SUPREME COURT ISSUES LANDMARK VOTING RIGHTS DECISION: AN UNEXPECTED VICTORY IN A HARD FOUGHT BATTLE THAT CONTINUES

Perhaps lost in the noise surrounding Friday's announcement of the indictment of former President Trump (not to mention other political news such as the resignation of Boris Johnson as an MP), was the decision of the Supreme Court (with Chief Justice Roberts and Justice Kavanaugh (in large part) joining Justices Kagan, Sotomayor and Brown Jackson) published Thursday. The decision in *Allen v. Milligan,* written by the Chief Justice and characterized by the Democracy Docket on the day it was published as "landmark" and by Vox as "genuinely shocking," struck down a Republican-drawn 2021 congressional map in Alabama. The Court did so on the ground that the map discriminated against Black voters and, thus, violated Section 2 of the Voting Rights Act. There actually were three lawsuits covered by the opinion.

Section 2 of the Voting Rights Act

Section 2(a) allows voters to challenge racially discriminatory maps, and the Supreme Court found that the map impermissibly carved up majority-Black areas, so that only one (District 7) of Alabama's seven congressional districts (representing 14%) had a majority of Black residents, despite Blacks representing 27.16% of the state's total population and 25.9% of its voting-age population. The case was brought to create two "majority-minority" congressional districts, roughly proportional control.

The *Milligan* Decision

The *Milligan* decision affirmed a lower court ruling (by a three-judge panel, two of whom were appointed by former President Trump). Among other grounds, the Supreme Court concurred with the conclusion of the District Court that the plaintiffs' claim was likely to succeed under a test set out in the 1985 Supreme Court case, *Thornburg v. Gingles.*

Gingles set out three preconditions for Section 2 relief: the minority group must (i) be sufficient large and [geographically] compact to constitute a majority in a reasonably configured district; (ii) be able show it is political cohesive and (iii) be able to demonstrate that the white majority votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate. After satisfying the preconditions, successful plaintiffs must then show under "the totality of circumstances" that the challenged political process is not "equally open" to minority voters. The Supreme Court held that the District Court had "correctly found that Black voters could constitute a majority in a second district that was 'reasonably configured.'"

Significance

The *Milligan* decision was an unexpected and rare victory for minority voters and the civil rights groups that support them. The Supreme Court previously had allowed the 2021 Alabama map to stand for the 2022 midterms, using its "shadow docket" (otherwise known as its "emergency docket"), notwithstanding that the lower court had ruled against the state.

Cook Political Report's Dave Wasserman writes that the decision is "the culmination of a push by civil rights groups and Democrats to unpack 'hyper-minority' districts in the Deep South and seek more proportional representation for Black voters." The ACLU tweeted, *Milligan* "is a huge win for Black voters in Alabama."

The *Milligan* decision was unexpected because the Roberts court has repeatedly narrowed the Voting Rights Act, and Roberts had authored the *Shelby County v. Holder* decision that had gutted Section 5 (the pre-clearance provision) of the Voting Rights Act. As recounted by POLITICO, Roberts, as a young lawyer in the Reagan Department of Justice, had authored an estimated 25 memoranda opposing the expansion of the Voting Rights Act to add an effects test for Section 2. That "effects test" was added in 1982 as part of the so-called "Dole compromise" (*see* "Compromise Likely on Voting Rights") and in reaction to an earlier Supreme Court case, *Mobile v. Bolden.* The compromise was to change the phrase "to deny or abridge the right [to vote]…" to "in a manner which results in a denial or abridgement of the right [to vote]" – in effect, substituting a results test for a discriminatory purpose test. The flip side of the compromise was to add a disclaimer about proportionality. In *Milligan*, Roberts concluded, "Alabama's proposed approach stands in sharp contrast to all this, injecting into the effects test of Section 2 an evidentiary standard that even our purposeful discrimination cases eschew."

Mark Joseph Stern, writing in Slate, explains the Roberts' change of heart in *Milligan* as a reaction to Alabama "pushing too far, too fast, too transparently." In one of the takedowns of the state's arguments, Roberts wrote that "The heart of these cases is not about the law as it exists. It is about Alabama's attempt to remake our Section 2 jurisprudence anew." Stern notes that that Roberts easily dispatched Alabama's contention that the "effects test" is unconstitutional in stating that the Court had upheld the law's constitutionality in the past and he had no interest in revisiting "four decades" of settled precedent. A "stunning turnaround for [Roberts] that suggests he really has made peace with the law as it exists today." And stunning as well in light of *Dobbs* (Justice Alito's opinion, with which Robert concurred).

Thomas authored an aggressive dissent, which prompted a pointed retort from the Chief Justice ("The dissent, by contrast, goes where even Alabama does not dare, arguing Section 2 is wholly inapplicable to districting because it 'focuses on ballot access' only… . But the statutory text upon which the dissent relies supports the exact opposite conclusion.")

Potential Impact

The June 8 Democracy Docket analysis notes that "crucially the Court … leaves Section 2 – the most litigated portion of the VRA – in place, which will allow pro-voting plaintiffs to continue utilizing this indispensable tool to challenge racially discriminatory maps in court." In a related analysis, Democracy Docket is clear: "the decision reaffirms that Section 2 is constitutional and will remain an integral tool in fighting racial vote dilution."

An article by Stef W. Knight and Andrew Solender in Axios posits that the *Milligan* decision could change maps in several key states, enhancing the chances of Democrats to retake control of the House in 2024. Dave Wasserman tweeted that the decision could "reverberate to LA, SC and/or GA, forcing creation of 2-4 new Black majority districts and netting Dems 2-4 seats," over and above the new seat likely to be formed in Alabama when the congressional map is redrawn. Executive Director of the National Redistricting Foundation (which supported the plaintiffs in the *Milligan* case and is the non-profit arm of the NDRC), Marina Jenkins, characterized the decision as a "massive win for voting rights [which] lays a foundation for fair map decisions in our other Section 2 cases in states like Texas, Georgia, Louisiana."

The June 8 Democracy Docket analysis notes that the *Milligan* decision "will have a largely positive impact on active litigation involving Section 2 claims across 10 different states." Of the 63 active redistricting cases in the Democracy Docket database, 31 allege Section 2 claims and are currently pending in federal court. Last June, the Supreme Court paused a Section 2 lawsuit over Louisiana's congressional map (where Blacks have only one majority-minority district despite representing 33% of the population), pending its decision in *Milligan.* That litigation should now resume.

Concluding Thoughts

Democrats should celebrate the victory and, despite *Dobbs,* should not automatically assume that the rule of law is dead. The Slate article argues that "It is difficult to overstate the impact of *Milligan* on voting rights." But, as the Congressional Black Caucus statement notes, the *Shelby v. Holder, Rucho v. Common Cause* and *Brnovich v. DNC* decisions have "distorted the voting landscape that has made it easier for states to dilute and supress the Black vote." As Khadidah Stone, one of the *Milligan* plaintiffs noted, "the fight is far from over."

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