REDISTRICTING ISSUES FOR CITY ATTORNEYS

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Presented to the

TCAA SUMMER CONFERENCE
June 10-12, 2009

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In 2011, Texas cities, along with school districts, counties, and the legislature, will redistrict, drawing new boundaries from which their governing bodies will be elected. Other entities—specifically, the congressional delegation and the state board of education—will be redistricted by the legislature. This paper addresses the redistricting process and some of the changes since the last redistricting cycle. No paper or talk of this length could cover the entire subject of redistricting. The purpose of this paper is to (1) set out the basic framework of issues that come up in redistricting and (2) to note the changes between redistricting in 2001 and 2011.

Redistricting 101–A Primer on Redistricting Basics

What Cities Are Affected By Redistricting?

While city charters[1] and statutes[2] may have provisions that expressly require some governmental bodies to at least determine if redistricting is necessary on a particular schedule, every jurisdiction with single-member districts will need to examine those districts when the decennial census is published to determine if its districts are in population balance. It is likely that growth in the city will not have occurred uniformly across the geography of the city over the past ten years. As a result, districts that were relatively equal in population under the 2000

[1] *E.g.,* Houston City Charter, art. V, § 3 (requires examination each year in which an election is held to determine if the population of the council districts is materially unbalanced and, if so, requires redistricting).

[2] *E.g.,* Tex. Educ. Code §11.052(I) (requiring school trustee districts to be redrawn if the census shows that the population of the most populous district exceeds the least populous by more than ten percent).

census very likely will not be equal under the 2010 census. In that case the jurisdiction will be in jeopardy of being sued on a one person–one vote claim, which it almost certainly will lose. As soon as a jurisdiction determines that its districts are out of population balance, it generally will begin the redistricting process.

This paper is most relevant to those cities that have single-member districts or a mixed plan with some single-member districts and some at-large positions. Nevertheless, even those cities with at-large election schemes will be affected by the publication of the census and may need to make decisions regarding redistricting. The new census data will permit potential plaintiffs and cities to analyze those cities to determine if they are vulnerable to a suit under section 2 of the Voting Rights Act,[3] claiming that those cities' at-large systems are discriminatory. Thus, districts with at-large election systems may want to review the 2010 census results for their city to determine if they are vulnerable to a suit challenging the use of the at-large system.

What Are The Legal Issues Governing Redistricting?

Equal Population

The first issue of any redistricting of city council districts is whether the districts comply with the one person-one vote requirement of equal population. Unlike congressional seats, which are subject to a different provision of the United States Constitution[4] and require almost

[3]42 U.S.C. § 1973

[4]Equality of congressional seats is required by article I, section 2 of the United States Constitution, while the requirement of equality of population among city council districts derives from the Fourteenth Amendment.

exact equality,[5] a city council has the ability to vary the size of a council district within some parameters. Generally, if the deviation between the population of the largest and smallest district does not exceed 10 percent, the districts will be presumed to be constitutional.[6] On the other hand, a deviation of more than ten percent results in a prima facie case of discrimination.[7] While it is not an absolute safe harbor, cities should be sure that the deviation among their districts does not exceed ten percent.

To determine the deviation, you divide the total population by the number of districts. Thus, if a city had a population of 5,000 persons and five districts, the ideal district would have 1000 persons. If the largest district has 1,040 persons, it would be four percent above the ideal. In our hypothetical, if the smallest district had 950 persons, it would have a deviation of five percent below the ideal. Since the total deviation is determined by comparing the largest to the smallest district, the total deviation would be nine percent (4% + 5% = 9%), which falls within the ten-percent limit and means that our districts are prima facie constitutional.

Section 5 of the Voting Rights Act

Although the status of section 5 will be discussed in much more detail below, it is the part of the Voting Rights Act that requires any change in an election practice, standard, or procedure

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[5]Congressional districts are generally drawn to be precisely equal. For example, the 32 Texas congressional districts range in size from a low of 651,612 to a high of 651,627 for a total deviation of only 15 persons. That deviation occurred when a federal court made changes to some district boundaries. As drawn by the legislature, the deviation from the largest to the smallest district was only one person, and that deviation existed only because it was not possible to divide the population of the state by 32 without producing a remainder.

[6]*Brown v. Thompson,* 462 U.S. 835, 842-43 (1983),

[7]*Id.*

to be submitted either to the Department of Justice or a three-judge United States District Court in the District of Columbia[8] for "preclearance" before the new practice can be implemented.

The two most important things to remember about section 5 are (1) that the standard is one of retrogression—*i.e.,* the new practice cannot leave minority groups worse off than they were under the old one[9] and (2) every change must be submitted for preclearance.[10]

In regard to this second point–-the need to submit all changes—it is important to remember that the failure to submit even non-redistricting related changes can affect the redistricting process. For example, a Texas city recently drew new council districts and submitted them to the Department of Justice four months before the election at which the new boundaries would be used. Since the Department is required to rule within 60 days[11] (barring a request for additional information), this was ample time to have the submission reviewed. It turned out, though, that the city had sent earlier submissions, including submissions for prior annexations, to a post office box that was no longer used by the Department of Justice. Some of those submissions had been delivered to the Department and some had not been, and in retrospect it was apparent that it was a hit-or-miss proposition whether mail sent to that address

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[8]As a practical matter governmental bodies almost always follow the Department of Justice option and very seldom use the slower and much more expensive option of bringing a suit in the District of Columbia.

[9]*Beer v. United States,* 425 U.S. 130, 140-42 (1976).

[10]*E.g.,* 28 C.F.R. §§ 51.12–51.18.

[11]28 C.F.R. §§ 51.41-51.42.

would actually be delivered to DOJ. When the redistricting submission was sent to DOJ,[12] the Department compared the plan to the Boundary and Annexation survey for the city and realized that it had not precleared all of the city's annexations. These were the annexations that had dutifully been sent to the Department at the incorrect address but that had never been received. As a result, the Department required the city to resubmit all annexations that had not been precleared, which included multiple annexations over a twenty-year period, before it would begin the analysis of the redistricting plan. This meant that the relatively generous four-month period the city planned on to permit preclearance shrunk dramatically as the city scrambled to re-submit twenty years worth of annexations. Ultimately, the redistricting was precleared, but the city's inadvertent failure to submit the annexations led to anxious moments.

Additionally, if there is opposition to a redistricting plan or to some other election change, the failure to have submitted an earlier change can be used by the opposing party as leverage. For example, if a governing body is sued in a Voting Rights case, knowledgeable voting rights plaintiffs' attorneys typically use discovery to determine if every election change has been precleared. If not, the failure can be used to pressure the jurisdiction to settle. The pressure can be especially severe if the failure involves a bond election or similar matter.

Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act[13] prohibits election practices that discriminate on the basis of race or language minority status. In the redistricting context, perhaps the most important

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[12]The submission was sent by an outside law firm and was not addressed to the no-longer-correct post office box that was contained in the city's files.

[13]42 U.S.C. § 1973.

thing for a city to do is to avoid "cracking" and "packing." Cracking, which is also referred to as fracturing, refers to dividing a geographically compact area of minority voters between one or more districts so that the minority group's voting power is fragmented. If the minority group would have been able to elect the candidates of its choice if it were kept in a single district but loses that power when it is split into multiple districts, the group's voting strength has been diminished by the way the boundaries were drawn, and there is a good case for a section 2 violation. A violation is also possible if the body drawing the district engages in packing. If a minority group's members are concentrated into a single district when by splitting the group it could control two districts rather than one, the practice is called packing. Basically, when districts are drawn artificially either to concentrate or disperse minority citizens in a way that minimizes their voting strength, there is a possibility of a section 2 violation.

The ultimate issue under section 2 is whether the election system or redistricting plan operates to minimize or cancel the minority group's ability to elect their preferred candidates. That determination must be made after an examination of the totality of the circumstances. Before making that determination, though, a plaintiff must first satisfy a three-part threshold test. Specifically, the plaintiff group must show that

1. It is sufficiently large and geographically compact so as to constitute a majority in a single-member district;

2. It is politically cohesive; and

3. The white majority votes as a bloc usually to defeat the minority choice.[14]

[14] *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

Generally, the question of whether a minority group can state a section 2 claim revolves around the first prong of the *Gingles* threshold test. In the Fifth Circuit, that majority must be a citizen-voting-age population majority.[15] In essence, the courts will look to see if a potential district can be drawn in which the minority group could constitute a majority of the people potentially eligible to vote—*i.e.,* those persons over 18-years-of-age who are citizens of the United States. As discussed in more detail later in this paper, the citizenship factor can be especially relevant depending on the locale. In a case decided only this March, the Supreme Court made it clear that the majority had to be a true majority—*i.e.,* where the minority group citizens of voting age constitute at least 50 percent plus one of the potential district's citizen-voting-age population—and not an electoral majority made up of a large number of persons from the minority group along with cross-over voters who are not members of the minority group but can be expected to vote for the minority-favored candidate.[16]

***Shaw v. Reno* and the Unconstitutional Use of Race**

In 1993, the United States Supreme Court recognized a cause of action that can be brought by persons of any race to challenge redistricting plans as being based on an unconstitutional use of race.[17] The basic principles that have emerged from *Shaw* and its progeny are

- It is permissible to be aware of race in the districting process and to consider issues of race

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[15]*Campos v. City of Houston,* 113 F.3d 544, 547 (5th Cir. 1997).

[16]*Bartlett v. Strickland*, 129 S.Ct. 1231 (2009)

[17]*Shaw v. Reno,* 509 U.S. 630 (1993).

- Race, however, may not be the *predominant* factor in the redistricting process to the subordination of traditional districting principles

- Districts are not per se unconstitutional because they have odd shapes; however, a bizarre shape may be evidence that strongly suggests that race was the predominant factor driving the districting decision

- If race was the predominant consideration in the districting decision, the districts are subject to strict scrutiny analysis and the governmental body must demonstrate that they are a narrowly tailored means of addressing a compelling governmental interest.

- Compliance with sections 2 and 5 of the Voting Rights Act can be a compelling state interest[18]

- Districts drawn to comply with sections 2 or 5 must be narrowly tailored. That means, among other things, that they use race no more than is necessary.

While *Shaw* produced several cases in the latter part of the 1990's, by the 2001 round of redistricing, most governmental bodies had figured out how to comply with its mandate. The truly bizarre districts that are the ones that typically generate a *Shaw* claim are now unlikely to be drawn and *Shaw* challenges are relatively rare. Still, it is important to be aware of the *Shaw* doctrine and to take care to draw districts that do not raise a *Shaw* issue.

State Law Issues

In addition to being governed by federal statutes and court decisions when redistricting, a city is also subject to state law and charter requirements. Charter provisions, of course, may vary

[18]This has not been a holding of the Court; however, there are opinions in which at least five members of the Court have said that compliance with sections 2 and 5 is a compelling state interest. *Bush v. Vera*, 517 U.S. 952, 993 (1996) (O'Connor, J., concurring), 1033 (Stevens, J., dissenting) 1065 (Souter, J., dissenting) (compliance with section 2 as a compelling interest); *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 476, n.12 (Stevens, J., concurring in part and dissenting in part), 485, n.2 (Souter, Jr., concurring in part and dissenting in part); 518-19 (Scalia, J., concurring in the judgment in part and dissenting in part) (2006) (compliance with section 5 is a compelling interest).

from city to city. The most important state law requirements relate to the timing of a redistricting and the relationship between single-member district lines and county election precincts.

The Election Code requires that any redistricting be completed at least three months before election day.[19] Cities should strive to adopt an order well before that statutory deadline, though, as a redistricting adopted only three months before the election will be very difficult to implement. For example, assuming section 5 is in effect, the redistricting plan will need to be precleared. It cannot be submitted until after the order is formally adopted,[20] and the time required for preclearance is generally 60 days.[21] If the Attorney General determines that he needs additional information, the period can be extended for an additional 60 days,[22] which would take the time for response past election day.

It is also important that a city be cognizant of county election precinct boundaries when redistricting. State law provides that a county election precinct may not contain territory from more than one "ward in a city with a population of 10,000 or more."[23] Thus, to the extent possible, the city will want to draw its districts without splitting county election precincts. In very large cities, such as Houston and Dallas, it should be possible to draw districts using county election precincts as the building blocks so that no election precincts are split. In smaller cities,

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[19]TEX. ELEC. CODE § 276.006.

[20]28 C.F.R. § 51.22.

[21]28 C.F.R. § 51.42. Although 60 days is the statutory maximum time for the Attorney General to rule on a submission, in practice the Attorney General typically takes the entire 60-day period.

[22]28 C.F.R. § 51.37.

[23]TEX. ELEC. CODE § 42.005(a)(6).

though, the election precincts will be too large relative to the size of a single-member district to permit equipopulous districts to be drawn without splitting election precincts. In that case, the county will need to adjust the county precinct lines to conform to the city's single-member district boundaries. The county also must be sure that its election precinct lines conform to the boundaries of other districts listed in section 42.005 of the Election Code, including commissioner precincts, justice precincts, congressional districts, state representative and senate districts, and state board of education districts. It makes sense for the city to be aware of these lines to avoid situations that will require the county to draw extremely small election precincts. For example, if a council district is drawn so that Third Street is a boundary while the county commissioner precinct uses Fourth Street, the county will be required to draw an election precinct that is only one block wide. The failure to pay attention to the boundaries of other jurisdictions when drawing districts has resulted in very small election precincts that increase the cost of election administration and are confusing to voters. To a large extent, this can be prevented by paying attention to the boundaries of the districts of overlapping governmental entities when redistricting.

What Should The City Be Doing Now About Redistricting?

Many governmental bodies have been receiving solicitations for several months urging them to retain a redistricting expert to assist them in the redistricting process. Some were sent as early as 2008 telling governmental bodies that they need to sign up now.

While it makes sense to obtain expert assistance before redistricting actually begins in 2011, in most cases the currently sitting council is not the one that will actually conduct the

redistricting process as there will be an election before the release of the census in 2011, which is the triggering event that will permit the redistricting process to begin.

The main thing that cities can do now is to be sure that the Census Bureau has up-to-date boundaries for the city and is aware of all annexations. Each year around January 1, the Census Bureau mails a Boundary and Annexation Survey. Cities should be sure to respond to all of these surveys. The last opportunity to affect the 2010 Census will be the Boundary Validation Program, which will be mailed to the highest elected official of each local government in the early summer of 2010. This will be the last opportunity to submit corrections and to update boundaries.

Ensuring that the Census Bureau has accurate boundaries for your city will help provide accurate population numbers for the city. Additionally, being sure that the boundaries are correct in the Census Bureau database will save the city money and time during redistricting. One of the first things that our firm does when assisting a governmental body during redistricting is to have the governmental body verify that the boundaries used by the census accurately reflect the entity's boundaries. If the census boundaries for the city are incorrect, we have to work with the governmental body to be sure that we have the correct boundaries and that we have a correct count of the population. In the past, this has sometimes involved scores of adjustments, and can be a highly-detailed and time-consuming procedure. By taking care to be sure that the boundaries are correct, a city can avoid the need to adjust the census boundaries and census numbers to reflect the actual boundaries of the city.

What Will Be Different About Redistricting This Time?

Will section 5 be in effect?

Section 5 of the Voting Rights Act,[24] is the portion of the Voting Rights Act that likely has the most immediate and sustained impact on Texas cities. Under section 5, every change in an election practice, standard, or procedure–and this includes annexations, changes in polling place locations, calling special elections for charter amendments and other purposes, and many other issues—must be reviewed and approved either by the Department of Justice or a three-judge district court in the District of Columbia before it can be implemented. That section, though, is the subject of a suit, *Northwest Austin Municipal Utility District No. 1 v. Holder* [*NAMUDNO*], challenging its constitutionality. *NAMUDNO* was argued before the Supreme Court on April 29 of this year.[25] It was the last argument heard by the Court this year, and it is expected to be among the last decisions to be released in this term of the Court, which is scheduled to end on June 29, 2009. Thus, in the next two to three weeks we should know the fate of section 5.

To understand the issue before the Court, it is helpful to have some background on section 5 and the Voting Rights Act because the difference in the barriers to minority voter participation in 1965 when section 5 was originally enacted and in 2006 when the Act was most recently extended is key to the *NAMUDNO* plaintiffs' challenge to the constitutionality of the Act.

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[24]42 U.S.C. § 1973c

[25]The transcript of the oral argument can be found at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-322.pdf

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 televison 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 difficult, if not 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.[26] 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.[27] 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

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[26]T. Branch, *At Canaan's Edge: America in the King Years 1965-68* (New York: Simon & Schuster 2006) 6, 101.

[27]*Id.*

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.[28] 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 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.[29] While the NVRA and HAVA apply to all voters, the Voting Rights Act is targeted to discrimination in the

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[28] *Id.* at 19.

[29] The National Voter Registration Act (NVRA) or motor voter law was enacted in 1993. 42 U.S.C. § 1973gg. In 2002, Congress enacted the Help America Vote Act (HAVA). 42 U.S.C. §§ 15301–15545.

electoral process on the basis of race.[30] Also, section 5[31], which is the part of the Act that requires preclearance of voting changes, is a temporary measure that originally was to exist only until 1970 but was extended multiple times. Most recently it was scheduled to expire in 2007 before it was extended for an additional 25 years. Section 5 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.[32]

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.[33] 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 was 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

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[30]In 1975, the Act was amended to extend its protections to persons who are in a language minority group. 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).

[31]42 C.F.R. § 1973c.

[32]*See* 28 C.F.R. Pt 51 (App.).

[33]R. H. Pildes, *The Future of Voting Rights Policy: From Anti Discrimination to the Right to Vote*, 49 HOWARD L. REV 741 (2006).

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.[34]

Shortly after the Voting Rights Act passed, the Supreme Court, in an opinion by Chief Justice Earl Warren, upheld its constitutionality.[35] Since that time, however, the Supreme Court seems to be taking a less expansive view of federal power. A major focus of the Rehnquist Court involved the "new federalism," which sought to define the limits of the Congress *vis-a-vis* the states. In 1997, the Court explored the scope of the Congress' authority to adopt remedial legislation based, as the Voting Rights Act is, on the power to enforce the Civil Rights Amendments. It indicated that the Congress must build a strong evidentiary record of intentional discrimination and that the legislation must be congruent and proportional to the violation.[36] In fact, it discussed the 1965 Voting Rights Act as an example of legislation that was congruent and proportional to the violations set out in the legislative record.[37]

Shortly after section 5 was extended in 2006, the Northwest Austin Municipal Utility District No. One filed suit in the United States District of Columbia seeking either to bail out of

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[34]42 U.S.C. § 1973b(b).

[35]*South Carolina v. Katzenbach,* 383 U.S. 301 (1966).

[36]*City of Boerne v. Flores*, 521 U.S. 507 (1997).

[37]*Id.* at 530–33.

coverage under the Act[38] or to have section 5 declared unconstitutional. The basic claim was that the extension of the 1965 legislation was not a proportional and congruent response to the problems that existed 41 years later in 2006. Further, the coverage formulas from 1965 and 1972 may not make sense today. To persons who listened to or read the oral argument, it seemed clear that five members of the Supreme Court were receptive to this argument. Virtually every analysis presented by law professors and election law specialists who studied the oral argument predicts that the Court is likely to overturn the 2006 extension of section 5. The most optimistic analysis by those hoping to see section 5 survive the constitutional challenge is a suggestion that the Court may avoid the question on grounds of ripeness and standing.[39] That view is not without its detractors, especially by those supporting a finding of unconstitutionality.[40]

There is a very good chance that the Court will overturn section 5. If it does, how will that affect 2011 redistricting?

Assuming that section 5 is not in effect when cities redistrict, they will not have to submit their redistricting plans to the Department of Justice for preclearance. Additionally, they will not have to satisfy the requirements of section 5. Specifically, they will not have to be sure that any plan they adopt is not retrogressive. The standard under section 5 is that an election change cannot be retrogressive—that is, it may not result in backsliding in terms of minority voting

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[38]Section 4(a) of the Voting Rights Act, 42 U.S.C. §1973b(a), permits certain jurisdictions to bail out of coverage under the Act. Most observers read the statute to permit only the entire state or a county in Texas to bail out.

[39]J. Gerald Hebert, *Standing, Ripeness and the NAMUDNO Case,* Campaign Legal Center Blog, (May 14, 2009), http://www.clcblog.org/blog_item-286.html.

[40]Hans von Spakovsky Response to Hebert argument (May 20, 2009), http://electionlawblog.org/archives/spakovsky-standing.doc.

rights.[41] A city, though, will still need to be sure that any redistricting plan it adopts does not violate section 2—*i.e.,* that it is not discriminatory. As a practical matter, the necessity to comply with section 2 will keep most jurisdictions from adopting plans that are worse for minority voters than the current redistricting scheme, although it is possible for a plan to be non-discriminatory even though it is retrogressive. The absence of section 5, however, will shift the burden of enforcement to plaintiffs and will shift the forum from the Department of Justice to the federal courts.

It is by no means certain that section 5 will be gone even if it is overturned by the Supreme Court. If the Court's opinion provides the opportunity, there will be great pressure on the Congress to reenact section 5 with changes necessary to comply with the Court's opinion. The 2006 extension of section 5 passed overwhelmingly and had broad support from both political parties. Thus, even if section 5 is declared unconstitutional in late June of 2009, it may very well be reenacted in a somewhat different form by 2011.

The Census

The Census Bureau will conduct the decennial census on April 1, 2010, which is the date defined by statute as the decennial census date.[42] Obviously, the census will be conducted over a longer period of time with questionnaires mailed to households prior to April 1 and follow-up visits after that date, but the census is designed to measure the population as of April 1 in years divisible by ten.[43] The results will be tabulated, and the statewide totals will be reported to the

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[41] *Beer v. United States,* 425 U.S. 130, 140-42 (1976); 28 C.F.R. § 51.54(a).

[42] 13 U.S.C. § 141(a).

[43] *Id.*

President by December 31 so that congressional seats can be apportioned among the several states.[44] Those totals are simply a count of total population by state and are not suitable for redistricting. The data that permits states and local governments to redistrict, which is sometimes known as P.L. 94-171 data because of the 1975 statute that required its publication, must be released within a year after the decennial census date—*i.e.*, by April 1, 2011.[45] The P.L. 94-171 data has traditionally been released in tranches of several states with the largest states, including Texas, being in the last tranche. The Texas data was released in March in 1991 and in February in 2001. Discussions with the Census Bureau suggest the 2011 data may come even earlier.

The reason we may see an earlier release is that the volume of data to be processed in this census will be significantly reduced from earlier censuses. Historically, the census has distributed a "long-form" and a "short-form." About five-sixths of the households receive the short-form and about one-sixth receive the long-form. Basically, the short-form asks respondents to name the persons in the household, to give their gender, age, and race and to note if they were Hispanic. The long-form contained all those questions as well as many more about employment, income, housing details, etc. The data from the long-form was used to produce the sample-detail file, which provides a rich and highly detailed picture of the population.

The long-form, however, is no longer being used. In its place, the Census Bureau is conducting the American Community Survey (ACS), which is a continuous process of sampling the population. In any given year the sample used by the ACS will be much smaller than the one for the long-form. To attain comparable statistical accuracy, it is necessary to use a multi-year

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[44] 13 U.S.C. § 141(b).

[45] 13 U.S.C. § 141(c).

sample. In essence, the ACS is much like a tracking poll where the pollster conducts surveys every day and reports a rolling three-day average with one day's result dropping out each time a new day is added. Although, the ACS produces a yearly report, it is designed to be used as a three-year or five-year sample, with smaller geographic detail available only in the five-year sample. Because the ACS is conducted separately from the decennial census and has replaced the long-form, which required extensive processing time, the Census believes it will be able to produce the P.L. 94-171 data necessary for redistricting earlier than in prior years.

The one piece of data that is especially useful for redistricting that was previously found in the long-form and now is in ACS relates to citizenship. In the past, we have not had citizenship data when drawing initial districts at the beginning of a decade because that information was not released for a year or more after the P.L. 94-171 data. Now, it should be available—albeit in five-year averages—at or near the time cities will be redistricting.

Citizenship data is important because in the Fifth Circuit one of the showings a minority group must make to demonstrate that it has a section 2 right to a single-member district is that it can constitute a majority of a district's citizen-voting-age population.[46] *Campos v. City of Houston,* 113 F.3d 544, 547 (5th Cir. 1997). Additionally, since only citizens are eligible to register to vote, a city will likely want to avoid drawing a district that appears to be a predominantly minority district but, in fact, contains very few minorities who are eligible voters.

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[46]While the current national debate on immigration policy focuses on "illegal immigration," this paper makes no judgment on whether persons reported as non-citizens are lawful residents of the country. The Pew Hispanic Center estimates that the total number of legal permanent resident aliens and temporary legal resident aliens in the United States is slightly larger than the number of unauthorized migrants. J. S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey* (Pew Hispanic Center Research Report, March 7, 2006) at 4.

While there are non-citizens among all racial and ethnic groups, the percentage is higher among Hispanics than other major groups in the Texas population. Non-citizens are not evenly distributed throughout the state as is apparent from the very wide discrepancy in the citizenship rate for the adult Hispanic population in major Texas cities.

Percentage of Adult Hispanic Population Who Are Non-Citizens

Lubbock	96.87%
San Angelo	88.88%
San Antonio	87.6%
Amarillo	80.59%
El Paso	76.19%
McAllen	73.40%
Austin	65.60%
Houston	48.41%
Dallas	40.09%

Source: 2000 Census, Summary File 4, Special Tabulation 56.

Among the conclusions that can be drawn from the table are (1) the incidence of the non-citizen population varies widely, (2) San Antonio and the areas along the Texas–Mexico border have relatively high percentages of Hispanic citizenship, and (3) the Hispanic non-citizen population clusters in large cities such as Dallas and Houston, which apparently offer greater opportunities for employment. In fact, in both of those cities more than half of the adult Hispanic population consists of non-citizens. To have some appreciation of the size on the non-citizen population in the largest cities, it is helpful to realize that there are about as many adult Hispanic non-citizens in Houston (260,900) as there is total population in Corpus Christi (277,450).

In many cities, knowing where the citizen population is will be very helpful in drawing districts. Obviously, it makes little difference in Lubbock where the Hispanic citizenship rate approaches 100 percent, but it has a significant impact in Dallas or Houston where more than half of the adult Hispanics are non-citizens. Further, these percentages are based on the 2000 census, and they may now be higher or lower.

In the past, citizenship data and other information that came from the long-form responses was not available at the time districts were being drawn. The basic redistricting data would be released in a year ending in 1, while the long-form data would not be released for another year or so. Since the information that came from the long form now comes from the ACS, it should be available at or near the time the redistricting data comes out. Because it will be a five-year or three-year rolling average, it will not be as current or geographically precise, but it will represent the best data available and it will be released more quickly than in the past. Thus, we may have more timely citizenship information, which will be very important in cities where there is a significant variance in the rate of citizenship of the various racial and ethnic groups.

Conclusion

The 2010 Census will be released in early 2011, and cities with single-member districts will need to redistrict. Cities with at-large election systems may want to evaluate the census data for their cities to see if the new numbers suggest that they may be vulnerable to a suit seeking single-member districts.

The 2011 redistricting may differ from earlier rounds of redistricting because (1) the applicability of section 5 of the Voting Rights Act is, at this time, uncertain, and (2) we will have

access to more timely, if less detailed, data on citizenship—information that can be especially relevant in light of the increasing impact immigration has on the population of some Texas cities.