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## Technical Bulletins: At-Large Electoral Systems and Voting Rights

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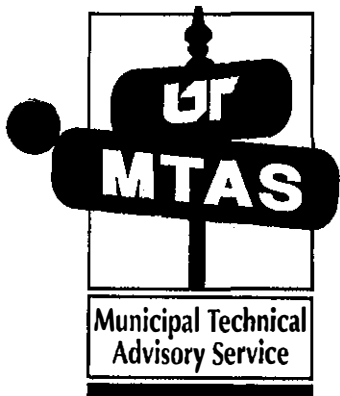
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# Technical Bulletin

Bulletin 37

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## At-Large Electoral Systems and Voting Rights

By Sidney Hemsley

So you want to adopt or continue an at-large election system where all the members of the governing body are elected from the municipality as a whole. Or, you want to adopt a combination district/at-large election system in which the majority of members of the governing body would be elected from districts and one or two would be elected at-large. Will either system survive a challenge on the ground that it discriminates against minority voters?

Well, yes and no. Local governments have successfully defended a tiny number of totally at-large systems and at least one combination district/at-large system (by agreement of the parties).

However, if the local government has a significant minority population and a less-than-pristine record of race relations, any at-large component of its electoral system is skating on thin ice. Besides, win or lose, the defense of such suits is horrendously expensive (if the city loses, it also pays the plaintiff's attorney's fees).

If that answer is not particularly helpful in individual municipalities, there is a good reason for it. The reason lies in the nebulous legal tests against which at-large and combination at-large/district electoral systems are measured that have grown out of the history of the statutes and cases in this area.

The Civil Rights Act of 1965 (Act) banned a large number of election practices considered by the Congress to discriminate against minorities in violation of the Fifteenth Amendment to the United States Constitution. These practices include literacy tests, educational or knowledge tests, moral character tests,

and proof of qualifications through registered voters or other classes. A major amendment to the Act, passed in 1975, required many states and local governments to provide bilingual election forms, including ballots.

Section 2 of the Act, which basically tracked the language of the Fifteenth Amendment, 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, or in contravention of the guarantees set forth in section 4(f)(2).

In applying Section 2, the federal courts disagreed on whether a Section 2 violation was triggered by election practices that were adopted with the intention to discriminate against minority groups or simply by the effect of the practice.

The United States Supreme Court settled that disagreement in *Mobile v. Bolden*, 446 U. S. 55 (1980). That case involved a challenge under the Fourteenth and Fifteenth Amendments to the U. S. Constitution, and Section 2, of the at-large election system of the City of Mobile, Alabama. The city was governed by a commission consisting of three commissioners elected at-large. The commission was established in 1911, but no black had ever been elected under that system.

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In fact, until 1973 none had ever sought office. However, the Supreme Court turned aside the challenge on the grounds that the plaintiffs had not proved the election system was a "purposeful device to further racial discrimination." Curiously enough, the Court reasoned that purposeful discrimination in establishing the system could not be proven because in 1911 blacks in Alabama were, for all practical purposes, disenfranchised; therefore there was no need on the part of the City of Mobile to adopt an at-large system to discriminate against them.

In response to Bolden's requirement that proof of intentional discrimination was essential to an election practice claim under both the Fourteenth and Fifteenth Amendments to the U. S. Constitution, and Section 2, the Congress in 1982 amended Section 2 by writing into it an "effects test." The intent and effect of that amendment was to overturn the "intentional test" of *Bolden* under Section 2. In fact, the Senate Judiciary Report on the bill whether "a challenged practice or structure, prevents plaintiffs from having an equal opportunity to participate in the political process and to elect candidates of their choice" (emphasis is mine).

As amended in 1982, Section 2 presently reads as follows:

- (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
- (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political process 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) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office

in the State or political subdivision is one circumstance which 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 (emphasis is mine).

At-large election systems, then, are not per se unconstitutional or a violation of Section 2. They, like other election practices, stand or fall on a "totality of circumstances" test under Section 2.

However, because intentional discrimination is still essential to the proof of a voting rights discrimination case under the Fourteenth and Fifteenth Amendments to the United States Constitution, and Section 2 requires only that the effect of the election practice in question be discriminatory, the latter has become the primary vehicle for at-large elections system challenges.

The only U. S. Supreme Court case that interprets the present Section 2 is the landmark case of *Thornburg v. Gingles*, 106 S.Ct. 2752 (1986). In striking down most of the redistricting plan of the North Carolina General Assembly on the grounds that it diluted the vote of black citizens in certain districts, the Court announced a three-pronged test for proving a minority voter dilution claim under Section 2. A plaintiff must show that:

1. The minority is sufficiently large and geographically compact enough to constitute a majority in a single-member district.
2. The minority is politically cohesive.
3. The majority votes sufficiently as a block to enable it — in the absence of special circumstances, such as an unopposed minority candidate -- usually to defeat the minority's preferred candidate.

The Court went on to say that, "Stated succinctly, a bloc voting majority must usually be able to defeat candidates supported by a politically cohesive geographically insular minority group" (emphasis is mine).

If a local government possessed no other information than the history of Section 2, it should be on notice that if it has a significant minority population

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identifiable pockets, an at-large election system or a combination district/at-large is automatically suspect.

The Voting Rights Act of 1965, as amended, generally, and Section 2 of that Act, as amended after *Bolden*, in particular, express a clear intention on the part of Congress to snuff out any kind of election practice that operates to the detriment of minority groups. At-large provisions created or preserved in such cities after 1982 are invitations to legal trouble even if they were, or are, established with no discriminatory intent in mind.

The reason it is difficult to answer the question of whether a proposed district/at-large combination in a particular municipality would withstand challenge is that there are no simple rules or standards against which to measure any particular at-large or combination district/at-large election system, either before its adoption or after it is challenged.

Even the U.S. Supreme Court in *Gingles* could not agree on what kind of evidence will satisfy the proof of a violation of each prong of the three-pronged test. Under the "totality of circumstances" test, the determination of whether a system complies with Section 2, can require some incredibly complicated and expensive analysis. In theory, that should be the plaintiff's problem; in reality, it is usually municipalities that end up on the complicated, expensive defensive in most at-large cases.

However, one ironclad rule can be observed in the at-large electoral system cases: if under the old election system no blacks, or few blacks were ever elected to office, that system will not stand constitutional muster. The corollary is that if under a proposed election system it is likely that no blacks, or few blacks will be elected to office, the system will not stand constitutional muster.

Beyond that simple rule, a municipality's defensive problems are compounded by the Senate Judiciary Report's list of nine "objective" factors the Courts are to use in analyzing a Section 2 claim:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise participate in the democratic process.

2. The extent to which voting in the elections of the state or political subdivision is racially polarized.
3. The extent to which the state or political subdivision has used unusually large election districts, majority voter requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group.
4. If there is a candidates listing process, whether the members of the minority group have been denied access to that process.
5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.
6. Whether political campaigns have been characterized by overt or subtle racial appeals.
7. The extent to which members of a minority group have been elected to public office in the jurisdiction.
8. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
9. Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisites to voting, or standard, practice or procedure is tenuous.

But that list of rules is not a comprehensive and exclusive one, and there is no requirement that any particular factors be proven, the Senate Judiciary Report continued. In other words, the "totality of circumstances" test permits the plaintiff to use the shotgun approach in his presentation of evidence of discriminatory effect. Any evidence or perceived evidence of discrimination in, as well as by, the city is allowed to be shot forth as evidence of election practices discrimination.

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That list of rules has been used in one form or another by the courts in virtually all of the cases challenging at-large systems since *Gingles*. Many courts have gotten even into white-minority income comparisons as evidence of a lesser ability on the part of the latter to participate in the electoral process!

For an outstanding and devastating example of the Senate Judiciary Committee rules applied in a Tennessee case, see *Buchanan v. City of Jackson*, 683 F.Supp. 1515 (1988) in which the court developed a 170 year history of discrimination against blacks in and by the City of Jackson.

What the *Gingles* three-pronged test and the "factors" that go into an analysis of a Section 2 case mean is that how a case is actually analyzed is "judge's choice." As one prominent writer on the subject pointed out:

Because the nine factors of the Senate Report remain relevant, and because of the presence of constitutional claims, proof in at-large election cases extends backward to the formation of a local government in the Nineteenth Century, and extends forward to cover the fairness to minorities of every aspect of current government operations: hiring, housing, urban renewal and relocations, street improvements, school operations and curricula, and the provision of all government services . . . (emphasis is mine). (Rhyne, William S., *Preparing and Trying the At-Large Election Voting Rights Case*).

In other words, the at-large system analysis can become an as complicated and comprehensive look into the history of the municipality as the judge wants to make it, and the outcome can be totally unpredictable, depending upon which proof the judge wants to accept or ignore.

Although at-large election systems are not per se unconstitutional or a violation of Section 2, there is a judicial bias against them. While some have been upheld, they have generally received rough treatment in the courts, including in Jackson and Chattanooga.

No matter what good arguments justify at-large systems, where there is a significant minority population in identifiable pockets, they are viewed as an instrument which either dilutes, or have the high potential to dilute, the voting strength of minority groups.

While Section 2 specifically says 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," arguably, cases brought under that section lead to roughly that result.

The lengths to which the courts have gone to overturn local election practices clearly not designed with a discriminatory intent in mind and defensible on common sense grounds is seen in *NAACP v. City of Statesville*, 606 F. Supp. 569 (1985). In that case the parties agreed to a combination district/at large system in which some of the district seats contained a majority black voting age population.

However, the city supported staggered two year terms, the plaintiffs non-staggered four year terms, for the at-large offices. The Court was asked to resolve that difference in a way that would lead to the least diminution of minority voting power. The Court decided that the at-large seats would be filled in non-staggered elections because that method permitted single-shot voting and candidate support trade off agreements between white and black candidates. The terms of office would be for four years because the blacks were less economically able than whites to sustain the cost of more frequent elections.

In theory, a redistricting scheme which incorporates one or two at-large seats would insure the election of members of the minority to office, thereby satisfying Section 2 and *Gingles*. But a careful reading of Section 2 and the Senate Judiciary Committee Report's nine rules lead the court's to ask two questions about minority representation under such a system: (1) Does it permit the minority group to elect minority officeholders? and (2) Does it provide the minority group political power? Minorities may be elected to office in "proper" number in satisfaction of Section 2 and *Gingles* under a combination district/at-large election system, but conceivably find their political

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power diluted by the at-large office holders. The court will assure itself that both questions are answered in favor of the minority. Although Section 2 and Gingles may have had in mind voting power as opposed to political power, the latter has become a major component of the "totality of circumstances" test.

In fact, evidence of that can be seen in *Buchanan v. City of Jackson*, 683 F. Supp. 1537 (1988) in which the Court fashioned a remedy to the at-large election system it had found in violation of Section 2 in *Buchanan v. City of Jackson*, 683 F. Supp. 1515 (1988). A proposal by the City of Jackson called for a board of nine commissioners, six district commissioners to be elected from single member districts, and three administrative commissioners to be elected at-large.

The three administrative commissioners were to be responsible for the administration of the City of Jackson in virtually the same manner as was the old board of three commissioners struck down by the Court. The Court rejected that plan on the premise that the election of all the administrative commissioners at-large would not remedy effects of past discrimination, which included,

... among other things, under employment of blacks as City employees, poorly maintained streets in black communities, and the total absence of blacks elected to City administrative positions or appointed to head any department.

If there has been past discrimination on the part of the city, it is very easy for a court to find that any proposed system in which the majority voters can elect the controlling faction on the governing body perpetuates the effects of past discrimination.

Assume that there are five members of the governing body, two elected from majority districts, two from minority districts, and one elected at-large. If the total number of the majority voting age population in the municipality exceeds the total number of the minority voting age population, the at-large member of the governing body would, given polarized voting, always be elected by the majority. In addition, he or she would hold the swing vote on the governing body.

On the whole, it is not worthwhile to defend an at-large or even a district/at-large election system any place in Tennessee where there are significant identifiable pockets of blacks, unless the city in question has an immaculate history on discrimination. It is essential to remember that the issue here is not whether the municipality intended to discriminate, but whether there was and is discrimination.

Several good Tennessee Attorney General's opinions and publications from various sources have been written on this subject.

#### FOR FURTHER INFORMATION

For further information on at large electoral systems and voting rights, contact Sid Hemsley, senior legal consultant in Knoxville (615) 974-0411, or your local MTAS municipal consultant in Nashville at (615) 256-8151; Knoxville at (615) 974-0411; or Jackson at (901) 423-3710.

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