CITY ATTORNEYS AND THE VOTING RIGHTS ACT

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One of the most important statutes any city attorney must deal with is the Voting Rights Act as it affects every aspect of the electoral process from determining the size of the electorate, as occurs whenever a city annexes territory, to the conduct of elections and the counting of votes.

The Historical Context—The Voting Rights Act passes to remedy the deep South's complete exclusion of blacks from the political process.

The Voting Rights Act of 1965 is one of the most important and effective pieces of federal legislation in American history. Congress passed the Act after demonstrations in Selma, Alabama highlighted the systematic disenfranchisement of Southern blacks, and television reports shocked the conscience of the nation by showing local Alabama law enforcement authorities' violent response to the demonstrators.

For persons under the age of fifty, it may be difficult to imagine the depth of the problem the Act addressed. While states may not have imposed overtly racial restrictions on voter registration, the fact was that it was at least difficult, and often impossible, for African-Americans to register to vote in many parts of the deep South. In 1965, there were counties in Mississippi and Alabama where blacks constituted a majority of the population, yet the number of African-Americans who were registered to vote could be counted on the fingers of one hand. Sometimes there were no blacks registered at all. For example, in Lowndes County, Alabama, blacks outnumbered whites by a margin of 4-1, yet not a single African-American was registered to vote. T. Branch, *At Canaan's Edge: America in the King Years 1965-68* (New York: Simon & Schuster 2006) 6, 101. In fact, no black had been on the registration rolls for at least 60 years, and it had been 20 years since one had even attempted to register. *Id.*

It is not surprising that no one made the attempt. A black person who sought to register could expect to be fired by his white employer or subjected to violence. Even if one could muster the physical courage and economic independence to make an application, the legal system was rigged to prevent black registration. Many states employed literacy tests that were either ridiculously easy or impossibly difficult depending on the race of the applicant. In Lowndes County, a prospective registrant was required to present an existing voter to vouch for his or her character. Of course, there were no black registrants, and no white voter could be expected to provide the necessary statement. *Id.* at 19.

The bottom line was that fully100 years after the end of the Civil War and 95 years after the adoption of the 15th Amendment, which prohibited the states from denying any citizen the right to vote on the basis of race, blacks still were not permitted to participate in the political process in many areas of the South. Further, in the instances where progress had been made by

the courts overturning specific barriers to black voter registration, the southern states simply devised different schemes that produced the same racially discriminatory result. As a practical matter, in many parts of the southern states, the franchise was the exclusive property of whites, and African-Americans were entirely excluded from the governmental process.

The 1965 Congressional Response—The Voting Rights Act represents a harsh remedy to a severe problem. It overrides state sovereignty in some states and localities.

The passage of the Voting Rights Act of 1965 changed that. The legislation put the federal government firmly in the business of regulating elections—a field that previously had been the province of state and local government. The Act, however, does not regulate the right to vote generally. Subsequent laws enacted decades later would establish more comprehensive federal standards for voter registration and the mechanics of conducting elections. *E.g.*, The National Voter Registration Act (NVRA) (also known as the motor voter law), 42 U.S.C. § 1973gg; Help America Vote Act (HAVA), 42 U.S.C. §§ 15301–15545. While the NVRA and HAVA apply to all voters, the Voting Rights Act is targeted to discrimination in the electoral process on the basis of race. In 1975, the Act was expanded to extend its protections to persons who are in a language minority group as well as to persons experiencing racial discrimination in the electoral process. The Act applies to four language groups—Alaska natives, American Indians, persons of Spanish heritage, and Asian Americans. 42 U.S.C. §§ 1973aa-1a, 1973b(f).

While parts of the Act apply to the nation as a whole, section 5, 42 U.S.C. § 1973c, which is the part of the Act that requires preclearance of voting changes and is the focus of this paper, is limited to a specific geographic area—Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia as well as various counties and townships in other states. Section 5 was enacted as a temporary provision and set to expire in five years. It has, however, been extended four times—in 1970, 1975, 1982, and most recently in 2006.

Section 5 represents a significant federal encroachment on state sovereignty. In fact, one scholar has likened the Act to putting the election systems in these areas into what is, in effect, a form of federal receivership. R. H. Pildes, *The Future of Voting Rights Policy: From Anti Discrimination to the Right to Vote*, 49 HOWARD L. REV 741(2006). Before any change can be made in an election practice, standard, or procedure, a jurisdiction covered by section 5—as all governments in Texas are—must seek the approval of either the United States District Court in the District of Columbia or the Attorney General of the United States. The pre-approval or preclearance requirement is designed to avoid the practice of states staying one step ahead of the regulator where, in the past, every time a legal barrier to minority voting rights was removed, a state would come up with some new requirement that might be innocuous on its face but that was designed to produce the same discriminatory effect. The various states, counties, and townships to which section 5 applies are determined by a coverage formula. The formula is based on the jurisdiction's use of tests or devices during the 1960's or 70's that had the purpose or effect of denying or abridging the right to vote on account of race coupled with a low level of registration or voter turnout in the 1964 or 1972 presidential elections. 42 U.S.C. § 1973b(b).

Shortly after the Act's passage, the Supreme Court upheld the constitutionality of section 5 in *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). The Supreme Court most recently

considered the constitutionality of section 5 in *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009), but did not overturn section 5. The issue is again before the Supreme Court in *Shelby County, Ala. v. Holder*, No. 12-96, and is set for oral argument on February 27, 2013. A decision is expected in late June.

Perhaps the major issue before the Court is whether section 5 is congruent and proportional to the injury to be prevented. The petitioners argue that even if the legislative remedy met that criterion in 1965, it does not do so in 2013. The likely outcome of this most recent Supreme Court challenge has been the subject of intense speculation and debate among the voting rights bar and the academy. Obviously, we do not know what will come of section 5. It may survive in whole or in part. If it is struck down, it may be reenacted in some form.[1] Or it may be found unconstitutional and not replaced. In the meantime, it is an important statute that any city attorney must deal with.

Accordingly, here are various questions and answers on issues that arise in a city attorney's day-to-day practice under the Voting Rights Act.

QUESTIONS ARISING UNDER SECTION 5

What sort of actions have to be precleared?

The Act requires that any change affecting voting be precleared. That refers to any change in a voting qualification, a prerequisite to voting, or a standard, practice, or procedure with respect to voting that is different from what was in effect on the coverage date or the existing practice, standard, or procedure as it was altered after the coverage date. 28 CFR § 51.2. See *infra* for a discussion of the coverage date.

What sort of things are considered to be standards, practices, and procedures affecting voting?

The Department of Justice regulations contain a long list of examples. 28 CFR § 51.13. These include:

- Any change in qualifications or eligibility for voting.
- Any change concerning casting or counting votes or change concerning publicity for or assistance in voting.
- Any change with respect to the use of a language other than English in any aspect of the electoral process.

[1] It may be difficult to imagine any extension of the Voting Rights Act to be passed by the very conservative House majority much less by the filibuster prone Senate. It is worth remembering, though, that the past extensions of the Act were signed by Presidents Nixon, Ford, Reagan, and Bush (43). The primary author of the 2006 extension, which is the statute now being challenged, was Rep. James Sensenbrenner, the conservative Republican who was then chairman of the House Judiciary Committee. The extension passed the Senate by a vote of 98-0 and the House by a vote of 390-33. At least in 2006, the issue was a bipartisan one.

- Any change in the boundaries of precincts or the location of polling places.
- Any change in the constituency of an official or the boundaries of a voting unit. Specifically, this includes, but is not limited to, any annexation, deannexation, redistricting, incorporation, dissolution, change from at-large to single-member districts or change from single-member districts to at-large elections.
- Any change in determining the outcome of an election. For example, changing from a plurality requirement to a majority vote requirement or adoption of a numbered place system.
- Any change in the term of an office, whether lengthening or shortening. Any change from election to appointment. Any creation or elimination of an elective office.
- Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum.
- Any change affecting the right or ability of persons to participate in campaigns or other pre-election activities. For example, regulations governing political activity of city employees would be a change requiring preclearance.
- Any change transferring responsibility for the conduct of the election process.

Some things that will require preclearance, but that may not be specifically listed in the DOJ list of examples, include:

- A change in the entrance to a polling place;
- A change in the type of ballot or election system (*e.g.*, optical scan, punch card, computer touch screen, etc.) used;
- Contracting for a joint election or for another entity such as the county clerk or elections administrator to conduct all or part of the election;
- Cancelling an election;
- Any special election such as a bond election, a charter amendment election, an election to fill a vacancy, or an initiative or recall.

<u>What about recurrent practices such as elections that occur at regular intervals</u>?

A recurrent practice, once precleared, does not have to be submitted again. For example, if the city has its elections for city officials on the uniform election date of May in each even-numbered year, it is not necessary to submit that for preclearance each year so long as the initial use of the election date was precleared or preceded the coverage date (see below for a discussion of the coverage date). If, however, the city makes a change, such as holding elections every year instead of every two years or uses the November date rather than the May date, preclearance would be required. 28 CFR § 51.14.

In this regard, it is important that the dates of special elections always have to be precleared. By definition, a special election is one that does not regularly recur on fixed dates.

TEX. ELEC. CODE § 1.005 (6) and (18). Thus, for example, an election to fill a vacancy or an election on a proposed charter amendment will need to be precleared even if the election is held in connection with the general election for city officials. In that example, there are actually two elections, both of which may be on the same ballot—the general election and the special election to fill a vacancy or to consider charter amendments.

What is the coverage date?

The coverage date is the date the Act became effective in the jurisdiction. For any city or other governmental entity in Texas, the coverage date is November 1, 1972. 28 CFR Part 51 Appendix. Thus, whatever practices were in place on November 1, 1972, constitutes the baseline and do not need to be precleared. Please note, though, that the baseline changes over time. As a new practice is introduced and precleared, then it becomes the new benchmark against which any subsequent change will be measured. 28 CFR § 51.54(c). For example, if a city used the civic center as a polling place in 1972 but subsequently changed the polling location to an elementary school and precleared that change, then the elementary school becomes the benchmark location for that polling place so that any change from the elementary school—even if it is to move the polling place back to where it was in 1972—must be precleared.

What is the standard for preclearance?

To be precleared, the Attorney General or the D.C. District Court must determine that "the submitted change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group." 28 CFR § 51.52. Thus, the section 5 analysis has two elements—purpose and effect.

How does the Department of Justice determine if there is a discriminatory purpose?

In determining if there is a discriminatory purpose, the Department's evaluation will be guided by the analysis in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). That case set out five areas of inquiry to consider in determining the presence of a discriminatory purpose:

- The impact of the decision;
- The historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent;
- The sequence of events leading to the decision;
- Whether the challenged decision departs, either procedurally or substantively, from the normal practice;
- Contemporaneous statements and viewpoints held by the decision makers.

How is the effect prong of the analysis conducted?

As most changes will not appear to have been taken with discriminatory intent, the analysis will generally focus on whether the change will have the effect of denying or abridging the right to vote. Under section 5, a change will be found to have a prohibited effect if it will lead to a retrogression in the positions of the minority group. In other words, the issue is whether the change will make the minority group worse off than they were before the change insofar as their effective exercise of the electoral franchise is concerned. *Beer v. United States*, 425 U.S. 130 (1976); 28 CFR § 51.54(b).

To determine if there is retrogression, it is necessary to look at the benchmark. Is the new practice worse for minorities than the one it replaces? If so, it will not be precleared.

As an example, single-member districts typically afford more opportunity for minorities to achieve electoral success than at-large election systems. Thus, a change from an at-large system to a single-member district election system is almost always going to be precleared. On the other hand, if the jurisdiction desires to change back to the at-large system, it is unlikely the change would be precleared since going from a single-member district system to an at-large system would generally be considered to be retrogressive.

What if the current practice was not precleared?

An unprecleared practice cannot be a benchmark. 28 CFR § 51.54(c)(1), (3). The benchmark is the last legally enforceable practice, and a practice that has not been precleared or that was not the practice in effect on the coverage date cannot be the benchmark. When you are making a change in an election practice and discover that the current practice was never precleared, it generally means that you will need to determine what the last precleared practice was. That will establish the benchmark. Then, when seeking preclearance for the new system, you will probably ask DOJ to preclear the prior, unprecleared practices as well.

Is there an alternative to seeking preclearance from the Department of Justice?

Yes. A city has two options. It can submit a change to the Department of Justice or can seek a declaratory judgment from the United States District Court in the District of Columbia that the proposed change does not have the purpose or effect of discriminating. 42 U.S.C. § 1973c. In a section 5 case, the district court will sit as a three-judge district court, 28 U.S.C. § 2284, and any appeal will be directly to the Supreme Court. The defendant in the declaratory judgment action will be the Attorney General of the United States.

Almost all cities choose the Department of Justice route as it is much easier, much less costly, and much quicker. Because of the expense, jurisdictions choosing to bring a declaratory judgment in the District Court of the District of Columbia would likely be larger ones, and they make that decision only rarely. For example, the State of Texas felt it preferable to submit the 2011 legislative and congressional redistricting to district court rather than to the Department of Justice. In the highly partisan and contentious arena of legislative and congressional redistricting, the State apparently felt its chances for preclearance were better in the courtroom

rather than in the Justice Department of a Democratic President. As it turned out, the Department of Justice, in its answer to the suit, did not contest the validity of the state senate redistricting although the senate redistricting was challenged by intervenors. The court ultimately declined to preclear all the challenged plans, including the senate plan that the Department of Justice did not find to be objectionable. Thus, it is not necessarily an accurate assumption that the court will look more favorably on a submission than the Department of Justice will.

How do I make a submission under section 5?

Submissions must be made in writing. All or part of a submission may be made on magnetic media. Specific requirements for submissions utilizing magnetic media are found at 28 CFR § 51.50 The Department of Justice has had a procedure for electronic submissions so that one could fill out the submission using forms found on the Department website and submit it electronically. At the time of preparing this paper, that system was not operational although the Department did have procedures for submitting shorter submissions by facsimile transmission. Those procedures are explained on the Department's website: http://www.justice.gov/crt/about/vot/sec_5/posting.pdf

Typically, submissions are made by mail or overnight courier such as Federal Express. Depending on which delivery system is used, a different address is required. The addresses and instructions on how to mark the envelope and first page of the submission are found at 28 CFR § 51.24.

The author's firm uses a template for submissions that simply lists the required contents for submissions and the suggested supplemental contents. These are found at 28 CFR §§ 51.27 and 51.28. The template shows the language of the Code of Federal Regulations with a space to fill in the information responsive to each specific requirement. Typically, responses will often refer to exhibits where materials responsive to the specific part of the regulations may be found. These templates are designed to be used for submissions of redistrictings or annexations, which are typically the lengthiest and most complex type of submission. A submission for a more minor manner, such as moving a polling place or calling a special election to coincide with the general election, generally will not require such detail. In those cases, the submission will be much shorter and all of the contents set out in the Code of Federal Regulations will not be relevant.

Who has the burden of proof under section 5?

The burden is on the submitting jurisdiction. Thus, if the Department is unable to decide if the change is retrogressive or whether it was enacted with discriminatory intent, it can deny preclearance. This provides a special incentive to provide all necessary information and to fully answer any questions the Department poses.

How long does it take to get an answer from the Department of Justice?

By statute, the Department must interpose an objection, if at all, within 60 days of receiving the submission. If no objection is interposed, then the change is considered to be precleared. While there have been rare instances of the Department's not answering in the allotted time, it always attempts to give a timely answer.

The Department may decide that a submission does not provide all the required information. In that case, it will ask the jurisdiction to provide additional data. Once the new data is received, a new 60-day clock begins to click. 28 CFR § 51.37. Also, if the jurisdiction submits additional information without being asked and the supplementary submission cannot be independently considered from the original submission, a new 60-day clock will begin to run. 28 CFR § 51.39. The 60-day clock can only be reset once. Any subsequent requests for information do not operate to extend the Department's time.

Although a determination that a submission is insufficient and that additional information is required is supposed to be made "as promptly as possible within the original 60-day period," 28 CFR § 51.37(b)(1), as a practical matter requests for additional information typically come very late in the 60-day period. The fact that a request for additional information is made does not mean that you did not provide all the material listed in the federal regulations. Often a request will seek a response to information that the Department has received from another source—perhaps from a person opposing preclearance. Or a request for additional information may simply be a way of giving the Department another 60 days (or more depending on how long it takes the city to respond) to make a decision.

Requests for additional information are more common on major, controversial submissions and are unlikely on more routine ones. The Department almost always takes most, if not all, of its 60 days to respond. Thus, you should always strive to make a submission at least 60 days before the change will go into effect. On a controversial matter, it may be advisable to make the submission 120 days or more prior to the effective date if at all possible.

What typically happens during the preclearance process?

Upon receiving the request, the Department will give the submission a number and then will assign it to an analyst. The analyst will review the file and prepare an analysis. During the time the analyst reviews the matter, he or she will often call persons in the community to obtain background and their understanding of the process. For example, the analyst might call members of the city council or other community leaders. One of the items that the regulations suggest furnishing along with the submission is a list of minority contacts. The Department may well contact those persons as well as other members of the minority community it is independently aware of. Sometimes members of the community or advocacy groups will submit comments to the Department. During this time the analyst may well call you with specific questions or requests for additional information. These oral inquiries do not trigger the beginning of another 60-day period. While the analyst does the bulk of the work in reviewing the request, the analyst's work will be reviewed by a supervising attorney and perhaps other senior attorneys before the final decision is made.

What if I don't have 60 days before the effective date?

If the city has adopted a change less than 60 days before the election, the change should be submitted for preclearance as soon as possible and you may want to request expedited consideration. 28 CFR § 51.34. The Department discourages such requests (*i.e.,* "jurisdictions . . . should not routinely request such consideration") and often does not provide it. The request should state why expedited consideration is necessary.

Sometimes it is impossible to make a submission 60 days in advance. For example, a polling place may become unavailable, and a substitute polling place must be named shortly before the election. Similarly, run-off elections typically are to be held between 20 and 45 days after the final canvass of the main election, although home rule charters may provide for a different time period. TEX. ELEC. CODE §§ 2.025(a) and (b). Although one should always make every effort to submit a preclearance request at least 60 days in advance, as a practical matter there are times when cities make a submission and proceed with the election with strong confidence that the change will be routinely approved. There is a risk in this course, but a city may have no alternative if, for example, a polling place is destroyed by fire shortly before election day.

Does preclearance have a retroactive effect?

Typically, courts have found that preclearance will have a retroactive effect. For example, in an early case several elections were held under a staggered-term provision for a three-member board before a suit was filed to compel the jurisdiction to seek preclearance. The Supreme Court did not act until after some of the elections had occurred. It determined that the state should be ordered to submit the change to the Department of Justice for review under section 5 and stated, "if approval is obtained, the matter will be at an end." *Berry v. Doles,* 438 U.S. 190, 193 (1978).

Can some, non-election-related, portions of a change be implemented prior to preclearance?

An annexation is an election change requiring preclearance because it changes the composition of the electorate. This is so even if the annexed area has no population because the possibility exists that it someday will be populated. Thus, annexations are required to be precleared before they can be implemented as an election change, that is, before persons in the annexed area can vote or run for office in municipal elections. Annexations, though, have other, non-election-related aspects. Municipal ordinances apply to the annexed areas, and taxes are levied. Can the city enforce its ordinances and collect taxes while awaiting preclearance?

Both the Department of Justice and the courts have distinguished between the election changes that are a part of an annexation and the other aspects of the annexation. They recognize that the absence of preclearance precludes residents of the annexed area from participating in elections either as voters or candidates. They also recognize, though, that the failure to preclear does not affect the residents of the annexed area in any other way and does not affect the validity

of the annexation itself. *Dotson v. City of Indianola,* 514 F. Supp. 397, 403 (N.D. Miss. 1981) (three-judge court), *aff'd,* 456 U.S. 1002 (1982); *City of Petersburg v. United States,* 354 U.S. 1002, 1023 n.2 (D.D.C. 1972) (three-judge court) (per curiam), *aff'd,* 410 U.S. 962 (1973). Theoretically, this creates the possibility that the city would annex an area, enforce its ordinances in the area, and tax its residents without permitting them to vote simply by failing to promptly seek preclearance. State statute, however, requires a city to seek preclearance at the earliest possible time. TEX. LOC. GOV'T CODE § 43.906(a). The statute also ensures that residents of an annexed area will be able to vote immediately on preclearance even though the Election Code typically requires a change in boundaries to occur three months before it becomes effective for an election. *Compare* TEX. LOC. GOV'T CODE § 43.906(b) *with* TEX. ELEC. CODE § 276.006.

When is the earliest time I can submit a change for preclearance?

With certain exceptions, the Department of Justice "will not consider on the merits . . . any proposal for a change submitted prior to final enactment or administrative decision." 28 CFR § 51.22(a)(1). Thus, the relevant authority—typically, the city council—must formally adopt the change prior to the time it is submitted to the Department of Justice. Indeed, the very first item listed in the required contents of a submission is "a copy of any ordinance, enactment, order, or regulation embodying the change affecting voting for which section 5 preclearance is being requested." 28 CFR § 51.27(a). Although the election aspects of a change are not to be implemented prior to obtaining preclearance, it is necessary to adopt the change before seeking preclearance.

The exception to the rule encompasses a change requiring approval by referendum, by a state or federal court, or by a federal agency, so long as the change is not subject to alteration. 28 CFR § 51.22(b). Where this most frequently occurs is in the case of a charter amendment or initiated ordinance. The matter is to go on the ballot and, if approved, will become law with any other action and without any opportunity to amend it. Thus, in the case of a charter amendment or initiated ordinance, the city would have the option of submitting either one or two submissions. It can opt to submit the special election as a separate change. Any time a special election is called, which will always be the case with a charter amendment or an initiated ordinance, the election must be precleared. If the charter amendment or initiated ordinance is itself a voting change as, for example, might be the case if it changed the length of terms of office or changed the election system from an at-large system to a single-member-district system, then the charter amendment or ordinance will itself need to be precleared. The city can choose to wait to see if it passes and then submit the change. Or, it can submit the change at the same time it makes the submission of the special election at which it will be considered. In this instance, the city has the option of submitting both questions (the special election and the charter amendment or initiated ordinance that will be voted on at the special election) prior to the election or it can choose to submit the special election before the election is held and wait to submit the charter amendment or initiated ordinance only after it knows whether it was adopted.

Why might a court order need to be precleared?

The general rule is that election changes made by the State of Texas or its political subdivisions must be precleared. That requirement applies whether the change is made by an executive, legislative, or judicial body.

In regard to federal courts, the rule is that changes that reflect policy choices of the governmental entity must be precleared even if they are ordered by a federal court. *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981). Where the issue typically arises is in redistricting cases. The courts are required in these situations to give the governmental body the first opportunity to propose a remedy. If the court chooses that remedy, or significant aspects of it, preclearance is required. In those instances, the proper procedure is for the court to approve the remedy and then order the city to submit it for preclearance while deferring entry of the final judgment until after preclearance is obtained.

What if the city disagrees with the Department of Justice's ruling?

The city has the option of bringing a declaratory judgment suit in the District Court of the District of Columbia just as if it had chosen that option originally. The case must be heard by a three-judge district court.

The city may also ask the Department to reconsider its decision. 28 CFR § 51.45.

What if we receive preclearance from the Department of Justice but some citizens disagree and want to challenge the Department's ruling?

The Department of Justice's decision not to object to a change is final and not reviewable. *Morris v. Gressette*, 432 U.S. 491 (1977). Once the Attorney General has failed to object during the 60-day review period (or, in appropriate instances, the extended review period), the section 5 inquiry is at an end.

Of course, a litigant could still bring a challenge under section 2 of the Voting Rights Act, 42 U.S.C. § 1973, or the Constitution. The issue then, though, would be whether the election change was discriminatory, not whether it was retrogressive. Also, in a section 2 or constitutional suit the burden would be on the plaintiff, not on the city.

What if the city implements an election change without seeking or obtaining preclearance?

If the city implements a change without seeking preclearance or if preclearance is denied and it proceeds with the change anyway, it may be subject to a section 5 enforcement action. While any substantive decision under section 5—*i.e.*, the decision whether to preclear a change—must be made by the Department of Justice or by the United States District Court for the District of Columbia, an enforcement action may be brought in the local federal district court. The district judge in whose court the action is filed will be required to ask the chief judge of the circuit to convene a three-judge district court to hear the case. *Allen v. State Board of Elections,* 393 U.S. 544, 563 (1969). A section 5 enforcement court may consider only three questions:

(1) is the change required to be precleared; (2) if the answer is yes, then was it precleared; and (3) if the answer is no, then what remedy is appropriate in order to ensure it is precleared. *Lopez v. Monterey County, Calif.,* 519 U.S. 9, 23-24 (1996). The issues are so basic and straightforward that if the city is sued in a section 5 enforcement action and it has no good argument why the change is not required to be precleared, it is highly likely it will be the subject of an injunction and an award of attorneys fees to the plaintiffs.