

The Dole Compromise: Revision of Section 2, Voting Rights Act

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Section 2 was one of the original provisions of the 1965 Voting Rights Act, it called for a permanent, nationwide prohibition on the use of voting practices or procedures that abridged the right to vote on the basis of race or color.¹ The Supreme Court subsequently ruled that in order for there to be a valid violation of the act proof of an intentional discriminatory purpose was required.² Congress responded to this contention when the Voting Rights Act was up for re-authorization in 1984 by amending Section 2.³ The 1982 amendments to section 2 rejected the Court's intent requirement; Congress provided instead that demonstrating the discriminatory results of a political process is sufficient to establish a section 2 violation.⁴

The changes to Section 2 did not come easily in the senate, although the house overwhelmingly approved the changes.⁵ Senator Orrin Hatch (Republican-) and his subcommittee had concerns that the earlier version of amended Section 2 - as it existed before adding Section 2(b) - would inevitably lead to proportional representation.⁶ In an effort to quiet these objections, Senator Dole offered a compromise. The compromise expanded the provision of section 2 by dividing it into two parts, Section 2(a) and Section 2(b).⁷ Section 2(a) repeated in large part the language of the original Section 2, but added a transition sentence at the end. The original Section 2 provided that "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."⁸ Additional sentence stated: *or in contravention of the guarantees set forth in section 1972b(f)(2) of this title, as provided in subsection (b).*⁹

Section 2(b), delineated the legal standards to be applied under the "results" test in order to address the proportional representation issue.¹⁰ The text of the article is as follows:

A violation of subsection (a) is established if, based on the totality of 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 class of citizens protected by subsection (a) in that its members have less opportunity than other

¹ Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation, 42 U.S.C. § 1973 (1982).

² *Mobile v. Bolden*, [446 U.S. 55](#) (1980)

³ Laughlin McDonald, The Voting Rights Act in Indian Country, 29 Am.Indian L. Rev. 43, 2004

⁴ S. REP. No. 417, 97th Cong., 2d Sess. 27

⁵ Paul Mckaskle, The Voting Rights Act and the "Conscientious Redistricter" 30 U.S.F. L. Rev. 1, 1995

⁶ *Id.*

⁷ *Id.* at footnote 5

⁸ S. REP. No. 417, 97th Cong., 2d Sess. 27

⁹ *Id.*

¹⁰ Bernard Grofman, Would Vince Lombardi Have Been Right If He Had Said: "When It Comes To Redistricting, Race Isn't Everything, it's The Only Thing"?, 14 Cardozo L. Rev. 1237, 1992.

members of the electorate to participate in the political process and to elect representatives of their choice. The extent that members of a protected class have been elected to office in the State or political subdivision is one circumstance that may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.¹¹

In 1986 the Supreme Court attempted to clarify the legislation by interpreting the language of § 2 as requiring three "necessary preconditions" for determining whether use of a multimember voting district system has the effect of diluting a minority group's voting power in violation of § 2:¹² First, the minority group must be able to show that it is geographically compact enough to constitute a majority in a single-member district. Second, the minority group must be able to show that it is politically cohesive. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate.¹³

Prior to the act's re-enactment and the addition of Section 2(b) the court had failed to define that portion of the act. However, Senator Dole's compromise set the stage for the Supreme Courts interpretation of the requisites of Section 2(b) of The Voting Rights Act.

Conclusion: It is likely that in 2007, when the act is up for re-authorization, the opponent's of the act are going to advocate the reinstatement of a *City of Mobile v. Bolden* or the most recent, *Georgia v. Ashcroft* type analysis in proving discriminatory conduct in elections. Those two cases held that a jurisdiction only violated Section 2 of the VRA if it acted purposefully and discriminately to deny or abridge the freedom to vote on account of race; this is difficult to prove without a confession. Proponents of reauthorization will advocate for a "results" test type analysis, as is supported by the Dole amendment to Section 2 and the decision in *Thornburg v. Gingles*. While the Supreme Court's decision interpreting the language of the Dole amendment may appear restrictive, it still encompasses the spirit of Section 2 which is to allow those who are discriminated against a framework in which to redress their grievances and to prove violations of the act.

¹¹ Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation, 42 U.S.C. § 1973 (1982).

¹² *Thornburg v. Gingles* , [478 U.S. 30](#) (1986)

¹³ *Id.*