Judicial nominee offers interesting take on redistricting and race

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Republican legislators have generated criticism for ignoring voters' race when drawing North Carolina's latest congressional and legislative election maps. But recent electoral redistricting rulings from the U.S. Supreme Court could support their decision.

An attorney who has represented GOP lawmakers in redistricting cases explained why during a recent appearance on Capitol Hill.

That attorney — Thomas Farr — has been nominated to serve as a U.S. District Court judge. During a Senate committee meeting tied to the judicial confirmation process, Farr tackled the issue of addressing race when drawing district lines.

"You pointed earlier to the tension between compliance with Section 5 of the Voting Rights Act and meeting other constitutional protections," said Sen. Chris Coons, D-Delaware, referencing a key portion of 1965 federal legislation that was designed to help combat the impact of Jim Crow laws. The Voting Rights Act continues to serve as the basis for taking racial impacts into account when drawing election maps and changing other election laws.

"Is it permissible in your view, under federal law, for a state legislature to engage in gerrymandering that takes race into account?" Coons asked. "How would you suggest we move forward to a place where district lines are drawn in a way that respects the fundamental rights of all Americans?"

Before sharing Farr's answer, it's worth noting that federal courts have demonstrated inconsistency in rulings linked to race and redistricting. During a recent Carolina Journal Radio interview, constitutional scholar Ilya Shapiro of the libertarian Cato Institute offered this technical legal assessment: "These redistricting cases are really weird."

"You kind of apply the Goldilocks standard when race comes to bear," Shapiro added. "You can't use race too much, but it turns out you can't use race too little with the Voting Rights Act."

Shapiro doesn't consider the U.S. Supreme Court's ruling in the recent N.C. congressional redistricting case, *Cooper v. Harris*, to be groundbreaking. Nor does he believe it sets a significant legal standard. "At a certain point, the court's just going to have to throw up its hands and say, 'We can't police this any more.'"

Farr offered a different take on the issue while addressing Coons' question on Capitol Hill. "I think that's an evolving area of the law that's taken different turns over the last 30 years," Farr testified. "My understanding of the law today is the courts have pretty much said that any time a state redistricts, there's a consciousness of race."

"But based upon the most recent decisions, a legislature cannot take race into account until they have essentially the same type of evidence a plaintiff would have to have in a Section 2 case to show that remedial districts were necessary," he added.

Section 2 of the Voting Rights Act prohibits voting practices of procedures that discriminate on the basis of race, color, or membership in a language minority group spelled out in the act. People who file suit based on Section 2 often call for "remedial districts," or new election maps, to replace those that are deemed to have violated the VRA.

"The legislature would have to have evidence that the minority group was politically cohesive, that it was geographically compact to constitute a majority in a single-member district, and then you would have to have evidence of what's called legally significant racially polarized voting," Farr said.

"That was what was at issue in our cases in North Carolina," he continued. "We had tons of evidence of racially polarized voting. In fact, I don't think that anyone disputes that in North Carolina there is racially polarized voting."

Farr then turned to a key element of the latest redistricting rulings. "The Supreme Court has now clarified that the standard is much higher," he said. "You have to have evidence that the white majority votes in a bloc typically to defeat the ability of the minority group to elect the candidate of their choice," he said. "So I think the Supreme Court has very healthily clarified the standard that legislatures now have to follow before they take race into account."

"Absent that type of evidence, they should not take race into account in drawing districts," Farr concluded.

In summary form, Farr simply restated a key element of U.S. Supreme Court Justice Elena Kagan's opinion in *Cooper v. Harris*. In striking down a congressional district as an example of unconstitutional racial gerrymandering, Kagan wrote for the court's majority:

"North Carolina can point to no meaningful legislative inquiry into what it now rightly identifies as the key issue: whether a new, enlarged District 1, created without a focus on race but however else the State would choose, could lead to [Section] 2 liability. … To have a strong basis in evidence to conclude that [Section] 2 demands such race-based steps, the State must carefully evaluate whether a plaintiff could establish the … preconditions — including effective white bloc-voting — in a new district created without those measures. We see nothing in the legislative record that fits that description."

In the *Cooper* case, this finding ended up helping Democrats and their allies. But it's not clear that this new standard will generate long-term benefits for ideological foes of the Republican-led General Assembly.

The GOP legislature's latest congressional map, drawn without taking race into account, already has survived one court challenge and the 2016 election cycle. Legislative maps drawn without taking race into account face legal scrutiny now. They head back to federal court today.

If the nation's highest court confronts this issue again, we'll learn whether Farr's assessment of the latest Supreme Court "clarification" proves correct.