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Who's Playing Politics?

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Section 5 of the Voting Rights Act was enacted as a temporary, emergency measure to prevent jurisdictions from devising new ways to disenfranchise blacks. Today, however, it has been distorted to ensure that racial considerations are heavily weighted in drawing electoral maps. The statute should be allowed to expire when it comes up for reauthorization in 2007 to prevent further abuse.

Government memos leaked to the press are nothing new in Washington, yet they can still command a front-page, above-the-fold headline. The latest came on December 2, 2005, when the *Washington Post* trumpeted, "Justice Staff Saw Texas Districting as Illegal; Voting Rights Finding on Map Pushed by DeLay Was Overruled." (Part of this story was recycled by the *Post* on Monday, January 23, in another front-page, above-the-fold story.)

The story that followed loosely described the contents of a 2003 internal Department of Justice memo written by career staffers in the voting section of the civil-rights division. Those staffers—five lawyers and two analysts—had concluded that the Congressional redistricting plan Texas had recently submitted to them for approval was in violation of the 1965 Voting Rights Act because it "retrogressed"—or, more simply, "diminished"—the electoral position of blacks and Hispanics. Then attorney general John Ashcroft and the political appointees in the civil-rights division—as well as, incidentally, a career lawyer higher in the chain of command (a fact that the *Post* failed to note)—rejected the memo's findings and allowed Texas to implement the new plan.

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The leaked memo dominated the news for days. There were dozens of indignant editorials and op-eds criticizing the "politicization" of the Bush Department of Justice, with their "end run around the law, around fairness, and around decency." The "controversy" has culminated with Senate Judiciary Committee chairman Arlen Specter hinting that he may hold hearings on the contents of the memo later this year. The Specter threat aside, the matter is likely to remain in the news, because the legality of the redistricting plan was upheld by a lower federal court and is now before the U.S. Supreme Court.

None of the stories and editorials, however, carefully examined the accuracy of the memo. The implication in the stories was always that dispassionate, unbiased, white-lab-coat-type civil servants spoke truth to Republican-apparatchik power and were, of course, steamrolled.

But guess what? The memo was inaccurate. In fact, it was filled with erroneous assumptions and irrelevant statistics, it misrepresented the testimony of expert witnesses, and it omitted key data for the proper analysis of voting-rights law. The career bureaucrats who wrote it—one of whom now works for a Left-leaning advocacy group—seemed to be intent on saving Texas Democratic incumbents any way they could. Thus they, rather than their Justice Department supervisors, were the ones brazen in their political motivation.

Texas, the Voting Rights Act, and Politics

Before turning to the contents of the leaked memo, a brief history of the 2003 Texas redistricting plan and its interplay with the Voting Rights Act may help clarify the issues at hand.

Texas is one of nine states that are covered by section 5 of the Voting Rights Act. Section 5 requires these states—and a few other (smaller and local) jurisdictions scattered throughout the country—to seek permission from the federal government before they can implement any changes, small or large, to election procedures, from moving polling places to redrawing voting district boundaries.

In 2001, the year in which most legislative bodies redrew voting-district lines after the 2000 census, the Texas legislature deadlocked and was unable to produce a plan. The job of redrawing the state's Congressional districts fell to a federal three-judge panel out of a lawsuit styled *Balderas v. Texas*. Using the population census data, the *Balderas* judges explained how they went about drawing the new lines: "Starting with a blank map of Texas . . . [we] first drew in the existing Voting-Rights-Act-protected majority-minority districts." The judges found that eight out of thirty-two districts allocated to Texas were minority districts protected by the provisions of section 5 of the Voting Rights Act. These included six Hispanic districts and two black districts (although the two black districts did not actually have majority black voting-age populations).

The court for its new plan thus declined to draw any additional Hispanic or black districts, noting that the creation of such districts was "not required by law"—section 5, after all, is about retrogression (that is, preventing backsliding changes that leave minority voters worse off than they were before). What is more, the judges wrote that they were not persuaded that the racial minorities living outside of the eight majority-minority districts were "sufficiently numerous to form voting-age population majorities in effective districts" because of the "absence of cohesive voting between Latinos and African-Americans at the point at which it is meaningfully measured, the Democratic primaries." In other words, the three judges in the *Balderas* case (two of whom were appointed by President Bill Clinton, the other by President Ronald Reagan) unanimously determined that there were only eight majority-minority districts that the law and the Justice Department could require to be maintained.

The map the judges produced was used for the 2002 election. In each of the "protected" majority-minority districts, a minority incumbent won. That election produced another consequence as well. Both the Texas House of Representatives and the Texas Senate became controlled by Republicans for the first time since Reconstruction. And once the Republicans took control, it was not long before talk of a new round of redistricting filled the corridors of the state capitol.

The story of the controversial Texas 2003 redistricting plan is filled with high jinks and low comedy: Texas state senators hiding out in New Mexico and Oklahoma in an attempt to kill the legislative-redistricting efforts, the dubious use of a federal agency to hunt them down and bring them back, and now the indictment of U.S. representative Tom DeLay and others on charges of illegal fundraising and money laundering. But whatever one thinks of those issues, they are completely unrelated to the leaked Justice Department memo (although, predictably, the press has treated them as if they are all one interconnected saga).

In the end, after two special sessions, the legislature created a new set of Congressional districts for use in the 2004 elections. That plan was sent again to the voting section at the Justice Department for approval.

The Career Staffers' Memo

The Department of Justice's scope of review is narrow for a redistricting plan like the one sent to it by Texas. It cannot reject a plan because it is "unfair" to one political party or another. Nor can it reject a plan simply because it hurts the reelection chances of this or that incumbent. The Justice Department can reject a plan only if it "retrogresses" the ability of minority voters to participate in the election process. This means that the staffers in the department's voting section must conduct a thorough analysis that compares the existing, or "benchmark," redistricting plan to a proposed redistricting plan, with an eye solely toward determining whether there has been any backsliding in the position of minority voters.

But the career staffers did not do so; instead, they essentially created a new benchmark. Using the same 2000 census data used by the three-judge panel in the *Balderas* case, the career staffers determined that the benchmark plan protects seven safe Hispanic districts, even though the judges identified only six; the staffers also claimed that there were four safe black districts in the benchmark plan, when the court in 2001 found only

two. The staffers justified their addition of these three new districts to the benchmark comparison because of the way minorities voted in the 2002 election. While the results of the 2002 election may be important in analyzing a variety of things, the baseline of comparison for the 2003 plan is what the three-judge panel in *Balderas* drew. If the old plan created six majority-minority districts, keeping that number rather than drawing nine districts simply cannot be labeled "retrogressive." What is more, by adding three new protected districts to the baseline, all the career staffers did was protect white Democrats.

The first case in point is Congressional district (CD) 23, represented by Henry Bonilla, a Hispanic Republican. The career staffers wrote that CD 23 was a safe Hispanic district despite the fact that it was currently represented by a Republican who, they admitted, was not the candidate of choice for Hispanic voters. The Texas legislature's plan, on the other hand, while it lowered the Hispanic population in Bonilla's district from 63 percent to 51 percent, it also created a new Hispanic district with a 63 percent Hispanic population. Regression analysis showed that in nonfederal general elections the new district, unlike Bonilla's, would have consistently elected a Hispanic candidate of choice.

The second case in point is Congressional district 24, represented by Martin Frost, who happens to be a white Democrat. The legislature broke this district up into six surrounding districts, none of which would have provided any likely opportunity for minorities to elect their candidate of choice. The career staffers objected to this, arguing that the dismantled CD 24 must be counted as a loss of a safe seat for blacks, even though the judges in the *Balderas* case had determined that the district required no special protection under the Voting Rights Act. The judges' determination was sensible, since the black citizen voting-age population of the district was only 25 percent (the Hispanic citizen voting-age population was 21 percent).

The third case in point is Congressional district 25, represented by another white Democrat, Chris Bell. Once again, the career staffers characterized this as a safe minority district, even though the black citizen voting-age population was 26 percent and the Hispanic citizen voting-age population was 19 percent. And just as they did for CD 24, the judges in *Balderas* did not count CD 25 as "protected." Indeed, Bell had beaten an African-American (who received a majority of the black vote) in the Democratic primary in 2002 before going on to win the general election. How was this, then, a "safe" minority district? It was not, of course.

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The icing on the cake is this: not only did the new plan not eliminate any safe minority districts, it actually carved out a new one even though there was no legal requirement to do so under section 5. The Texas legislature created Congressional district 9, in which the black citizen voting-age population was 47 percent and the Hispanic citizen voting-age population was 17 percent. Al Green, the candidate of choice among African-American voters, was elected from this district in 2004, adding a third black congressman to the Texas delegation.

Lessons Learned

So, was the Voting Rights Act "twisted beyond all recognition" as alleged by the *Akron Beacon Journal*? Were the voting rights of minorities "trumped by politics and power" as editorialized by the *Minneapolis-St. Paul Star Tribune*? Was the *Milwaukee Journal Sentinel* accurate when they wrote that the Bush administration failed "to safeguard the voting rights of African Americans"?

The obvious answer is no, as the federal court has again unanimously agreed by rejecting a challenge to the Texas legislature's redistricting efforts. (Related challenges, none raising the section-5 issue, are currently scheduled for the Supreme Court's review later this year.)

Now, we readily admit that the interpretation and administration of the Voting Rights Act has evolved into a complete mess. The ideal of taking racial considerations out of redistricting has been replaced by a guarantee that they will be heavily weighted; instead of the racial integration of districts, the courts and bureaucrats strive for segregation. All too bad.

But the point is that the Left has pushed the evolution of the law in this direction, and even by the law's present sad terms the arguments made by the career

bureaucrats for rejecting the Texas plan were not close to the mark. Not by a mile.

The Texas plan was justified, reasonably enough, as an effort to align the districting configurations with the actual partisan split in the state—that is, to make the districts reflect the increased power there of the GOP. The Democrats, of course, painted it as a partisan power grab by Republicans, led by Tom DeLay. But even if that were so, that is politics, and the wisdom or fairness of the power grab is not an issue the Justice Department's voting section is supposed to address under section 5. Yet apparently that is precisely what the career bureaucrats there tried to do—twisting the Voting Rights Act in their own partisan attempt to prevent the Republicans from picking up five new seats in Congress.

Not the First Time—Nor Likely the Last

This is not the first time that career staffers in the voting section at the Justice Department have distorted section 5 for dubious ends. After the 1990 census and the cycle of redistricting that followed, the voting-section staffers—aided by old-line racial-advocacy groups, the American Civil Liberties Union (ACLU), and many in the Republican Party—began to use the Voting Right Act to require "max-black" redistricting outcomes. The result was the creation of dozens of racial gerrymanders—Rorschach-test-like bug splats—that systematically harvested blacks and Hispanics out of multiracial communities to form safe minority districts. The Supreme Court took the voting section to the woodshed over this renegade legal interpretation and struck down these districts in a series of cases beginning in 1993.

The high Court has not been alone. A district court in Georgia was so shocked at the extent to which voting-section lawyers acted as surrogates for the ACLU that the court labeled its behavior as "disturbing" and concluded that the section's views were therefore "less than credible." What is more, the U.S. Court of Appeals for the Eleventh Circuit has pointedly awarded attorney fees against the voting section for filing a case that was "not substantially justified."

At this point, the only way to prevent further abuses of section 5 of the Voting Rights Act is to scrap it. Section 5, passed as an "emergency" and "temporary" provision in 1965, was originally scheduled to expire in 1970 but has now been extended three times. It comes up for reauthorization again in 2007, but continued government oversight of voting procedures in the Deep South can be justified today only if it is shown that blacks and Hispanics are still being denied full electoral participation. But they are not. For instance, African-Americans register to vote and participate in elections at rates that usually exceed those of whites in states like Texas and Georgia.

All of this, however, appears to be lost on the Republicans in Congress and the Bush administration, who seem eager for more abuse. The GOP leadership appears to be unwilling to make these arguments and stand up to Washington's liberal orthodoxy. They have decided to continue to put their political fate in the leaky hands of partisan Justice Department career staffers, who one day will not have a Republican administration to overrule them.