Testimony of

Professor Sherrilyn A. Ifill

July 13, 2006

Testimony of
SHERRILYN A. IFILL
Associate Professor of Law, University of Maryland School of Law Before the Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights

"Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after LULAC v. Perry"

Hearing Regarding the Reauthorization of the Voting Rights Act
July 13, 2006

Background

I am pleased to have the opportunity to offer my testimony in support of S. 2703, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006. My testimony is focused on the impact of the Supreme Court's recent ruling in League of United Latin

American Citizens, et al. v. Perry, et al., 548 U.S. __(2006)(slip. op. no. 05-204)(LULAC), on Congress's efforts to renew the expiring provisions of the Voting Rights Act of 1965 (VRA). Although the Court's ruling arises in the context of several legal claims that did not touch upon Section 5 of the VRA, the ruling recognizes that voting discrimination persists throughout the State of Texas, which has the nation's 4th largest minority population,1 and essentially reaffirms the importance of the expiring provisions of the Act. I strongly urge Chairman Arlen J. Specter and other Members of this Committee to pass S. 2703 to help ensure that African Americans, Latinos, Native Americans and other racial and language minority groups are able to participate meaningfully in the political process.

I am a civil rights lawyer and an Associate Professor of Law at the University of Maryland School of Law in Baltimore, Maryland. My coursework includes Civil Procedure, Constitutional Law and Voting Rights Law, among others. I have extensive experience litigating voting rights matters including challenges to discriminatory election schemes under the Voting Rights Act of 1965 and cases, on behalf of black voters, challenging the method of electing judicial officers in Texas, Louisiana, and Oklahoma. I have also served as counsel for the petitioners in Houston Lawyers' Ass'n. v. Atty. Gen'l. of Texas, 501 U.S. 419 (1991), in which the U.S. Supreme Court held that Section 2 of the Voting Rights Act applies to judicial elections. Given my experience litigating voting rights matters in the State of Texas, I am struck by the Supreme Court's analysis of the Section 2 claim in LULAC and the similarities between circumstances currently affecting minority voters in the state, and the voting conditions that I encountered while litigating in Texas

and other covered jurisdictions around the country during the 1980s and 1990s. In light of those similarities, I am alarmed by the claim advanced by some that the Court's decision in LULAC v. Perry in some way weakens the case for reauthorizing the key provisions of the Voting Rights Act contained in the draft bill before this Committee. To the contrary, the Court's decision in LULAC v. Perry affirms the continuing need for the preclearance provisions of Section 5 of the Act and reaffirms the principles by which courts have analyzed claims brought under section 2 since the 1982 amendments to the Act.

Introduction

In LULAC, the Supreme Court considered the legality of a redistricting plan that presented substantial issues of minority vote dilution occurring in the context of a contested, partisan-driven legislative session in the State of Texas.

In its ruling, the Court determined that there was no "manageable" standard that could be employed to police partisan gerrymandering, and thus refused to invalidate the redistricting plan on the basis of proposed legal theories that would limit partisan redistricting. The Court also rejected a Section 2 challenge to District 24, which incorporates significant parts of the Dallas-Forth Worth metropolitan area, in which African-American voters argued that they had effective electoral control of a Congressional district even though they constituted under 30 percent of the voting population in that district. Significantly, and most relevant for purposes of this hearing, the Court held that District 23 had to be redrawn because it results in impermissible vote dilution in violation of Section 2 of the Voting Rights Act (VRA).

In large part, the Court's ruling addresses the various legal claims raised to challenge the practice of one political party drawing legislative district lines to maximize its electoral advantage. However, to the extent that the Court's ruling bears on Congress's consideration of the expiring provisions of the VRA, it lies in the fact that the successful Section 2 vote dilution claim shows that voting discrimination persists today in covered jurisdictions, contrary to the views of those who attempt to deny this well supported fact. The VRA's protections remain important checks on voting discrimination which continues to have the tendency to "shape shift;" Congress has used evidence that jurisdictions have moved to adopt new and more sophisticated forms of discrimination to justify the necessity of Section 5 from the outset. My testimony will highlight a few points made by the Court that lend support to the current renewal bill. First, the Court recognized that discrimination persists on a statewide basis in Texas and is reflected, in part, by significant levels of racially polarized voting in state elections. Second, the Court also suggested that intentional discrimination continues to stand as a threat within the political process. Third, the Court recognized that Section 5 is a compelling state interest, suggesting that any future challenge to the constitutionality of Section 5 would likely fail as similar challenges have in the past.2 And finally, the Supreme Court's ruling supports the need for Congress to restore the "ability to elect" standard within the Section 5 context, thus bringing imperative uniformity and clarity to the way that minority electoral opportunities are measured within the judicial and administrative contexts.

Supreme Court Recognition of Continued Racially Polarized Voting

The LULAC Court recognized that significant levels of racially polarized voting continue to hamper minority electoral opportunities. This political reality highlights the continued need for the expiring provisions of the Act.

Indeed, the Court recognized that polarization within challenged District 23 was "particularly severe," finding that the "Anglo citizen voting-age majority will often, if not always, prevent Latinos from electing the candidate of their choice in the district."3 The LULAC case illustrates not only the existence of racially polarized voting, but more significantly, how knowledge of those voting patterns - which are vestiges of state-sponsored discrimination - can be used by governmental actors to structure electoral arrangements in ways that disadvantage minority voters. To state it more simply, racially polarized voting patterns plus governmental power can, and does, result in minority vote dilution in many covered jurisdictions.

Discrimination as Shape Shifter

Congress has compiled an extensive record that demonstrates that discrimination persists in the political process. This record illustrates the continuing need for Section 5 of the Voting Rights Act and provides a sufficient basis for Congress to reauthorize its expiring provisions. Although opponents have pointed to substantial progress made since the 1982 renewal, the evidence demonstrates that jurisdictions continue to find new ways to retrogress and dilute minority voting strength. Indeed, the LULAC Court recognized that the contested redistricting plan eliminated minority electoral opportunity in the face of growing numbers of politically cohesive Latino voters. This observation ties directly to well-established findings of Congress, in the context of previous renewal debates, showing that one of the periods of greatest danger for minority voting power occurs at the very time that minority communities are poised to exercise it.

Consider, for example, that as early as the seminal Section 5 case of Allen v. State Bd. of Elections, 393 U.S. 544 (1969), the underlying discriminatory practices involved illustrated that once African Americans were able to register to vote, the rules of the game shifted resulting in restrictions that limited the effectiveness of their votes.

It is also noteworthy that the Court noted that the Texas redistricting plan "bears the mark of intentional discrimination that could give rise to an equal protection violation."4 The Court also recognized that jurisdictions are often juggling various redistricting principles when it adopts a particular plan but noted that these principles, such as incumbency protection, "cannot justify the [negative] effect on minority voters."5 Similarly, in the Section 5 context, the preclearance process ensures that jurisdictions do not adopt retrogressive voting changes dressed up with justifications that bear the marks of apparent neutrality.

Indeed, the Section 5 process is aimed at ferreting out those changes that place voters in a worse position and those changes may or may not have been adopted with any malice or apparent discriminatory intent. Nonetheless, the Court's ruling in LULAC recognized that discriminatory intent may continue to surface within the political process. Experience shows that, more often than not, this discrimination may surface in different shapes and forms.6 Indeed, the LULAC Court provides the most recent and compelling evidence of this fact. It bears emphasis that the Court's opinion identifies many hallmarks of the voting discrimination in Texas that were

so familiar to me when I litigated voting rights cases in that state much closer in time to the 1982 renewal.

Partisanship Will Not Insulate Voting Changes from Review Regarding their Impact on Minority Voting Strength

The LULAC ruling highlights the fact that intense partisan debates will not suffice to insulate those jurisdictions that adopt changes that either impair or retrogress minority voting strength. Some scholars have argued that, perhaps, statewide redistricting should be removed from the scope of Section 5 review because the high-stakes nature of those plans is almost always subject to litigation. While Section 5 itself did not block the voting discrimination in this case, a reality that perhaps illustrates, among other things, the difficulty of applying
Georgia v. Ashcroft, there can be little doubt that the Voting Rights Act does play a vital role in protecting minorities in battles that are often characterized as solely partisan. If anything, LULAC illustrates that minorities cannot be used as fillers or as pawns for districts in a quest for a partisan power grab. Rather, protection of minority voting strength and compliance with the Voting Rights Act are a compelling state interest that must seriously be considered by line-drawers and politicians alike.

LULAC makes clear that it would be completely untenable to ask all minority voters facing continuing voting discrimination in covered jurisdictions to file and litigate complex Section 2 cases in order to vindicate their rights. Indeed, the time and resources involved would lead to too many communities bearing continued discrimination in the absence of funds and expertise to stop it.

The Proposed Bill Will Bring Uniformity to the VRA Statutory Framework

The proposed bill will bring needed uniformity and coherence to the Act's statutory framework by restoring the "ability to elect" standard in the Section 5 preclearance context. Currently, Section 2 of the VRA relies on the "ability to elect" standard in determining whether a particular voting practice or procedure dilutes minority voting strength. Specifically, in the redistricting context, Section 2
requires that courts look to see whether a redistricting plan impairs minority voting strength by eliminating the "opportunity to elect their candidate of choice."
Section 2 courts perform this analysis by conducting a very thorough review that looks to the preconditions set forth in Thornburg v. Gingles, 478 U.S. 30 (1986), while also considering the totality of the circumstances surrounding the challenged practice. Although the current Section 5 retrogression determination
is different in that it looks only to whether a particular voting change places minority voters in a worse position, historically, the Justice Department and courts have made preclearance determinations by initially comparing minority electoral opportunities under the benchmark and proposed plans. It is this assessment of minority electoral opportunities that has long been consistent with
Section 2 determinations about practices that provide minority voters an opportunity to elect candidates of choice.

The Court's recent ruling highlights the appropriate methodology for determining whether minority voters have an opportunity to elect candidates of choice. The proposed bill provides a needed coherence by restoring this
methodology and standard in the Section 5 context and bringing a degree of consistency between Sections 2 and 5 while continuing to recognize that they serve as distinct, but complimentary tools for attacking the same harm. The
LULAC opinion demonstrates that the ability to elect standard is administrable,
as both the Court and the Department of Justice (DOJ) had recognized for nearly 30 years prior to Georgia v. Ashcroft, 539 U.S. 461 (2003), vacated and remanded. Indeed, the Court determined that challenged District 23 was invalid under Section 2 because it no longer provided minority voters the opportunity to elect candidates of their choice. The Court recognized that the opportunity to elect candidates of choice in a Section 2 case requires more than the ability to influence the outcome between some candidates.7

Further, the Court emphasized the importance of making particularized determinations about minority electoral opportunity. Although the Court acknowledged that the challenged district was physically compact, the court noted that the Gingles compactness requirement refers to the compactness of the minority population, not the compactness of the contested district."8 In reaching its holding, the Court noted that the old district fractured a politically cohesive population of minority voters who had forged an "efficacious political identity."9 This particularized determination is consistent with the approach used to measure electoral opportunities in the Section 5 context.

Conclusion

Although the recent LULAC ruling does not bear directly on the bill, to the extent that any relevant conclusions can be drawn from it, the Court affirms that the Voting Rights Act and the protections it affords are still a vital and necessary component of our nation's political life. Moreover, several Justices recognize that
Section 5 is a compelling state interest and this strongly suggests that any future challenges to the constitutionality of the Act's retrogression provisions will likely be unsuccessful. LULAC does not require that Congress amend the language of the proposed bill. In fact, the ruling supports the importance of restoring the ability to elect standard in the Section 5 context to bring needed clarity, uniformity, and enhanced administrability to the Act's statutory framework.

Most significantly, the LULAC Court recognized that racial discrimination against our nation's racial and language minorities persists to the present day -- at times in the context of statewide voting changes -- as does extreme levels of polarized voting such as the Court found on a statewide basis in Texas. This stark evidence of persisting discrimination not only bolsters Congress' authority to renew the expiring provisions but also highlights the continuing need for Section 5 to remain in effect in the covered jurisdictions.

Finally, the LULAC ruling highlights the fact that intense partisan struggles are not sufficient to insulate those jurisdictions that adopt changes that either impair or retrogress minority voting strength. Partisan battles, as illustrated by Texas's recent experience, may indeed pose a grave threat to minority voting rights.