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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 Ms. Sherrilyn Ifill:

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?

Ms. Ifill's Answer to Question No. 1:

This provision of the Voting Rights Amendment Act (VRAA) merely adopts established precedent, which holds that, in general, irreparable harm results from infringements on the right to vote. In the context of voting rights disputes, it is largely settled that "[a]n abridgement or dilution of the right to vote constitutes irreparable harm." *Montano v. Suffolk County Legislature*, 268 F.Supp.2d 243, 260 (E.D.N.Y. 2003); *see Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Reynolds v. Sims*, 377 U.S. 533, 563-62 (1964) (stating that the right to vote is "fundamental," "preservative of other basic civil and political rights," and that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized").

This principle derives from the fact that, unlike in many legal disputes, "voters denied equal access to the electoral process cannot collect money damages after trial for the denial of the right to vote." *United States v. Berks County, Pa.*, 250 F. Supp. 2d 525, 540-41 (E.D. Pa. 2003); *see also Scott v. Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010) ("An injury is irreparable if it cannot be undone through monetary remedies." (internal quotation and citation omitted)). In the absence of an injunction, during the years that are often required to successfully litigate a Section 2 action and overturn a discriminatory election law, the proponents of the law will continue to enjoy its benefits, including winning elections and gaining the advantage of incumbency. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 43-44 (Oct. 18, 2005).

Therefore, rather than "requir[ing] courts to issue injunctions in the absence of any showing of irreparable injury," the VRAA instead would merely recognize by statute what is now widely accepted by various federal courts. *See, e.g., Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("When constitutional rights are threatened or impaired, irreparable injury is presumed. A restriction on the fundamental right to vote therefore constitutes irreparable injury." (citations omitted)); *Marks v. Stinson*, 19 F. 3d 873, 878-79 (3rd Cir. 1994) (affirming district court's conclusion that the plaintiffs, "and even the entire state, suffer irreparable injury when an improperly seated representative of the people exercises the powers of his office and when constitutional freedoms are lost." (internal quotation marks and alterations omitted)); *Wil-*

liams v. Salerno, 792 F.2d 323, 326 (2d Cir. 1986) (finding that the plaintiffs "would certainly suffer irreparable harm if their right to vote were impinged upon.").

Moreover, this provision conditions the issuance of an injunction on the court's assessments of the relative hardships between the parties, and so the injunction shall issue only *if*, the court makes the appropriate determination. Courts therefore are necessarily asked to continue to exercise their sound discretion in order to determine whether the asserted hardships associated with the VRAA claim, even if meritorious, are sufficient to justify issuing a preliminary injunction. *Cf., e.g., SW Voter Registration Educ. v. Shelley*, 344 F. 3d 914, 918-19 (9th Cir. 2003) (denying a preliminary injunction where, although the plaintiffs had established a "possibility of success on the merits," the balance of hardships tipped sharply in favor of the Defendants).

Thus, the VRAA would not require a court to issue a preliminary injunction if it found that, on balance, the legitimate interests of the Defendants in enforcing a likely valid election law outweigh the interests of the plaintiffs in pursuing a potentially frivolous claim.

2. You 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 is the basis for your statements 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? For the latter, please cite to any statutory language or court decision that prevents a litigant from challenging a voting change under Section 2 prior to the effective date of the change or that would require a court to rule against such a challenge as a matter of law prior to its effective date.

Ms. Ifill's Answer to Question No. 2:

First, there can be no doubt that litigation under Section 2 is intensely complex, extremely costly and time-consuming, and puts significant strains on limited judicial resources. *See, e.g.*, Federal Judicial Center, *2003-2004 District Court Case-Weighting Study*, Table 1 (2005) (finding that voting cases consume the sixth most judicial resources out of sixty-three types of cases analyzed); *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 92 (Oct. 25, 2005) ("Two to five years is a rough average" for the length of Section 2 lawsuits); *Understanding the Benefits and Costs of Section 5 Pre-Clearance, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 80 (May 17, 2006) (responses of Armand Derfner to questions submitted by Senators Cornyn, Coburn, Leahy, Kennedy, and Schumer) (describing Section 2 cases as "expensive and time-consuming to litigate and hard to win," and refuting the position that "Section 5 is not needed because other litigation will do the job"); *The Continuing Need for Section 5 Pre-Clearance, Hearing before the S. Comm. on the Judiciary, 109th Cong.* 15 (May 16, 2006) ("*Continuing Need*") (testimony of Pamela S. Karlan) (explaining that Section 2 suits demand "huge amounts of resources" and that Section 2 litigation is not "an adequate substitute in any way" for Section 5). Section 2 litigation requires attorneys "to assemble plaintiffs with standing, file a case and engage in discovery," and "even on an expedited schedule, trial will be months and possibly a year after the new law is put in place." *Continuing Need* 61 (Earls' Responses).

While your question asks about the comparison between Section 2 and Section 5 litigation, the appropriate comparison is between Section 2 litigation and the Section 5 administrative preclearance process, which rarely results in litigation. Indeed, of the thousands of changes submitted in accordance with Section 5 between 2006 and 2013, only a handful resulted in litigation. *See, e.g.*, *Florida v. United States*, 885 F. Supp. 2d 299 (D.D.C. 2012); *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012); *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012); *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012); U.S. Dep't of Justice, Civil Rights Division, *Cases Raising Claims Under Section 5 of the Voting Rights Act*, http://www.justice.gov/crt/about/vot/litigation/recent_sec5.php (last visited July 14, 2014) (summarizing the three cases brought by the U.S. Department of Justice to enforce Section 5 since 2006). The substantial burdens on the litigants and the federal judiciary inherent in Section 2 litigation stand in stark contrast to the ease of compliance with the administrative preclearance process under Section 5. *See, e.g.*, NAACP Legal Defense and Educational Fund, Inc., Br. of Respondent-Intervenors Cunningham et al., *Shelby Cnty., Ala. v. Holder*, 2013 WL 315241, at *33-34 (Jan. 31, 2013) (describing *United States v. Charleston County*, 316 F. Supp. 2d 268 (D.S.C. 2003), in which Charleston County, South Carolina fought unsuccessfully for years to overturn a Section 2 liability finding concerning the County Council's discriminatory at-large electoral system at the cost of two million dollars in public funds, whereas Section 5 promptly blocked the similarly discriminatory efforts to change the Charleston County School Board's method of election). Still, even direct comparisons between Section 2 and Section 5 *litigation* have found that the latter is often faster and more efficient. *See, e.g.*, Br. for Amici Curiae Section 5 Litigation Intervenors, *Shelby County, Ala. v. Holder*, 2013 WL 432972, at *23-26 (Feb. 1, 2013).

Testimony before Congress from the 2006 reauthorization of the Voting Rights Act confirms that, under Section 5, most preclearance submissions "are routine matters that take only a few minutes to prepare using electronic submission formats" that are "readily available." *Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 312-13 (2006) (testimony of Donald M. Wright, North Carolina State Board of Elections). That same testimony further characterized the practical cost of preclearance as "insignificant"—with the exception of redistricting submissions, which tend to be relatively infrequent—and explained that the "consensus" among North Carolina election officials is that Section 5 imposes "a manageable burden providing benefits in excess of costs and time needed for submissions." *Id.* A number of other witnesses also testified in 2006 that the preclearance submission process is "a task that is typically a tiny reflection of the work, thought, planning, and effort that had to go into making the [election] change to begin with." *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 10 (2006) ("*Benefits and Costs*") (testimony of Armand Derfner); *id.* at 25 (testimony of Fred D. Gray) (describing preclearance submissions as no more than "a small administrative act"); *Continuing Need* 64 (Earls' Responses) (explaining that "the majority" of election officials "did not find Section 5 requirements to be burdensome").

A number of formerly covered states also agree that the Section 5 preclearance regime is preferable to constantly being subject to Section 2 litigation. In *Shelby County v. Holder*, four states covered in whole or in part by former version of Section 4(b)—California, North Carolina, Mississippi, and New York—submitted an amicus brief in which they urged the U.S. Supreme

Court *not* to strike down Section 5, arguing that, if "every [U.S. Department of Justice] objection were to be replaced by Section 2 litigation, the burden on covered jurisdictions would arguably be more severe [than preclearance under Section 5]. . . . [O]ne of the most significant benefits of the preclearance process to covered jurisdictions is that a Section 5 objection will prevent a problematic voting change from taking effect, thereby reducing the likelihood that a jurisdiction will face costly and protracted Section 2 litigation." Amicus Br. for New York, California, Mississippi and North Carolina, *Shelby County*, 2013 WL 432966, at *8-9 (Jan. 31, 2009); *see also id*. at *12 ("the costs of gathering and submitting the information are relatively small"). Similarly, in *Northwest Austin Municipal Utility District Number One v. Holder*, Louisiana, California, North Carolina, Arizona, Mississippi, and New York had argued that the preclearance process under Section 5 is "expeditious and cost-effective" in part because it "helps States to prevent costly Section 2 litigation." Amicus Br. for North Carolina, Arizona, California, Louisiana, Mississippi and New York, *Nw. Austin,* 2009 WL 815239, at *1-2, 16-17 (Mar. 25, 2009).

Second, unlike under Section 5, even if the plaintiff is able to win a Section 2 lawsuit, the challenged discriminatory voting law is only *guaranteed* to be blocked *after* it has already been implemented to the detriment of voters of color. Even where an irreparable injury may otherwise result to the plaintiff, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982), a preliminary injunction remains an "extraordinary and drastic remedy." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). It is awarded only if there is a "clear showing" that the standard was met, *id*., and is "never awarded as of right." *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008),

Thus, very few successful Section 2 cases are preceded by the grant of a preliminary injunction. Estimates for the number of such cases ranges from "fewer than one-quarter" of ultimately successful Section 2 suits, Solicitor General Donald Verrilli, Transcript of Oral Argument, *Shelby Cnty*., 2013 WL 6908203, at *38 (Feb. 27, 2013), to "less than 5% and possibly quite lower." J. Gerald Hebert and Armand Defner, *More Observations on Shelby County, Alabama and the Supreme Court*, Campaign Legal Center Blog (Mar 1, 2013), http://clcblog.org/index.php?option=com_content&view=article&id=506&Itemid=1. Again, the *Charleston County* litigation clearly illustrates this reality. 316 F. Supp. 2d 268. There, the United States alleged in January 2001 that the at-large method of electing the members of the County Council violated Section 2. *Id*. at 270. In March 2002, the United States moved for a preliminary injunction barring the use of at-large elections, and the court denied that request. *Id*. at 272-73. In 2003, however, the court found that the at-large system violated Section 2 and enjoined its use in future elections. *Id*. at 304. Unfortunately, by that time, the November 2002 elections had already occurred. *Id*. at 268; *see also Williams v. City of Dallas*, 734 F. Supp. 1317, 1317, 1367-68, 1415 (N.D. Tex. 1990) (finding after denial of preliminary injunction and trial that the electoral system for the Dallas City Council violated Section 2, and noting that an election had occurred since the time the injunction was denied).