

Law 796: Law and The Political Process

Professor Persily

Final Examination

Fall 2001

This Examination consists of a total of 7 pages including this cover sheet. Check now that your exam has all 7 pages.

Instructions

1. This is a 24 hour take home exam. It is open book. In answering the questions, you may consult any materials you wish, but you may not consult any person.
2. All exams are to be typed and double-spaced.
3. There is a strict word limit for this exam. **Your answers to all three questions combined may not exceed 3000 words.** (This is roughly 12 double-spaced, typed pages using a 12-point type and one-inch margins.) **You must indicate on your examination how many words you have used.** If you go over the word limit you will be penalized.
4. Questions 1 and 2 each count for 30% of your score. Question 3 counts for 20%. You might want to budget your time, effort and words accordingly. Please be clear which question you are answering.
5. Be very organized and concise in your answers. I encourage you to use headings as a shorthand way of organizing and identifying the issues involved in each answer.
6. Thanks for being such a terrific class. Good luck, have a great winter break, and please keep in touch.

Question I – 35 points

The current U.S. House of Representatives is almost equally divided between Democrats and Republicans. The district lines that will be drawn for the 2002 congressional elections will likely determine which party controls the House, perhaps for the next decade. Fearing a Democratic takeover of the House, the Attorney General instructs the voting section of the Civil Rights Division of the Department of Justice to deny preclearance to any plan that does not maximize the number of districts in which Republicans have a majority.

Because of rapid population growth over the last ten years, the state of Arizona will gain two congressional seats – moving from four seats to six seats.¹ The six districts as they existed before the 2002 reapportionment reflected the racial and political breakdown as depicted in Plan I below. (Assume for purposes of this question that everyone who lives in Arizona is a Democrat or a Republican and everyone in Arizona is Mexican-American or Non-Hispanic White. The percentages reflect the percent of each district that is Non-Hispanic White, Mexican-American, Democrat and Republican. For example, District 2 in Plan A is 8% Mexican American and 92% Non-Hispanic White. It is also 67% Democrat and 33% Republican.)

Plan A: Plan in Effect Immediately Prior to 2002 Reapportionment

District Number	1	2	3	4	Total
Mexican-American	130,000 (65%)	25,000 (8%)	40,000 (10%)	55,000 (55%)	250,000 (25%)
Non-Hispanic White	70,000 (35%)	275,000 (92%)	360,000 (90%)	45,000 (45%)	750,000 (75%)
Democrat	130,000 (65%)	200,000 (67%)	100,000 (25%)	70,000 (70%)	500,000 (50%)
Republican	70,000 (35%)	100,000 (33%)	300,000 (75%)	30,000 (30%)	500,000 (50%)
Total	200,000 (100%)	300,000 (100%)	400,000 (100%)	100,000 (100%)	1,000,000 (100%)

¹ Just for your information, in “real life” Arizona is moving from 6 to 8 seats, but I wanted to keep the math easy for this question.

Arizona is a state covered in full by Section 5 of the Voting Rights Act because of its history of voting-based discrimination against “language minorities.” The effects of past and present discrimination are reflected throughout the economic and political system: in Mexican-Americans’ lower social, economic and educational position; in their low rates of office-holding, candidate-slating, voter registration and voter turnout; and by the presence of bloc voting by Mexican-Americans and non-Hispanic Whites in races in which a Mexican-American is a candidate.

After enacting several plans that were denied preclearance because the Attorney General said they violated the U.S. Constitution, the state of Arizona submitted Plan B, which those drawing the plan thought would maximize Republican representation. In order to maximize Republican representation, the line-drawers felt they should spread the Mexican American population, which almost always voted Democratic, equally in Districts 1 through 5. Districts 1 through 5 were wildly contorted given that they broke up Phoenix into several small slices and jutted far out into the less populated parts of the state. District 6 was remarkably square-like and was created as a White District with many Democrats who were not very allegiant to their party’s nominees. Plan B was granted preclearance.

Plan B: Proposed Plan for 2002 Election

District Number	1	2	3	4	5	6	Total
Hispanic	50,000 (33%)	50,000 (33%)	50,000 (33%)	50,000 (33%)	50,000 (33%)	0 (0%)	250,000 (25%)
Non-Hispanic White	100,000 (67%)	100,000 (67%)	100,000 (67%)	100,000 (67%)	100,000 (67%)	250,000 (100%)	750,000 (75%)
Democrat	60,000 (40%)	60,000 (40%)	60,000 (40%)	60,000 (40%)	60,000 (40%)	200,000 (80%)	500,000 (50%)
Republican	90,000 (60%)	90,000 (60%)	90,000 (60%)	90,000 (60%)	90,000 (60%)	50,000 (20%)	500,000 (50%)
TOTAL	150,000 (100%)	150,000 (100%)	150,000 (100%)	150,000 (100%)	150,000 (100%)	250,000 (100%)	1,000,000 (100%)

The Chairman of the Arizona Democratic Party was outraged when the Republican legislature and Republican governor passed Plan B and the Attorney General swiftly granted preclearance. The Chairman and six potential Democratic congressional candidates (three Mexican-Americans from Districts 1, 2, and 3 and three Whites from Districts 4, 5, and 6) have approached you in hopes that you can find some way to get this plan overturned by a federal court. In a concise memo, please evaluate the claims they could bring and whether they will be successful.

Question 2 – 30 points

The year is 2003. In a remarkable turn of fate, Janet Reno has become governor of Florida after defeating Jeb Bush in the 2002 election. One of her main campaign pledges was reform of the electoral system. Once assuming office, however, Governor Reno quickly learned that following through on her campaign pledges would not be as easy as storming Waco, Ruby Ridge, or Elian Gonzalez's relatives' home. With help from her supporters, she places a proposed state constitutional amendment (called the "Democracy Enhancement Amendment" or DEA) on the next state general election ballot. That amendment, which an overwhelming majority of voters approve and which therefore becomes part of the Florida Constitution, gives to the Governor the exclusive and unfettered power to enact "executive orders with the force of law" on any subject concerning elections. (Prior to DEA's passage, election laws were just like all state laws. They could be passed in one of two ways: (1) by a majority vote of the Legislature plus the Governor's signature, or (2) through a popular initiative submitted by a group of 1000 voters and passed by a majority vote at a general election.)

Giddy with her newfound powers, Governor Reno issues the following executive orders ("EOs"):

EO1. Except for those counties covered by Section Five of the Voting Rights Act, optical scan technology (*i.e.*, SAT-style ballots) will be used for presidential ballots.

EO2. In order to vote in federal elections, voters must successfully complete a sample ballot to demonstrate that they are competent to vote. After being given instructions on how to vote and a sample ballot with candidates designated X, Y, and Z, voters will be asked: "To vote for Candidate X, what space should you mark?" Any voter failing to mark the correct space next to Candidate X's name will be denied the right to vote in the federal election to be held on that date. (A flawless computer will "grade" these competency tests thereby ensuring that there is no danger of improper exercise of human discretion in denying the right to vote based on failing the test.)

EO3. The practice of direct democracy (*i.e.*, submitting to the voters a ballot proposition for their approval) in the state of Florida and in any of its subdivisions is hereby terminated.

You are an attorney working in the Office of Legal Counsel of the Florida Attorney General. Because Governor Reno considers herself pretty knowledgeable when it comes to the requirements of the U.S. Constitution and federal law, she has some specific questions for you about the DEA and EOs and wants you to write a memo answering them concisely and directly.

- (1) Does EO1 violate the U.S. Constitution? Explain which provision(s) and explain why or why not. (8 points)
- (2) Does EO2 violate the U.S. Constitution? Explain which provision(s) and explain why or why not. (7 points)
- (3) What, if any, claims could be brought under the Voting Rights Act concerning DEA or EO3? (10 points)

Please write a concise letter answering Governor Reno's questions. Do not speculate about other reasons why the EOs or the DEA might be illegal or might violate other provisions of state or federal law.

Question 3 – 30 Points

Given the tremendous approval ratings President Bush has received since September 11, the leaders of the Democratic Party are fearful of their chances in the 2004 presidential election. They have focused their efforts on Arkansas and Tennessee, two states won by Bill Clinton in 1996 but lost by Al Gore in 2000.

The Democratic National Committee (DNC) is the official governing body of the National Democratic Party. The DNC Chairman thinks that Arkansas and Tennessee could serve as accurate indicators of a nominee's chance of success in the general election. The Committee decides to give Arkansas and Tennessee a greater voice at the Democratic National Convention by allotting those states a disproportionate number of delegates. Specifically, all other states will get a number of delegates to the national convention equal to the number of Representatives and Senators from the state. (A similar system is used for the Electoral College.) However, Tennessee and Arkansas will receive twice the number of delegates they would otherwise "deserve." For example, because Arkansas has four Representatives and two Senators, it will get twelve delegates to the convention. Whoever receives a plurality vote from the total number of delegates at the 2004 Democratic National Convention will become the Democratic nominee for President. National Democratic Party rules specify, however, that each state's official Party Committee has the exclusive power to determine the precise method and rules for choosing delegates.

Arkansas

The Arkansas State Democratic Party Committee decides on the following new rules for its 2004 presidential primary:

1. No presidential candidate who receives campaign contributions totaling over \$20 million in the year preceding the primary election shall have his or her name appear on the party's primary ballot (although a write-in option shall be available).
2. Only voters who have been registered members of the party for the past two presidential elections shall have the right to vote in the party's presidential primary.

Tennessee

In Tennessee, a different process unfolds. The newly elected, conservative, Democratic Governor of Tennessee, Guy Smiley, hopes to be the Democratic nominee in 2004. Governor Smiley, who prides himself on being an “independent thinker, not a partisan”, pushes through the Republican-dominated legislature a generally applicable election law with the following provisions:

- A. The State Committee of a political party is empowered by law to determine the method of nomination for its presidential candidate. However, the government of Tennessee will only fund and conduct a “nonpartisan presidential primary contest”, in which all presidential candidates competing for each party’s nomination appear on a single ballot and any voter, regardless of party affiliation, can vote for any candidate of his or her choice.

- B. Any presidential candidate who receives less than 10% of the national popular vote in a general election for the office of President of the United States shall not appear on the Tennessee general election ballot in the next presidential election.

Ed Rendell, the former chairman of the Democratic National Committee, former Mayor of Philadelphia, and current Pennsylvania gubernatorial aspirant, is outraged that the DNC is biasing its nomination process in favor of Arkansas and Tennessee. (He also detests Governor Smiley and is considering a presidential run in 2004 himself.) He turns to you for legal advice on ways he might be able to get a federal court to strike down the various provisions described above.

Rendell has friends in high places (in both parties) in Arkansas and Tennessee as well as throughout the nation, so standing will not be a barrier to launching a claim. Write a concise memo to Rendell explaining to him the best constitutional claims that could be brought against (1) the DNC rule giving Tennessee and Arkansas a disproportionate number of delegates [4 points]; (2) the new Arkansas rules [13 points]; and (3) the new Tennessee law [13 points].