important to get beyond an intent test. Although there were some flaws, the amendments to section 2 offered an opportunity to reverse the effect of the *Bolden* decision. He, therefore, supported current Federal enforcement of section 2 and did not agree with critics that controversial SMDs amounted to proportional representation.

The Committee asked Mr. Clyburn about perceptions in communities regarding current Federal enforcement of the act. A main concern was that amassing minority voters or stacking certain districts in turn would leave other districts racially opposite. The Committee was aware of allegations that the DOJ favored racially drawn single-member districts because resulting dissatisfaction among white voters would encourage partisan realignment. White and black voters in a racially polarized climate, separated along partisan lines, would divide and weaken a traditionally solid hold over local politics by the Democratic Party. He said in response:

> No question about that . . . I think that you all ought to look very hard at that, and that's why, now that you have said it, that's one of the reasons we ought to be very, very careful about recommending the pure single-member district plan every time because there is some other stuff going on here.[25]

Mr. Clyburn acknowledged that there was little evidence justifying a perception that DOJ perverted the intent of section 2 enforcement for partisan advantage. In discussions with Committee Chairperson Dennis W. Shedd, who participated in U.S. Senate development of the 1982 amendments as legislative staff, Messrs. Clyburn and Shedd recalled earlier talks about the

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[25]Transcription, p. A23.

likelihood that proportional representation would arise from section 2 enforcement. The worrisome concern then was whether minority voters would get token representation through single-member districts and later find themselves pushed to one side, bypassed, and out of the political arena for practical purposes. Escaping a political ghetto would be difficult. Black voters learned that in *Whitcomb* v. *Chavis*,[26] in Indianapolis, Indiana, in 1971.[27] Mr. Clyburn reiterated his belief that communities should come together voluntarily to develop suitable election schemes that a court would accept and thereby avoid imposition of a more rigid court-ordered plan.

Dr. Blease Graham, Assistant Vice Chair Department of Government and International Studies University of South Carolina

Professor Blease Graham[28] summarized current aspects of single-member districts and speculated on the impact of single-member districts in South Carolina.[29]

Professor Graham explained that a wave of reform in the early 20th century promoted three major changes in American cities: (1) at-large elections, (2) nonpartisan ballots, and (3) the professional city manager. Much of current national policy on voting rights may be viewed as an effort to change these earlier reforms, particularly regarding at-large elections.

The movement toward change focused more on the structure of elections. This occurred because the Voting Rights Act of 1965[30] largely removed fundamental barriers to minority voter registration. Since passage of the act, many municipal governments across the country turned to single-member districts to enhance minority political power, a trend that predominated in the Nation but came late to Southern States.

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[26]403 U.S. 124 (1971).

[27]The Report states:

> The . . . [Supreme] Court directly considered a racial dilution challenge in *Whitcomb* v. *Chavis*, rejecting a claim that a state legislature reapportionment plan operated 'to minimize or cancel out' minority voting strength. Black voters of Indianapolis, Indiana, challenged the plan for at-large election of eight state senators and 15 assembly members from a countywide multimember legislative district. The District Court sustained the plaintiff's contention that their voting strength was unconstitutionally diluted, on the basis of proof that black ghetto residents with district legislative interests had been consistently underrepresented in the legislature in comparison with their proportion of the population.
>
> The Supreme Court reversed, holding that the mere fact that ghetto residents were not proportionately represented does not prove a constitutional violation unless they were denied equal access to the political process . . . . Senate, p. 20.

[28]Transcription, pp. C1–20.

[29]See app. B, B. Graham, Comments Regarding the Long-Term Effects on Minority Rights of the Current Implementation of the Voting Rights Act of 1965 with Special Focus on Single-Member Districts (May 22, 1989)[hereinafter Graham].

[30]Act.

A recent national survey[31] showed a lingering effect of slowed implementation. Redistricting in the South required racial criteria more often than other regions. Among 117 cities surveyed nationally, about 33 percent required, among other criteria, that districts offer blacks and Hispanics an opportunity to choose representatives in numbers roughly equal to their proportion of the population in the total city. More than 60 percent of cities that used the minority representation criterion were in the South. These data pointed to a southern focus on single-member districts.

A southern focus also persisted throughout much of the voluminous literature in political science on the Voting Rights Act; it suggested that single-member districts enhanced the probability of minority representation. In part reflecting implementation of the act, the South had 93 percent of the cities that attempted to switch from at-large to single-member districts during the 1970s. A switch was more likely to occur in southern cities in which minorities were most severely underrepresented on the council. Between 1970 and 1980, a third of southern cities employing at-large elections switched to geographic districts.

Professor Graham summarized several leading works. Noting that his presentation was not exhaustive, he reported that literature specifically on racial polarization and redistricting was sparse. He continued, saying:

> [I] would argue that single-member districts have a modest positive impact on local government decisionmaking and, as a consequence, don't contribute to racial polarization . . . . If I tried to spin out scenarios over the next 10 years, ... I think *de facto* housing segregation is a fact that isn't likely to change . . . . Some other potential problems in an underlying social structure . . . [are] a fairly fixed economic pie; the potential reluctance of the national government to be an ally for the poor and racial minorities; and what I think may be most applicable to South Carolina, little potential for political alliance between racial minorities and low-to moderate-income whites. Because the low-income whites feel pressured by the Federal Government, they are thrown into potential conflict with racial minorities and react in the voting environment accordingly.[32]

The Committee asked Professor Graham about the feasibility of studying whether South Carolina should allow mixed systems of representation for county councils.[33] He outlined two methods in response. A survey of many jurisdictions, residents, and voters regarding their level of participation, views,

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[31]Identified in app. B as, "Redrawing Council Districts in American Cities," by W.E. Lyon and Malcolm E. Jewell, *State and Local Government Review*, (Spring 86), pp. 71-81.

[32]Transcription, pp. C3–5.

[33] Graham's prepared comments stated:

South Carolina's 1975 Local Government Law attempted to separate much local decision making from dominance by the General Assembly through county-based legislative delegations. The basic forms and structure of local government, however, are still prescribed by the legislature. In 1984, twenty five counties used single member districts and nineteen used at-large. About four out of five municipalities use at-large plans. The number is large because of the small size of most cities in the State. See Graham, p.3.

and characteristics was a more comprehensive but potentially costly method. A comparison of census data using something like Taeuber's Index of Racial Segregation was a more feasible method for the Committee.[34] A comparison of 1990 census data with 1980 and 1970 would reveal whether housing segregation patterns changed and to what extent. Matching these data with locations of single-member and at-large election districts would provide another way of describing them without going through the expense of a survey. The Committee welcomed the insight for use in future program planning.

On balance, Professor Graham reiterated, he believed a pure single-member district structure contributed moderately to protecting minority rights but was far from a panacea. Single-member districts, he thought, were mostly important for symbolic or descriptive or appearance representation. An SMD imparted a general sense of appropriateness or rightness about things and laid the groundwork for an unfolding, positive, supportive set of decisions. The realities that faced new district governments still were a strong source of apprehension in his view. He was uncertain of the outcome as single-member councils realized that significant powers rested not with themselves but other governing structures, e.g., boards of estimates, independent commissions, budget offices.

He underscored a need for a community relations process in an attempt to reach a community consensus in support of single-member districts. He believed this approach would be an effective way to achieve long-term success. He said:

> But . . . [descriptive representation] is going to bring along with it a tremendous amount of conflict. I don't think that conflict on a city council or a county council is necessarily evidence of racial polarization. [I]t is, in part. I don't mean to say that it's not . . . [racial], but it may be an unfortunate combination of personalities or the weakness of the city manager or the county administrator or the lack of a tradition . . . . The nature of statewide leadership sets a tone or a feeling within which local units of government work. South Carolina governors and the interracial councils of the late sixties and early seventies set a tone for that. Governor Riley certainly set a tone for that in a broad-based appeal. People had a sense of efficaciousness, as awkward as that word is, that there was some kinship in this thing, that it was trustworthy.[35]

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[34] Graham's prepared comments stated:

The Index ranges from 0–100. If every block in a city were either 100 percent black or 100 percent nonblack, that city would have an index score of 100, indicating that it was completely segregated. A completely desegregated city would be one in which the black-nonblack population of every block was found in the same percentage proportion as the black-nonblack population of the entire city; its index score would be 0. The 28 city average in 1970 = 87; in 1980 = 81. See Graham, p.6.

[35]Transcription, pp. C15–17.

Professor Graham concluded without making specific recommendations, but generally supported the move toward single-member districts as a desirable one, despite a potential for negative consequences.

John Roy Harper II, General Counsel South Carolina Conference of Branches of The National Association for the Advancement of Colored People (NAACP)

John Roy Harper[36] spoke from 19 years' experience as an attorney specializing in constitutional and civil rights law, and voting rights cases in South Carolina since 1970. He was actively representing or involved with many legal actions for minorities in South Carolina under the provisions of the Voting Rights Act, as general counsel of the NAACP.

In opening comments, Mr. Harper stated an unalterable and unequivocal opposition to combination or mixed election schemes that included at-large representation. He opposed such schemes because:

> The United States Supreme Court stated unequivocally in *Thornburg* v. *Gingles*, 106 S. Ct. 2752, a 1986 case, that single member election districts are the preferred remedy for violations of section 2 of the Voting Rights Act. The Court said where multimember districts generally work to dilute minority voting rights, it cannot be defended that it sporadically and serendipitously benefits minority voters, ...[37]

Mr. Harper noted an exception regarding multimember districts. Courts permitted multimember districts in situations where minority voters experienced sustained success in picking representatives of their choice in proportion to their numbers in the population.[38] He said that with only rare exceptions, black voters in South Carolina were unable to influence elections in proportion to the numbers in the population. He said that empirical data showed a pattern of exclusion where election systems provided at-large seats in tandem with the same number of single-member districts. White candidates dominated those at-large races, and only white candidates with considerable financial resources at their disposal won those at-large seats, he said.

The Committee asked about alternatives or whether at-large or mixed systems were anathema to the NAACP viewpoint. Mr. Harper recommended a scheme called cumulative voting as an alternative. Operating in another State, jurisdictions with small minority populations used the scheme that worked as follows: The elections for all seats on a governing body were held at once, for example, five seats. Voters placed ballots for the total number of seats, distributing them among the candidates however they wished. Using

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[36]Transcription, pp. D1–30.

[37]". . . and the reference on that is 92 Lawyer's Edition Second at page 63." Transcription, p. D2.

[38]". . . and the reference on that is the same, *Thornburg* v. *Gingles*, 92 Lawyer's Edition Second at page 63." Transcription, p. D3.

the example of five seats, a voter, therefore, could cast all five ballots for a single candidate or any combination totaling five votes.

Mr. Harper expressed concern about uneven enforcement of the act. He listed eight complaints and immediate concerns in South Carolina, as identified by the NAACP:

- DOJ was remiss in its obligation under section 5 to prevent dilution of black voting strength. For example, DOJ did not scrutinize many annexations of municipalities. The NAACP observed that many white municipalities annexed white areas while refusing to annex black areas immediately adjacent, despite requests by black residents. DOJ also pre-cleared annexations of vacant land targeted for development of subdivisions designed to attract high-income white voters.
- DOJ provided little or no monitoring assistance for local elections, disappointing requests for assistance by black citizens. Because of the intransigence of local election officials and the lack of intervention by the DOJ, there were five counties in South Carolina where less than 50 percent of the eligible blacks were registered to vote. The counties were Anderson, Lancaster, Oconee, Pickens, and York. Therefore, the NAACP charged, the net result was that black citizens there continued under extreme disadvantages in connection with or as a result of weak representation. The inadequate delivery of basic governmental service was a major concern as a result.
- The dilatory tactics of county election officials thwarted efforts to carry out voter-registration-by-mail procedures in several counties. NAACP information connected officials in Anderson, Oconee, and York Counties with this kind of activity. The election board in Colleton County did not process registration-by-mail applications in time for prospective voters to cast ballots in general elections in 1988, despite applicants having mailed their forms sufficiently in advance.
- County registration boards in South Carolina were predominately white in almost every county in the State, a matter the DOJ had not addressed. The NAACP considered this a travesty, especially in areas of high black population.
- DOJ enforcement of section 5 preclearance procedures was sometimes lax. DOJ also granted so-called retroactive preclearance to changes in voting procedures, contrary to its own regulations and legal precedents.
- DOJ action, based on erroneous information in the view of the NAACP, allowed voter registration in Edgefield County and a portion of Aiken County, comprising District 82, to proceed over the objections of the NAACP during the U.S. House of Representatives reapportionment in 1982. Similar problems arose in Fairfield and a portion of Chester County, comprising District 41, also in Marion County council elections. The NAACP believed that registration in these areas was improper and impermissible. The result was a DOJ concurrence in a reapportionment plan that diluted the black vote in Richland and Charleston Counties and throughout the First Congressional District.
- DOJ supported single-member districts in elections for Federal offices but provided no leadership to encourage single-member districts for city and town councils, school boards, and commissions. This neglected a type of representation that included 230 commissioners statewide, three-fifths of those in elected positions, of which only one commissioner was black.

■ DOJ approved a mixed plan of 4–2–1 in Aiken City, a scheme in which four districts elected representatives, and at-large elections determined two additional seats and a mayor, if two of the districts had a predominately black population. The NAACP objected, complaining that no black had ever won an at-large seat in the city. A similar problem arose in Union County school board elections.

Mr. Harper acknowledged that the forum focused on broad issues rather than specific complaints but considered the opportunity an appropriate occasion for Federal level discussion. He urged the Committee to make a recommendation to the Attorney General of the United States, from the information collected at the forum, that DOJ needed to take corrective actions regarding DOJ enforcement practices in South Carolina.

Returning to the long-term effects, Mr. Harper made a sharp distinction, contrasting his view of DOJ enforcement actions and private legal actions by the NAACP, the American Civil Liberties Union (ACLU), and other civil rights organizations. He believed that most current legal actions through private lawsuits like those the NAACP filed will have a beneficial result for minority rights over time. He predicted a reverse result for DOJ actions. With few exceptions, he viewed recent DOJ efforts as detrimental to minority rights over time.

Mr. Harper made clear his view that racial proportions were important in SMDs to achieve independent representation of minority interests. He maintained that political results were different in district elections where blacks made up 65–70 percent of the electorate compared with a bare majority of 51–55 percent. An officeholder from a 65 percent black district was more representative of minority interests. He said that the act justified enhancing minority political power and producing representatives who were more responsive to minority interests was among its basic objectives. He agreed with critics of certain SMD plans that high minority concentrations in districts were undesirable:

> All too often the Justice Department has approved plans where there has been an inordinate number of black voters lumped into a district. And, in my opinion that's dilutive just as at-large seats are dilutive (sic). There is absolutely no reason to have a 90 percent black electorate in a single district. The common wisdom at the present time is that you need about 65 percent . . . . You don't really need any more than that. And what you can do is to spread out some of the black voters into some of these other predominately white districts so that they can influence the outcomes in those districts.[39]

In an exploratory discussion of possible results, Mr. Harper doubted predictions that making some districts mainly minority while leaving others

[39]Transcription, p. D12.

mainly white helped institutionalize racial polarization. He narrowed his view mainly to urban areas in the State and pointed to changing housing patterns as portending more racially integrated election districts. He noted:

> On the contrary to your premise . . . [of long-term racial polarization], blacks are moving into every area of Richland County . . . [which] has 11 single member districts . . . . I think, with the new housing act that was passed by the...[U.S.] Congress and with the new housing act that was recently passed by the General Assembly of South Carolina, that you're going to see more and more racial integration of housing. So I don't really foresee . . . [institutionalized racial polarization] as being as much of a problem as you might indicate, that is . . . in urban areas. And, quite frankly, my observation is that even with some of these smaller towns throughout the State you find that you've got blacks in subdivisions, those who can afford it, and the black population is not today as nearly concentrated as it was some years past.[40]

Mr. Harper concluded by reiterating opposition to mixed plans like the 4–2–1 plan in Columbia. He noted that the Columbia City Council recently voted down a proposition banning city council meetings in clubs that excluded women or minorities. He pointed out the action as one that the council would not have taken under a single-member district system. He assumed that a council elected under a single-member district system would have a more significant representation of minority interests. In this case, he believed minority interests supported the proposed banning.

Honorable Frank Gilbert
Senate of South Carolina

In opening remarks, Senator Frank Gilbert[41] recalled that racial polarization and racial bloc voting characterized all the elections in which he participated as a candidate. A politician since 1977, he won election to the South Carolina House of Representatives from 1983 to 1988, before his recent election to the State Senate. He noted that for several years before his election to public office he represented his area on the State Executive Committee of the Democratic Party. Despite this experience and other leadership positions, he found white voters reluctant to support a black candidate for public office. He said:

> When we didn't have single-member districts, we didn't find . . . [political access,] unless it was an area which was predominately black . . . . So single member districts really caused me to be elected and others as well . . . . I have a number of white friends who have supported me in the area but certainly not enough to effectuate change . . . . Some other white folks just cannot bring

[40]Transcription, pp. D18–9.

[41]Transcription, pp. B1–30.

> themselves around to supporting a black person in public office. And many of them told me that when they were campaigning and trying to get me elected, that they'd rather not vote. They just could not vote-as they would put it-for a nigger. And we often laugh about that . . . . I said that to say, single member districts have given . . . [minority candidates] an opportunity to serve in public office.[42]

The Committee noted that stacking[43] minority voters in some districts necessarily left other districts with 75–80 percent white voters. The Committee asked Senator Gilbert whether these predominately white areas produced representatives who were less responsive to minority interests?

Senator Gilbert did not find a general pattern regarding political responsiveness or lack of it from predominately white districts. He offered anecdotal examples of a typical range of responses to minority officeholders from their white counterparts in the legislature. Some whites felt threatened by an increased sense of competition from minority representatives. They reacted by adjusting their political positions. This group responded to the minority community. Other whites also adjusted their political positions to fit minority community interests. Still other whites were resistant to most proposals that accommodated minority community interests. According to Senator Gilbert,:

> [T]hey . . . who oppose minority interests . . . bring their prejudices along with them, not only into elected positions, but out there on the farm as well. And sometimes, . . . [their racial prejudice is] . . . the reason they get elected, too; because their constituents see them as their protector . . . [against advancing minority political power].[44]

Senator Gilbert considered whether white officeholders improved the quality of their representation of black community interests after redistricting increased the percentages of minorities in their constituency. He believed many whites became more aware of minority constituents when their percentage of population increased, if the incumbent had an interest in reelection. An increased percentage of minority voters within a district also favored minority community concerns. An increase in potential minority voters, he said, gave them greater opportunity to select candidates who represented their interests, even among a field of all white candidates. Practical white politicians realized that increased minority percentages in districts offered a new opportunity for support and sought it, according to Senator Gilbert.

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[42]Transcription, pp. B2–3.

[43]The term identifies a process of amassing minority population in an election district in numbers sufficient to permit a controlling percentage of prospective voters.

[44]Transcription, pp. B4–5.

Senator Gilbert considered whether so-called trading or political negotiations for support of legislation in return for support of other legislation included minority officeholders. He said:

> I have been cautioned . . . to walk easy, so to speak, because the . . . [white] folk would freeze me out. Well, I recognize that too, and to my knowledge, I haven't been frozen out, but I'm always cognizant of the possibility. So, a lot of trading goes on; and those who are of like color oftentimes can trade best. And, that's just the way it goes. I mean, they'll cut you in; they'll cut you out, for whatever reason they want to. It's not . . . [decided] . . . only on the basis of the merits of whatever it is you're asking for.[45]

Senator Gilbert reiterated a view that racial polarization posed a significant barrier to minority political access. Racism distorted the two-party system, in his view, abusing partisan affiliation as a facade for racial polarization. He mentioned that four or five Democratic members of the State House of Representatives switched to the Republican Party recently. Senator Gilbert described the move as a response to increasing Republican Party membership among whites in the districts. He depicted the newly declared Republican representatives as:

> . . . always a Republican-leaning . . . [group] in terms of their conservatism, and conservatism in this State is a new definition for racism. It has nothing to do with what the term conservatism is supposed to mean. Conservatism is racism in the State of South Carolina.[46]

Senator Gilbert noted that a white politician, who was an incumbent like himself, could expect to receive more votes from whites. He believed that incumbency offered less advantage to a minority officeholder among white voters. He expected, as a result, that whatever political advances he might make during the term could be potentially offset by some minor issue raised by an opponent. Confronting the possibility of a difficult reelection, he believed that without political power acquired through single-member districts that he, as a minority candidate, would never have had an opportunity to win office and prove what he could do.

Willie B. Owens, Community Organizer
Orangeburg, South Carolina

Willie Owens[47] brought a grassroots perspective to the forum and insight into the viewpoint of youth. He spoke as a public school teacher and a long-term civil rights activist in Orangeburg.

Mr. Owens spoke in broad terms about combating racial discrimination in South Carolina. He recalled that before passage of the Voting Rights Act a drastic imbalance in political power favored whites. The black community

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[45]Transcription, p. B7.

[46]Transcription, pp. B25-6.

[47]Transcription, pp. E1–7.

suffered deeply because of their powerlessness. He noted that recollections were still fresh in the minority community of that earlier period, and traces of mistrust remained as voting rights protection became a reality. He asked rhetorically, "I think about what happened when we didn't have single-member districts; how willing was the white community to relinquish power?"[48]

In Owens' view, SMDs helped minority residents overcome part of their apprehension about encountering whites in a political arena. SMDs constructed to enhance minority political power served as a kind of proving ground for the political aspirations of minority candidates and development of their skill. He believed that minority advances under SMDs were a milestone in the progress of disadvantaged blacks toward full citizenship. He summarized his view:

> Briefly, in terms of the importance of single-member districts, I think it's the first time in the history of black America, especially in the South, where we have had an opportunity to make important decisions that helped us to provide a delivery system. It may not have been as effective as we wanted it to be, but it was a delivery service that did not exist previously. Prior to that time, it was hard to identify who actually represented you.[49]

Mr. Owen's comments concluded the forum presentations. Reviewing the remarks, the Advisory Committee noted several recommendations coming from the participants. The recommendations are as follows:

- The Committee should compare census data since 1970 for indications of changed patterns of racially segregated housing. The aim of a study would be an estimate of whether housing desegregation also eliminated barriers to political representation for minorities.
- The Committee should conduct a study to find the factual basis of perceptions that the DOJ constructed an enforcement of the Voting Rights Act that promoted a partisan realignment by angering white Democrats who opposed racially weighted weighted SMDs.
- The Committee should inform the Attorney General of the United States of nine specific complaints of voting rights violations charged by the NAACP South Carolina Conference of Branches. A detailed listing of the complaints is part of this report.
- South Carolina communities should seek resolution of political disputes through community debate and avoid settlements resulting from lawsuits. An approach that avoided a perception of coercion resulting from court rulings would improve intergroup relations in South Carolina in this view.
- South Carolina communities should extend the use of weighted single-member districts as a voting rights remedy. The continuing pattern of denial or limited access to political processes for minorities justifies effective measures to restore minority political power in this view.

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[48]Transcription, p. E1.

[49]Transcription, p. E2.

- South Carolina communities should identify problems involving voting rights protection and act voluntarily to offer courts a community consensus on remedies. A community following this approach may tailor plans with more options for community peculiarity and avoid sometimes inflexible court-ordered voting rights plans.

SUMMARY

Reversing political powerlessness for black voters continued to be a paramount civil rights concern in South Carolina throughout the 1980s. In scores of local elections around the State, communities confronted moral, political, and legal challenges to get meaningful political representation for all. A current, controversial method in this effort, often used with approval by the U.S. Department of Justice (DOJ), involves racially weighted single-member election districts (SMDs).

Racially weighted SMDs enhanced political empowerment of minority voters. Black voters, for example, become more essential to the outcome of elections. This result often followed where, after court-ordered or voluntary SMD redistricting, minority voting strength reached about 65 percent in one or more election districts. The electoral choices in these weighted SMDs improved the numbers of minority officeholders in local and State public office. An increasing number of newly established weighted SMDs and black candidates picked to represent them prompted concern among critics that SMDs supported a system of proportional representation for minorities.

The Advisory Committee explored the question: "What are the long-term implications of current implementation of the Voting Rights Act?" At issue was a concern that, despite the intentions of supporters, SMDs brought political segregation by isolating blacks into racially significant election districts. The forum included five knowledgeable persons representing diverse viewpoints on the issues. The forum speakers expressed opinions on racially proportional representation and whether politically isolated black communities could flourish and exercise political influence outside their own districts. The Committee hopes that its forum contributed a better understanding of these issues. We hope to continue monitoring significant developments in the implementation of the Voting Rights Act as they emerge in South Carolinia.

Appendix A

THE VOTING RIGHTS ACT AND SINGLE-MEMBER DISTRICTS

by

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Of Counsel

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Columbia, South Carolina

I. Voting Rights Act

A. History

1. 1965 Act
   a. Section 2
   b. Section 5
      1) Preclearance
      2) Bailout

2. 1970 Extension
3. 1975 Extension

B. Current Law - The 1982 Amendments

1. Section 2

   a. Mobile v. Bolden
   b. "Results" Test
   c. Meeting Legal Burden Under Section 2

2. Bailout

II. The Push for Single Member Districts

A. Through Section 5 Preclearance
B. Through Section 2 Lawsuits

III. How Section 5 Preclearance Operates In The Real World

A. Procedures
B. Plaintiff's Attorney's Fees

IV. How Section 2 Operates In the Real World

A. Suit
B. Statistical Analysis
C. Violation Shown
D. Remedy Phase

1. Court Defers to Legislative Authority

   a. Home Rule issues in South Carolina
   b. Requirement of Violation
   c. Procedures for Devising New Plan

2. Submission to Justice Department under Section 5
3. Court-Drawn Remedial Plan
4. Plaintiff's Attorney's Fees

V. Other Issues

The Evolution From Multi-Member to Single-Member District Electoral Schemes in South Carolina is the result of:

Federal Law - VRA
Federal Court Decisions
Department of Justice Philosophy

I. Voting Rights Act

A. History

1. Originally passed in 1965 because of low voter turnout and the use of "tests or devices" which hindered voting. The goal was to remove obstacles preventing access to the ballot.

a. Section 2 - Was a Recodification of the Fifteenth Amendment to the U.S. Constitution:

Who is Covered: Every jurisdiction in every State
What is Covered: Existing law which affects elections

What is the Legal Analysis:

Who has Burden: Person challenging the law
What Burden must he meet: Show that the challenged law was racially motivated
Where is matter heard: U.S. District Court

b. Section 5 - New, unique enforcement mechanism

1) Preclearance
Who is covered: Selected jurisdictions, based on low voter turnout and the use of test or device which hampered voting in 1964 elections. All of S.C. is covered.

What is covered: Changes in "voting qualification or prerequisite to voting, or standard practice, or procedure with respect to voting . . ." 42 U.S.C. 1973 c. [See Appendix 1]

In Allen v. Board of Elections 398 U.S. 544 (1969) the Court indicated that any

proposed change that even indirectly touches on elections is covered. Also, 28 CFR 51.1 gives examples of changes which must be precleared. [See Appendix 5]

What is the Legal Analysis:

Who has the Burden: The submitting jurisdiction.
What Burden must he meet: The jurisdiction must show that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race" 42 U.S.C. 1973 c. This is the "effects" test, which negates the need to show motivation.
How is the Burden Met:
By showing the change is nonretrogressive i.e. the change does not put the minority in a worse situation than it currently holds.
Beer v. U.S. 425 U.S. 130 (1976);
Lockhart v. U.S. 460 U.S. 125 (1983).

Where is Matter Heard: At the U.S. Department of Justice or U.S. District Court in Washington, D.C.

2) Bailout

Jurisdiction could remove itself from preclearance requirement if had not used a "test or device" from 1965 until 1970.

2. In 1970 there was a 5-year extension of the bailout requirement; therefore, preclearance was extended until 1975.

3. In 1975, there was a 7-year extension of the bailout requirement; therefore, preclearance was extended until 1982.

B. Current Law - The 1982 Amendments

1. Fundamentally changed Section 2 to accommodate a new definition of discrimination, emphasis was shifted from "fair process" to "fair results".

a. The impetus for this Section 2 change was Mobile v. Bolden 446 U.S. 55 (1980) where Court indicated "intent" was standard of proof to be used in Section 2 cases.

b. Section 2 was amended to prohibit any law "which results in a denial or abridgement" of right to vote on account of race. 42 U.S.C. 1973 (See Appendix 1).

Therefore, the approach under Section 2 is changed.

Who is covered: (Same as before 1982) Every jurisdiction in every State.

What is covered: (Same as before 1982) Existing law which affects elections.

What is legal analysis:

Who has the Burden: (Same as before 1982) Person challenging the law.

What Burden must he meet: (New) Based on totality of circumstances, the political processes leading to nomination or election are not equally open to participation by minorities.

Where is Matter Heard: (Same as Before 1982) U. S. District Court

C. How does one meet the burden under the new Section 2?

1. The Senate Committee report set out factors to be reviewed. [Appendix 3] These factors will be alleged in every lawsuit.

2. In Thornburg v. Gingles 478 U.S. 30 (1986), the Court simplified the test in challenges to multi-member districts to a three-part test:

a. The minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district,

b. The minority group must be politically cohesive, and

c. The white majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate. [See Appendix 4 for Court's exact language]

3. In South Carolina, #a and #b above are met fairly easily, so the focus is on requirement #c:

The white majority bloc votes . . .

This need not be racially motivated voting, merely that whites and blacks vote differently. This is shown by statistical analysis.

To enable it to usually defeat. . .

Must review election results over a period of time, not just in one election.

The minority's preferred candidate . . .

This candidate need not be a minority member. Need to look at primaries to see if minority-preferred candidates even make it to general elections.

2. 1982 Amendments - Also extended Section 5 coverage until 2009 and toughened criteria for bailout.

a. There had been no successful contested bailouts from 1965 until 1982.

b. Under the current law, there is no realistic chance of any significant bailout before 2009.

II. The Rush to Single-Member Districts

A. Through implementation of Section 5 preclearance.

1. The Justice Department generally will not preclear a proposed electoral change until it includes a Single-Member plan. Department of Justice relies on input from minority community.

B. Through Section 2 challenges in District Court

1. Generally in multi-member district litigation, the preferred remedy is single-member districts when courts draw new the election plan. Plaintiffs usually seek a single-member plan as the remedy to a Section 2 violation. [See Tallahassee Branch of NAACP v. Leon County, Florida, 827 F2d 1436 (11th Cir. 1987) for discussion of preference for single-member districts, especially in reapportionment.]

III. How does Section 5 Preclearance work in the real world?

A. Proposed change is submitted to Department of Justice with request for preclearance. Department of Justice has 60 days to object (or request more data, which extends the 60-day deadline). [For further discussion see 28 CFR 51 in Appendix 5].

1. If Department of Justice objects, change cannot be implemented.

2. If Justice Department does not object, the proposed change can still be challenged in court.

B. Attorneys fees for fighting Preclearance are generally not granted.
Arriola v. Harville 781 F.2d 506 (5th Cir 1986).

IV. How does Section 2 work in the real world?

A. Suit challenging existing law filed in District Court.

B. Statistical analysis of voting patterns is considered by court.

C. Basically if bloc voting and a lack of proportional representation are present, a violation has been established. Then jurisdiction can

1. Continue to trial to merits, or
2. Negotiate a settlement.

D. Remedy phase

1. Court defers to proper legislative authority to redraw plan.

a. Who is proper legislative authority in South Carolina?

(1) For Counties, generally, County Council is proper authority under Home Rule. South Carolina Constitution Article VIII, Section 7 (prohibiting special legislation for counties); S.C. Code Section 4-9-10 [See Appendix 2].

a. But look at S.C. Code Section 4-9-10(c); probably not applicable to a current system which has been precleared. Horry County v. Cooke. 275 S.C. 19, 267 S.E.2d 82 (1980).

(2) For municipalities, City Council is apparently proper authority. South Carolina Constitution Article VIII, Section 10 (prohibiting special legislation for municipalities); S. C. Code 5-15-30.

b. Can Council draw a new plan absent a stipulation or finding of a Section 2 violation?

(1) Generally County Council can change method of election only through referendum. S.C. Code Section 4-9-10(c) (as to Counties); S. C. Code Section 5-15-30 (apparently the same rule for municipalities). There seems to be no authority to change to a new electoral plan simply by consent agreement between the parties.

c. What is the proper procedure to adopt a new plan after a stipulation or finding of a Section 2 violation?

(1) It appears to taken an ordinance to change the election system under the normal ordinance

procedures. S.C. Code 4-9-120 (as to Counties); S. C. Code 5-15-30 (as to municipalities). [See Appendix 2]

(2) Is this the type of ordinance which requires a public hearing?

a. Apparently not for a County. S. C. Code Section 4-9-130.

2. After properly drawing new plan, Council submits to the Justice Department (or D.C. District Court) for Section 5 Preclearance. See III supra.

a. But what is standard to be applied under this Section 5 review?

(1) The normal Nonretrogressive (or "effects") standard, which is used for voluntary submissions? or

(2) A Section 2 standard - "results"? It appears that a plan which is non-retrogressive may still be objected to if it violates Section 2. 28 C.F.R. 51.55(b)(2). [See Appendix 5.]

3. If council fails to come up with precleared plan, the Court will draw a plan.

a. Is such a Court-drawn plan subject to preclearance?

(1) Not if it is wholly judicially drawn. Connor v. Johnson, 402 U.S. 690 (1971).

(2) If it is based on earlier legislative plan, it is subject to preclearance. Leon County 827 F2d 1436 (11th Cir. 1987).

E. Generally, attorneys fees will be awarded to the Plaintiffs in Section 2 suits. 42 U.S.C. 1973 l.

V. Other Issues

A. How much State law can be overridden by a Section 2 remedial plan?

1. Could a County adopt a mixed plan?

B. Does Section 2 create a duty of periodic adjustment?

1. A valid Section 2 system can become invalid as population or voting patterns shift.

C. What about contexts other than multimember districts?

1. Limited Voting
2. Stack voting

D. Mixed City plan may be susceptible to challenge.

E. Reapportionment in 1991.

Appendix B

COMMENTS REGARDING THE LONG TERM EFFECTS ON MINORITY RIGHTS OF THE CURRENT IMPLEMENTATION OF THE VOTING RIGHTS ACT OF 1965 WITH SPECIAL FOCUS ON SINGLE MEMBER DISTRICTS

PREPARED FOR THE SOUTH CAROLINA ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS

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I. OVERVIEW OF CURRENT ASPECTS OF SINGLE MEMBER DISTRICTS

A. BACKGROUND. The early twentieth-century wave of reform in American cities promoted three major changes: (1) at-large elections, (2) nonpartisan ballots, (3) the professional city manager. The general purpose of these reforms was to break the control of the party bosses over the electoral processes and to administer the city government according to designs that would make it more efficient and honest. Of these elements, my focus, in this brief discussion, is districting.

B. GENERAL INFORMATION ON DISTRICTING PRACTICES. Since barriers to black voter registration have largely been removed since passage of the Voting Rights Act of 1965, the new reforms focus not on denial of the right to vote, but on the structure of elections.

Some general characteristics of the ways election districts are structured in American cities may be found discussed in W. E. Lyons and Malcolm E. Jewell, "Redrawing Council Districts in American Cities," State and Local Government Review, (Spring 86), 71-81.

* a study of 117 cities nationwide (115 report use of districts, 2 have missing data.)

* 70/117 (60%) have followed the system of electing some or all council members from wards or districts BEFORE 1965

17 others adopted the system between 1965-1975
28 others adopted the idea since 1975

* By region: 54 out of 62 Northeastern and Midwestern cities had used the district concept in whole or part before 1965

COMPARED to 8 of 35 cities in the South
8 of 20 cities in the West

*43 of 117 cities use some combination of single-member, at-large districts
Some cities have two-member districts

74/117 use some combination of single-member, at-large, but in only 7 of these 74 cities do at-large members make up more than half of total council seats

2/3 of the 56 northeastern cities choose at least one-fourth of their members at large

* 101 of the 117 cities had carried out a redistricting since 1980 census

PERCENTAGE OF USE OF CRITERIA TO REDRAW as expressed by cities

95% Population equality as nearly as possible
45% Districts should be compact
78% Districts should be contiguous
29% Districts should be as homogeneous as possible in terms of such factors as race, socioeconomic interests, or cultural identity
33% Districts should be drawn so that blacks and/or hispanics have an opportunity to elect representatives roughly equal to their proportion of the population in the total city. More than 1/2 (63%) of cities that use the minority representation criterion are in the South

The larger the proportion of black population, the more minority representation is likely to be a criterion for council districting:

58% of the time in cities with more than 26% black population
39% of the time in cities with 11-25% black
15% of the time in cities 10% black or less

C. A SOUTHERN FOCUS ON DISTRICTING

The percentage of a city's council members who are black is usually less than the percentage of a city's population which is black. Numerous studies have documented the positive impact that the single-member district has had on this underrepresentation:

1. Albert Karnig ("Black Representation on City Councils: The Impact of District Elections and Socioeconomic Factors," Urban Affairs Quarterly 12,2, Dec, 1976) found that it was more probable for blacks to get a fair number of council members with single member than with at-large representation districts.

2. A study of Texas cities that switched from at-large to ward systems found that minorities increased their representation after the switch (Davidson and Korbel, 1981).

3. Engstrom and McDonald found that the ward system consistently gave blacks more representation than the at-large system.

4. Heilig and Mundt in a 1980-1981 survey of cities with populations exceeding 10,000 and with at least 15% black population in 1970 documented the southern focus of this reform activity. 93% OF THE CITIES IN WHICH ATTEMPTS WERE MADE IN THE 1970S TO SWITCH FROM AT-LARGE TO SINGLE-MEMBER DISTRICTS WERE LOCATED IN THE SOUTH. The attempts occurred in 55% of the southern cities in there survey that had in 1970 used at-large elections to select council members. Efforts were most likely to have occurred in the southern cities in which blacks were the most severely underrepresented on the council. 33% OF THE SOUTHERN CITIES EMPLOYING AT-LARGE ELECTIONS IN 1970 WERE FOUND TO HAVE SWITCHED TO GEOGRAPHIC DISTRICTING BY 1980.

D. SOUTH CAROLINA'S LOCAL GOVERNMENT REFORM. South Carolina's 1975 Local Government Law attempted to separate much local decision making from dominance by the General Assembly through county-based legislative delegations. The basic forms and structure of local government, however, are still prescribed by the legislature. In 1984, twenty five counties used single member districts and nineteen used at-large. About four out of five municipalities use at-large plans. The number is large because of the small size of most cities in the state.

II. SPECULATION ON IMPACT OF SINGLE MEMBER DISTRICTS

A. IMPLICATIONS FOR POLITICAL REPRESENTATION OF ELECTION STRUCTURE. A variety of political representation theories extend Burke's longstanding differentiation of representative as delegate, responsive to constituents at home, and as trustee, who exercises best judgment.

Following is a partial inventory of representation theories and the implications of political structures for each. The discussion follows Welch and Bledsoe (1988: 106).

1. Descriptive Representation (Pitkin, 1967): policymakers have salient social characteristics of the constituency as a whole. Political structure matters here. At-large council members tend to have higher incomes and more education. There is a general and strong negative effect of at-large elections on black representation.

2. Service Representation: work of representative on behalf of constituents. Political structure matters here. At-large council members devote less time to service activities than district council members. At-large members are also less likely to believe that constituents expect personal service.

3. Focus of Representation: a general reflection of the interest of the representative. Political structure matters here. District council members are more likely to focus upon a narrow geographic constituency while at-large council members focus on a citywide and business constituency.

4. Policy Representation (Miller and Stokes, 1963: congruence between constituents and representatives in Congress) and Allocative Representation (Eulau and Karp, 1977: benefits for the district). The impact of political structure is mixed here. Welch and Bledsoe found no consistent differences in policy attitudes by structure type; they actually found noteworthy similarities. They did find that councils with district elections engaged in more conflict than councils elected at-large and that their conflict was more likely to be geographically based.

5. Overall effectiveness: political structure has mixed impact. Black citizens feel more efficacious in cities with district elections. It does not seem to matter for white citizens. There is some evidence that citizens favor district elections and that voting participation is higher with districts than at-large.

B. IMPLICATIONS FOR RACIAL POLARIZATION. I am unable to find clear evidence that links political structure to enhanced or reduced racial polarization, however defined. Political structures, like prisms, refract the social pressures behind them. Some pressures are bent and delayed but the structure as prism does not add or subtract very much. The potential for racial polarization lies not in political structures but in the fundamental tension between demands of racial minorities for improved access to middle-class life styles and functionally organized structures in social services, education, urban redevelopment, public housing, and suburban development that have coalesced to build the largely segregated urban metropolis of today.

A speculative projection of underlying social trends suggests that the underlying tension for political structures will not get much better in the next decade.

1. De facto housing segregation is not likely to change. While increasing numbers of blacks are moving into predominately white suburbs and neighborhoods, the basic segregation of residential neighborhoods does not appear to change. Taeuber's Index suggests modest improvements between 1970 and 1980 in 28 American cities. It may be productive to compare the census units of South Carolina cities or counties before and after single member districts to see if the Index rises or falls. Many influences other than single member districts would affect the Index.

[The Iniex ranges from 0-100. If every block in a city were either 100 percent black or 100 percent nonblack, that city would have an index score of 100, indicating that it was completely segregated. A completely desegregated city would be one in which the black-nonblack population of every black was found in the same percentage proportion as the black-nonblack population of the entire city; its index score would be 0. The 28 city average in 1970 = 87; in 1980 = 81.]

2. A more slowly growing economic pie will not help the poor, especially the poor who are racial minorities, to have access to middle-class life styles.

3. The biggest ally for the poor and racial minorities has been the federal government. The continued effectiveness of federal intervention and the success of racial minorities in state and local government influence are questionable.

4. There seems little potential for a political alliance between racial minorities and lower to moderate income whites. Competition seems more likely and this may be viewed generally as racial polarization. Workingclass whites and workingclass blacks have been joined into more frequent social interaction through federal policies. Workingclass whites are more vulnerable than the upper middle classes to layoffs and thus resentment of affirmative action, to the squeeze on housing, and to the impact of school busing. These tensions may be reflected by low voter turnout, the appeal of a candidate to racial prejudice, or low voter support for black candidates, especially by low and middle income white voters.