

MEMORANDUM

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To: Erwin Chemerinsky, Chair
Elected Charter Reform Commission

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Re: Questions Relating to Application of the Voting Rights Act and Similar Laws to
Neighborhood Council Elections

Over the last several days, we have received numerous questions from members of your commission relating to the election of neighborhood council members. To the extent that time allowed, we have researched the issues raised by those questions; our answers are set forth below.

Question No. 1

If the Charter were to provide for neighborhood councils possessing decision-making authority (as opposed to being advisory only), would the federal Voting Rights Act allow these councils to consist of some members who are appointed and some who are elected?

Answer

The suggested method of choosing neighborhood council members raises a serious question of vote dilution under the Voting Rights Act. It also raises a serious question under the Equal Protection Clause of the Fourteenth Amendment with respect to whether the scheme violates "one-person one-vote" precedent.

Discussion

The Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment apply to the election of members of government representatives. Courts have held that the one-person one vote principle (equal protection) is applicable to a multimember government body if a majority of its members are elected, even if some of its members are appointed. *Cunningham v. Municipality of Metropolitan Seattle, et al.* (1990 W.D.WA) 751 F.Supp. 885, 893; see also *NYC Board of Estimate v. Morris* (1989) 489 U.S. 688. Based on the *Cunningham* court's analysis of the issues raised there, we believe that the same would be true with regard to a "vote dilution" claim under the Voting Rights Act. (The application of the Act to such a scheme was not discussed in the case, and our research has not revealed any other case that discusses the issue.)

The Voting Rights Act prohibits the City from adopting or implementing any election scheme, rule or procedure which would result in the dilution of minority voting strength. The question is always whether members of a minority community "have less opportunity than members of the electorate [generally] to participate in the political process and to elect representatives of their choice." Voting Rights Act, § 2(b).

The *Cunningham* court determined that the complex scheme of selecting members of the government body involved there (some elected at large, some elected locally and some appointed) violated the Equal Protection Clause. It used a complicated formula for calculating whether the one-person one-vote principle was violated. Each scheme of selecting members of a government body must be analyzed based on the facts peculiar to it. In order to determine whether the scheme proposed would violate the Constitution and/or the Act, we would have to analyze the data with a demographer familiar with the legal issues.

Question No. 2

If the recommendations of an advisory body are regularly followed by the decision-makers, is that body really a decision-making body for purposes of the Voting Rights Act?

Answer

We are in the process of researching the law relating to this question and will provide an answer as soon as that research can be completed.

Question No. 3

Could neighborhood council members be selected at local "caucus" meetings?

Answer & Discussion

As we understand it, what is being suggested is that public meetings would be held in a neighborhood, that all adult residents of the neighborhood will be given notice of the meeting and allowed to attend and vote for candidates for the neighborhood council.

The problems that might be associated with this suggested way of choosing neighborhood council members depend on whether the councils will be advisory or decision-making bodies.

If the councils will be advisory bodies, § 2 of the Voting Rights Act will not apply, and its requirements therefore will not present any legal issues that we would need to address. However, there are other laws which would be implicated. First, caucus meetings could not take place on days on which some residents would be unable to attend, *e.g.*, religious holidays on which observant adherents are not allowed to drive, write, *etc.* Second, care would need to be taken that meetings are held at locations and in a manner accessible to the handicapped (access for those with mobility limitations, sign language interpreters for the deaf). Third, arrangements would have to be made to assure that persons who speak foreign languages (Spanish, Chinese, Japanese, Vietnamese, Tagalog) will understand the proceedings. A fourth consideration should be whether the day and time of a caucus would otherwise make it difficult for some members of the public to attend and vote (*e.g.*, child care, hours of employment).

If the councils will be decision-making bodies, in addition to the above considerations, there will be an issue concerning whether selecting members by persons attending neighborhood meetings would result in vote dilution within the meaning of the Act. Depending on the demographics of a neighborhood, it may be necessary to create districts and to hold the meetings in each district.

Question No. 4

May a neighborhood council be elected at-large in the following manner: (i) five members will be elected; (ii) each voter is entitled to cast three votes, which may be broken up at the discretion of the voter (*i.e.*, one for each of three candidates, one for one candidate and two for another, or three for one candidate); the five candidates with the highest votes are elected?

Answer and Discussion

1. If the neighborhood council were solely an advisory body, the Voting Rights Act would not apply, and the members may be elected at-large.

2. If the council possesses decision-making authority, the Voting Rights Act would

apply. In order to determine whether the Act would allow us to elect the members at-large as described in the question, rather than from districts, we would need to study demographic information about the area. If the area were racially and ethnically homogeneous, the Act would probably allow the members to be elected at-large. However, if the area contained members of different racial and ethnic groups, we would have to determine whether district lines could be drawn in such a way as to place a sufficient number of minority voters into one or more districts so that the members of the group would be able to elect representatives of their choice. If so, we would have to review the same demographic information to determine whether the voting scheme suggested in the question could accomplish what dividing the area into districts would accomplish.

3. We are not aware of any cases that have dealt with a scheme like that suggested but believe that the courts would likely look to the same criteria as they do in evaluating whether at-large voting rather than single member districts is required in order to avoid vote dilution.

Question No. 5

Could the Charter constitutionally prohibit Councilmembers from endorsing candidates for neighborhood council?

Answer

No.

Discussion

The suggested prohibition clearly touches on First Amendment rights. It "imposes a direct and substantial burden on core political speech." *California Democratic Party v. Lungren* (N.D.CA 1996) 919 F.Supp. 1397, 1400. Indeed, the United States Supreme Court has made clear that "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo* (1976) 424 U.S. 1, 14. Therefore, such a prohibition would be subject to strict scrutiny and could be upheld only if the City could show that it advances a "compelling state interest and is narrowly tailored to serve that interest." *San Francisco County Democratic Central Committee. v. Eu* (1989) 489 U.S. 214, 222.

A similar provision in the California Constitution, Art. II, § 6(b), was found to be unconstitutional in *Lungren, supra*. That provision prohibited political parties from endorsing candidates for nonpartisan and judicial office. In that case, the state argued that the prohibition was necessary in order to protect the integrity and independence of judges, to protect the nonpartisan election process and to "combat the corruption of the political

process caused by the influence of the major political parties." *Id.* The court determined that these interests did not provide a sufficient justification for the prohibition.

The City can no more prohibit elected City officials from endorsing candidates for other City offices than can the state prohibit political parties from doing the same thing. We seriously doubt that the City would be able to point to a compelling interest that would justify the prohibition or to show that the City's interests cannot more narrowly be protected than by a total prohibition on endorsements.

Question No. 6

May positions on an elected neighborhood council with decision-making authority be designated for particular classes of persons, *e.g.*, landlords, renters, business owners, *etc.*?

Answer

Such a scheme might well result in the dilution of minority voting rights and thus violate the Voting Rights Act. In the past, courts have held that property ownership as a condition to voting for members of government officials violated the Act and the Equal Protection Clause of the Fourteenth Amendment.

Question No. 7

Must neighborhood councils all represent areas of equal population, and must they all have the same number of members?

Answer

If these councils select members to serve on another government body (*e.g.*, a city council), the neighborhood councils must either be of equal population, or there must be a system of proportionality to assure that the weight of all voters will be equal. For instance, if one neighborhood council area included twice as many residents as another, that area would have to be able to elect twice as many representatives to the other body. Also, having neighborhood councils which do not consist of the same number of members raises a serious Voting Rights Act question.

However, if the neighborhood councils will not select members to serve on other bodies, and if their authority extends only to matters affecting their own residents, the various areas of the councils would not have to be the same. The same would be true about the number of members of each council.

Question No. 8

With respect to a Board of Education:

- a. Can the City Charter determine the method of electing members of the Board of Education for a school district located within its borders?
- b. Could the City Charter determine whether the Board is to be elected and/or appointed?
- c. Can the City Charter increase the number of members of a Board of Education?
- d. What matters other than those relating to the election of School Board members can be governed by the City Charter?

Answer and Discussion

a. The California Constitution authorizes city charters to provide "for the manner in which, the times at which, and the terms for which" members of a Board of Education are to be elected or appointed, and for their qualifications and the number which will constitute a board. Art. IX, § 16(a). Because the Constitution also says that these matters are "in addition to those provisions allowable by this Constitution, and by the laws of the state," it has not been clear when and the extent to which state law might preempt City charter provisions. It has been our advice that, although not free from doubt, the Charter may validly provide for the number of members of the Board of Education of the LAUSD, for their qualifications, the terms for which they are to be elected, whether or not the number of their terms will be limited and the rules governing the manner in which they are to be elected.

b. The Charter can determine whether members will be elected and/or appointed. Please note that if some members will be elected and others appointed, the Voting Rights Act will apply, as indicated above.

c. Yes.

d. A city charter may provide for the compensation of Board members. Otherwise, the California Education Code governs matters relating to education in California.