

TO: Mackenzie Babichenko and Greta Harris, Co-Chairs, Redistricting Commission  
FROM: George Barker  
SUBJECT: Legislative Districts, Race and the Voting Rights Act

There has been a lot of discussion about race in the drawing of districts in our meetings and in presentations from the two sets of counsel. I think we understand several issues based on the statements from the attorneys. There are, however, a couple of issues I would like clarified.

We recognize the significance of being able to draw districts that have a majority of persons of voting age who are African-American or black. My understanding is that Section Two of the Voting Rights Act applies where there are African-American majorities of Voting Age Population. We also are aware that some courts and states have applied Section Two to combinations or coalitions of more than one racial or ethnic group but also are aware of the differing views of our attorneys on that issue.

We have had maps drawn that provide five Senate districts, three in Hampton Roads and two in the Richmond area, that have majorities of African-Americans among the voting age population. These correspond to five similar districts drawn in 2011.

I note, however, that when federal courts determined that the Congressional and House of Delegates maps were unconstitutionally racially gerrymandered and adopted plans to replace the maps approved by the General Assembly, they did not have majorities of African-Americans of voting age in multiple affected districts. The enacted Congressional map had a large majority of African-Americans in the third Congressional district and no other district where African-Americans could elect a candidate of their choice.

The Court reduced the proportion of voting age population in the third district by about 10 percentage points to the mid-forties. They shifted many African-Americans from the third to fourth district, providing the fourth district with an African-American voting age population of more than 40 percent. African-Americans have been able to elect candidates of their choice to both Congressional districts since the Court adopted the new district lines. The ability of African-Americans to elect candidates of choice without having majorities was not surprising because a racially polarized voting analyst had indicated that in the Hampton Roads and Richmond areas, blacks could control the outcome with only 33 to 40 percent of the voting age population.

Similarly, the courts found 11 of 12 Section Two House of Delegates districts racially gerrymandered. All had African-American voting age percentages of between 55.2 percent and 60.7 percent. All were reduced to less than 55 percent, with several between 40 and 50 percent. District 63 in the Petersburg area was reduced from 59.5 percent to 47.5 percent, District 77 in Chesapeake was reduced from 58.8 percent to

40.2 percent, District 90 in the Norfolk area was reduced from 55.6 percent to 41.9 percent, and District 95 was reduced from 60.0 percent to 47.4 percent. Each of these newly drawn districts that were now in the 40-47% range continued to provide black voters with an effective opportunity to elect a candidate of choice and black voters continued to do so.

As we began working on the maps, I decided to see if we had the potential to develop another Section Two State Senate district. Knowing that the greater Richmond area is one of three in Virginia that will gain significant representation in this redistricting and that there have been substantial shifts in voting patterns, I decided to try to draft a possible new district in the Richmond area. Because of both substantial population growth and a surprising shift in voting in the Chesterfield area, I focused on that area and the city of Richmond, which not only had significant growth but also maintained very high Democratic performance while the percent of the city's black population decreased from about 52 percent to about 43 percent.

A draft I submitted two weeks ago showed that a Section Two district could be added in the Richmond area, with an AP Black percentage above 50 in a compact district covering much of Richmond and extending from the southwestern city boundary into nearby areas in Chesterfield. In my draft, the African-American percentages in the other two Central Virginia districts where African-Americans have elected candidates of choice drop below 50 percent, but the districts are still effective for African-Americans to control.

I would like our attorneys to address issues relating to this. Below are some questions I have.

1. Although the actions taken to draw districts with less than voting age population majorities of African-Americans were done by courts, what would we have to do to draw a new district with less than 50 percent even though we could have a majority if needed? If a new district can be drawn at above 50% black and voting is racially polarized in that area, then Section 2 of the VRA requires that a district be drawn that provides black voters with an equal opportunity to elect their preferred candidate. Note that does NOT mean that the new district has to be above 50% black VAP. If it can be shown, for example, that black voters in the 40%-49% black VAP still are able to elect their candidate of choice, then such a district can be drawn in that area. Indeed, in such a district, if it can be shown by looking at reconstituted election returns that B voters are able to elect candidates of their choice, then such a district may be drawn and a 50% B VAP is not necessary (and may even be racial gerrymandering or packing in violation of Section 2 if it precludes creating a second district that is effective for B voters. Republicans who drew the 2011 map misinterpreted the VRA and believed that maintaining districts at 55% BVAP was necessary to comply with the VRA. They were legally wrong then (as the U.S. Supreme Court found). Republicans today who claim that it is necessary to create districts greater than 50% BVAP are

required by Section 2 (when a BVAP % less than 50% will still provide B voters with an effective opportunity to elect their preferred candidate) are wrong as a matter of law. Indeed, the federal court that imposed the remedial House of Delegates map and the new congressional map (both highlighted by Sen. Barker) found that their court-imposed plans complied with Section 2 of the Voting Rights Act because B voters were still able to elect their candidates of choice in the districts between 40% and 47% black.

2. What would we have to show to document that the other districts, particularly draft district 26, would still be effective for African-American voters? After noting that the area is marked by racially polarized voting according to Dr. Palmer, you then look at reconstituted election returns, especially the 2017 Fairfax race, to see if B voters have an effective opportunity to elect their preferred candidate in District 26. This general methodology mirrors the approach taken by Dr. Grofman, the special master tasked with recommending a remedy to the U.S. District Court in the *Bethune Hill* litigation. It is worth emphasizing that (as noted in the memo above), the special master reduced the BVAP figures to below 50% in no less than a quarter of the unconstitutional House of Delegate districts in that case. In each instance, he relied upon the analysis of reconstituted elections to conclude that the new districts would effectively elect candidates of choice.
3. Would it be advantageous to include the Hispanic percentage of above 10 percent to the more than 50 percent African-Americans? Not necessarily. If B voters are already shown to be effective in a district, then including additional minority voters (e.g., Hispanics) to the district could be considered packing in violation of Section 2 and may also raise concerns under the 14<sup>th</sup> Amendment racial gerrymandering jurisprudence.
4. If we do not include a Section Two justification for such a proposed district even though we have more than 50 percent VAP, might we be taken to court for not providing such a district and what would be the likely outcome of such a challenge?

Section 2 does not REQUIRE districts be drawn over 50% BVAP in all cases where it is mathematically possible to do so. If voting is racially polarized and a black VAP of more than 50% is needed for the choices of black voters to prevail in the district, then such a district must be drawn. Under Section 2, a district must be created that provides minority (black) voters with an effective opportunity to elect their candidate of choice to remedy a potential violation but that may not always require a majority black district. So the fact that a district can be drawn over 50% Black VAP (a burden of proof) helps to create an obligation to draw a district that performs for black voters (i.e., they can elect their preferred candidate). As the federal court found in the *Bethune Hill* and *Personhuballah* cases, a district over 55% black VAP that is redrawn below 50% black can still be effective for black voters and meets the requirements of Section 2.

So, if it is possible to create a majority BVAP in an area, then an effective district for B voters must be drawn but it does not necessarily have to be over 50% BVAP. In such an area, failing to create an effective district for black voters to elect candidates of choice would violate Section 2, and the State would likely lose a case if such a district is not drawn. If an examination of racially polarized voting and reconstituted election returns shows that a district would perform for B voters at less than 50% BVAP, then such a district may be drawn and it would not violate Section 2. The argument that Section 2 requires districts be over 50% BVAP simply because such a district can be drawn commits the same kind of legal error that led to the decisions in *Bethune Hill* and *Personhuballah*.

VA VRA District Comparisons

HOUSE	Plan	va_hod_current	Plan	va_hod_a7	Plan	va_hod_b7b
	<b>VRA Consideration</b>		<b>VRA Consideration</b>		<b>VRA Consideration</b>	
	Majority AA districts	6	Majority AA districts	11	Majority AA districts	10
	Coalition districts	25	Coalition districts	22	Coalition districts	22
	Opportunity districts	19	Opportunity districts	15	Opportunity districts	18
	Effective Opp districts	13	Effective Opp districts	9	Effective Opp districts	15

SENATE	Plan	va_sen_current	Plan	va_sen_a5	Plan	va_sen_b7b
	<b>VRA Consideration</b>		<b>VRA Consideration</b>		<b>VRA Consideration</b>	
	Majority AA districts	3	Majority AA districts	5	Majority AA districts	5
	Coalition districts	9	Coalition districts	7	Coalition districts	5
	Opportunity districts	5	Opportunity districts	3	Opportunity districts	9
	Effective Opp districts	5	Effective Opp districts	3	Effective Opp districts	7