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DATE: May 30, 1991

SUBJECT: LB 614; Does Proposed Redistricting Plan Violate the Federal Voting Rights Act or Pertinent State and Federal Constitutional Provisions?

REQUESTED BY: Senator Emil Beyer
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

LB 614 is a current redistricting bill proposing new legislative districts in the State of Nebraska. As amended by the Government, Military, and Veterans Affairs Committee of the Legislature, LB 614 would establish various legislative districts in conformance with the 1990 census, including Legislative District No. 8 with a total population of 31,647, Legislative District No. 11 with a total population of 31,598, and Legislative District No. 13 with a total population of 31,880. Each of those latter legislative districts would be located in Douglas County, and those legislative districts would have the following percentages of African American residents: District No. 8--13.10 percent, District No. 11--73.40 percent, and District No. 13--27.26 percent.

You are apparently concerned that the composition of District 11 might involve the practice of "packing" where protected minority residents are packed into one district so as to diminish their potential influence in other districts. Conversely, you are concerned that the composition of Districts 13 and 8 might involve "cracking" where the voting strength of minority residents is diluted by placing them in separate districts rather than in one particular district where their influence might be maximized. You have, therefore, requested our opinion as to whether either of these practices might violate the Voting Rights Act of 1965, the

Federal Constitution, or the Nebraska Constitution. We assume that your question is posed with respect to Legislative Districts 8, 11, and 13 as established by LB 614.

Section 2 of the Federal Voting Rights Act of 1965, as amended in 1982, provides 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 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of the 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 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.

Section 2 is codified at 42 U.S.C. § 1973. The United States Supreme Court had occasion to deal with Section 2 of the Voting Rights Act in Thornburg v. Gingles, 478 U.S. 30 (1986). That case establishes the criteria for proving a violation of Section 2.

In Thornburg, the Supreme Court indicated that Section 2 prohibits states from imposing any voting procedures which result in the denial or abridgement of the right to vote of any citizen who is a member of a protected class of racial or language minorities. Id. at 43. The essence of a Section 2 claim "is that a certain electoral law, practice or structure interacts with social or historical conditions to cause an inequity in the opportunities enjoyed by black and white voters to elect their preferred representatives." Id. at 47. Section 2 is violated when the "totality of circumstances" indicates that the political processes leading to nomination or election are not equally open to members of a protected class. Id. at 43. Whether the political processes are equally open depends upon a "searching practical

evaluation" of the "past and present reality" and on a "functional" view of the political process. Id. at 45.

Thornburg and subsequent cases in this area have indicated that three factors must initially be established in a Section 2 action for that case to proceed. Thornburg v. Gingles, supra; Solomon v. Liberty County Florida, 899 F.2d 1012 (11th Cir. 1990); Jeffers v. Clinton, 730 F.Supp. 196 (E.D. Ark. 1989); Neal v. Coleburn, 689 F.Supp. 1426 (E.D. Va. 1988). First, the plaintiff minority must show that it is sufficiently large and geographically compact to constitute a majority in a single-member district. Thornburg, 478 U.S. at 50. Second, the minority group in question must be able to show that it is politically cohesive. Thornburg, 478 U.S. at 51. Third, the minority group must be able to show that the white majority votes sufficiently as a block to enable it, in the absence of special circumstances, to usually defeat the minority's preferred candidate. Thornburg, 478 U.S. at 51.

If this threshold showing is met, then there are a number of other factors which a court may consider in determining whether the "totality of circumstances" indicates that a violation of Section 2 of the Voting Rights Act has occurred. Those factors, set out in the Senate Report which accompanied the 1982 amendment to the Voting Rights Act, include:

> [t]he history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processees; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value.

Thornburg, 478 U.S. at 44-45 (citations omitted). In sum, the process for determining whether a violation of Section 2 of the Voting Rights Act has occurred is a complex endeavor, and can be described as follows:

> If lines are drawn that limit the number of majority-black single-member districts, and reasonably compact and contiguous majority-black districts could have been drawn, and if racial cohesiveness in voting is so great that, as a practical matter, black voters' preferences for black candidates are frustrated by this system of apportionment, the outlines of a Section 2 theory are made out. Whether such a claim will succeed depends on the particular factual context, including all of the factors that Thornburg, Smith, and the legislative history of Section 2 say are relevant.

Jeffers v. Clinton, supra, 730 F.Supp. at 205.

In the present instance, we believe that "packing" a legislative district or "cracking" minority voters among several legislative districts would constitute a violation of the Voting Rights Act of 1965 if the facts surrounding such activities were to establish the threshold criteria and other factors set out in the Thornburg case and subsequent authorities. However, the factual determination required by those cases is clearly an intense, fact-driven determination.[1] We obviously do not have such detailed facts before us with respect to the proposed legislative districts in Omaha and the "past and present reality" of any discrimination in those areas. As a result, we cannot provide any definitive answer as to whether the proposed legislative districts in LB 614 violate the Voting Rights Act of 1965. Such a determination would necessarily turn on a multitude of facts that we simply do not have available.

We would note, however, with respect to your concern regarding "packing" in District 11, that, in at least two instances, courts have held that 80 percent minorities in a particular district are not automatically unreasonable or cause for concern with respect to Section 2 of the Voting Rights Act. Latino Political Action Committee, Inc. v. City of Boston, 784 F.2d 409 (1st Cir. 1986); Rybicki v. State of Board of Elections, 574 F.Supp. 1147 (N.D. Ill.

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[1] For example, in Jeffers v. Clinton, 730 F.Supp. 196 (E.D. Ark. 1989), a case under Section 2, the court heard evidence for twelve days. Id. at 198. Similarly, in Garza v. County of Los Angles, 918 F.2d 763 (9th Cir. 1990), the district court held a three month bench trial. Id. at 766.

E. Div. 1983). On this basis, 73.4 percent minorities in District 11 would appear acceptable.

You have also asked whether the situation involving minority concentrations in proposed Districts 8, 11, or 13 violates the Federal Constitution. As a rule, discriminatory apportionment practices involve a violation of the Fourteenth and Fifteenth Amendments to the United States Constitution dealing with equal protection and the right of citizens to vote. To show a violation of either the Fourteenth or Fifteenth Amendments, it is necessary to establish that there was purposeful discrimination or racially motivated discriminatory intent. City of Mobile, Alabama v. Bolden, 446 U.S. 55 (1980); Whitfield v. Democratic Party of the State of Arkansas, 890 F.2d 1423 (8th Cir. 1989). We have no reason to believe that Legislative Districts 8, 11, and 13 in LB 614 were designed with racially motivated discriminatory intent. In any event, we are aware of no facts which would support such a showing, and, in the absence of such a factual determination, we cannot state whether the districts proposed by LB 614 violate the Federal Constitution.

Finally, you ask whether LB 614 violates our Nebraska Constitution. Article III, Sections 5 and 7 of the Nebraska Constitution deal with redistricting in Nebraska. The various Nebraska cases dealing with those provisions primarily concern numerical equality among legislative districts and the mechanics of drawing district boundaries. See Buller v. City of Omaha, 164 Neb. 435, 82 N.W.2d 578 (1957); Rogers v. Morgan, 127 Neb. 456, 256 N.W. 1 (1934). The proposed legislative districts at issue here have a very slight variance in total population, and we believe that they would comply with the requirements of numerical equality. Beyond those cases dealing with simple numerical equality, we have been unable to find any Nebraska cases which involve violations of the equal protection guarantees of our State Constitution in the context of racial discrimination and redistricting. However, there is at least some indication that such an equal protection violation under our State Constitution would involve purposeful discrimination as is the case in the federal authorities cited

above. State v. Bird Head, 204 Neb. 807, 285 N.W.2d 698 (1979). Absent such purposeful discrimination, there would be no violation of our State Constitution.

Sincerely yours,

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05-09-14.91

cc: Patrick J. O'Donnell
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APPROVED BY:

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