

Texas Redistricting 2011-12: A few lessons learned

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Legal challenges for redistricting plans enacted by a state

- (1) challenges in state court
- (2) challenges in federal court
- (3) challenges related to Sec. 5 preclearance in front of the US Department of Justice or the Federal District Court for the District of Columbia
- The relationship among the various challenges is what makes for complex litigation.

Develop a redistricting litigation strategy

- “Win” everywhere isn’t really a strategy and usually cedes too much control to events
- Instead, consider a strategy that maximizes the use of legislatively enacted plans in the upcoming election according to the election schedule the state has prescribed.
- As litigation proceeds, you may find that maximizing the use of enacted plans requires you to sacrifice the state’s election schedule or that preserving the election schedule means you sacrifice more of the enacted plans.

The choice of venue for preclearance or why litigation in the DC District Court is a lot harder than it looks

- Under Sec. 5, a covered jurisdiction must receive federal approval (“preclearance”) before most changes affecting voting may take effect. Preclearance is achieved administratively, through DOJ, or judicially, through a three-judge panel of the DC District Court.
- Covered jurisdictions:
 - Whole states of AL, AK, AZ, GA, LA, MS, SC, TX, VA
 - Part coverage of CA, FL, MI, NC, NH, NY, SD

- Following the 2006 amendments to the VRA, the covered jurisdiction has the burden of proof to show that the voting change does not have the purpose or the effect of denying or abridging minority voting rights.
- In determining whether the effects burden is met in a redistricting plan, a functional analysis is used that compares the number of minority districts in the existing (“benchmark”) plan and the proposed plan to make sure no reduction (“retrogression”) has occurred.

In the 2011-12 preclearance cycle:.

- Most states chose to submit either exclusively to DOJ or in conjunction w. DC Court filing. All plans submitted to DOJ were approved except NH congressional which is still pending (first out 8/20/2012).
- MS legislative plans have not yet been submitted for preclearance—no elections in 2012.
- TX, MI, and AL (elections 2014) chose to submit only to DC Court. MI approved, TX pending, AL just filed.

Issues with judicial preclearance: Timing

- Under administrative preclearance DOJ has 60 days to make determination but can ask for another 60 days.
- Judicial preclearance is under a normal trial schedule with no inherent priority. Three federal judges' timetables must be coordinated to reach a trial setting.
- Texas filed suit July 19, 2011, and had a candidate filing period that was scheduled to open Nov. 12, 2011.

Issues with judicial preclearance: Intervenors

- In administrative preclearance, DOJ actively seeks comments from interested minority groups and considers all comments that are submitted. Otherwise outsiders have no formal role.
- In judicial preclearance, motions to intervene by interested parties are usually granted. Intervenors add to the complexity of discovery and trial and may greatly enhance the legal experience and resources available to opponents of preclearance.

Issues with judicial preclearance: Cost and complexity

- Administrative preclearance through DOJ is relatively low cost and informal. Since DOJ sets the functional analysis for the effects test, only a limited amount of preparation can be done primarily through reviewing past DOJ objections and the few court cases. This approach is especially suitable for a jurisdiction that does not want to commit the legal and financial resources required for a trial.

- Judicial preclearance:
 - can be highly complex and involve significant trial costs for outside counsel, expert witnesses, and travel costs to DC. The state may be liable for attorney's fees for intervenors that are prevailing parties.
 - may require counsel experienced w. preclearance, at least as a consultant, and additional trial counsel may also be helpful.
 - will have a more neutral forum on developing the standards by which preclearance is judged; judges do tend to give some deference to DOJ views.

Issues with judicial preclearance: Discovery

- Administrative preclearance involves the submission of information to DOJ listed by the regulations and additional materials requested by DOJ.
- Judicial preclearance involves a discovery process that may become a significant burden as the state usually has custody of most relevant materials. Despite the trial seeming to move slowly, discovery may be accelerated and highly invasive. DC Court not particularly deferential to state privileges (legislative, attorney-client), but a recent ruling in the Texas Voter ID case seems to more firmly recognize legislative privilege in a preclearance case.

So how did judicial preclearance go for Texas redistricting plans in 2011-12?

- State initially sought a motion for summary judgment on preclearance. This motion frequently is used to narrow issues and weed out less meritorious claims. DC Court's initial ruling on the motion occurred Nov. 8, 2011 and was a short order denying the motion that provided little guidance as to which areas of preclearance were problematic. This left the state with no preclearance for its plans and a candidate filing period opening four days later.

- A full opinion on the summary judgment motion was released on Dec. 22, 2011 (Texas. v. U.S., 831 F. Supp. 2d 244). The functional analysis for Sec. 5 effects test was laid out in some detail—can't use demographic data only (as the state initially did), but such data serves as a starting point. The use of the wrong standard by Texas and genuine issues of facts regarding purpose meant summary judgment not appropriate. Other highlights:
 - “ability to elect” districts is the standard for the effects test and doesn't include districts that may be on the verge of becoming “ability to elect” districts in the benchmark

- besides demographics, a functional analysis includes whether cohesive voting exists among minorities, whether racially polarized voting exists, and analysis of minority voter registration and turnout statistics
- minority coalition and crossover districts could be “ability to elect” districts in benchmark
- when new congressional seats are awarded, relative decline in percentage of minority seats is not considered for the effects test but may be considered under the purpose test

- Trial was then held in the DC Court in the last two weeks of Jan. 2012. As of Aug. 1, 2012, no opinion has been issued and thus Texas has no precleared legislative or congressional plans.

Meanwhile back at the Alamo . . .

- In spring 2011, a number of cases challenging Texas legislative and congressional plans were consolidated in Federal Court in San Antonio in *Perez v. Perry*.
- Claims include intentional discrimination and violations of one-person, one-vote standard and Sec. 2 of VRA.
- Trial was held on congressional and state house plans on Sept 6-16, 2011, and senate plan on Feb. 8, 2012.
- Resolution of the claims was delayed pending a preclearance ruling.

- The DC Court's Nov. 8 ruling on preclearance left the SA Court with no precleared plans and little guidance as to what objections were valid.
- In late November 2011, by a 2-1 decision, court ruled that it was not required to defer to the enacted house and congressional plans since they weren't precleared. Instead, the court drew remedial interim plans under the standards of a court-drawn plan; though borrowed heavily from enacted plans in areas that weren't challenged
- By a 3-0 decision, court in state senate case only modified 5 districts in its interim plan to cure violations alleged in one senate district.
- In this phase, the SA Court adjusted the upcoming filing period but otherwise left the state's primary schedule alone in imposing interim plans.

SCOTUS appeal

- The state appealed the judgment on all three maps to the Supreme Court. On Dec. 9, 2011, SCOTUS granted a stay and set oral arguments for Jan. 9, 2012.
- On Jan. 20, 2012, SCOTUS handed down the 8-1 opinion in *Perry v. Perez* (565 U. S. _____) which vacated the November interim maps drawn by the SA Court. SCOTUS found that the SA court should provide new maps that use the state's enacted plans as a starting point. The SA Court should then:

- determine which Sec. 2 or constitutional claims have a likelihood of success on the merits;
- determine which parts of the state's plans have a reasonable probability of failing to get Sec. 5 preclearance; reasonable probability means the Sec. 5 challenge is not insubstantial; and
- prepare interim maps accordingly.

- Compliance with the SCOTUS decision was relatively easy with regard to maps. The revised maps handed down in late February 2012 by SA Court changed fewer districts than the November maps and relied in part on settlements achieved among the state and several parties. The court made clear the maps were interim maps for use only in 2012.

The election schedule changes

- While guidance was provided from SCOTUS on maps, the changes in the primary election schedule were left up to the SA Court. The court held several hearings in an attempt to bring consensus among all interested persons including the state, the political parties, and the county elections administrators.
- Initially during the pendency of the Perez v. Perry appeal, the SA Court moved the primary from March 6 to April 3. By the time the appeal was resolved and new maps prepared, this date was no longer viable.

- Some parties advocated a split primary approach—having the presidential primary and certain other races on an earlier date and the congressional and legislative races on a later one. The added cost (mainly to the counties holding the elections) and other logistical issues weighed against this approach.
- The federal MOVE Act requirement of providing ballots to military and overseas voters 45 days before election day, the majority vote requirement in a primary under Texas law, and the timing of local elections were the biggest limiting factors in rescheduling the primaries.

- Ultimately, following agreement of most interested persons, the SA court ordered one primary to be held on May 29, 2012 and a run-off on July 31.
- The resulting change effectively removed Texas from the Republican presidential selection process. Turnout in the R primary in 2012 was very similar to 2010 and 2008, while D primary turnout was down dramatically from 2008 and slightly from 2010. Turnout in the R run-off was also fairly high (1.1 million) which contrasted with predictions of a low-turnout election held in the middle of the summer.

What's next for Texas?

- As of Aug. 1, 2012, no ruling on preclearance has been made. Hopefully this will occur before the start of the next legislative session in Jan. 2013. Following this ruling, the SA Court will likely need to make its final rulings on the Sec. 2 and constitutional challenges to the enacted plans so the Texas Legislature has the opportunity to remedy all defects during its next regular session. Legislature will then need to either enact new plans or leave it to the SA Court to impose a permanent remedy.