

No Stay for State Redistricting Challenge

By: Deborah Elkins February 16, 2016

A Richmond Circuit Court denies a motion to stay proceedings in this Virginia constitutional challenge to a state legislative redistricting plan, as the federal constitutional challenge to the plan pending in federal district court does not involve the same parties or legislative districts; the court also denies motions to quash subpoenas duces tecum, holding that only legislators and their legislative assistants employed and paid by individual legislators, committees or the legislature as a whole, may claim legislative privilege.

The matter is before the court on two separate issues. The first is a motion to stay the proceedings, filed by the Virginia State Board of Elections and its members, the Department of Elections, and Edgardo Cortes (defendants) and the Virginia House of Delegates and its Speaker (defendant-intervenors). The second is a motion to quash subpoenas duces tecum and objections to requests for production, filed by three separate groups: non-party legislative respondents, defendant-intervenors, and legislative non-parties. Those document requests and subpoenas generally seek documents and communications related to the compactness, population, contiguity, creation, prioritization and implementation of criteria considered by the legislature in their 2011 redistricting efforts.

The responding parties have all objected to the production of the requested information citing legislative privilege. Secondarily, they cite the requests as being overly broad and unduly burdensome, but the court finds that objection has not been sufficiently argued or demonstrated and the court denies the motions to quash to the extent they are based on being overly broad and or unduly burdensome.

Defendants and defendant-intervenors move for a stay of the proceedings until resolution of the appeal of *Berthune Hill v. Va. State Board of Elections* to the U.S. Supreme Court.

The plaintiffs are different in each case because the challenged districts are dissimilar, thus plaintiffs residing in those districts are not identical. Defendants and defendant-intervenors fail to establish that all parties are identical.

Legal issues

As to actual issues before the court, plaintiffs in the federal litigation challenge the constitutionality of the House of Delegates districts under the Equal Protection Clause of the U.S. Constitution. In the current case, plaintiffs challenge state House and Senate districts on compactness grounds under Article II, Section 6 of the Virginia Constitution. It is clear the federal litigation and the state litigation examine different issues of law.

The federal action was filed first and is at an advanced stage. While the extensive discovery and the experts retained in the federal case may have some overlap with the current litigation, the issues and districts are completely different. The discovery in this case will have a different focus in the House districts and will be completely new in the Senate districts. The court does not attach much weight to this factor.

By denying defendants' motion to stay, plaintiffs will have a likelihood of a final decision in this matter before the 2017 General Assembly elections, but by granting the motion, plaintiffs may well not have any final resolution before the 2017 elections.

Denying the stay will allow defendants to engage in discovery herein long before the presidential election takes place. Speculating that the Supreme Court's decision will be unfavorable to defendants, and that such a decision will impact entirely different districts, is not enough for the court to find that defendants will be prejudiced by denying the motion to stay.

The court denies the motion to stay.

Motion to quash

The legislative privilege applies absolutely to purely internal legislative communications solely among legislators, and between legislators and their legislative staff. This central core of the legislative privilege has been thoroughly discussed by all persuasive authorities and the parties agree as to this core aspect of the privilege.

With one exception, the court declines to extend the privilege beyond that core definition and finds that the individuals included within the legislative privilege are only the legislators and their legislative assistants and/or aids who are employed and paid by the individual legislator, a legislative committee or the legislature as a whole. The one exception and addition to

that definition is communications between legislators (including their paid staff) and the Virginia Attorney General's office regarding preclearance of the redistricting plan. Despite the fact that the Attorney General is part of the executive branch, its role in advising and advocating changes to the district map brings the AG under the umbrella of legislative privilege.

The court orders the non-party legislative respondents (other than Susan Schaar) and the legislative non-parties shall answer all the discovery at issue, but such response shall be limited and protected by the scope of the privilege defined herein. The court denies the motion to quash of Christopher Marston and John Morgan as they fall outside the scope of the legislative privilege and the court orders them to answer plaintiff's discovery requests. The court denies the motion to quash as to Del. Chris Jones because he waived his legislative privilege through his extensive testimony in the *Berthune-Hill* proceeding, and the court orders him to respond to plaintiffs' discovery requests. The court denies the motion to quash of Division of Legislative Services as it also falls outside the legislative privilege and orders that it comply with the discovery requests. The court denies the motion to quash of defendant-intervenor Speaker William Howell because he waived his right to assert the legislative privilege by intervening in this suit and orders that Speaker Howell comply with the discovery request. Regarding the House being merely a repository of legislative documents to that extent the House motion to quash is granted.

Vesilind v. Virginia State Board of Elections (Marchant) No. CL 15-3886, Jan. 29, 2016; Richmond Cir.Ct. VLW 016-8-013, 13 pp.

VLW 016-8-013

Fulltext Opinions

016-8-013 – Vesilind v. Virginia Board of Elections

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