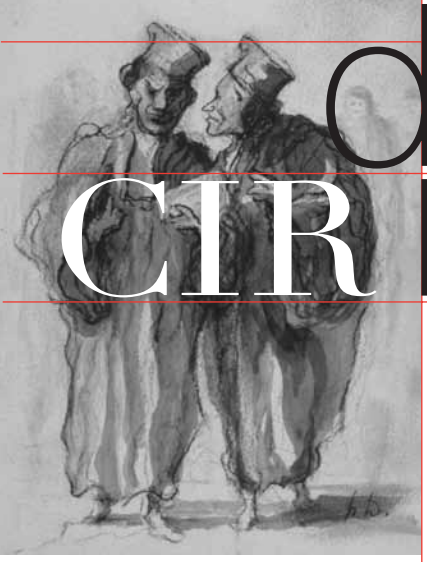

CIR docket report

Schooling Judge Silberman
CIR Takes on Obamacare

Cooperating Counsel: Theodore Olson, Amir C. Tayrani; Gibson, Dunn & Crutcher, LLP

Spring 2012

Pro-Obamacare protestors demonstrate outside the Supreme Court, as the Court hears oral argument in the case.

In late March, the Supreme Court heard an unprecedented three days of oral argument in the most important case of this decade. The Court now will decide whether Congress has the authority to require every individual in the United States to purchase health insurance.

CIR teamed up with former Solicitor General Theodore Olson to submit a high profile *amicus* brief on behalf of five former attorneys and solicitors general. Though the Court received briefs from economists and health care specialists, CIR's brief was one of the few to make an unapologetic defense of the idea of limited government.

CIR has been involved in *Florida v. HHS* from the beginning, and we filed a particularly influential brief when the case was before the Eleventh Circuit. In that case, some twenty-six states plus the National Federation of Independent Business claim Congress does not have the authority to compel individuals to *participate* in interstate commerce, but only to regulate already existing interstate commerce.

There is a lot at stake politically, of course – the Court expects to rule on the constitutionality of President Obama's signature legislative initiative right before this year's presidential general election campaign kicks off.

But the Obamacare fight is about more than nationalized healthcare. The case poses an unavoidable choice between two views of government. Whichever view emerges as the winner will set the terrain on which many other constitutional fights will be waged over the next several decades.

Unfortunately, it is not clear that the Court will side with the idea of a limited federal government based on enumerated powers. For the stubborn fact is that a string of Supreme Court cases have expanded Congress's Commerce Clause authority so much over the last fifty years that it would not be a great leap for the Court finally to declare, in 2012, that Congress indeed has the authority to compel individuals to engage in commerce, not just regulate existing commerce.

CIR's brief takes aim at one of the more important lower court decisions that accept endless, incremental expansions of federal authority to address every "big" problem Congress decides to tackle. Last December, Judge Lawrence Silberman of

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Desperate Measures

LaRoque v. Holder, Cooperating Counsel: Michael Carvin, Hashim M. Mooppan, David J. Strandness; Jones Day

There they go again.

Shortly after pressuring the City of St. Paul, Minnesota, to drop a Supreme Court challenge to racial quotas under the Fair Housing Act, the Obama Justice Department now is trying to scuttle CIR's lawsuit *LaRoque v. Holder*, in which we contend that Section 5 of the Voting Rights Act functions as a quota for minority-preferred candidates.

Section 5 requires that any change in voting practices in certain (mostly Southern) jurisdictions with a history of voting discrimination must be precleared by the Justice Department. In 2009, DOJ objected to a voter-approved referendum to change to nonpartisan local elections in Kinston, North Carolina, on the sole ground that nonpartisan elections would be bad for black candidates because they would lose the support of some white Democrats.

CIR client John Nix meets the press in Kinston, North Carolina, as CIR President Terry Pell looks on.

In early January, CIR succeeded in getting the influential Court of Appeals for the D.C. Circuit to hear *LaRoque v. Holder* on an expedited basis. Then, several weeks later and in an extremely rare move, DOJ purported to "withdraw" its objection to the referendum after nearly two years of litigation. That abrupt about-face came too late to prevent the use of partisan elections this past November in Kinston's City Council elections. But not coincidentally, it came just in time for DOJ to argue in court that the case is now moot, only a week before the Court of Appeals was scheduled to hear oral argument.

DOJ is desperate to evade judicial review in *LaRoque*, not just because of the outrageous facts in CIR's case, but also because of the unique legal arguments we make. In the 2009 case of *Northwest Austin v. Holder,* the Supreme Court explained that "serious constitutional questions" were raised when the 2006 Congress reauthorized Section 5 despite the drastically changed circumstances in the South since the 1960s. Since then, several cases challenging Section 5 on the basis of those changed circumstances have been brought and are pending.

LaRoque, however, is the only case to challenge not just Section 5's preclearance requirement, but also its substantive standard, which creates a quota-floor protecting minority candidates. Specifically, in Section 5, Congress prohibited any voting change that diminishes the ability of a minority group to elect its "preferred" candidates.

By so doing, Congress mandated, among other things, that Southern jurisdictions retain "safe" majority-minority districts that virtually guarantee the election of minority candidates, even where there are completely legitimate reasons for not retaining such districts. One such reason is that minority voters themselves may prefer not to be packed into a small number of districts through racial gerrymandering, but rather to be spread among a larger number of districts where they can have greater electoral influence by forming coalitions with non-minority voters based on issues rather than skin color.

The 2006 amendments to Section 5 that create this quota-floor were the product on an unholy alliance. On the one hand, the quota, particularly as applied by the Obama Justice Department, is a boon for minority candidates in "safe" districts, who will often be Democrats. On the other hand, some Congressional Republicans were perfectly happy to adopt that quota, because concentrating minority voters in a few

districts creates other districts with heavy concentrations of non-minority voters, where Republican candidates think they can reliably win.

Unlike today's politicians, however, the federal courts strictly scrutinize acts of Congress when – to borrow a phrase from Chief Justice Roberts – it "engages in the sordid business of divvying voters up by race." Clearly, DOJ's knowledge of the skeptical judicial inquiry that awaited Section 5's amended preclearance standard is precisely what sent it scrambling to derail the *LaRoque* case, just as it had squelched the St. Paul Fair Housing Act case shortly before.

The D.C. Circuit is currently considering whether, despite DOJ's belated machinations, *LaRoque* remains a live suit. It should hold that it does. Indeed, the Obama Justice Department's extreme efforts to block judicial review of the current preclearance regime only highlight Section 5's fundamental intrusion on local self-governance and the pressing need for a definitive adjudication of Section 5's constitutionality. ~

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the D.C. Circuit reasoned that in the absence of a clear legal precedent *barring* Obamacare, it would be risky for the courts to strike down a legislative program of this magnitude. Silberman's view was in line with modern cases interpreting the Commerce Clause that emphasize Congress's need to legislate broadly, sometimes regulating intrastate non-commercial activity that affects interstate commerce.

In effect, Judge Silberman tailored an already-broadened Commerce Clause to the circumstances forced upon the country by an activist president. As a result, the Commerce Clause is in danger of becoming even less the specific and limited grant of congressional authority it used to be and more the limitless license to address national problems that Obama and his allies have always hoped it would become.

Silberman's opinion is especially problematic because of who Judge Silberman is: both a respected jurist and a conservative in judicial philosophy. And so we must assume his opinion will be taken seriously by conservative justices on the Supreme Court. Of those, both Justice Kennedy and Justice Scalia, at one time or another, have embraced a broad view of Congress's authority under the Commerce Clause. Each must be considered a possible swing vote in the Obamacare case.

And since Silberman's opinion is not part of the case before the Court, none of the parties to the case can address it at length in their briefs. Hence the need for an *amicus* or "friend-of-the-court" brief in which the principled alternative to Silberman's view can be developed.

Olson's brief fully meets that need. By explicating the Commerce Clause as a grant of limited authority to Congress to remove trade barriers between the states by itself regulating national commerce, Olson counters Silberman's modern account of the Commerce Clause with nothing less than its original meaning. He shows how the Commerce Clause was understood by the Framers, by the eighteenth-century public, and by early Supreme Court cases as a *limited* grant of power to Congress to regulate interstate commerce – certainly not an open-ended power to compel individuals to engage in new commerce.

No one should doubt the importance of *Florida v. HHS* to future efforts to restrain the growth of government with enforceable constitutional limits on Congress's authority to regulate interstate commerce. As Judge Silberman frankly acknowledged in his opinion, there are *no* principled limits on what Congress can compel under the modern theory of the Commerce Clause. On this view, any activity or non-activity that in the aggregate creates a "national" problem is fair game for Congress, including, for example, the failure to save for college, the failure to save for retirement, or even the failure to purchase a fuel-efficient car. The types of individual "inaction" that Congress could decide to address with new, national requirements are, literally, endless.

If we want to preserve a system of limited government based on enumerated powers explicitly granted to Congress and enforceable in the courts, then we must persuade five justices of what stark folly it would be to give the country over irretrievably to the "modern" view of the Commerce Clause. ~

Stupid *and* Evil: A Primer on Section 5

It is a truism (or ought to be) that votes should be counted the same way regardless of the race of the candidate. It seems totally obvious, for example, that votes for minority candidates shouldn't count for more – or less – than votes for non-minority candidates.

Yet since at least 2006, the Voting Rights Act has operated on the presumption that blacks and other minority voters have a federally-enforceable right to maximize the number of representatives of their own race. Under Section 5 of that Act, the attorney general is required to block changes in voting procedure that do not maximize the odds that minority voters will be able to elect minority candidates.

Predictably, Section 5 led to a proliferation of "concentration districts" – congressional districts drawn, often in glaringly unnatural ways, to concentrate minority voters so that they form a clear majority. In the 1990s, the Justice Department went so far as to interpret Section 5 to mean that whenever a state "covered" by Section 5 redraws district lines, it must create as many concentration districts as possible – however bizarrely-shaped they may be.

CIR successfully challenged DOJ's interpretation in 2000 in *Reno v. Bossier Parish*, one of CIR's first Supreme Court victories. The Court ruled that Section 5 was satisfied as long as a proposed change in voting rules did not diminish minority voting strength. In 2003, in *Georgia v. Ashcroft,* the Supreme Court held that minority voting strength was to be measured by "all the relevant circumstances," not simply the number of concentration districts. Jurisdictions could, for example, convert a concentration district into several "cross-over" districts or "influence" districts where minority success might depend on forming coalitions with non-minority voters based on *issues* rather than skin color.

The NAACP and other interest groups responded

The Court of Appeals for the District of Columbia Circuit.

by pressuring Congress to amend Section 5 to overrule *Bossier Parish* and *Georgia v. Ashcroft.* And in 2006, Congress dutifully re-wrote Section 5 to make it abundantly clear that jurisdictions *must* maximize the number of concentration districts. The 2006 amendments also extended Section 5, which had been due to expire, all the way to 2036.

The facts of CIR's *LaRoque v. Holder* show just how intrusive and overtly political Section 5 has become. In order to maximize the number of black elected officials in Kinston, Obama officials used Section 5 to strike down a proposed non-partisan voting system on the spurious ground that minority candidates needed the Democratic Party label to win elections – even though Kinston is a majority-black city. Section 5 also is being wielded to strike down voter ID laws in South Carolina and Texas.

One effect of Section 5 is to insulate minority officeholders from having to compete for non-minority votes by simply giving them an automatic supply of minority voters. Another is to deprive minority voters of the opportunity to influence the election of non-minority officials by forming coalitions on the basis of public-policy issues rather than race.

You see, a key assumption underlying Section 5 is that non-minority voters will not support minority candidates, and so minority voters must be grouped in concentration districts so that such candidates can be elected. In fact, however, non-minority voters regularly support minority candidates, and in large numbers. Also, many minority voters now forced into districts designed to elect minority officeholders would prefer to use their votes to further some purpose other than the racial agenda forced on them by the Justice Department.

The creation of safe seats for minority officeholders also perpetuates the illusion that what minorities want most is to elect minority officeholders, rather than elect representatives who reflect and further their political interests. And this illusion, in turn, proves useful to the Justice Department again and again, as it did in *LaRoque*, when it comes time to strike down voting changes under Section 5.

If DOJ can show that the maximum number of minority *candidates* might not be elected under the change, it will conclude that the change will give minority *voters* a diminished capacity to elect their candidates of choice. Using this argument, more concentration districts are created, with the predictable result that minorities once again will be seen voting just for other minorities – a useful datum in the next round of redistricting. Rinse and repeat...

In taking on Section 5 of the Voting Rights Act, CIR is not just up against the "civil rights" establishment, but an almost monolithic political consensus of both parties in Congress. That consensus recalls a story about a congressional aide who while escorting some inquisitive foreign visitors through the Capitol explained: "In America we have two political parties, the Stupid Party and the Evil Party. Sometimes, the two parties get together and do something both stupid and evil. We call this 'bipartisanship'."

"The bipartisan 2006 amendments to Section 5 put race into American political arrangements in an unprecedented way, introducing a racial warping effect into how Americans vote that will be perpetuated, at the very least, for decades to come."

The bipartisan 2006 amendments to Section 5 put race into American political arrangements in an unprecedented way, introducing a racial warping effect into how Americans vote that will be perpetuated, at the very least, for decades to come.

Only CIR, in *LaRoque v. Holder,* is challenging these amendments, and with them the disastrous idea that America is only a loose collection of contending racial groups, each with its attendant "rights." We are asking the courts to strike a judicial hammer blow to Congress's and the race industry's unconstitutional project of foisting this new form of race-based thinking on our nation. ~

What Happens in Guam...

Cooperating Counsel: J. Christian Adams; Election Law Center

In Guam, authorities pursue racial favoritism with a vengeance. Their latest gambit: an official referendum that is restricted to members of the indigenous racial group and designed to convey "advice" about whether Guam is to secede from the United States.

One would think that if the Obama Justice Department cared about anything, it would care about an official referendum that was racially discriminatory on its face. Imagine what would happen if a state decided to hold a referendum on whether to secede but only allowed white voters to participate.

But incredibly, Obama officials are standing mute as the government of Guam goes about its business of systematically excluding anyone but descendants of "native inhabitants" from voting on the future of Guam.

CIR's co-counsel in the Guam case, former Obama DOJ attorney and whistleblower J. Christian Adams.

CIR's lawsuit on behalf of Arnold "Dave" Davis, longtime resident of Guam, is the only thing stopping the descent of one of America's oldest protectorates into tribal feudalism. (This descent is happening, of course, even as Guam's residents continue to benefit from millions in federal defense dollars and accept the benefits of U.S. citizenship in every other way.)

This indifference of American officials to blatant racial discrimination is made possible by Guam's relative obscurity. Indeed, when most Americans think about Guam, they simply draw a blank. Those who know will think of a tropical paradise, with beaches, scenery, and a climate every bit as spectacular as Hawaii's. Others may think of an important naval base.

But perhaps what too few Americans think, when and if they think about Guam, is – America. The fact is, Guam has been part of our country since 1898, when the U.S. acquired it from Spain after the Spanish-American War. (The Spanish had ruled the island and heavily influenced its culture since the sixteen-hundreds.)

The day after Pearl Harbor, the Japanese invaded Guam. Over three long years, they subjected its people to brutal and widespread atrocities, including murder, gang-rape, and torture. Then, in some of the fiercest fighting of World War II, U.S. forces suffered almost 8,000 casualties liberating Guam in 1944.

Today the people of Guam are American citizens, one and all. That includes the descendants of the island's original inhabitants, a Polynesian-descended group known as the Chamorro. The Chamorro comprise thirty-six percent of Guamanians today, the rest being... other Americans, that is, ones of non-Chamorro origin.

Some Chamorro openly resent Caucasians, and also the Filipino and other pacific island immigrants who have come to Guam to take advantage of the economic opportunities made possible by Guam's relationship to the United States. Politicized Chamorro wield every tool at their disposal to establish the dominance of the native inhabitants at the expense of these other racial groups.

Now they have succeeded in

CIR client, and Guamanian, U.S. Air Force Major Arnold Davis (Ret.).

U.S. Marines re-planting the flag during the Liberation of Guam, 1944.

getting the government of Guam to use its authority to proclaim a fundamental political difference between the Americans on Guam who are Chamorro and the Americans on Guam who descend from other racial groups.

This difference was made painfully clear to CIR client Arnold Davis, a retired Air Force major who made Guam his home after his military service. When he heard about the referendum and went to register to vote in it, officials turned him down flat. He was *almost* eligible, they explained, but he didn't meet one of the requirements – only those Guamanians who, unlike Davis, are or are descended from persons who had been Guamanians *in 1950* could register to vote in this particular exercise in "democracy."

Since the so-defined group is essentially a stand-in for the Chamorro, the requirement amounts to a flat-out racial bar to voting. Despite the blatant illegality of this racial test for voting, the Justice Department refused to take action when Davis lodged a complaint.

So, faced with this stance of the Obama Administration, and knowing Guam to be at least American enough to have its own federal district court, CIR elected to bring up the matter there. With co-counsel J. Christian Adams (he's the former DOJ attorney who blew the whistle on DOJ's failure to prosecute voter intimidation by New Black Panthers in the 2008 elections), CIR, in November of 2011, launched a major lawsuit to strike down the racial exclusivity of the referendum. CIR's complaint cites the large number of Guamanian and federal laws, including the U.S. Constitution, that are violated by Guam's voting requirement.

In response, Guam says that the referendum is "advisory" and will not be "binding" but "merely" transmitted to the U.S. Congress and the Secretary General of the United Nations. So even if the Chamorro voted to separate from the United States, Guam says, that vote wouldn't have any "real" effect on the future status of Guam.

But of course, in telling the court what an advisory vote *isn't,* Guam neglected to mention what an advisory vote *is*. The point of an advisory vote is to give citizens an officially recorded "voice." On the world stage, Chamorro activists no doubt intend to wave around the results of Guam's Chamorro-only vote as evidence of "the voice of the people" in Guam. That the majority of Guamanians, because of their race or ancestry, will have had no voice at all will be conveniently dropped from the "narrative" of what the referendum means.

It is no exaggeration to call such blatant disenfranchisement of the majority of Guamanians an instance of tyranny – a new tyranny exercised over Americans on American soil. But this time, we don't need to fight a costly and bloody military battle to end the tyranny; all we need is a president and an attorney general who enforce the law. That we lack such an attorney general and such a president speaks loudly of our current political predicament. Though CIR's case in Guam will not end the larger political difficulty, it will at least ensure that the law is enforced in this instance. And it will create a valuable precedent that will make it easier to insist on constitutional norms in other instances.

For Guam, after all, is part of the same web of law and precedent that covers all of America. And that means that what happens in Guam can't and won't stay in Guam – ultimately, it will affect us all. ~

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