

## ***Legislation as Political Fodder***

My first serious encounter with the legislative process was thanks to Henry “Merc” Hager. The “Merc” stood for Mercury, HGH, Henry G. Hager’s initials. When I first came to the law firm in Williamsport, I was fresh out of a federal clerkship. My job was to do primarily insurance defense work, although the powers that be at the law firm did permit me to do Criminal Justice Act cases for accused inmates at Lewisburg and Allenwood Penitentiaries.

It was an eye opening and remarkable experience to look over the shoulder of the President Pro Temp of the State Senate, Henry Hager, when the legislature adopted the Political Subdivision Torts Claims Act; the Catastrophe Loss Fund Act and the Comparative Negligence statute. All of these bills are, in one form or another, still extant and effectuated a dramatic alteration in Pennsylvania jurisprudence. Hager maneuvered that legislation through the political thicket in a way that can only be described as deft and prompt. The bills, each in their own way, were compromises but they were embraced by both political parties, the Governor and ultimately the public. Such a speedy and deliberative process is virtually unknown today.

Later in my career when I became active in the Trial Lawyers and other bar associated organizations, I had a taste of lobbying. Initially, I was treated very poorly in Harrisburg and one powerful Republican lobbyist referred to me as, “that long-haired liberal Jew from upstate.” He did not know anything about my politics, but he surmised my religion correctly. On more than one occasion this powerful lobbyist referred to Henry Kissinger as, “that ugly old Jew.” I saw plenty of very unpleasant things in the legislature. As President of the Trial Lawyers, I was told by one Philadelphia Representative that she was going to change her vote on asbestos legislation because “the other side” took care of a leftover campaign debt which she had incurred. I reported that and other such instances to the United States Attorney, who did nothing about it. Thanks to Governor Corbett, there eventually were indictments and jail terms meted out.

During my career, I drafted or reviewed many hundreds of pieces of legislation at the request of various legislators or organizations. One time I was even asked to be a mediator on a Bill involving Equine Immunity between forces advocating for the immunity such as Pennsylvania State University and the hotel industry with the Trial Lawyers and consumer groups on the other side. That took several years, but we finally hammered out a Bill, Henry Hager style.

Perhaps the most memorable experience was when I was lobbying and doing some drafting on a Bill involving a chancery court, in Pennsylvania, heavily supported by the Chamber of Commerce and other industry groups but opposed by the AFL-CIO. I was working against the Bill, because the folks who were utilizing my services believed that it would create a specialty court in which consumer claims would be degraded or ignored. Many times, I rewrote the Bill to try to make it more palatable to both sides. Finally, I received a telephone call from a loyal member of one party working at the White House for the reelection of Bill Clinton. I was told that if I wanted a federal judgeship that was available in the Middle District of Pennsylvania, I should make sure to write a Bill that would be acceptable to chamber and industry groups. “No” could not come out of my mouth any faster. The chancery court died a quick death in the

legislature, and the federal judgeship went to someone else, a very fine candidate, I might add.

On one occasion, I was bemused to find myself arguing for changes to Pennsylvania's Uniform Arbitration Act with highly distinguished members of the Pennsylvania Bar Association taking a contrary view. Having tepid support, even from the Trial Lawyers, we hammered out a compromise that seemed to effectuate a logical update of the statute. The incredibly fine minds, in opposition to my views, articulated their position with precision and persuasiveness.

One of the things that I learned about legislation, the hard way, is that it frequently falls into three categories:

1. Legislation genuinely intended to address or solve an issue.
2. A silver bullet. The promoters of such legislation know that it will not pass, but it is intended to offset or deflect some other legislation that "the other side" may be promoting.
3. The fundraiser. A Bill which will never go anywhere, but fires up the base.

Sometimes legislation starts off as a fundraiser or silver bullet, and evolves into one which has a legitimate purpose. John Kennedy had no luck at an important civil rights Bill but, in the wake of his tragic death, Lyndon Johnson was able to get the Bill through, changing the face of America's approach to racial injustice.

The debate is currently raging over H.R.4 – the John R. Lewis Voting Rights Advancement Act of 2021. Democrats are seeking to alter the so-called filibuster rule, which is really a super majority procedural device, while the Republicans oppose it. It was not too many years ago that the parties were on opposite sides of that debate. What is in the Bill and why it is necessary, tends to get lost in the smoke and fog. Democrats say that it is necessary to preserve the republic against Republicans like Donald Trump and his followers. Republicans say that the Bill is merely intended to protect and enhance Democratic control in major population centers.

The real question is whether this Bill is necessary to solve a problem, is a silver bullet intended to deflect other legislation, or is merely a fundraiser.

When a legislator brings me a Bill to review or tells me about a problem that needs to be addressed through legislation, I always start off by studying the problem and, if there is proposed legislation, reading it. Recently, for example, I learned that the Veteran's Administration, when it pays for non-service related injury in the way of hospital or medical bills, has a right to recover its money through subrogation. However, by virtue of some language snuck into a Bill when Vietnam War veterans were returning, the Veteran's Administration gets to pay essentially the Medicare rate but to recover at two or three times that, sometimes referred to the community billing charges. In other words, the Veteran's Administration makes money, significant amounts of money, on recovery of benefits that should inure to the benefit of the veteran. I have therefore worked on legislation to correct that problem and to assure that when the

Veteran's Administration does recover for monies it has paid out, it is treated like any other federal agency, and is not enriched by the trauma suffered by the veteran. We will see where that goes.

In reviewing the John R. Lewis Voting Rights Advancement Act of 2021, there is no question what this Bill addresses. It is intended to preserve "politically cohesive" blocks of voters. If a plaintiff could show that this group of voters may be diluted, they have a legal claim. Why would any political party want to keep a particular group of voters intact? The answer is obvious. If the group supports one particular party or candidate, it is an anathema to that party for the voting block to be diluted. This has nothing to do with democracy, and in fact it can be argued that such an approach is anti-democratic. The concept of keeping voters of a particular kind or type together is without question a form of segregation. Is it good for the country or bad?

In examining whether there is a legitimate claim of "vote dilution," or splitting up of a racial or language block, the courts are given the role of examining "significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the protected class...." What is the class intended to be protected? The proposed law is not clear about that in the beginning, but we read later on that it is intended to protect not merely "minority groups" but those who face discrimination based upon "race, color or membership in a language minority group." The latter group is a new one on me. I never have heard of "membership in a language minority group" being a protected class and it certainly has not been traditionally.

My grandparents on my mother's side were born in Poland. My grandmother, by the time I was a child, spoke perfect English. My grandfather, however, never lost his thick Polish accent, notwithstanding that he worked in New York City every day of his life and well past retirement. Was my grandfather a member of a protected "language minority group" and my grandmother not? Is the concept behind this law that people should not lose their native language fidelity? What is the ill that is sought to be protected by this Bill?

In evaluating the "totality of the circumstances analysis with respect to a claim of vote denial or abridgment" the court may examine the "use of overt or subtle racial appeals either in political campaigns or surrounding adoption or maintenance of the challenged practice." Any First Amendment problems here? Are the courts now going to look at political advertising in adjudicating whether a forbidden voting practice exists?

The courts would also be given authority, under this Bill, to evaluate whether a "minority group is too small to elect candidates of its choice...."

The legislation is peppered throughout with references to voting restrictions or dilution based upon voter identification and other practices which clearly are in the crosshairs of the drafters.

Another manner in which the courts will be created as super legislators and executives is that under the totality of the circumstances analysis as to whether there is voter dilution, the courts would examine a "significant lack of responsiveness on the part of public officials to the particularized needs of the members of the protected class,

including a lack of concern for or responsiveness to the requests and proposals of members of the protected class....”

The question, as a long-time legislative drafter, is whether we want to put the courts in the role of not only keeping blocks of voters together based upon race, color and language? In asking the courts to make that decision, should the judiciary apply a fine comb analysis to the local political process and electoral peculiarities of hundreds, maybe thousands of jurisdictions throughout the United States?

The courts need to be given robust power to address voter discrimination based upon invidiously discriminatory animus, not merely race, color or membership in a language minority group. In that respect, the Bill is too narrow. Likewise, if we are going to convert the courts into a matrix of social scientists tasked with the obligation of doing what the voters or the legislature has not, we will find ourselves standing on the precipice of a deep canyon.

Voter dilution, as a social or political “wrong,” is highly debatable. To the extent that we seek a melting pot nation, where no specific identified group is protected at the expense of other groups, we will regret regressive legislation enforcing a Balkanization of our nation. For example, in many jurisdictions there are mixtures of groups. I have a close friend who lives in a part of Queens, New York heavily populated by people of color, people of a particular “race” and those who speak a “language minority.” In the same jurisdiction are Asians, Jews and other groups not specifically identified by the voting rights Bill. If we are going to adopt a policy of prohibiting dilution of votes of some members of that jurisdiction, but not others, are we asking for more trouble than we are attempting to solve?

It is clear that this Bill is primarily intended to strike at the heart of voter registration, but it goes far beyond that. The Bill does not address in any specific way what sort of voter ID would discourage voting as opposed to voter identification that would add integrity to the process. That is really not the purpose of this Bill. Its purpose is clearly to create guaranteed votes for certain parties or individuals in specific population centers.

An interesting question: Can the bill be used by entirely White, English-speaking people in upstate Pennsylvania to prevent dilution of their vote by African Americans moving into, say, the City of Williamsport? In the view of most, that would be clear racial bigotry. Yet, when we attempt to protect minorities, by locking them into a particular community or voting scenario, are we not likewise playing the role of Jim Crow segregationists?

An evaluation of H.R. 1 (S.1) – For the People Act, is a massive undertaking resulting in the automatic registration of eligible individuals, registration portability, attempts to ensure not only easy registration, but also essentially unsupervised registration to the right to vote. The Bill would require applicants for motor vehicle drivers’ licenses to indicate whether the state serves as a residence for voter registration purposes. Programs would be adopted to permit universal vote by mail as well as so-called “early voting”. The Bill is so stuffed full of favors to particular constituencies and legislators, that it is hard to sort out each of the provisions and their consequences. Clearly, most of the legislators who will be voting on this Bill know little

or nothing about it. One of the intriguing components of the Bill is internet registration, although it is now clear that the internet is not free of problems in connection with reliability, safety and security. There are some good parts of this Bill, but it is difficult to tease those apart from those portions of the Bill intended to guarantee incumbency for the sponsors and their allies. While the Bill prevents certain practices such as “voter caging”, it unfortunately does not address voter security as aggressively as it might. The Bill contains questionable prohibitions on speech insofar as it addresses “deceptive practices”.

What this Bill and the John Lewis legislation need to have happen is for an independent, non-partisan commission to sit down, look at both Bills, and to incorporate in a readable, understandable version, a statute which will address both obstacles to registration voting and security issues that exist in the current system and in those schemes that would encourage voting by mail or computer.

Based upon my experience in handling reapportionment cases, it is clear that the greatest problem this country has in connection with voting are jerrymandered districts and loose regulations on who can vote and vote counting. In one case I handled, the Court of Common Pleas was so resistant to comply with the one-person, one-vote requirement commanded by the United States Supreme Court, interpreting the federal Constitution, that an appellate court actually had to stop the election and assume jurisdiction itself. To the best of my knowledge, that is the first and only time such an event occurred in Pennsylvania. The Common Pleas Judge who refused the reapportionment request eventually was removed from the bench for wrongdoing.

What kind of legislation would make a difference in connection with voting rights? In my experience, the following is what would enhance voting rights in America:

1. Jerrymandering. The propensity of creating oddly shaped and irrational districts to include or exclude certain groups must be prevented.
2. Education. Voters, particularly those with little experience in voting or from other cultures, need to be shown how they can register to vote and obtain proper identification so that they can be identified as legitimate voters, without discouraging their ability to vote.
3. Safe vote by mail. In the 2000 election, it was the Democrats who were worried about Republican absentee votes being improperly counted in Florida. Now the shoe is on the other foot. In all elections, mail-in votes, absentee votes and military votes need to be counted accurately, honestly and in a timely fashion. Vote by mail needs to have uniform standards so that it works fairly in every state and jurisdiction.
4. Reapportionment Commissions. Reapportionment shenanigans are one of the major ways that the electoral process is undermined in the United States. There needs to be a well thought out system in place to reapportion at the federal and state level every ten years, after the census, in a way which will never be non-partisan, but may at least reduce the tyranny of the majority in creating voting districts which heavily favor the party in power at the time the reapportionment is performed.

5. Vote Harvesting. The laws need to be strengthened to protect the elder, infirmed and others from being victims of “vote harvesting.” This is a well-known and antique technique whereby one part or another harvests votes by telling people how to fill out ballots, accompanying them to the voting booth, and taking other actions that are at the very least, shady and, at times, represent clear voter fraud. This is a shadowy area of voter suppression, which will take considerable thought and not a simple kneejerk reaction.
6. Confirming Absentee Ballots. We need legislation to make sure that anyone who fills out an absentee ballot or mail-in ballot is actually a living, eligible voter. We need to assure that mail-in ballots are counted only once.
7. Observers. Strengthening the observer role in voter counts is necessary, and in fact is addressed in a minor way in the current federal Bill under debate.
8. Technology. Technology, technology, technology. Technology is making itself known in every facet of American life. It can be a terrific way of assure reliability, integrity, and expeditiousness or it can be manipulated so as to be deceptive and completely dishonest. It is crucial to address technology in voter registration and in voting generally. How technology will be utilized, what technology is reliable and how to assure its integrity is a key factor in safer elections.
9. Preventing Apartheid. Rather than attempting to group similar peoples, races or colors together in order to protect political interests, as the current Bill would encourage, we need to completely ban and discourage the creation of voting regions or districts that either preserve or dissuade color and race barriers. Our laws should be colorblind, race neutral, gender irrelevant and need to be based upon rational borders, rather than to create an apartheid type of system where politicians are protected by a guaranteed constituency.

This Bill, as is, will not pass; but it will continue to split and divide our country. Unfortunately, a good safe, sound piece of legislation could easily be crafted to address those voting rights which could and should be more robust. While Congress has done some funding at the state and local level to eliminate voter fraud, it is still a major problem in this country, especially in the big cities. Making sure that each person casts only one ballot, that they are eligible to vote and that the votes are properly counted, without creating undue burdens, also needs to be the goal of an improvement in the voting rights Act.

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