

# Federal Review of Voting Changes: The U.S. Supreme Court Opens the Door to Relief

By John Tanner

## The 1965 Voting Rights Act

The Voting Rights Act of 1965 armed the national government with an array of tools to end racial discrimination in voting. The Act included in Section 2 a broad ban on voting discrimination, while Section 8 provided for federal examiners to register black voters where local officials refused and Section 6 allowed federal observers to enter polling places and ensure fair treatment of minority voters. Perhaps nothing, however, has transformed the landscape of local government in Alabama more than the “pre-clearance” requirement of Section 5 of the Voting Rights Act, a temporary provision that has been extended repeatedly.<sup>1</sup>

Since 1965, every level of state and local government in Alabama and certain other states have been required to undergo federal review of every change in voting practices and procedures to ensure that the changes are free of racial discrimination, either in purpose or effect.<sup>2</sup> Until that review has been completed and pre-clearance either from the Justice Department or the U.S. District Court for the District of Columbia has been obtained, the new practice is unenforceable. That federal review has blocked some 100 voting changes in Alabama, including everything from polling place changes to municipal incorporations and annexations to redistricting plans.<sup>3</sup> This federal review requirement is largely responsible for the broad representation and participation that minority voters in Alabama enjoy today. Congress extended the Section 5 review requirement for another 25 years in 2006.

In *Northwest Austin Municipal Utility District No. 1 v. Holder*,<sup>4</sup> the Supreme Court has written an important new chapter in the life of the Voting Rights Act, one that holds both

promise and peril for local governments. Briefly, the *Northwest Austin* decision creates a realistic opportunity for many local governments to obtain release from the federal review provisions of the Voting Rights Act so that they will no longer have to obtain federal clearance before moving ahead with changes in voting practice. Significantly, the Court decided the case on a novel and narrow statutory interpretation, specifically, indeed ostentatiously, to avoid ruling on whether the federal review requirement and its “substantial federalism costs” remain constitutional after more than four decades, and whether “the Act’s current burdens ... [are] justified to meet current needs.”<sup>5</sup>

## Standards for Release

The Voting Rights Act is well known in Alabama election circles for its requirement for federal review of voting changes. The pre-clearance requirement does not apply nationwide, but only to certain “covered” “political subdivisions,” generally an entire state or county (the unit at which voter registration is conducted). These areas were determined based on the use of a racially discriminatory voting “test or device” by local registrars, and low voter participation in the 1964, 1968 or 1972 general election.<sup>6</sup> The entire state of Alabama and each county are subject to the Voting Rights Act. All cities, school districts, municipal utility districts and other electoral entities within each county are also subject to the federal review requirements of the Act.<sup>7</sup>

The Act has always provided an escape valve, awkwardly known as a “bailout” provision, whereby a jurisdiction may file suit in the

U.S. District Court for the District of Columbia and obtain judgment from a three-judge panel that federal pre-clearance of voting changes need no longer be required. Initially, however, only the entire state, in the case of Alabama, could seek such a judgment.<sup>8</sup> In 1982, Congress amended these procedures to allow counties within states subject to the review requirements of the Voting Rights Act a realistic opportunity to obtain release from federal review, to recognize and reward jurisdictions which had not used discriminatory voting practices and to create an incentive for local governments proactively to enhance voting opportunities for minority citizens.<sup>9</sup>

Section 4(b) of the Voting Rights Act<sup>10</sup> spells out the “bailout” criteria, the standards necessary to obtain such a release. Local officials as plaintiffs must establish that:

1. No “test or device,” such as a literacy or moral character test, has been used in the preceding 10 years. Because such tests and devices have been outlawed since at least 1970, this should not be a barrier to bailout for any jurisdiction.
2. There have been no successful voting rights lawsuits against the jurisdiction in the preceding 10 years.
3. Federal observers have not been assigned to monitor elections in the jurisdiction in the past 10 years.
4. There has been full compliance with the review requirements (timely submissions and no implementation without pre-clearance) for 10 years.
5. There have been no objections to voting changes in the past 10 years.
6. There have been affirmative steps to eliminate any discriminatory voting practices, including steps to eliminate intimidation and harassment of minority voters. There also have been constructive efforts to encourage minority registration and voting.
7. There has been no discrimination in voting in the past 10 years that was not caught by an earlier lawsuit or Section 5 objection. A bailout action will not proceed if there are pending Voting Rights Act lawsuits against the applicable state or county or any of its subdivisions.<sup>11</sup>

The statute also requires the jurisdiction to provide current voter registration data and data on voter participation rates for both white and minority citizens, so as to show any racial disparities.<sup>12</sup> These data are readily available in Alabama. The statute also calls for public notice, and gives local minority citizens an automatic right to intervene in the lawsuit if they wish.<sup>13</sup>

Once a jurisdiction has obtained a favorable judgment, it no longer has to seek review of any of its voting changes. The District of Columbia District Court, however, retains jurisdiction over the case for 10 years. If there is any voting discrimination—any act that would have prevented the jurisdiction from being released if it had happened earlier—the court will vacate the bailout order, and restore the pre-clearance requirement of the Act.

## Theory and in Practice

In passing the 1982 amendments, Congress believed that roughly 25 percent of all covered jurisdictions were eligible for release

from federal review, and that a majority would be eligible for bailout by 2007.<sup>14</sup> The actual record has been far different: among 12,000 jurisdictions subject to the federal review requirement, only 17, all in Virginia, have been released or “bailed out.”<sup>15</sup>

The modest success in Virginia points to a key barrier to release or bailout in the past. Prior to *Northwest Austin*, for purposes of bailout/release suits, counties had to demonstrate not only their own full compliance, but also that all cities and other districts within their borders were compliant.<sup>16</sup> Virginia is unique in separating many cities from the adjacent or surrounding counties. A county in Virginia, thus, is responsible only for demonstrating its own compliance and, perhaps, for one or two small towns within the county. Making sure that all voting changes have been submitted for federal review is a manageable task.

Compare Jefferson County, Alabama with its welter of large and small cities of all dispositions and resources, all of which may enact voting changes, or have the state legislature enact voting changes for any or all of them—all without consulting the others. Some of the cities spread into adjacent counties. For counties in Texas and elsewhere, with literally hundreds of utility, water, fire and other special-use districts, the idea of meeting the bailout criteria has been a complete non-starter.

The *Northwest Austin* determination that individual cities can obtain bailout and release from federal review of all voting changes holds great significance for individual cities across Alabama. A given city need simply get its own house in order and not worry

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about its neighbors. Accordingly, for some cities, the balance of time and expensive process has shifted from compliance to bailout. In those cases where the burden of federal review of each and every voting change no longer serves its vital purpose, the burden of compliance now can be lifted from local governments.

## Considerations

Most of the Virginia jurisdictions which have obtained release successfully have been very heavily white, much like parts of northern Alabama. Such areas never devoted the time and energy to the voting discrimination that marked areas where minority voters had a real potential to affect election outcomes. An all-white city need do little more than make certain that all of its voting changes have been submitted for federal review.

Where there are substantial minority populations, the calculus can be more complicated, although it remains a distinct possibility in many areas. On the surface, most Alabama jurisdictions should be able to meet the bailout/release criteria. Objections to voting changes and voting rights lawsuits have been few and far between in the last 10 years, if only because the full Voting Rights Act has been so successful in earlier years. Along with the objections and scores of lawsuits against individual government entities, key cases such as *Dillard v. Crenshaw County* (elections in 192 cities, counties and school districts overturned under section 2)<sup>17</sup> and *Harris v. Seigelman* (equalization of appointment of poll workers across Alabama, thereby minimizing the need for federal observers)<sup>18</sup> transformed elections in Alabama. Those gains have been preserved in large part by the prophylactic role of federal review of voting changes in deterring backsliding, and there has been relatively little activity during the past 10 years—only two objections to voting changes, for example, and little federal observer coverage.

Accordingly, the main obstacle to bailout may be technical: establishing full compliance with the federal review requirement. What constitutes a voting change subject to federal review is not necessarily intuitive to local officials, and in the normal course many local officials will have failed to submit changes for review. Notoriously, the City of Calera found that it had failed to submit 177 annexations it had enacted and enforced over the years.<sup>19</sup> There also may have been confusion regarding voting changes enacted by state legislation as to whether the state attorney general or local officials should make the submission.

Some non-compliance is genuinely unavoidable, and will not count against a city. Fire or storms may render a polling place unusable on the eve of an election, and a new site must be selected regardless of pre-clearance if the election is to proceed—and stopping the election without pre-clearance is a violation.<sup>20</sup> The Voting Rights Act specifically provides that violations which “were trivial, were promptly corrected, and were not repeated” can be discounted.<sup>21</sup> The clear message from the Supreme Court in *Northwest Austin*, moreover, was that a reasonable opportunity for release from federal review is important to the constitutionality of section, and it is likely that the District of Columbia courts will not balk at technical violations or exigencies caused by events beyond the control of local officials.<sup>22</sup>

Nothing in the *Northwest Austin* decision removes the understanding that a geographically larger jurisdiction can only bail out if there has been compliance by all sub-jurisdictions within

its bounds. Release by cities within a county, however, would simplify the release process for the county.

It may be that the main barriers to a successful action will arise from more recent circumstances. The court-ordered reports on compliance with the equalization of black and white poll workers mandated in *Harris v. Seigelman* ended long ago. There has been ample time for backsliding, and for failure to keep up with shifting populations. Voting rights problems certainly have not disappeared. Consider reports from a recent mayoral election between black and white candidates that white persons with video-cameras stood in pickup trucks outside each city polling place and filmed as black voters went to the polls. The potential for intimidation by such tactics should be clear, and has been recognized by the Justice Department.<sup>23</sup>

While black-white tensions have long been familiar in Alabama, many have overlooked voting rights issues that have arisen as Latino and Asian-American citizens have moved into some parts of the state in significant numbers. The circumstances of these citizens raise serious issues, and appear to have generated significant hostility, including mistreatment of voters at the polls.<sup>24</sup>

The possibility of recent discrimination that may interfere with efforts to obtain release from the federal review requirement is one that must be faced frankly and thoughtfully, with a full sensitivity to the range of possible discriminatory conduct. In many cases, the effects of discrimination can be erased for bailout/release purposes by reasonable proactive steps. A successful effort to obtain relief from the District of Columbia court will identify and effectively meet the needs of minority communities.

Consideration of bailout should include frank consultation and discussion among representatives of members of all racial and ethnic communities in a city or county. The statute allows “any aggrieved party” the right to intervene in the action,<sup>25</sup> and a judgment of discrimination in the decade after a successful release restores the pre-clearance obligation to the city or county.<sup>26</sup> If the state’s long experience with voting rights litigation has proved nothing else, it has shown that black political organizations in Alabama have been perhaps the most effective in the United States in generating the facts necessary to support voting rights litigation. As a practical matter, no city or county should pursue an action to escape continuing federal scrutiny of its voting changes unless it is serious about assuring to all of its citizens easy and equal access to all aspects of the election process for another 10 years and beyond.

## Conclusion

A lawsuit to obtain release from the Voting Rights Act is not for every jurisdiction. Many communities see benefits in federal review of their voting changes, as it provides a respected forum for fast and inexpensive resolution of disputes and an alternative to costly litigation.<sup>27</sup> Cities that consider post-census litigation over redistricting, for example, may welcome the administrative forum for review of their plan.

For many cities and counties, however, release provides an opportunity to avoid the financial and other costs of continuing compliance with this unusual and stringent federal law requirement. Some will see an opportunity to remove a no-longer-merited stain of the past and replace it with a progressive and welcoming image as a community seeks to attract business and other growth.

Cities with few or no minority citizens will find the potential savings well worth pursuing. There also is a benefit for the effective enforcement of minority voting rights in eliminating the burden on the Justice Department of processing and reviewing voting changes from jurisdictions where there is no prospect of actual discrimination; the Justice Department would be able to spend its energies on stamping out discrimination in voting where it exists.

For all cities and counties across Alabama, a fresh look at the details of minority political access can be healthy and positive. Relief from federal review under the Voting Rights Act is now an option. Alabama cities that are eligible should give the possibility careful thought, and certainly all cities and counties in the state should strive to become eligible. ▲▼▲

## Endnotes


1. 42 U.S.C. 1973c.
2. *Id.* The state or local officials can seek either administrative review by the Attorney General or may seek a declaratory judgment from the U.S. District Court for the District of Columbia that the change is not discriminatory. In the administrative procedure, the Attorney General can "pre-clear" a change and allow it to go forward, or can "interpose an objection." Until pre-clearance or a positive declaratory judgment is obtained, the change is legally unenforceable and can be enjoined.
3. For a list of voting changes blocked under section 5 see [http://www.usdoj.gov/crt/voting/sec\\_5/obj\\_activ.php](http://www.usdoj.gov/crt/voting/sec_5/obj_activ.php).
4. \_\_\_ US \_\_\_ ( June 22, 2009).
5. Northwest Austin, slip op. at 7-8.
6. The determinations, made by the Attorney General and the Director of the Census, brought into Section 5 coverage all of the states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, as well as parts of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. A map and list of jurisdictions currently covered under Section 5 are available at [http://www.usdoj.gov/crt/voting/sec\\_5/covered.htm](http://www.usdoj.gov/crt/voting/sec_5/covered.htm).
7. *Sheffield Bd. of Comm'rs v. United States*, 435 U.S. 110 (1978). As if to forgive all lawyers who missed something in proofreading a pleading, the Court placed Sheffield in Texas rather than Alabama. Northwest Austin slip op. at 12.
8. *City of Rome v. United States*, 446 U.S. 156 (1980).
9. Report of the Committee on the Judiciary, United States Senate, Voting Rights Act Extension S. Rep. 97-417 at 45-46.
10. 42 U.S.C 1973b.
11. 42 U.S.C. 1973b(a)(1)(A-F).
12. 42 U.S.C. 1973b(a)(2).
13. 42 U.S.C. 1973b(a)(4).
14. S. Rep., No. 97-417 at 60. "The Committee is disappointed that more States have not taken advantage of this liberalized process and finds it telling of the commitment by some of the covered jurisdictions to end discriminatory practices. The Committee reiterates that termination of covered status has been and continues to be within the reach of compliant covered jurisdictions and hopes that more covered States and political subdivisions will take advantage of the process." H. Rep 1009-478 at 25.
15. Northwest Austin, slip op. at 16.
16. S. Rep. 97-417 at 56-57.
17. 640 F. Supp. 1347 (M.D.Ala.1986).
18. 700 F. Supp. 1083 (M.D. Ala. 1988).
19. August 25, 2008 letter to Dan Head, esq. from Acting Assistant Attorney General Grace Chung Becker, available at [http://www.usdoj.gov/crt/voting/sec\\_5/ltr/L\\_082508.php](http://www.usdoj.gov/crt/voting/sec_5/ltr/L_082508.php). Annexations are "enforced" by allowing the annexed citizens to vote in city elections.
20. The most dramatic election disruption occurred in New York City, three boroughs of which are subject to section 5, on September 11, 2001.
21. 42 U.S.C. 1973b(a)(3).
22. For an overview of the various changes subject to section 5 and the circumstances that render each problematic see John Tanner, *An Informal Guide to Section 5 of the Voting Rights Act: A Manual for Citizens and Local Officials*, Alabama Law Institute 2008.

23. See, e.g., June 14, 1004, letter to Constance Slaughter-Harvey from Assistant Attorney General Deval L. Patrick; November 2, 1994 letter to Edward Allen from Acting Voting Section Chief John K. Tanner.
24. In Bayou La Batre, Alabama, Vietnamese attempting to vote systematically were subjected to race-based challenges until blocked by the Department. Statement of Karen K. Narasaki, president and executive director, Asian American Justice Center, before the Subcommittee on the Constitution, Civil Rights and Property Rights Committee on the Judiciary, United States Senate, Hearing on S. 2703, "Continuing Need for Section 203's Provisions for Limited English Proficient Voters" June 13, 2006, 14, available at [http://www.advancingequality.org/files/VRA\\_Senate\\_Hearing\\_Statement\\_706.pdf](http://www.advancingequality.org/files/VRA_Senate_Hearing_Statement_706.pdf).
25. 42 U.S.C. 1973 b(a)(4).
26. 42 U.S.C. 1973 b(a)(5).
27. Statement of Donald Wright, general counsel, North Carolina Board of Elections, before the Subcommittee on the Constitution, Civil Rights and Property Rights Committee on the Judiciary, United States Senate, "Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field," June 21, 2006.



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