July 26, 2013

Magdalena Blanco
William Hewitt
Anna Saenz
TJ Costello
Henry Johnson
Mariano Diaz-Miranda
Carmen Llanes Pulido
Maria Solis
Stefan Haag
Ryan Rafols
Rachel Farris
Arthur Lopez
Catherine Coco
Harriett Harrow

Dear Members of the Independent Redistricting Commission:

I thought some comments would be appropriate on the recent decision of the U.S. Attorney General to join the lawsuit in San Antonio and to ask the court to reimpose preclearance requirements on the State of Texas.

At a previous meeting of this commission the focus was on Sections 2 and 5 of the Voting Rights Act. At the time I said it was unclear how (or if) the U.S. Attorney General would use Section 3 of the Act in the future. I did not discuss Section 3 at the time because I did not want to confuse things further by discussing the many possible scenarios that might arise under the seldom used provision.

As you may recall, the requirements of Section 2 of the Voting Rights Act remain applicable to this commission. On the other hand, the requirement of Section 5 of the Act for preclearance of the commission's redistricting plans is no longer applicable after the decision of the U.S. Supreme Court in June (*Shelby County v. United States)* to invalidate the formula (in Section 4) that made Texas, and its political subdivisions, subject to the preclearance requirement of Section 5. I have resubmitted for your consideration my earlier comments on the effect of the Supreme Court ruling on the actions of this commission.

Section 3 is a seldom used provision of the Act that allows the U.S. Attorney General to sue to make a jurisdiction submit election changes for preclearance even when the jurisdictions were not included under Section 5 (often called the {"bail-in" provision of the law). Altogether, it has been used only nine times (two states, six counties, and one city) since 1965; virtually all of which ended through a consent decree. No case has ever been decided by the U.S. Supreme Court. U.S. Attorney General Holder has announced that the Department of Justice will join the pending state legislative and congressional redistricting litigation pending in federal court in San Antonio and join with the plaintiffs in the lawsuit to ask that the state redistricting be declared unconstitutional and that, as a remedy, the state be compelled to submit all future redistricting plans to the U.S. Attorney General for preclearance. **What does this action mean for the Austin Independent Redistricting Commission?**

Initially, there are several characteristics of an action under Section 3 that should be noted:

1. That a lawsuit under Section 3 is usually narrowly aimed at a single jurisdiction (in this case the State of Texas), over one aspect of elections (e.g. redistricting), and asks preclearance for

a prescribed time period (DOJ is asking for ten years). However, before the San Antonio court, the U.S. Attorney General is asking to require "any voting qualification or voting-related standard, practice, or procedure that the State enacts or seeks to administer that differs 'from that in force or effect'" on May 9, 2011 (including Texas' voter ID law);

2. That a lawsuit under Section 3 usually originates as an action under Section 2 of the Act (as occurred in the lawsuits now pending before the federal court in San Antonio challenging the state redistricting);
3. That the burden in a lawsuit is on the Department of Justice and the plaintiffs to show that the jurisdiction has violated the 14th or 15th Amendments to the United States Constitution (not merely Section 2 of the Voting Rights Act);
4. That, in order to establish a violation of the U.S. Constitution, the Department of Justice and plaintiffs must show that the jurisdiction engaged in "purposeful discrimination" on the basis of race (City of Mobile v. Bolden, 446 U.S. 55 [1980]);
5. That once a constitutional violation is proven, the federal court (if it chooses to do so) can impose the "preclearance" requirement for certain election changes in the future as equitable relief; and
6. That jurisdiction in the future remains with this federal court to enforce this requirement (as would occur with any such remedy adopted by a federal court).

Since Section 3 has been seldom used in the past there is very little precedent to guide attorneys as to what is likely in the litigation. Most of the previous lawsuits under Section 3 occurred long ago and ended with consent decrees (not protracted litigation). Therefore, everyone is proceeding on uncertain ground.

The announcement by U.S. Attorney General Holder and the action in San Antonio is unlikely to directly affect this commission because:

1. Unlike the judicial precedents under Sections 4 and 5 of the Act, it is unlikely that a judgment to require preclearance for the State of Texas would automatically reimpose such a requirement for the state's political subdivisions (such as the City of Austin). The plaintiff and U.S. pleadings appear directed toward redistricting and other state election legislation. However, both DOJ and plaintiffs would welcome a ruling that reimposed preclearance for both the state and all of the political subdivisions in Texas. A misstep by the Texas Attorney General could allow such a result;
2. The State of Texas will fight the DOJ and plaintiffs in the litigation; and
3. Any litigation over the status of preclearance (even if imposed by the federal trial court) is likely to take years to finally resolve.

In other words, the work of this commission is almost certainly to be outside the scope of the federal litigation announced by U.S. Attorney General Holder. As I have repeatedly indicated, however, the absence of a preclearance requirement does not lessen this commission's obligation to avoid racial or ethnic discrimination.

On the other hand, another intriguing possibility exists. Earlier I was asked by Commissioner Harrow at a commission hearing whether this commission could "agree" to impose the preclearance requirement.

I answered no because I saw her question as envisioning a DOJ review that was essentially an opinion with no legal effect and that I knew that DOJ was unwilling to give "advisory opinions." However, the little precedent that exists under Section 3 shows that, once sued, several jurisdictions "consented" to imposition of the preclearance requirement even though, at the time, they were outside of the scope of Section 5. This possibility as it affects the commission is very complicated and turns on many unresolved legal issues (such as the need for showing that the city has intentionally discriminated). I am not suggesting that the commission can or should seek or agree to imposition of such a requirement, but I wished to expand on my answer to Commissioner Harrow.

Also, please note that the city submitted Proposition 3, along with certain other propositions, to the U.S. Department of Justice for preclearance earlier this summer before the Supreme Court ruling in *Shelby County v. U.S.* When asked recently about the effect of the ruling on the submission, I said that the submission was moot. This remains my opinion. Assuming, as all of us do, that Proposition 3 will receive routine preclearance, a favorable letter from DOJ is unnecessary, but welcome. For this reason, withdrawal of the submission is unwise.

Welcome to the world of redistricting where change is constant. Having lived in this world for 40 years, I expect such change. I hope you will find this letter helpful, but I am not giving this commission legal advice. I am sure that you will ask the city attorneys, or the commission's own counsel, about the effect of Section 3.

Steve Bickerstaff

The Supreme Court Ruling on Section 5 of the Voting Rights Act

(June 25, 2013)

Today, the United States Supreme Court by a vote of 5-4 effectively struck down Section 5 of the Voting Rights Act of 1965.

Technically, the Court left Section 5 in place, but unusable. The Court directly struck down the formula in Section 4 (b) of the Act that determined which states and local jurisdictions nationwide were covered by the requirement of Section 5 that changes in election procedures and practices by those covered jurisdictions had to be submitted for preclearance. Section 5 was effectively left dangling inapplicable to any jurisdiction.

Contrary to some preconceptions, the Voting Rights Act of 1965 never actually named certain states or jurisdictions to which Section 5 applied. Instead, the Act established a coverage formula (Section 4 [b] of the Act) based on the presence in the jurisdiction in 1964 of a test or device (e.g. literacy tests) limiting voting and a low total voter registration or turnout in the 1964 presidential election. Only certain jurisdictions nationwide were covered by this formula. Other jurisdictions (including Texas) were added in 1970 and 1975 by amendments supplementing the coverage formula, but also tying coverage to circumstances existing when the amendments were adopted.

Today's opinion for the Supreme Court (written by Chief Justice Roberts) found that the coverage formula was unconstitutionally outdated. In his opinion, Chief Justice Roberts explained, "Congress could have updated the coverage formula . . ., but did not do so. Its failure to act leaves us today with no choice but to declare §4(b) unconstitutional." It is unclear whether the Department of Justice may be more aggressive in the future in trying to utilize other parts of the Act not tied to this coverage formula.

In terms of the City of Austin process for drawing ten new election districts, there are three identifiable results of today's ruling. First, Section 2 of the Voting Rights Act remains in effect nationwide and bans racial discrimination in voting procedures and practices, including redistricting. Thus, the city's independent redistricting commission remains subject to a firm federal legal requirement that it must not discriminate against minority voters (Black or Hispanic) during redistricting.

Second, any final redistricting plan adopted by the independent redistricting commission will take effect immediately on adoption without preclearance under the Voting Rights Act. As a result, the independent commission can plan its schedule without allowing time for obtaining preclearance.

Third, although the ban on discrimination remains applicable, the burden of showing discrimination in a legal proceeding has changed. Under the preclearance requirement of Section 5, the covered jurisdiction had the burden of showing that the redistricting did not discriminate against minority voters. If the covered jurisdiction failed to carry this burden, the election change (e.g. redistricting) was rejected and could not take effect. Now, with the Supreme Court ruling, an election change takes effect when enacted and the burden is on the minority plaintiff (under Section 2) to demonstrate that the redistricting is illegally discriminatory.

For many observers (including myself) the outcome of the Supreme Court decision is regrettable. At the state level in Texas, the absence of the preclearance requirement clearly shifts power to the legislative majority and places a greater burden on minority plaintiffs in court. Challenges to the state legislative redistricting are likely to continue, but now under Section 2 of the Act. In Austin, however, I expect the independent redistricting commission to draw our ten districts without discriminating against minority voters. If my expectation is accurate, the lack of preclearance should not be a factor in the final shape of the city's districts.

Steve Bickerstaff
[sbickerstaff@utexas.edu]