

MEMORANDUM

Confidential: Attorney Work Product and Attorney-Client Privileged

To: Chairman Steve Israel
From: Kelly Ward
Marc Elias
Re: Potential VRA Challenges
Date: August 2013

I am providing this memo at the direction of our legal counsel and with their input. As is well-known, the Supreme Court recently eliminated the coverage formula for Section 5 of the Voting Rights Act. What is less well-known is that this ruling potentially impacts the constitutionality of the maps drawn specifically to meet the requirements of Section 5.

While this issue has not received much public attention, we have reason to believe the Republicans are planning to file lawsuits to challenge several maps around the country. For example, I was recently on a panel with the NRCC Political Director who, when asked if he expected conservative groups to challenge the maps in court now that they are not limited by Section 5, he very confidentially said, "yes." We have also received other signals that the Republicans are planning to bring these lawsuits, and we should expect the NRCC to support their efforts.

We believe it is critical that we go on offense against these efforts. **If the Republicans file lawsuits and present new maps on their terms, not only would we lose even more seats around the country, it would become even more difficult to protect the Democratic agenda that we are fighting for every day.** We have already seen the impact the Republican majority has had on the issues most important to the American people. Rest assured, any Republican effort to revisit maps will only bolster their ability to push their extreme, out-of-touch agenda.

We have done an initial analysis of the jurisdictions covered by Section 5 and believe we have the opportunity to go on offense in four states: Florida, North Carolina, Louisiana and Virginia. This would entail bringing lawsuits against each of these maps and presenting new map alternatives. Doing so would enable us to proactively fight these legal battles and not be caught off-guard by the upcoming Republican challenges, which would likely cost us seats.

While there is no guarantee that we will succeed, without this proactive effort, we will still very likely be in court in these states and others – just on their terms, not ours. Filing lawsuits in these four states is a very important way to protect our interests.

If it is helpful, we can arrange for Marc Elias to provide a legal briefing for you and other Members on this issue. We also recommend reaching out to Mr. Clyburn to get his thoughts on the best way to proceed, as he provides a very important perspective on these issues.

Offensive Opportunities

With Section 5's "retrogression" principle no longer operative, the foundation of a legal claim would challenge whether the legislatures drew the congressional districts using race as the predominant factor. If they did, their maps can be challenged and redrawn. There is no guarantee that this strategy will succeed. The states will all argue that they used factors other than race to draw these districts.

They will also contend that the districts were drawn to comply with Section 2 of the VRA, and/or that DOJ's stated intention to seek "bail-in" of certain jurisdictions under Section 3 means that states continue to have a compelling interest in abiding by preclearance requirements. Furthermore, we will be asking the courts to act on a very expedited schedule. However, the lawyers believe we have credible claims to bring, and we think the possibility of success is a risk worth taking.

According to an initial review from the lawyers, we have the best chance of success in Florida and North Carolina, a relatively good chance in Louisiana, and somewhat of a chance in Virginia. Unfortunately, in South Carolina a federal court has already said race was not a predominant factor in congressional redistricting, making it nearly impossible for us to bring a case there.

The estimated budget for each state is \$300,000, making this a \$1.2 million budget if we pursued all four states. If we move quickly, the lawyers would pursue a strategy aimed at forcing a court decision before the end of the year. Time is also of the essence given the likelihood of the Republicans to move quickly..

Florida

Legal Summary: Florida is the most ripe for a racial gerrymandering claim. In light of the new Fair Districts law, as well as the ongoing state court litigation over its congressional map, Florida has made certain public record statements indicating that one of its congressional districts was drawn primarily based on race. We could file a racial gerrymandering claim in federal court to supplement or bootstrap the state court litigation.

Alternative Map: A new map would give us the opportunity to pick up 1-2 marginal seats and create better seats for Reps. Murphy and Garcia. This would most likely affect Rep. Brown's district (FL-05) and Rep. Castor's district (FL-14), although both would still represent strongly Democratic seats.

North Carolina

Legal Summary: Though a state trial court has already rejected a racial gerrymandering claim, there are plausible arguments that a federal court should not defer to the state court's rationale, particularly its finding that a congressional district drawn with race as the predominant purpose passed "strict scrutiny."

Alternative Map: A new map could give Democrats 1-2 marginal seats and a better seat for Rep. McIntyre. This would most likely affect Rep. Watt's district (NC-12) and Rep. Price's district (NC-04), although both would still represent strongly Democratic seats.

Louisiana

Legal Summary: While further factual discovery is needed to determine if race was a predominant factor in drawing Louisiana's congressional districts, the shape of LA-02 (Rep. Richmond's district) suggests that plaintiffs could meet their initial burden in a racial gerrymandering suit. It is worth pursuing an effort here.

Alternative Map: A new map could give Democrats 1 more marginal seat. This would affect Rep. Richmond's district (LA-02). He would still represent a majority-minority district, but he could lose the Baton Rouge area of his current district.

Virginia

Legal Summary:

Virginia was very careful not to say anything in the preclearance papers that would raise questions about racial intent, so a racial gerrymandering claim will likely be based on a fact-specific inquiry into district shapes and demographics. It is the hardest of the four, but still worth pursuing.

Alternative Map:

Redrawing the Virginia map could yield 2 marginal seats for Democrats. This would most likely affect Rep. Scott's district (VA-03) and possibly Rep. Connolly's district (VA-11).