

UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

STATE OF TEXAS,

Plaintiff,

- against -

UNITED STATES OF AMERICA and ERIC H.
HOLDER, JR. in his official capacity as Attorney
General of the United States,

Defendants.

CIVIL ACTION NO. 1:11-cv-01303

Three-Judge panel: RMC-TBG-BAH

**DEFENDANT-INTERVENOR TEXAS LATINO REDISTRICTING TASK FORCE'S
NOTICE OF FILING SUPPLEMENTAL
PRE-FILED WRITTEN DIRECT TESTIMONY**

EXHIBIT 1

Rebuttal Report of Dr. Richard Engstrom

REBUTTAL REPORT
FOR STATE OF TEXAS v.
UNITED STATES OF AMERICA

Richard L. Engstrom

Visiting Research Fellow

Center for the Study of Race, Ethnicity, and Gender in the Social Sciences

Duke University

My name is Richard L. Engstrom and I am a resident of Durham, North Carolina. I have previously submitted a report and a supplemental report in this matter. I have been asked by the attorneys for the Texas Latino Redistricting Task Force Defendant Intervenor to respond to the January 7, 2012 “Supplemental Expert Report of Dr. John Alford” in this case.

My experience in section 5 matters includes preparing reports on behalf of covered jurisdictions for section 5 administrative submissions to the U.S. Department of Justice (DOJ) and testifying in section 5 preclearance litigation in the U.S. District Court for the District of Columbia. I have prepared reports for section 5 submissions to DOJ for the Mississippi (post 2000, successful) and South Carolina (post 2010 successful), and numerous local government jurisdictions in Texas (for submissions made by Guinn and Morrison at Baylor, all to my knowledge successful). I also prepared an expert report objecting to preclearance of an election system change in Fayetteville, NC (preclearance was denied). I also testified in the preclearance litigation *Georgia v. Ashcroft*, (D.D.C. 2002).

In his report Dr. Alford adopts what he calls a “statewide functional analysis” in place of the conventional approach (which he calls “district counting”) to assessing retrogression in new redistricting plans.

There are serious problems with this new approach suggested by Dr. Alford. One is that in analyzing the ability of Hispanic voters to elect their preferred candidates of choice in the districts in a benchmark plan, Dr. Alford’s approach totally ignores the outcomes of the actual *legislative elections* that have been held in those districts. These “endogenous” elections are generally considered the most probative indicator, but not the only indicator, of such an ability to elect. I am not aware of any analysis, prior to this one by Dr. Alford, by any expert that completely ignores the results of endogenous elections in a benchmark plan in a retrogression analysis, prior to this one by Dr. Alford.

Dr. Alford however argues that only the results of elections to statewide offices within the geographical area of a district, such as elections for Governor and United States Senator, be used for this purpose. The results of these reaggregations of votes in these “exogenous” elections during the time the districts have been in place are substituted by Dr. Alford for the results of the actual legislative elections.

Another problem is present in Dr. Alford’s approach to assessing the ability of Hispanics to elect their preferred candidates of choice in a state’s newly adopted districts. This analysis is also based on reaggregations of the votes in the same exogenous elections, but this time in the geographical areas of the newly adopted districts. This is a standard procedure for assessing how many of these districts provide minority voters with

the ability to elect their preferred candidates in these adopted districts. But Dr. Alford pushes this further; he does not use the results of these reagggregations to predict how many districts will provide the ability to elect, but rather how many state legislative elections Hispanic preferred candidates will win while these districts are in place.

If for example 80 percent of these exogenous elections were “won” by a Hispanic preferred candidate in the area of an adopted district, other experts will find that this is good evidence of an ability to elect in that district. In contrast, Dr. Alford would project that Hispanic preferred candidates will win four out of five of the endogenous elections (assuming two-year terms) within that district while it is in place. Likewise, if Hispanic preferred candidates “won” only 20 percent of the exogenous elections in an adopted district, other experts would infer that this is inadequate evidence to conclude a district is an ability to elect district. Dr. Alford would predict, however, that Hispanic preferred candidates will be elected in one of the five state legislative elections. The first inference in each case, concerning the district being an ability to elect district or not, is credible; Dr. Alford’s inference, projecting how many of the state legislative elections will result in Hispanic preferred candidates winning, is not. Dr. Alford simply pushes the empirics further than justifiable.

This type of direct extrapolation from exogenous election results to endogenous election results is certainly not justified in the Texas context. This is apparent from Table 2 in Dr. Handley’s report, “A Section 5 Voting Rights Analysis of the Proposed Texas State House Plan” (at 4-5). This table contains a comparison of the her Endogenous Minority Effectiveness Index (the percentage of times that a Hispanic preferred candidate was elected to a House seat in a benchmark district over the past decade) and her

Exogenous Minority Effectiveness Index (the percentage of times the Hispanic preferred candidate was “elected” over the past decade in the exogenous elections examined in the geographical area of a district). These districts are all of the districts in which the Hispanic voting age population was 50 percent or higher as of the 2010 census. Many of these districts were super-majority Hispanic districts.

When the exogenous index score for a district is 100, not surprisingly the endogenous index score is also 100. The only exogenous score of zero for a district is likewise zero on the endogenous score. But when the exogenous index score for a district is less than 100 but greater than zero, the endogenous index score is higher 75 percent of the time. It is never lower. Table 1 below compares these scores on the respective indexes when the exogenous index is below 100.

Table 1

Comparison of Exogenous and Endogenous Index Scores for Districts

Greater Than or Equal to 50.0 Hispanic VAP

<u>House District</u>	<u>Exogenous Score</u>	<u>Endogenous Score</u>
33	60	80
34	60	80
35	40	80
41	80	100
74	20	100
78	20	20
117	60	60
137	60	100

The inability to extrapolate successfully from exogenous scores to endogenous scores, as Dr. Alford tries to do in his assessment of the Adopted Plan, is not surprising. There are important contextual differences between them. The endogenous elections are to seats in the state legislature, in which the candidates live within the district, and whose campaigns focus on the voters in the district. The exogenous elections are all for statewide offices that are not likely to involve candidates who reside in the district, and who are attempting to appeal to a much wider range of voters. This is not to suggest that exogenous elections cannot be informative, or that they are without any probative value whatsoever. It is to suggest, however, that they not be the exclusive basis for making the assessments of benchmark districts when relevant endogenous elections are available for that purpose, and that they are not a good basis for predicting the specific number of elections in many new districts that will result in Hispanic preferred candidates winning.

Another problematic part of Dr. Alford's report, although it does not concern his statewide functional analysis, is a statement in which he asserts that the court in this case, in its Memorandum Opinion of December 22, 1011, articulated a "bright-line rule" that a district that is "equal to or greater than 60%" (at 5) Hispanic in citizen voting age population (CVAP) is per se an ability to elect district. He then claims that HD 117 is therefore an ability to elect district in the state's adopted plan because the Hispanic CVAP in it is 63.8 percent. He claims that this 60 percent CVAP standard is articulated by the court in footnote 22 of its opinion. This footnote does not so state. Indeed, the footnote appears at the end of the following sentence:

A district with a minority voting majority of *sixty-five percent* (or more) essentially guarantees that, despite changes in voter turnout, registration,

and other factors that affect participation at the polls, a cohesive minority group will be able to elect its candidate of choice.

(Op. at 30, emphasis added).

The following sentence in the opinion does state that if this threshold is met, there is “no need to make further inquiries” about the Hispanic ability to elect in that district.

Id. I agree with Dr. Alford that the court must be referring to CVAP when it said “a majority voting minority” in the statement above, but the bright-line test articulated by the court is 65 percent, not 60 percent, as Dr. Alford claims. HD 117 in the adopted plan therefore does not automatically qualify as an ability to elect district based on this bright-line test, as Dr. Alford claims.

Nothing in Dr. Alford’s Supplemental Report causes me to change my opinion about the retrogressive nature of the redistricting plan for the Texas House of representatives adopted by the State of Texas in 2011. In my opinion, it is retrogressive.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge. Executed on January 20, 2011 in Durham, NC.

A handwritten signature in black ink, appearing to read 'Richard L. Engstrom', with a stylized flourish at the end.

Richard L. Engstrom