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Lani's Heir

The new, old racial ideology of the Holder Justice Department

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Washington Post columnist Michael Gerson has called Eric Holder "the most destructive member of Barack Obama's Cabinet." The description is apt. The attorney general's questionable judgment extends far beyond the high-profile decisions involving the trial of Khalid Sheikh Mohammed and the dismissal of charges against members of the New Black Panther Party who engaged in blatant voter intimidation at a Philadelphia polling place.

In recent months, Holder's putatively post-racial Justice Department has agreed in three cases to proportional-representation systems as a remedy for violations of the 1965 Voting Rights Act. All three cases involved section 2 of the statute.

Section 2, as amended in 1982, made jurisdictions nationwide vulnerable to suits challenging voting procedures that were said to have a discriminatory result. A discriminatory result, it turned out, was evident whenever minority candidates were not elected in numbers roughly proportional to the minority population. Where minority officeholding is disproportionately low, the electoral power of black and Hispanic voters has been "diluted."

The Justice Department (as well as private parties) can initiate section 2 suits. Full-scale trials are relatively rare; more often jurisdictions settle out of court. They cannot afford stiff legal fees, and litigation involving sensitive civil-rights issues is seldom worth its political cost.

A wrong requires a remedy, and the standard remedy for vote dilution has been single-member districts carefully drawn to create safe black or Hispanic legislative seats. Minorities are entitled to districting that gives them representation proportionate to their population, the Supreme Court held in 1986. But safe minority seats are an imperfect means to that end. The alternative methods of voting - the real proportional-representation systems - adopted in three recently settled cases are a much better bet.

There is nothing inherently undemocratic about PR systems; many countries, as well as a small number of scattered American communities, use them. But, in its seeming enthusiasm for their much wider adoption, the Justice Department risks further heightening the importance of racial identity in American elections and encouraging raw racial appeals - especially by black candidates trying to mobilize black voters.

Lani Guinier must be smiling. Remember her? Sixteen years ago President Clinton was forced to withdraw her nomination as assistant attorney general for civil rights when her radical views on voting rights and minority representation came to light. Those views

were too much even for a left-leaning Democratic administration. But Obama is not Clinton. The radical views that Clinton felt compelled to disavow when they became public have become part of the package of "change we can believe in."

At the time of her ill-fated nomination, Guinier was a professor of law at the University of Pennsylvania. (She later moved to Harvard.) Her extensive writings addressed what she called a "fundamental flaw in our democracy": methods of election that do not ensure that minorities will hold a number of legislative seats proportional to their share of the population. Blacks, in her view, were still "systematic losers in the political marketplace," but losers could become winners by abandoning an illegitimate system in which - and here she was quoting a student - those who are "outvoted . . . don't count."

They could become winners, in her view, if no legislation could pass without the support of a majority of minority representatives - an updated version of John C. Calhoun's notion of concurrent majorities. The Holder Justice Department today is not pushing for concurrent majorities, but it is surely on Guinier's page in believing that whites still have excessive power and that black elected officials are, as she argued, "inauthentic" unless "community based" and the first choice of black voters. Blacks elected with essential white support are thus not true representatives of black interests.

In 1996, Holder told the Washington Post that he always carried a favorite quotation in his wallet. A black man's "race defines him more particularly than anything else," it ran. Said Holder: "I am not the tall U.S. Attorney, I am not the thin U.S. Attorney. I am the black U.S. Attorney. . . . There's a common cause that bonds the black U.S. Attorney with the black criminal or the black doctor with the black homeless person." All blacks share a "common cause," and thus, methods of election that give them proportional legislative power are a moral imperative.

Guinier's radical translation of that moral imperative - her insistence on true PR methods of voting - was politically unacceptable in 1993. But through the 1980s and 1990s, with the exception of some political appointees in the George W. Bush administration, the commitment to maximizing black legislative power through the use of racially gerrymandered districts was unwavering. As Robert Driscoll, a deputy assistant attorney general in the Justice Department's Civil Rights Division from 2001 through 2003, put it: "The problem with the DOJ voting section is that, regardless of what is published on the website or said out loud, what they want is proportional representation. You could have whatever evidence you want about crossover voting, turnout figures, you name it - but if the number of black representatives is 'too low' for the jurisdiction in question, you have a problem with the DOJ."

For more than two decades, the drawing of race-conscious single-member districts has been the standard means of achieving that proportionality when the level of minority officeholding has been found to be unacceptably low. But, in the best of circumstances, race-driven maps "waste" black votes. Inevitably, many black voters end up in majority-white districts and find themselves represented by a white - which is to say without representation, by the Guinier and Holder definition.

The three systems to which the Justice Department has recently agreed are assumed to be much more likely to guarantee true proportionality. They have involved school-district elections in Euclid, Ohio; town-commissioner elections in Lake Park, Fla.; and trustee elections in Port Chester, N.Y. These were towns in which, despite a significant minority population, no blacks or Hispanics had been elected to public office. The Justice Department had filed suit, and, given the absence of elected minority representatives, there was no chance the towns could successfully defend their methods of election.

Was Lake Park a racist town? The DOJ painted a boilerplate picture of socioeconomic disparities and blacks' and whites' tending to vote for different candidates; it even threw into the list the presence of "gated communities" that impaired "the ability of black candidates to campaign and be elected."

But what really mattered, as the quotation from Robert Driscoll made clear, was a black voting-age population of 38 percent and an all-white governing commission. Driscoll, who then served as Lake Park's attorney, hoped the town would litigate, but it was not willing to do so. In the words of Baird, litigating would be "David vs. Goliath without David being armed at all."

The question of a remedy boiled down to two bad choices, given the statutory demand for racially fair election "results." Lake Park could replace its town-wide ("at large") voting with single-member districts drawn to ensure some safe minority seats, or it could institute some sort of proportional-representation system. The first option was a non-starter. Local officials objected to carving up their towns into wards. In Lake Park, with a population of only 9,000, turnout for elections had been running roughly 10 percent. Thus, "38 people in a single-member district could decide who would sit on the commission," town attorney Thomas Baird noted.

So, beginning with municipal elections in March 2010, Lake Park will use a "limited voting" system - one in which voters will be limited to casting only one ballot, although they will be electing commissioners to four seats. That is, any number of candidates might be running town-wide for the four openings, but voters will be forced to pick their one favorite. If black voters are united behind a single black candidate, he or she is bound to win. A mere quarter of the electorate can determine who gets one of the seats. And the elected whites will be free to think, No blacks voted for us, we owe blacks nothing, we can ignore the one black on the commission.

In Euclid as well, in a settlement between the Justice Department and the school district, three seats will be filled by voters who may cast only one ballot for their top choice among the candidates running. In the Port Chester settlement, however, a federal judge imposed a "cumulative voting" scheme - a slightly different proportional-representation system and one that is generally considered hard for voters to understand and use effectively. Six trustee positions will be open at one time, and voters will have six votes. They can divide them between candidates in any way they choose. If one Hispanic is running, Hispanic voters can decide to use all six of their votes on that candidate. If they

do so, considerably less than a sixth of the electorate will determine the winner of one of the six seats, provided members of other groups do not also use all their votes to elect their top choice.

Will this plan achieve its goal of empowering minorities? It's a more reliable means of achieving proportional representation than the current system of race-conscious single-member districting, which the Justice Department has called the "presumptive remedy" for minority "underrepresentation." But it's still not certain to succeed. The system is "a gamble," Jon Greenbaum, a former DOJ litigator who is now with the Lawyers' Committee for Civil Rights Under Law, has said.

Indeed, in Euclid, black turnout for the school-board elections on November 3 was too low to secure the election of the black candidate; white incumbents won all three available seats. Participation is crucial in proportional-representation systems. The population of Port Chester is 28,000, 46 percent of whom are Hispanics. But they are only 22 percent of the citizen voting-age population. If they want a Hispanic on the board, they need to turn out in full force and throw their full support behind one candidate.

Proportional-representation systems are "a gamble," but the Obama Justice Department seems likely to stress their advantages in the coming years. They solve a host of problems. In 1986 the Court had assumed that majority-minority single-member districts were the obvious remedy for methods of voting that "dilute" the power of blacks and Hispanics. Just last March, the Court held that single-member districts with only a minority of black voters are not an acceptable voting-rights remedy, even in settings with substantial and reliable white crossover voting. But the insistence on majority-minority districts assumes that most whites will refuse to vote for black candidates. And such districts can be drawn only if blacks and Hispanics are residentially clustered. Cumulative voting and limited voting dispense with districting altogether - and thus circumvent the Court's increasingly outdated decisions.

In addition, proportional-representation systems would be a preemptive strike against a possible Supreme Court attack on racial gerrymandering. Chief Justice John Roberts has already expressed skepticism about the constitutionality of "divvying us up" by race, which he has called "sordid business." If limited and cumulative voting become an established part of the American electoral landscape, however, the Justice Department will be free to insist on those methods of voting in jurisdictions electing too few minority officeholders by the standard of proportionality. Without obvious race-driven district lines, the divvying up by race will be better hidden.

For opponents of divvying up by race, cumulative voting and limited voting have superficial appeal. As voting-rights scholar Richard Pildes has argued, they allow voters to "voluntarily define their own interests and the voting affiliations that best promote them." Single-member districting plans imposed as voting-rights remedies allow group stereotyping by judges and bureaucrats to replace self-definition.

It's a nice theory: proportional-representation systems' encouraging more black voters to define themselves by qualities other than race. Fewer Eric Holders ("I am the black U.S. Attorney") and more Ward Connerlys. But it's unlikely to happen.

More probable is a heightened emphasis on race by black candidates who depend on black voters' thinking about racial identity as Holder does - and even more stress on the importance of race by DOJ attorneys who have long assessed the level of black representation by counting blacks in elected office. In this case, we will be stuck with race-drenched politics into the indefinite future.

Michael Carvin, one of the nation's foremost voting-rights litigators, puts the point well: "Cumulative voting and limited voting enshrine forever race-based legislative seats. Blacks and Hispanics will not see themselves as part of an integrated whole and vote accordingly. There will be color-coded voting into the future as far as the eye can see."

Reserved legislative seats that depend on geographical racial clustering are self-limiting; they can be drawn only as long as blacks do not become substantially residentially integrated. Not so with proportional-representation systems, and Carvin sees, as a next step, an end to single-member districts even for the election of members of the House of Representatives. With the substitution of cumulative or limited voting, racial gerrymandering in a new form will become a permanent part of the legislative landscape.

Even if geographically based districts were to remain the American way of electing representatives, race would not disappear from American politics. But as Duke law professor Donald Horowitz testified at 1982 hearings on the Voting Rights Act, it is wrong to structure methods of election so that race has "everything to do with voting behavior" and "political ethnicity ultimately smothers democratic choice and threatens democratic institutions." And that is precisely what PR methods of voting do.

The Voting Rights Act was supposed to integrate American politics - with politics as the key to closing the larger divide. Perhaps the Justice Department could keep that in mind as it contemplates proportional-representation systems as a remedy for voting-rights violations in the coming years.

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