

Election Law in the Trump Supreme Court

By: Ben Griffith, Griffith Law Firm, Oxford, Mississippi

Several important election law cases have been decided during the term that ended June 30, 2017, and several more may be coming before the Court for oral argument during the October 2017 term. As we move forward with a nine-member Court, it might be helpful to step back and take a broad look at the judicial landscape as Justice Neil Gorsuch joins the Court as its long-awaited ninth Justice. In an article by Stephen E. Gottlieb published shortly before Justice Neil Gorsuch was confirmed, Gottlieb gave this ominous warning:

> President Lincoln famously told the country at Gettysburg that we had a government of, by and for the people. That conclusion hangs in the balance. Will the next justice and the Court that he will steer prove a partisan Court, determined to steer the country toward one-party dominance, or will it and he prove to be a Court anchored to the American democratic creed, in which voters determine who handles the reins of government and politicians do not get the right to organize the voting machinery for their own benefit. Given the extent of existing voter suppression, gerrymandering, and other legal trends affecting the resilience of democratic institutions, this may be the single most important issue before the current Court. Gerrymandering is not just about equality but fundamentally about democracy. From a democratic standpoint, the willingness of some of the justices to treat legislative control over districting for the purpose of protecting their own seats is completely illegitimate, a reversal of democratic rules and requirements. Democracy requires neutrality rather than favoritism or manipulation to protect specific people or parties – the techniques of dictators. Because our first-past-the-post electoral system is unusual worldwide, precise comparisons are unusual but it is worth noting that many constitutions insist on proportionality; the U.S. Supreme Court and the Voting Rights Act have taken the contrary position, that proportionality cannot be required. Symmetry does not require proportionality, only that whatever the seats bounce from winning a given proportion of votes, both sides get that reward. It doesn't matter whether this is described as a kind of equality, between parties, or a requirement in addition to equality – either way it is democracy demands a legal system that preserves the symmetry of rewards from elections.[1]

During the term that ended June 30, 2017, several critically important election law cases were decided, including *Bethune-Hill v. Virginia State Board of Elections*, decided March 1, 2017. Several other election law cases, including *Cooper v. Harris*, were decided this term, and several more were also on the docket of the U.S. Supreme Court at the time Justice Neil Gorsuch was confirmed on April 7, 2017. These may be heard and decided during the October 2017 term.

Bethune-Hill was a pre-Gorsuch racial gerrymandering case that may have a significant impact on state and local government elections and electoral processes at the municipal and county level. The Supreme Court reversed and remanded (7-1) a lower court decision that rejected racial gerrymandering challenges to a dozen voting districts in Virginia drawn after the 2010 census, each with at least a 55 percent population of black residents of voting age. The Court reasoned that race cannot be the predominant reason in creating legislative districts and that "the racial predominance inquiry concerns the actual considerations that provided the essential basis for the lines drawn, not post hoc justifications the legislature in theory could have used but in reality did not" and that "if race for its own sake is the overriding reason for choosing one map over others, race still may predominate." One district in which race played the dominant role in drawing it was nonetheless justified by an attempt to comply with the Voting Rights Act, which forbade the reduction of minority voters' ability to elect candidates of their choice, where the state legislature's 55 percent target "was necessary for black voters to have a functional working majority."

In *Cooper v. Harris*, the Court upheld (5-3) a lower court ruling that two North Carolina congressional districts were racially gerrymandered and intentionally drawn to dilute the power of black voters by packing them into two districts, referred to by one critic as "apartheid-type redistricting."

In *North Carolina v. N.C. Conference of the NAACP*, the Court denied certiorari and allowed to stand a Fourth Circuit ruling that North Carolina's election reforms enacted shortly after the Court's 2013 decision in *Shelby County v. Holder*, imposing a photo ID requirement, reducing early voting by seven days, and eliminating same day registration, were motivated by discriminatory intent to deny African-Americans the right to vote, despite the state's claim that the challenged reforms did not adversely affect minority voters. Denial of cert. in the

North Carolina case leaves open the question whether Voter ID violates Section 2 of the Voting Rights Act.

Other election law cases have planted issues squarely before the Court that may be decided during the October 2017 term. The issues include whether the NC Congressional Redistricting Plan violates the First Amendment right to freedom of association (*Common Cause v. Rucho*); whether the Wisconsin redistricting plan violates the First and Fourteenth Amendment (*Gill v. Whitford*); and whether removal of eligible voters from Ohio's voter-registration rolls violated the NVRA and deprived eligible citizens of the right to vote (*Ohio A. Philip Randolph Institute and NEOCH v. Husted*).

Near the end of the term on June 19, 2017, the Court agreed to hear *Gill v. Whitford*, a case that is focused on whether partisan gerrymandering in Wisconsin violated the Constitution and whether there is indeed a judicially discernable and manageable standard by which political gerrymander cases are to be decided. The case will be argued during the October 2017 term. One of the issues in this case will likely be whether evidence of an "efficiency gap" is relevant to such a claim.[2] A detailed analysis of these most recently minted (or soon-to-be decided) election law decisions will be provided at IMLA's April 2018 Annual Meeting in Washington, D.C.

Editor's Note: Ben Griffith, partner in the Griffith Law Firm, Oxford, Mississippi, is a longstanding IMLA member and Chair of the IMLA International Committee. He is an acknowledged expert on voting rights issues and is the Editor of America Votes: A Guide to Modern Election and Voting Laws, now in its second edition.

Notes

1. Stephen E. Gottlieb, *Democracy Essential to the Legitimacy of Constitutional Interpretation, Legitimacy in Constitutional Interpretation*, March 10, 2017 p. 1 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2931153

2. See Nicholas Stephanopoulos & Eric McGee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015).

An Annotated Model Panhandling Ordinance Cont'd from page 19

identified in this ordinance, give rise to an increased risk of injury to solicitors on medians, traffic congestion, and traffic accidents that may affect drivers or solicitors.

2. Alternative Sites. This ordinance provides ample alternative sites for passive begging, pa handling, charitable and political solicitation in areas that do not give rise to enhanced public safety concerns or personal privacy and security concerns.

3. Evidence, The City Council has undertaken and carefully reviewed studies designed to identify areas in which small traffic medians may put solicitors or motorists at risks, and high speed and high volume traffic corridors that likewise are especially dangerous, in order to assure that these regulations are grounded in appropriate governmental concerns, are narrowly tailored, and allow alternative avenues for communication.

(c) Prohibitions

1. Generally. Both passive and aggressive begging, panhandling, charitable and political solicitation shall be restricted in "areas with heightened public safety concerns" as defined in subsection II(d).

2. Exceptions. The City Council may identify limited periods each year in which these prohibitions should not be enforced as a result of particularly pressing governmental concerns related to such activities.

a. Charitable initiatives. The Council may designate up to two days a year as days on which these prohibitions shall not apply in order to allow effective solicitation for designated charities, provided that appropriate safety measures are implemented.

b. Election activities. The Council may designate up to 5 days a year as days on which these prohibitions shall not apply in order to allow effective political communications in connection with local, state, and federal elections, provided that appropriate safety measures are implemented.

c. Documented public safety plan. In the event that the City Council designates days as exceptions from this ordinance's requirements, it shall also adopt a documented public safety plan to reduce risks to public safety that might otherwise arise.

d. Comparable treatment. To the extent that the City Council adopts exceptions to the prohibitions set forth in section VI(c)(1), relating to charitable initiatives and election activities, such exceptions shall extend to all parties otherwise covered by the provisions of this ordinance relating to begging, panhandling, charitable and political solicitation.

VII. Penalties

[This model ordinance does not address penalties, since penalties would need to be integrated with those applicable under other local ordinances. Note that there are opportunities to specify differing penalties for different offenses under this ordinance. Note 5 above suggests, for example, the possibility of enhanced penalties for aggressive panhandling in sensitive areas. Enhanced penalties might also be appropriate for recidivists. Some public policy advisers have suggested that a possible penalty for solicitors on probation would be to prohibit them from soliciting in particularly desirable locations. Because of the importance of local judgments on such matters, this draft model ordinance does not attempt to set out options for penalties.]

VIII. Severability

[Include severability provision that would allow provisions not struck down to remain intact].

Questions or comments? Please contact Judith Wegner at Judith_wegner@unc.edu.