



EMERGENCY

Voting Changes

By John Tanner

Things go wrong with elections, as recent experience across the United States has abundantly proved. The most careful planning cannot address every contingency, and situations arise where full compliance with the law is virtually—or actually—impossible. The best-laid plans of state and local officials can be disrupted by everything from a hurricane to a truculent owner of a building used as a polling place.

In addition to finding a new polling place and advertising its location, or solving whatever the actual problem may be in a manner consistent with state law, the practitioner struggling with an emergency has to face a federal law, Section 5 of the Voting Rights Act, 42 U.S.C.

1973c. Section 5 protects the voting rights of minority citizens, and requires federal review of your proposed remedial plan. That review must take place before your new procedure can be implemented, and the statute gives the U.S. Department of Justice months in which to complete its review. A misstep can mean redoing the whole election.

Success depends on awareness of the nature of and need of federal review, prompt action to comply and, most importantly, close consultation with the affected minority community on developing and implementing the new voting procedure.

Background: Section 5 of the Voting Rights Act

Under Section 5, any new voting practice or procedure—every change in an election date, voter registration or candidate qualifying deadline, polling place location, district boundary, or alteration of an election system—must undergo federal review to assure that it is not racially discriminatory as to either its purpose or effect. The review can be by either the United States District Court for the District of Columbia in a declaratory judgment action or administratively by the United States Attorney General, at the local government's choice. In an emergency, of course, the District Court process is out of the question. It is used relatively rarely even in more leisurely circumstances, and the vast majority of changes are reviewed administratively by the Department of Justice through the Voting Section of the Department's Civil Rights Division.

That review can take time. The statute allows the Department 60 days from its receipt of a submission of a new polling place or other voting change in which to interpose an objection to that change. The Department can, at any time within those 60 days, request additional information, and the 60-day period begins anew after receipt by the Department of the complete

information. Until that 60-day period has expired with no objection interposed, the change is legally unenforceable: the polling place cannot be moved.

Governments ignore Section 5 at their peril. In the absence of Section 5 "pre-clearance" of a change, not only the Justice Department but any affected voter can seek an injunction from a three-judge panel to enjoin the change or obtain other relief. *Allen v. State Board of Elections*, 393 U.S. 545, 554-557 (1969). Many readers will recall that a federal court allowed the 1982 Alabama state legislative elections to go forward under a redistricting plan that had not been pre-cleared as to all areas of the state, but limited the legislators to one-year terms. Legislators had to face the voters again in a 1983 special election held under a new, pre-cleared plan. *Burton v. Hobbie*, 561 F. Supp. 1029 (M.D. Ala. 1983). Even now, 25 years later, a former legislator grumbled to me about the 1983 do-over election.

Step 1—Working with the Minority Community

The most important step in avoiding problems under the statute is to satisfy its purpose, and avoid any action that may discriminate against minority voters. The best way to avoid enacting changes that

are racially discriminatory is immediate, frank consultation with the potential victims of any discrimination, the affected minority community.

Looking back to its origins in 1965, one of the most important facets of Section 5 is that it has given local minority communities a seat at the table at which decisions are made. That facet should be remembered and honored. It is important to engage leaders of this community, or these communities, in a genuinely collaborative process. If you need to select a new polling place, run through the options with them. Ask if they know of additional options. Listen to their ideas and concerns. Their views will be helpful in identifying a solution to the emergency problem.

A wise attorney will not succumb to the temptation to avoid consulting those community members who are most likely to raise complaints. If someone has a complaint, it is best by far to know about it early. As a part of its review, the Voting Section contacts local minority elected officials and other community leaders who will not be hesitant to articulate any concerns they have. Identifying those concerns at the outset allows the attorney to address them, consider alternatives and either achieve consensus or, at least, proceed knowing what the complaints will be. The attorney can, at minimum, arm herself to rebut any claims and be in a position to establish the absence of discrimination.

There may be more than one minority community. Alabama, like other states, has growing Hispanic and Asian populations in some areas, as well as African American and Native American populations. The interests and access to voting of each of these groups should be considered fully where they are present and eligible to vote.

It is one thing to identify a new procedure to meet an emergency situation. It is another thing to let the voters know what you have done. The Justice Department will look to whether the new polling place or new procedure has been publicized in a way that voters, including minority voters, actually will learn of it. The minority community itself will be the best guide to effective publicity among its members, and the most effective communication may vary from group to group. Court decisions, including the recent string of decisions in *Common Cause v. Billups*, 504 F. Supp. 2d 1333 (N.D. Ga. 2007), have weighed notice to voters heavily, and it can be a factor in Section 5 review.

The publicity issue may be especially significant for Hispanic or Asian communities, where some citizens have limited English-speaking and reading proficiency, and may rely on separate communication channels. Members of those communities will know what those communication channels are, as will retailers who sell products to those communities, religious leaders who serve their spiritual needs and other service providers.

The Price of Failure to Comply

The price of a failure to comply with Section 5 can be very high. Where a voting change is determined to be discriminatory, the jurisdiction faces the prospect of having a new election, just as the Alabama legislature did in *Burton v. Hobbie*. In a recent example, the North Harris Montgomery Community College District adopted a change reducing the number of polling places for its May 13, 2006 election from 84 sites co-located with sites of its constituent school districts, which were having elections on the same day, to 12 entirely separate locations. As set forth in a May 5, 2006 letter interposing an objection to the change,

“Under the proposed change, District elections will be held separately from [school district] elections, so that voters will have to travel to two separate polling places in order to cast their ballots. Moreover, instead of 84 polling places, there will be 12 polling places. These 12 polling places will serve a geographic area of well over 1,000 square miles with over 540,000 registered voters. The assignment of voters to these 12 sites is remarkably uneven: the site with the smallest proportion of minority voters will serve 6,500 voters, while the most heavily minority site (79.2 percent black and Hispanic) will serve over 67,000 voters.”

Letter of May 5, 2006 from Assistant Attorney General Wan J. Kim to Renee Smith Byas.

Under these circumstances, the District failed to meet its burden of establishing the absence of discrimination. The District determined to hold no May election at all. The Department of Justice subsequently filed suit under Section 5 and

obtained relief requiring the District to hold its election in conjunction with the November 2006 general election, using all polling places within its boundaries of the two constituent counties for that election. *United States v. North Harris Montgomery Community College District* Civil Action No. H 06-2499 (S.D. Tex. July 27, 2006).

Step 2—Working with the Justice Department

Contact the Voting Section promptly, even before you have finalized your plans for new procedures. The thought of navigating a federal bureaucracy can be daunting, but you can expect to engage in a productive conversation with knowledgeable people. They will not give legal advice as such, and will avoid answering some questions prior to their investigation and consultation, but they will identify issues, including sources of potential discrimination that may not have occurred to local officials. They can be helpful, and can help you to a much different outcome than that of the North Harris Montgomery Community College District.

The most notable recent case of an election emergency flowed from the devastation to New Orleans by Hurricane Katrina on August 26, 2005 and its aftermath, when the scope of the devastation gradually became known. On September 7, 2005, the Department wrote the Louisiana Secretary of State,

“I can only imagine the host of burdens facing you and other Louisiana officials. I write to express my sympathy and also to ease your burden in at least one respect. Specifically, I am aware that the State of Louisiana has an open primary election scheduled for October 15, 2005. No doubt the devastation and disruption caused by Hurricane Katrina will necessitate the postponement and rescheduling of that election. Please be assured that the Civil Rights Division stands ready to expedite the review of any and all submissions of voting changes (especially scheduling and polling place changes) resulting from Hurricane Katrina which the state and/or its subdivisions submit to our Voting Section for review under Section 5 of the Voting Rights Act.”

September 7, 2005 letter from Acting Assistant Attorney General Bradley J. Schlozman to Secretary of State Al Ater

Similar letters were sent to other states affected by Katrina and Rita.

The Louisiana letter offered broader assistance “in any way we can,” and the state took advantage of the offer. The October and November 2005 elections were postponed, as was the regular New Orleans mayoral election scheduled for the following February. Even with that delay, extraordinary changes in voting procedures were necessary and had to be adopted in a short period under daunting circumstances. The Department of Justice worked closely with state election officials, legislative leaders and others to facilitate a process for early inclusion of informed minority leaders in the formulation of each of the complex steps, from satellite poll locations across Louisiana to special absentee voting procedures to new and consolidated polling places, necessary to conduct an election. Accordingly, when these procedures were finalized and received by the Department, review was

completed in short order. March 16, 2006 letter from Voting Section Chief John K. Tanner to Assistant Attorney General William P. Bryant III, and Section 5 files 2006-0399, -0436, -0733, -1207, -1208, and -1209. (Submission of four state acts, the Secretary of State’s Emergency Election Plan and an Executive Order completed March 10, 2006; pre-cleared on March 16, 2006.)

Without comparing them to hurricanes, decisions of the courts also can disrupt the routines of election administration and create Section 5 exigencies. The Texas Supreme Court entered orders in several candidate qualification cases on January 27, 2006 which delayed the ballot certification of both the Republican and Democratic parties for their March 7, 2006 primary elections. The delay was such that at least two vendors of voting equipment and ballots could not deliver printed ballots to Texas counties on time; they would be over a week late. That delay wrecked the schedule for compliance with the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. 1973, (UOCAVA) which requires 30 days for transmittal of ballots to and from military

personnel and persons overseas. Thus, the state found itself in a bind between the command of the state supreme court and federal law. The state used existing discretionary authority to make up for the week’s delay in sending out ballots by extending the deadline for receiving ballots by nearly two weeks, from March 7 to March 20. The state submitted that change for Section 5 review by letter of February 23, 2006. February 23, 2006 letter from to Texas Director of Elections Ann McGeehan to Voting Section Chief John K. Tanner. The change was pre-cleared the same day. February 23, 2006 letter from Voting Section Chief John K. Tanner, to Texas Director of Elections Ann McGeehan

Actual impossibility

The Department of Justice thus is at pains to accommodate the needs of local authorities, and can act with remarkable speed. Circumstances can overcome even the best of efforts, however. In the fall of 2004, local elections were scheduled for many Gulf Coast communities just as Hurricane Ivan was bearing down on the area. On September 13, 2004, the City of Spanish Fort sensibly voted to postpone



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their September 14 municipal election. They submitted that postponement for Section 5 review on the same day and, no doubt, headed inland with Section 5 the last thing on their minds.

The federal courts and the Justice Department long have taken a sensible approach to such situations, and have allowed *nunc pro tunc* compliance with Section 5 review requirements—"post-clearance," as it were. In 1968, Georgia enacted a change in the method of electing the County Commissioners of Peach County. The change was never submitted for Section 5 review and private citizens filed suit on the eve of the 1976 commissioner election. In *Berry v. Doles*, 438 U.S. 190 (1978), the Supreme Court adopted the suggestion of the Department of Justice that the county be required to make a submission within 30 days, and noted that the courts could revisit the issue of relief if an objection were to be interposed. 438 U.S. 192-193. "If approval is obtained, the matter will be at an end." *Id.* The Department took that same approach in the Spanish Fort change in election date, which subsequently was "post-cleared." *October 26, 2004 letter from Voting Section Chief Joseph D. Rich to City Clerk Mary Lynn Williams.* Approval having been obtained, the matter was at an end.

Conclusion

The attorney whose client has an election emergency faces a difficult but manageable legal task. The statutory time period for federal review may make the federal legal requirements seem impossible to meet. They are not. *Berry v. Doles* identifies the two elements to obtaining "post-clearance": prompt efforts to comply and, most importantly, avoiding changes that are, in fact, racially discriminatory. The attorney who fails to follow these steps takes his client on a stroll through a mine field. The attorney who moves quickly and who meets the goals of the federal law through prompt inclusion of minority community in planning and publicity can find the Department of Justice to be a source of assistance and cooperation, rather than an obstacle. ▲▼▲



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