Study J-1200 December 4, 1995

Memorandum 95-79

Trial Court Unification: Voting Rights Act

The new unification statute raises difficult voting rights issues. The issues fall into two categories: (1) questions relating to the preclearance requirement of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and (2) issues pertaining to the Act's Section 2 prohibition against discriminatory election procedures, 42 U.S.C. § 1973(a).

THE PRECLEARANCE REQUIREMENT

Section 5 of the Voting Rights Act requires certain jurisdictions to obtain federal preclearance of any proposed changes in election procedures. The purpose of the preclearance requirement is to ensure that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c.

It is well-established that the preclearance requirement applies to judicial elections. Clark v. Roemer, 500 U.S. 646 (1991). The new unification statute does not expressly alter judicial election procedures. *See* Gov't Code § 68083. But superior court judges are elected countywide, whereas municipal court judges are elected in districts that usually do not encompass an entire county. Cal. Const. art. VI, §§ 5, 16(b). Thus, if the Governor converts a municipal court judgeship to a superior court judgeship pursuant to Section 68083, the conversion amounts to a change in election procedure in those counties where the municipal court district is not countywide (2/3 of the counties). One more judge will be elected countywide, and one fewer judge will be elected in a smaller district. Because it is generally easier for minorities to control smaller districts than larger ones, the result may be a decrease in minority voting power.

Regardless of the impact on minority voting power, in counties subject to the preclearance requirement the change must be submitted for federal approval before it is implemented. Four counties in California are subject to the preclearance requirement: Kings, Merced, Monterey, and Yuba. In those counties,

conversions of municipal court judgeships to superior court judgeships pursuant to Section 68083 will have to be precleared.

Further, if the Governor decides to convert the last municipal court judgeship in a district into a superior court judgeship, redistricting will be necessary. See Memorandum 95-78. Under existing statutes, the Board of Supervisors of the affected county would be responsible for the redistricting. *Id.* In those circumstances, both the Governor's decision to convert the judgeship and the Board of Supervisors' subsequent redistricting plan will need preclearance in preclearance jurisdictions.

Accordingly, a statute authorizing and directing the Attorney General to seek preclearance of judgeship conversions and related redistricting plans may be in order. The staff suggests something like the following:

> **Gov't Code § 68083.6 (added). Preclearance of judgeship conversions**
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> 68083.6. On conversion of a judgeship pursuant to Section 68083 in a county subject to the preclearance provisions of the federal Voting Rights Act, 42 U.S.C. § 1973 *et seq.*, the Attorney General shall seek to obtain preclearance of the conversion and any related redistricting.
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> **Comment.** Section 68083.6 requires the Attorney General to seek preclearance of judgeship conversions and any related redistricting in jurisdictions subject to the preclearance provisions of the Voting Rights Act. See 42 U.S.C. § 1973c (preclearance submission by state's chief legal officer); Cal. Const. Art. V, § 13 (Attorney General state's chief law officer). Where conversion of a judgeship necessitates redistricting, Section 68083.6 does not demand that the Attorney General seek preclearance of the conversion and the redistricting simultaneously, but does not preclude that approach.
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> Section 68083.6 does not address the consequences of a failure to obtain preclearance. If a federal court determines that conversion of a judgeship and redistricting of remaining municipal court districts violates the Voting Rights Act, any remedial voting arrangements are subject to court order.

SECTION 2 OF THE VOTING RIGHTS ACT

Introduction

Section 2 of the Voting Rights Act prohibits voting systems that result in "denial or abridgement of the right of any citizen of the United States to vote on

account of race or color . . . ." 42 U.S.C. § 1973(a). Like the preclearance requirement, Section 2 applies to judicial elections. *See* Chisom v. Roemer, 501 U.S. 380 (1991); Houston Lawyers' Ass'n v. Attorney General, 111 S. Ct. 2376 (1991). Unlike the preclearance requirement, it applies to all jurisdictions.

As amended in 1982, proof of intentional discrimination is not essential to establish a Section 2 violation. Rather, courts are to focus on the effect of a voting system, not the motivations of those instituting it.

Thus, a Section 2 violation is shown if "based on the totality of the 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 [protected class] 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." 42 U.S.C. § 1973(b). Importantly, however, nothing in Section 2 establishes "a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.*

Facial Challenge to the New Unification Statute

The new unification statute, Government Code Section 68083, does not appear to violate Section 2 on its face. Under Section 68083, it is not a foregone conclusion that there will be changes in California's judicial elections. Section 68083 merely directs the Governor to convert a municipal court judgeship to a superior court judgeship upon making certain findings. There is no assurance that any conversions will occur, much less that conversions adversely affecting minority voting rights will occur. It therefore seems unlikely that courts will hold that Section 68083 facially violates Section 2.

Challenges to Particular Applications of Section 68083

Particular applications of Section 68083 may be vulnerable to challenge under Section 2. In large counties, such as Alameda, Fresno, Los Angeles, and San Diego, conversion of a municipal court judgeship to a superior court judgeship may deprive minority voters of representation by diluting their voting strength. While a minority group may have sufficient cohesiveness and numbers to elect a municipal court judge in a municipal court district, the group may not be numerous enough on a countywide basis to elect a superior court judge. Vote dilution may also occur if conversion of a judgeship results in municipal court redistricting.

Other times, however, conversion of a judgeship may have no impact at all on minority voting strength. That would be true, for instance, when a minority group is evenly spread across a county, rather than concentrated in a particular municipal court district.

Certainly, application of Section 2 to judgeship conversions pursuant to the new unification statute will be highly fact-specific, depending on such factors as the geographic and political cohesiveness of the minority group involved, the group's potential to elect candidates, and numerous other factors. *See, e.g.,* Thornburg v. Gingles, 478 U.S. 30 (1986). Although multi-member political districts and at-large election schemes are classic means of abridging minority voting rights, they are not per se invalid. Rather, "[m]inority voters who contend that the multimember form of districting violates Section 2 must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates." *Id.* at 48.

Because the impact of judgeship conversions on voting rights will be so fact-specific, it is difficult to make general predictions regarding the potential success of Section 2 challenges to such conversions. But the current uncertainty in voting rights jurisprudence is an even greater impediment to assessing the interplay between Section 2 and the new unification statute.

Uncertainty in Voting Rights Jurisprudence

The Voting Rights Act stops short of requiring proportional representation of minority groups. But just how much minority voting strength is required? To what extent can race be considered in achieving that degree of voting strength? Are the answers the same in preclearance jurisdictions as in other jurisdictions?

The United States Supreme Court has struggled greatly with those issues, but has been unable to provide clear guidance. Its most recent decision, Miller v. Johnson, 115 S. Ct. 2475 (1995), exacerbates what was already a confusing situation. *Miller's* impact on local litigation concerning election of Monterey municipal court judges vividly illustrates the degree of confusion.

The Monterey case involves a preclearance challenge to Monterey's consolidation of its municipal court districts. Prior to issuance of the *Miller* decision, the three-judge district court hearing the case ruled that the consolidation violated the Voting Rights Act. The court ordered the county to implement a new election scheme, and ordered an interim election using districts. Just weeks before issuance of *Miller,* the interim election was held, and

one black and one Hispanic were elected. After *Miller* was decided, however, the court did an abrupt about-face. It ordered the newly elected judges to stand election again in a few months, this time in at-large districts. The court explained that the districts used in the interim elections may have been unconstitutional, because race was a significant factor in drawing those districts, and *Miller* casts doubt on the validity of such an approach. *See Monterey Muni Judges Must Run Again,* San Francisco Daily Journal, November 28, 1995, at 1, 7.

Miller definitely includes language suggesting a color-blind approach to the federal Constitution. The case involved an equal protection challenge to Georgia's congressional redistricting plan, which was designed to maximize black voting strength in order to obtain federal preclearance. The Court held that because race was the predominant motivating factor in preparation of the plan, the plan was subject to strict scrutiny. 115 S. Ct. at 2490. The Court further determined that the plan failed to satisfy strict scrutiny, in that neither Georgia's interest in obtaining preclearance, nor the policy of maximizing minority voting strength, was a compelling interest. *Id.* at 2491-94. The Court went on to comment:

> The Voting Rights Act, and its grant of authority to the federal courts to uncover official efforts to abridge minorities' right to vote, has been of vital importance in eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions. Only if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race. As a Nation we share both the obligation and the aspiration of working toward this end. The end is neither assured nor well served, however, by carving electorates into racial blocs. . . . It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of the worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids.
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> [114 S. Ct. at 2494.]

Some have interpreted *Miller* "as the death knell for most Voting Rights cases." *Monterey Muni Judges Must Run Again,* San Francisco Daily Journal, November 28, 1995, at 1. Indeed, *Miller* arguably means that Section 2 of the Voting Rights Act is unconstitutional. If the equal protection clause demands strict scrutiny of race-based districting, perhaps that standard cannot ever be

satisfied where there is no history of purposeful discrimination, as in jurisdictions not subject to preclearance.

But that is by no means the only possible conclusion regarding where the Court's Voting Rights jurisprudence is going. *Miller* involved Section 5, not Section 2. Those interpreting the case broadly to all but forbid consideration of race in drawing political boundaries may be going too far in regarding *Miller* as an endorsement of the color-blind Constitution. Indeed, *Miller* was only a 5-4 decision, with Justices Ginsburg, Stevens, Breyer, and Souter strongly dissenting. And although Justice O'Connor joined the Court's decision, she also authored a concurring opinion in which she distanced herself from the Court to some extent:

> Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may well have been considered in the redistricting process.
> [115 S.Ct. at 2497 (O'Connor, J., concurring).]

As some have commented, then, it is anyone's guess what future Voting Rights cases will conclude and what the implications will be for judgeship conversions pursuant to the new unification statute. On the one hand, courts may decide that a particular conversion violates the Act by diluting minority voting strength without sufficient justification. Although the state has an interest in equating a judge's political base with the judge's jurisdiction, the strength of that interest is unclear. *See* League of United Latin American Citizens v. Clements, 999 F.2d 831 (5th Cir. 1993) (en banc); Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (en banc). Similarly, while the state has an interest in furthering the administration of justice, that interest may also be insufficient to justify vote dilution. With cross-assignment of judges and other personnel readily available under trial court coordination plans, will conversion of a judgeship really have any significant, much less overriding, impact on the administration of justice?

On the other hand, however, it is perhaps equally likely that courts will reject most future Voting Rights challenges and strike down Section 2 as amended in 1982. Race-neutral voting changes, such as a switch from district elections to countywide elections due to a judgeship conversion, may readily survive attack. At the same time, attempts to alleviate societal discrimination by maximizing minority voting strength, such as may occur in redrawing municipal court

districts following a judgeship conversion, may be invalidated under the equal protection clause.

At best, it is difficult to predict which of these scenarios will prevail. The staff thinks it wisest not to offer any opinion in that regard.

Options Regarding the New Unification Statute

In light of the uncertainty in the law, what, if anything, should the Commission do to help insulate the new unification statute from Voting Rights Act challenges? Options include the following:

(1) **Do nothing, just wait to see how things develop.** There is a lot to be said for this approach. The Government Code already incorporates a severability provision, so if a particular application of Section 68083 is invalidated, the remainder of the statute and its applications may nonetheless survive. See Gov't Code § 23 ("If any provision of this code, or the application thereof to any person or circumstance, is held invalid, the remainder of the code, or the application of such provision to other persons or circumstances, shall not be affected thereby").

(2) **Attempt to Provide Statutory Guidance Regarding Dilution of Minority Voting Rights or Other Voting Rights Considerations.** Another possibility would be to try to fashion a statute giving the Governor guidance as to the appropriate weight to accord vote dilution or other Voting Rights considerations in deciding whether to convert judgeships pursuant to Section 68083. The staff thinks such an approach would be fraught with peril and strongly recommends against it. The Governor is already bound to uphold the federal Constitution and law, and Section 68083 does not allow him to convert a judgeship unless the conversion will further the administration of justice. Inherent in those restrictions is a demand that the Governor only convert a judgeship where conversion is consistent with the equal protection clause and constitutional requirements of the Voting Rights Act. Given the uncertainty in Voting Rights jurisprudence, it seems futile and potentially counterproductive to attempt to delineate that demand in more concrete terms.

(3) **Add Statutory Savings Clause.** The potential for successful Voting Rights challenges to judgeship conversions is an added reason for having a statutory savings clause such as the one proposed in Memorandum 95-77. The staff recommends this as a means of protecting against the chaos that could occur if a conversion is successfully challenged under the Voting Rights Act and litigants subsequently seek to undo an appointee's acts.

(4) **Require the Governor to Make Written Findings to Support a Conversion Decision.** In light of the potential for Voting Rights litigation, should the Governor have to memorialize his or her rationale for converting a judgeship pursuant to Section 68083? Would that help ensure that only defensible conversions occur? Would it make it easier to defend conversion decisions against Voting Rights challenges? The Governor may well have objections to a statute along these lines. More importantly, the staff does not think it would have much of an effect.

(5) **Amend the Constitution along the Lines Proposed in the Commission's Report on SCA 3.** In its report on SCA 3, the Commission addressed Voting Rights concerns by recommending an amendment of Article VI, § 16(b) of the California Constitution. The Commission might consider proposing a similar amendment here:

> (b) Judges of other courts shall be elected in their counties or districts at general elections except as otherwise necessary to meet the requirements of federal law, in which case the Legislature, by two-thirds vote of the membership of each house thereof, with the advice of judges within the affected court, may provide for their election by the system prescribed in subdivision (d) or by other arrangement. The Legislature may provide that an unopposed incumbent's name not appear on the ballot.

Such a proposal would involve downsides similar to those discussed in Memorandum 95-77 with respect to amending the Constitution to "provide for" the number of superior and municipal court judges. It nonetheless may be worth pursuing.

RECOMMENDATION

Based on its initial analysis of the Voting Rights considerations, the staff tentatively recommends option (3) (statutory savings clause) and perhaps also option (5) (constitutional amendment). Input from the Judicial Council and other sources may shed further light on the complicated Voting Rights issues and suggest better alternatives.

Respectfully submitted,

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