QUESTIONS FOR THE RECORD FROM SENATOR CHARLES E. GRASSLEY

The Voting Rights Amendment Act, S. 1945: Updating the Voting Rights Act in Response to Shelby County v. Holder

Questions for Mr. Carvin:

1. Section 6(b) of S.1945 provides that court "shall" grant injunctive relief "if the court determines that, on balance, the hardship imposed upon the defendant by the issuance of the relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted." In all other situations, courts exercise discretion in issuing an injunction, and never do so without finding that irreparable harm would occur in the absence of the injunction, as well as finding that the party seeking the injunction would be likely to succeed on the merits of his or her claim. Why is it desirable to require courts to issue injunctions in the absence of any showing of irreparable injury and for lawsuits that could be frivolous?

Answer:

It is plainly not desirable and would greatly disrupt how civil litigation should be and always has been conducted in all civil rights and other cases. Needless to say, the authority of federal courts to suspend presumptively valid state laws, particularly in areas like voter qualifications where the Constitution vests principal responsibility with the states, is extremely circumscribed. Therefore, it can only be done when the state will likely violate a citizen's constitutional or civil rights and impose an irreparable harm. As you note, however, Section 6(b) eliminates both of these basic requirements, replacing them with an unprecedented "balancing" test, measuring the relative "hardship" to the voter and the State, and *mandating* an injunction if the hardship is greater on the voter. Since the "hardship" of losing or burdening one's vote will inevitably outweigh the Government's administrative or ballot integrity interests *if* one assumes that the plaintiff's case is meritorious (as 6(b) requires), this "test" will actually mandate preliminary injunctions for all voting claims, even the manifestly frivolous ones. Thus, every voting practice in every state would be subjected to a *de facto* preclearance regime: state voting laws, particularly new ones, would be *presumptively* enjoined (once suit is filed by any voter) until the state can prevail on the merits. That being so, this section suffers from flaws quite similar to those that invalidated the 2006 renewal of Section 5 in *Shelby County*.

2. Ms. Ifill testified: "Litigation is costly, time-consuming, and can only address voting discrimination after it has gone into effect and after the democratic process has been besmirched with the taint of discrimination." What empirical evidence exists to support the proposition that litigation under Section 2 of the Voting Rights Act (1) is more costly than litigation arising from challenges filed under Section 5; (2) can only address voting discrimination only after it has gone into effect? Is there any statutory language or court decision that prevents a litigant from challenging a voting change under Section 2 prior to its effective date or that would require a court to rule against such a challenge as a matter of law prior to the effective date of the change? Is there any statutory language or court decision that says the opposite?

Answer:

As far as I am aware, there is no reliable empirical evidence that a Section 2 judicial challenge is more expensive than a Section 5 judicial challenge to the same voting laws. In redistricting cases, for example, the Section 2 and Section 5 cases both rely on expert testimony and complicated statistical regression analyses to assess likely outcomes for minority voters in future years. On the second question, there is nothing to support the notion that Section 2 cases cannot adjudicate or enjoin voting practices prior to their use in an election. Indeed, Section 2 redistricting challenges are quite frequently resolved, at least preliminarily, prior to the decade's first election. For example, as I mentioned in my testimony, the Texas three-judge court required new redistricting plans prior to the 2012 elections pursuant to Section 2, while the related *Section 5* challenge was not timely adjudicated. This is unsurprising because, again, Section 2 challenges involve fact-finding and evidence not cognizably different from Section 5 adjudication; *i.e.*, expert statistical and demographic analysis projecting the voting practice's consequences in *future* elections.