OREGON

CIVIL RIGHTS

NEWSLETTER

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The Right to Vote and Voter ID Laws

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President Barack Obama was re-elected on November 6 with an overwhelming Electoral College majority and the majority of the popular vote. One significant concern underlying the election was whether voting would be suppressed through new voter-ID laws. Some people recast the issue as the need to prevent voter fraud. In the short time since the election, neither party has contended that voter suppression or voter fraud affected the outcome of the 2012 presidential election. It could be a while before a consensus emerges on whether suppression or fraud affected local contests. In any event, questions concerning voter fraud, ID laws, and suppression will remain.

Discussion of these issues takes place in the context of the Voting Rights Act of 1965. The United States Supreme Court announced in November that it will review a case this term from Alabama that directly attacks the constitutionality of section 5 of that act. Section 5 requires states with a history of discrimination (and local political entities within those states) to seek preclearance from the U.S. Department of Justice regarding any changes they wish to make to voting requirements.

The Supreme Court expressed skepticism as recently as 2009[1] about whether the section still met constitutional standards. Therefore, it is possible that this powerful tool for maintaining voter participation will be gone by our next presidential election. This article discusses the origins of the Voting Rights Act and how it is being used today to fulfill its purpose.

History of the Voting Rights Act

The 15th Amendment to the U.S. Constitution was meant to ensure that recently freed male slaves, as well as other African American males, would be able to vote. The federal army occupied the defeated Confederate states to ensure that this right to vote became reality, and to a large extent it did. However, a rising tide of white resistance, reinforced with terrorist tactics, fought back against biracial voting in the South. After the withdrawal of federal troops at the conclusion of the 1876 election, significant biracial voting in the South came to an end.[2]

This descent into black disenfranchisement took longer to accomplish in some places than others, but by the beginning of the 20th century, the ability of African Americans to vote in the South in meaningful numbers was gone. In some areas it was extinct, with majority black counties having no black registered voters.

The road back to African American enfranchisement began in earnest after World War II. The first significant congressional enactment was the Civil Rights Act of 1957. It took the combination of Senate Majority Leader Lyndon Johnson's presidential ambitions and Attorney General Herbert Brownell's commitment to civil rights to create this first breakthrough.[3] Pushing Congress from that point to the Voting Rights Act of 1965 took the commitment of the nation's major civil rights organizations, local black leaders in the South, young men and women willing to risk their lives, congressional leaders, President Johnson, and the Justice Department's Civil Rights Division, tirelessly working for voting rights, county by county.

By 1957 there had been no significant civil rights legislation since the end of Reconstruction. Lyndon Johnson was the Senate majority leader and wanted to become president of the United States. A Texan, he knew that the liberal wing of the Democratic Party would never allow him to receive the nomination if he was seen as part of the Southern Democratic block that opposed all civil rights legislation. Johnson believed that passing a civil rights bill would greatly improve his chances of winning the presidency.

At the same time, Attorney General Herbert Brownell believed that passing a comprehensive civil rights bill was necessary. He believed in civil rights, and he thought that a civil rights act would help bring African Americans back to the Republican Party.

Brownell and a coalition of Northern, liberal Democrats and Republicans wanted a comprehensive bill

CONTINUED ON PAGE 5

✦ In This Issue

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USDOJ Settlements Address Mental Health Services and Police Use of Force

Bob Joondeph
Disability Rights Oregon

Last month, the U.S. Department of Justice (USDOJ) entered into settlement agreements with the State of Oregon and the City of Portland concerning some aspects of their treatment of people living with mental illness. After outlining the history of the USDOJ's investigations, this article summarizes the terms of those agreements.

USDOJ Investigations

In September 2004, Avel Gordly, then a state senator, sent a letter to the USDOJ asking it to open an investigation into possible civil rights violations of past and current patients at the Oregon State Hospital (OSH), including "serious overcrowding and understaffing." On June 14, 2006, the USDOJ informed Governor Ted Kulongoski that it was initiating an investigation of conditions and practices at OSH, pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), 47 USC § 1997. CRIPA authorizes the USDOJ to seek a remedy for a pattern and practice of conduct that violates the constitutional or federal statutory rights of residents of state facilities such as OSH.

While the USDOJ was investigating, the state took several major steps to improve its mental health services, including a legislative allocation of $9.3 million to improve the speed of discharge from OSH (and settle federal litigation brought on behalf of OSH patients by Disability Rights Oregon) and legislative approval of $458.1 million to replace OSH with two new state hospitals. The state also hired two nationally recognized consultants, a new OSH superintendent, and a "special master" to oversee improvements at OSH.

In January 2008, the USDOJ delivered a summary of its findings to the governor. It found that Oregon was violating the civil rights of OSH residents by providing

- Inadequate protection from harm
- Inadequate mental health care
- Inappropriate seclusion and restraint
- Inadequate nursing care
- Inadequate discharge planning and placement in the most integrated setting

Subsequent negotiations have still not yielded a formal agreement in this matter. Oregon's position has been that it is undertaking good faith efforts to address the inadequate conditions at OSH and does not want federal court involvement. It has also contended that the USDOJ does not have the authority to enforce a requirement that patients be placed in the most integrated setting.

In 2009, on the tenth anniversary of the U.S. Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), President Obama launched "The Year of Community Living" and directed federal agencies to vigorously enforce the civil rights of Americans with disabilities. The USDOJ responded by making enforcement of *Olmstead* a top priority. In *Olmstead*, the U.S. Supreme Court held that Title II of the ADA entitles individuals with disabilities to receive public services in the least segregated setting that is appropriate to their care needs as long as it does not require government to fundamentally alter its services. In 2010, the USDOJ announced a national initiative to investigate ADA complaints and enforce the *Olmstead* "integration mandate" of the ADA.

In early 2011, USDOJ lawyers met with Oregon officials and community partners in a renewal of its investigation of whether Oregon was honoring the ADA right of OSH patients to placement in the most integrated setting.

CONTINUED ON PAGE 3

CONTINUED FROM PAGE 2

In June 2011, the USDOJ also announced that it was opening an investigation into the use of force by the Portland Police Bureau (PPB) pursuant to 42 USC § 14141, which authorizes the USDOJ to seek declaratory or equitable relief to remedy a pattern or practice of conduct by law enforcement that deprives individuals of their constitutional or federal statutory rights. This investigation was to examine whether there was a pattern or practice of excessive force used by PPB officers, particularly against people living with mental illness.

The remainder of this article will summarize the terms of settlement of both the PPB excessive force investigation and the *Olmstead* investigation. The final terms of the PPB settlement were presented to the public on November 8, 2012, and approved by the Portland City Council on November 14. The final terms of the *Olmstead* settlement were included in a letter to the state from the USDOJ dated November 9. The contents of the agreements are certainly related in time, but their terms also reveal a consistency in legal theory and policy objective.

State of Oregon Agreement

The USDOJ initiated an investigation of Oregon because of chronic overcrowding in its state hospitals and lack of capacity in community mental health services.

In a settlement that is as unique as Oregon's health care transformation process, the USDOJ agreed to work with the state "by embedding reform in the design of the State's health care system." The agreement calls for Oregon to collect statewide behavioral health data about services currently being provided in order to assess the nature of those services and the outcomes they achieve. Attached to the agreement is a comprehensive list of "metrics" that spells out the data to be collected. Data collection requirements are to be placed in provider contracts, regulations, and other guidance documents. The collected information is to be reviewed and evaluated by the parties to identify gaps in services and how those gaps can be filled. This process will continue through 2015.

Among the "Program Outcome Measures" to be quantified and assessed are eight factors affecting the "ability to effectively manage behavioral health crises in a community setting" and the percentage of adults with severe and persistent mental illness who had a criminal justice event (jail, arrest, other interaction with law enforcement, etc.) within the year. These factors demonstrate that the USDOJ will be assessing how well Portland and other Oregon communities address the interaction of law enforcement with people who have behavioral health needs.

Although this settlement agreement recognizes that the USDOJ has not completed its investigation of conditions at OSH, it mentions that the parties are hopeful that the work set out in the agreement will "aid Oregon in providing treatment in the setting that is most integrated and appropriate." Such an achievement will require not only an adequate array of mental health services, housing, employment opportunities, and social supports but also a safe and humane approach to community crisis management.

City of Portland Agreement

The settlement agreement entered into between the USDOJ and the City of Portland and PPB spans 83 pages and contains over 100 individual points of agreement. Its stated purpose is "to ensure that encounters between police and persons with perceived or actual mental illness, or experiencing a mental health crisis, do not result in unnecessary or excessive force." The agreement is divided into seven substantive areas of concern:

- Use of Force
- Training
- Community-Based Mental Health Services
- Crisis Intervention
- Officer Accountability
- Community Engagement and Oversight
- Enforcement

Use of Force

The PPB has agreed to revise its existing use-of-force policies in order to minimize the use of force against individuals in mental health crisis and direct such people to appropriate mental health services if they so desire. These modifications will include the increased use of disengagement and de-escalation techniques, use of specialized units, and improved information-sharing. Use of tasers will be more limited. Use-of-force reporting and supervisory review of reports will be enhanced. Compliance audits related to the use of force will be instituted.

Training

Within 180 days, the PPB is to review data to determine if its training helps to effectively protect the constitutional rights of individuals perceived to have a mental illness and to ensure public trust and safety. Trainers will increase the use of role-playing scenarios and interactive exercises that illustrate the proper use of force; emphasize de-escalation techniques; review an officer's duty to procure medical care whenever a subject is injured during a force event; discuss alternatives to force, such as disengagement, area containment, surveillance, waiting out a subject, summoning reinforcements, requesting specialized units that include officers and other professionals with mental health training, or delaying arrest; describe situations in which force could lead to potential civil or criminal liability; and discourage the use of profanity and insulting language. Supervisors are to receive training on appropriate oversight and planning.

Community-Based Mental Health Services

The agreement refers to the USDOJ-Oregon *Olmstead* agreement and Or-

CONTINUED ON PAGE 4

Civil Rights Section Co-Hosts CLE on Litigating Section 1983 Cases

The Civil Rights Section partnered with the Federal Bar Association and the Oregon Chapter of the National Bar Association in hosting its annual CLE on October 19. The program was titled "Litigating Section 1983 Civil Rights Cases: Current Issues & Trends." Held at the U. S. Courthouse in Portland, the event attracted 93 attendees!

Experts covered a range of topics. Ken Crowley of the Oregon Department of Justice began the day with an overview of 42 USC § 1983. Judges Anna Brown, Michael Mosman, and Mark Clarke offered tips on presenting these cases to the court and jury, and Judge Thomas Coffin addressed warrantless searches of electronic devices. Attorneys Brandon Mayfield and Kevin Diaz, legal director of the ACLU of Oregon, presented an eye-opening, and at times deeply personal, account of racial and religious profiling in police work. Deputy City Attorney Jim Rice discussed attorney fees, and Paula Barran, Janet Hoffman, and Dana Sullivan discussed issues that arise in employment claims.

Speakers from the Portland Police Bureau, Multnomah County Jail, Office of Independent Review, and Disability Rights Oregon presented information on how police and jail staff are trained to interact with people who are mentally ill, and problems that often arise when a person in a mental health crisis and a police officer come into contact. The day ended with a presentation by Assistant U. S. Attorney Kelly Zusman and attorney David Angeli on how recent court decisions involving search-and-seizure issues may affect litigation of section 1983 cases.

The section is extremely grateful to the volunteers who developed and presented this CLE and to event sponsors Barran Liebman; Schwabe, Williamson & Wyatt; and Stoel Rives. A video recording of the CLE will soon be made available. ✦

USDOJ SETTLEMENTS CONTINUED FROM PAGE 3

egon's new community care organizations (CCOs), which are tasked with administering the state's Medicaid funds for most public mental health services. The agreement "expects" that local CCOs will establish "one or more drop-off center(s) for first responders and public walk-in centers for individuals with addictions and/or behavioral health service needs." Local CCOs are to immediately create subcommittees focused on addictions and mental health to pursue long-term improvements to the behavioral health system in seven specified areas, including the expansion of peer services.

Crisis Intervention

Within 60 days, the PPB is to create an Addictions and Behavioral Health Unit, which will oversee and coordinate a Crisis Intervention Team (C-I Team), Mobile Crisis Prevention Team (MCPT), and Service Coordination Team. The PPB is to continue crisis intervention training for all officers but also create a C-I Team of 60–80 volunteer officers with enhanced training and responsibility for responding to crisis situations. The MCPT, which deploy cars with one officer and one mental health professional, will be expanded from a single car for all of Portland to one car per precinct. The agreement also calls for changes in how calls to crisis lines are routed and triaged.

Officer Accountability

All administrative investigations of officer misconduct will need to be completed within 180 days. The PPB is to revise its protocols for on-scene investigations following the use of lethal force. The city will retain its present Police Review Board with certain procedural and membership changes to enhance efficiency, transparency, and effectiveness.

Community Engagement and Oversight

A new Community Oversight Advisory Board will be created to independently assess the implementation of the settlement agreement, make recommendations, and inform the public. It will have 15 members, who are independent of the city and the PPB, and it will be chaired by a compliance officer and community liaison (COCL) who is to be "independent of PPB" and "responsive to the entire City Council, the public, and DOJ." The COCL is to conduct semi-annual outcome assessments of the city and PPB's implementation of the settlement agreement.

Enforcement

The settlement agreement is to be jointly filed with the U.S. District Court. The parties will move the court to conditionally dismiss the underlying complaint with prejudice while retaining jurisdiction for enforcement purposes. It is anticipated that substantial compliance with the settlement agreement will be achieved by October 12, 2017.

Looking Forward

The USDOJ settlements offer a rare opportunity to adjust Portland's relationship with its police, improve public safety, and reform our plainly inadequate mental health services. The Portland investigation, of course, responded to community concerns about incidents of violence involving police. But the USDOJ has also been engaged in a lengthy study and critique of public mental health services in all of Oregon. It started with unsafe conditions at OSH and determined that one cause of overcrowding was the lack of community resources for discharge. In Portland, lack of mental health resources means that police are left as the first responders to a mental health crisis that can be handed off only to jail or an emergency room. With three investigations, two settlement agreements, and one new state hospital, Oregon is poised for a more humane future. ✦

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Back to page 1

CONTINUED FROM PAGE 1

that protected education and voting rights. Unfortunately, Johnson and Eisenhower wanted only a modest bill. (J. Edgar Hoover pushed for no bill at all.) Ironically, Johnson was able to strip from the bill many provisions he would later champion in 1964 and 1965.

In the end, "modest" was all that could get passed in 1957. Roy Wilkins, head of the NAACP, referred to the bill as "crumb." It did, however, create the Civil Rights Division, the U.S. Civil Rights Commission as a fact-finding body, and a modest ability to enforce voting rights. The voting rights provisions were somewhat strengthened by another modest bill in 1960, and the Civil Rights Division began to enforce the law.

Enforcing the right to vote in the South was painfully slow. Selma, Alabama, the county seat of Dallas County, became infamous as the focus of the voting rights struggle in 1965. But the U.S. Department of Justice had begun fighting it out in Dallas County many years before "Bloody Sunday" on the Edmund Pettus Bridge made Selma a household word.

The Justice Department had clear proof of discrimination by Dallas County and filed a suit for injunctive relief in the U.S. District Court for the Southern District of Alabama in 1961. The district court judge agreed that the prior registrars had behaved badly. But those registrars had been replaced after the lawsuit was filed, and because the judge was sure the new registrars would behave better, he saw no reason for an injunction. *United States v. Atkins*, 210 F. Supp. 441 (S.D. Ala. 1962). The Fifth Circuit Court of Appeals told the district court that the past matters and ordered it to issue an injunction. *United States v. Atkins*, 323 F.2d 733 (5th Cir. 1963).

But in 1965, after four years of litigation affecting just one county in the state of Alabama and using up significant Justice Department resources, the overwhelming majority of African American citizens in Dallas County were still not registered to vote. And they would not be able to register for years to come.

In December 1964, at the winter planning session of the Southern Christian Leadership Conference (SCLC), Amelia Boynton, a local Selma businesswoman and civil rights activist,[4] lobbied Dr. Martin Luther King Jr. to bring his voting rights campaign to her hometown. Knowing that the project would have strong local support was critical to King's decision to concentrate on Selma.

Beginning in January 1965, the SCLC and the Student Nonviolent Coordinating Committee (SNCC) carried on a relentless campaign for voting rights that stayed in the national spotlight.[5] The beatings and arresting of hundreds of marchers to the Dallas County Courthouse, the killing of Jimmie Lee Jackson and Rev. James Reeb, and the actions by Governor George Wallace's state troopers, seen on national television brutally attacking peaceful marchers, caused the White House and the Justice Department to dramatically speed up the drafting of the Voting Rights Act of 1965.

The new law made it significantly easier for African Americans to register to vote. Poll taxes and literacy tests that had been used to prevent African Americans from voting were deemed unlawful. Under the new law, no one could be forced to subjectively interpret an obscure segment of the Mississippi state constitution to the satisfaction of a registrar not inclined to allow African Americans to vote.

There was also an understanding built into the legislation that as a country, we had been down this path before. States had found ways to disenfranchise black citizens in the 19th century; to prevent them from doing so again, section 5 of the Voting Rights Act required that in certain jurisdictions any change in law affecting the vote had to be approved, or precleared, by the U.S. Department of Justice. In a speech at Rutgers Law School this April, Assistant Attorney General for Civil Rights Tom Perez explained:

> Jurisdictions covered by Section 5 are required to obtain permission—"preclearance"—for every change they make to their voting procedures and practices, and to demonstrate both that the change has no discriminatory purpose and that it has no discriminatory or retrogressive effect.
>
> Changes ranging from moving a polling location to a different place, to the enactment of a statewide redistricting plan, must be precleared before they can go into effect. A jurisdiction can obtain preclearance by either filing administratively with the Civil Rights Division, or by filing a lawsuit in front of a three-judge panel in the District of Columbia. Under either scenario, the Civil Rights Division is involved. If the jurisdiction chooses to file administratively with the Division—and most jurisdictions take this route because it is faster and cheaper—then the Division acts as a quasi judicial body in reviewing this submission. In these circumstances, if the Department determines that the jurisdiction has met its burden of proof, then the proposed change is precleared. And if the Department determines that the jurisdiction can't meet its burden of proof, then we will object to the change, and it can't be implemented.[6]

One critical element of section 5 is that it places the burden on the petitioning jurisdiction to demonstrate that the law has neither a discriminatory intent nor a discriminatory effect. This placement of the burden of proof has proved to be crucial in recent cases.

The preclearance provisions of the Voting Right Act were meant to be temporary—the original provisions were put in place for five years. In 1970 they were renewed for another five years, and in 1975 Congress

CONTINUED ON PAGE 6

CONTINUED FROM PAGE 5

renewed them for seven years. Each time the provisions came up for renewal, Congress had to determine whether they were still needed. In 1982 Congress decided to renew the temporary provisions for 25 years.

In 2006 Congress once again debated the need. With a House vote of 390 in favor and 33 opposed, and a unanimous Senate vote of 98 in favor, Congress renewed the preclearance provisions for another 25 years. President George W. Bush then signed the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.

Crawford v. Marion County Election Board

In the 2012 election cycle, the most significant voting rights issues involved new voter-ID laws that were passed by states with the expressed purpose of reducing voter fraud at the polls. The new laws raised the specter of voter suppression within black and Hispanic communities and led to several court cases decided on the eve of the presidential election.

A state's right to significantly tighten its voter ID laws received sanction from the U.S. Supreme Court in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). Indiana had passed a new law requiring citizens voting in person on election day to present a photo identification issued by the government. The law did not apply to absentee voting, and an exception was made for people living in nursing homes. The state also eliminated the fees for photo IDs issued by the Indiana Bureau of Motor Vehicles for people without a driver's license who were at least 18 years old.

The opinion upholding the constitutionality of Indiana's law was written by Justice John Paul Stevens. It's important to note that the case involved a state not covered by section 5 of the Voting Rights Act. Therefore, the burden of proof rested on the opponents of the new law.

The Court reiterated the general rule that "evenhanded restrictions that protect the integrity and reliability of the electoral process itself" are not invidious and satisfy the standard set forth in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (holding that Virginia could not condition the right to vote on payment of a poll tax). In *Crawford*, the Court explained that "a court evaluating a constitutional challenge to an election regulation [must] weigh the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'"

The first interest Indiana put forward to justify its photo ID requirement was its interest in deterring and detecting voter fraud. In finding this interest appropriate, Justice Stevens relied on a report by the Commission on Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James Baker. In the report, they wrote:

> There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo identification cards currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.

Ironically, Justice Stevens noted, "The only kind of voter fraud [the Indiana law] addresses is in-person voter impersonation at polling places. The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history." But Justice Stevens resurrected the ghosts of Tammany Hall corruption from the 19th century to affirm that such skullduggery was part of our electoral history. The state also advanced as a justification the need to safeguard voter confidence in the integrity and legitimacy of representative government.

A state's right to significantly tighten its voter ID laws received sanction from the U.S. Supreme Court in Crawford v. Marion County Election Board, *553 U.S. 181 (2008).*

The Supreme Court accepted the state's reasons as legitimate. It then had to weigh these legitimate interests against the burden the law imposed on the state's citizens. The Court noted that the new photo ID cards were free. "For most voters who need [the ID], the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." The evidence in the record was insufficient to convince the Court that the new rule would place an excessively burdensome requirement on any class of voter.

The Court was not blind to the evidence in the record that when Indiana's General Assembly voted on the new law, all the Republicans voted for it and all the Democrats voted against it. Justice Stevens wrote:

> It is fair to infer that partisan considerations may have played a significant role in the decision to enact [the law]. If such considerations had provided the only justification for a photo identification requirement, we may also assume that [the law] would suffer the same fate as the poll tax at issue in *Harper*.
>
> But if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motiva-

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CONTINUED FROM PAGE 6

> tion for the votes of individual legislators. The state interests identified as justifications for [the law] are both neutral and sufficiently strong to require us to reject petitioner's facial attack on the statute. The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting "the integrity and reliability of the electoral process."

Voter ID Laws in 2012

The Supreme Court's *Crawford* decision emboldened many states to enact voter ID laws premised on expressions of concern about voter fraud. The states may have assumed that their new laws would easily be upheld based on the *Crawford* decision. That has not been the case. Two examples of this litigation are discussed below.

The most prominent voter ID law enacted by a state not subject to section 5 of the Voting Rights Act has come from Pennsylvania. Although the Pennsylvania law, enacted in April 2012, was presumably meant to deter voter fraud, it became cloaked in partisan politics when Michael Turzai, the state's Republican House majority leader, announced in June, "Voter ID, which is gonna allow Governor Romney to win the state of Pennsylvania, done."[7]

Note that in the 2008 presidential election, President Obama beat Senator McCain by over 600,000 votes in Pennsylvania. Given that there is no legitimate claim of voter fraud on such a massive scale, Turzai's comment is difficult to reconcile with a concern about voter fraud as the primary motivation for the ID law, rather than voter suppression.

Opponents of Pennsylvania's new law filed a lawsuit seeking to have it invalidated. The Pennsylvania Commonwealth Court upheld the law, but the Pennsylvania Supreme Court found the law, as applied, problematic.

All parties agreed that the state could impose a voter ID law. The law as passed required that the Pennsylvania Department of Transportation (PennDOT) issue ID cards at no cost, and the law also established a policy of liberal access to ID cards. PennDOT, however, decided to apply strict requirements to issuing the IDs, and the ID cards were required to be "secure" ID and meet the requirements of the U.S. Department of Homeland Security. Pennsylvania is now sorting out how to switch to a less secure card.

The Pennsylvania Supreme Court accepted the plaintiffs' argument that the minority of voters affected by the law "includes members of the most vulnerable segments of our society (the elderly, disabled members of our community, and the financially disadvantaged)." *Applewhite v. Commonwealth*, No. 71 MAP 2012, slip op. at 5 (Pa. September 18, 2012)(*per curiam*). The supreme court ordered the commonwealth court to reconsider whether the procedures used for deployment of the new cards met the law's requirement for liberal access and whether there would be no disenfranchisement under the new law.

Applying this test, the commonwealth court found little doubt that some disenfranchisement would occur, and as a result the court enjoined the new law from taking effect until the difficulties in issuing the cards were resolved. *Applewhite v. Commonwealth*, No. 330 M.D. 2012 (Pa. Commw. Ct. October 2, 2012).

States that are covered by section 5 of the Voting Rights Act have the burden of proving not only that the new law did not have a discriminatory purpose but that it will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976).

Texas, a state covered by section 5, recently found that *Crawford* afforded little protection for its new voter ID law, enacted in 2011. Under the prior law, Texas had deemed many different documents to be acceptable

The new laws raised the specter of voter suppression within black and Hispanic communities and led to several court cases decided on the eve of the presidential election.

voter ID, including expired driver's licenses, utility bills, and "official mail addressed to the person."[8] The new law significantly tightened the ID requirements. As a result, many Texans, in order to vote, would have to obtain a birth certificate at a cost of $22 and travel to an office of the Texas Department of Public Safety to obtain the new ID.

Texas sought preclearance from the U.S. Department of Justice, but it was denied. Attorney General Eric Holder made no finding as to discriminatory intent, but he did find that the law would have a disproportionate effect on Hispanic registered voters. As a result, Texas filed a complaint in the U.S. District Court for the District of Columbia seeking judicial approval of its new law.

The three-judge panel turned Texas down. The court accepted Texas's stated reason for enacting the law, noting that "[a] state interest that is unquestionably legitimate for Indiana—without *any* concrete evidence of a problem—is unquestionably legitimate for Texas as well." *Texas v. Holder*, No. 12-cv-128, slip op. at 21 (D.C.D.C. August 30, 2012). The court also stated that "there are certain responsibilities and inconveniences that citizens must bear in order to exercise their right to vote, and a one-time trip to the driver's license office is, in most situations, simply one of those responsibilities." *Id.* at 22.

The court found, however, that the new Texas law was too strict and the state could not show that there would be no disproportionate impact on

CONTINUED ON PAGE 8

Hispanics. The court noted that the Texas law was much stricter than a recent Georgia voter ID law that had received preclearance from the Justice Department.[9]

The court also noted that the $22 cost of a birth certificate in Texas was almost double the most expensive cost for the Indiana ID ($3–$12). And the court noted that it was much more difficult to get to a Department of Public Safety office in Texas than it was to visit a Bureau of Motor Vehicles office in Indiana—some Texans would have to travel hundreds of miles round trip to get their IDs. The court said:

> To be sure, a section 5 case cannot turn on wealth alone. In Texas, however, the poor are disproportionately racial minorities. According to undisputed U.S. Census data, the poverty rate in Texas is 25.8% for Hispanics and 23.3% for African Americans, compared to just 8.8% for whites. . . .
>
> . . . 13.1% of African Americans and 7.3% of Hispanics live in households without access to a motor vehicle, compared with only 3.8% of whites.

Id. at 48. The court found that regardless of its intent, the Texas law would disproportionately affect Hispanic and African American voters. For that reason the court did not permit the law to take effect.

Would the decision have been different if the burden of proof had been on the United States? Whether the courts will answer that question hinges on whether the restrictions in section 5 of the Voting Rights Act remain in place. In November, the U.S. Supreme Court decided to address section 5, granting certiorari in *Shelby County v. Holder*, No. 12-96, which challenges the constitutionality of section 5's renewed preclearance provisions.

Shelby County, part of suburban Birmingham, Alabama, is arguing that the need for these provisions no longer exists, or at a minimum, Congress did not make a sufficient record in 2006 to justify their renewal. Both the D.C. District Court (811 F. Supp. 2d 424, 2011) and the D.C. Court of Appeals (679 F.3d 848, 2012) have ruled against the county. Both courts noted Chief Justice Roberts's admonition in *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009), that the renewed provisions raised serious constitutional questions, and Justice Thomas's dissent in that case, stating that he would overturn the law.

Because Shelby County is not arguing that the law is unconstitutional as applied, but that it is unconstitutional on its face, both courts looked to the record that Congress made about the need to combat discrimination in voting throughout the states covered by section 5. Both the district court and the appellate court found that Congress had made the necessary record.

The Supreme Court is expected to hear arguments in *Shelby County v. Holder* in the spring of 2013. If the law is upheld, the ongoing tension between covered states and the Department of Justice will likely continue. If the Court finds that Congress did not make a sufficient record to justify the continued preclearance provisions, the conflict will return to Congress. Congress will then have to decide whether to make a new record that supports the need for the provisions or to do nothing, in effect concluding that this phase of the civil rights movement is over. Ironically, the wave of preclearance litigation that was a prelude to the November 2012 election could become part of the next round of congressional evidence gathering. ✦

Ron Silver is the chief of the Civil Division in the U.S. Attorney's Office in Portland. The views expressed in this article do not represent the official position of the Department of Justice.

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Endnotes

1. *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009).

2. Nicholas Lemann describes the death of biracial voting in Reconstruction Mississippi in his book *Redemption*.

3. Several books describe the give-and-take that led to passage of the Civil Rights Act of 1957, including *The Walls of Jericho*, by Robert Mann; *Master of the Senate*, by Robert Caro; and *Advising Ike*, by Herbert Brownell.

4. Her son was the plaintiff in *Boynton v. Virginia*, 364 U.S. 454 (1960), the Supreme Court case that outlawed segregated interstate bus facilities and precipitated the Freedom Rides of 1961.

5. The Selma story is well told in *At Canaan's Edge: America in the King Years 1965–1968*, by Taylor Branch; *Selma, 1965: The March That Changed the South*, by Charles Fager; and *Selma, Lord, Selma: Girlhood Memories of the Civil Rights Days*, by Sheyann Webb and Rachel West Nelson. The changes the Voting Rights Act brought to Selma are entertainingly told by J.L. Chestnut in his memoir, *Black in Selma*. (In 2009, the Selma City Council changed the former Jeff Davis Ave. to J.L. Chestnut Blvd.)

6. www.justice.gov/crt/opa/pr/speeches/2012/crt-speech-1204131.html.

7. www.politicspa.com/turzai-voter-id-law-means-romney-can-win-pa/37153.

8. This does bring to mind the courtroom climax in *Miracle on 34th Street*.

9. Georgia accepted student IDs, paycheck stubs, and Medicare or Medicaid statements, among 24 categories of acceptable documents.

Back to page 1