

Federalism and the Voting Rights Act

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The Supreme Court, at its first scheduling conference of the year, has granted review in the case of *Northwest Austin Municipal Utility District Number One v. Mukasey*, 2008 WL 4153806 (U.S. Jan. 09, 2009) (No. 08-322).

Northwest Austin Municipal Utility District centers around the "preclearance" obligation in the Voting Rights Act of 1965. Section 5 of the Act prohibits "covered jurisdictions" (states and political subdivisions with histories of racial discrimination in voting) from making any changes in their voting procedures without first demonstrating to the federal government (the Attorney General or a three-judge panel of the court) that the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." If the Attorney General makes no objection after sixty days, or if the district court grants a declaratory judgment, the jurisdiction may implement the change. Congress adopted a formula that utilized two proxies for discrimination to be used in determining which jurisdictions would be "covered jurisdictions," and incorporated two procedures for adjusting coverage over time, including those that allowed jurisdictions to earn exemptions. A so-called "bail-out" provision, 42 U.S.C. § 1973b(a), allowed jurisdictions that met the stated requirements to terminate their Section 5 preclearance obligation.

Congress has reauthorized and extended these provisions several times, most recently in 2006 for a further 25 years (the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §2, 120 Stat. 577). Significantly, in 1975, Congress amended the legislation by the addition of a prohibition of voting discrimination against certain language minorities (persons of American Indian, Asian American, Native Alaskan, and Spanish descent). As a result of the language minority amendments, Texas (and all of its political subdivisions) became a covered jurisdiction, subject to Section 5.

Just over a week after the 2006 reauthorization was passed, the Northwest Austin Municipal Utility District Number One, a small utility district in Austin, Texas, filed suit seeking a bail-out or, in the alternative, bringing a facial challenge to the extension, alleging that, in 2006, when Congress extended the provision, it lacked sufficient evidence of racial discrimination in voting to justify the provision's intrusion upon state sovereignty. The district court, in a ruling reported at 573 F. Supp.2d 221 (D.C. Cir. 2008), rejected both the request for a bail-out (finding that the plaintiff was not a "political subdivision" eligible to seek a bail-out because it did not conduct voter registration) and the challenge to the validity of the legislation. In upholding the law, the unanimous court held that, first, the applicable standard of review was the rationality standard in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and not the stricter "congruence and proportionality" test (i.e., that the statutory scheme to remedy and prevent violations of the protected right was congruent and proportional to the record Congress developed and to the risk of future constitutional harm) in *City of Boerne v. Flores*, 521 U.S. 507 (1997), a Fourteenth Amendment case. Pointing out that "at its core" this was a Fifteenth Amendment case, the court explained that, "even if the *City of Boerne* cases changed the test for all statutes enacted pursuant to the Fourteenth Amendment, including provisions aimed at preventing racial discrimination in voting, those cases leave the Fifteenth Amendment standard untouched." Given the "extensive legislative record documenting contemporary racial discrimination in voting in covered jurisdictions, Congress's decision to extend Section 5 for another twenty-five years was rational" and, therefore, constitutionally valid under the Fifteenth Amendment. Although it rejected *Boerne* as the applicable standard, the court found, nonetheless, that the 2006 extension survived review under that standard as well. "Given section 5's tailored remedial scheme, the extension qualifies as a congruent and proportional response to the continuing problem of racial discrimination in voting," said the court, pointing to the fact that Section 5 was "geographically targeted, temporary, and applie[d] only to changes in voting procedures, not to all political or election-related activities in covered jurisdictions." (For an in-depth review of the decision, see the comment at 122 HARV. L. REV. 803 (Dec. 2008)).

Under the law, the utility district was entitled to file an appeal directly with the U.S. Supreme Court, and it did so on July 8, 2008. The appeal required five Justices to resolve it, including the issue of whether the Court should accept jurisdiction over the matter. U.S. Solicitor General Gregory G. Garre, in his motion asking the Court to rule on the issue without ordering written briefs and argument, argued that "the three-judge district court's unanimous, correct and careful disposition

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The district court accepted the magistrate's recommendation to grant summary judgment for the other officers, and as to the finding that Murray did not use excessive force and that the seizure was reasonable, but denied the motion with respect to Deputy Murray. He appealed, arguing that he was entitled to qualified immunity because it was objectively reasonable to believe that he was arresting Engleman in Arkansas.

The U.S. Court of Appeals for the Eighth Circuit reversed the denial of summary judgment. Engleman was required to proffer sufficient evidence to raise a genuine issue of material fact about whether a reasonable officer would have known that Deputy Murray's conduct violated a clearly established right. There were no material issues of fact, and, in the circumstances, notwithstanding the prohibition on executing an arrest warrant outside of the arresting officer's jurisdiction, it was objectively reasonable for an officer in Deputy Murray's position to have believed that he was executing the warrant in Arkansas. The 911 system identified Engleman's call as originating from a telephone number with an Arkansas area code and an Arkansas address and mailing address. The arrest warrant had been issued in Arkansas and stated that Engleman resided at 24512 Van Fleet Road in Arkansas, the same address that the officers were being called to. The fact that Engleman advised the officers they were in Oklahoma was not dispositive, as the "protests of a resisting arrestee generally do not make an objectively reasonable arrest unreasonable." Accordingly, Deputy Murray's actions were objectively reasonable in light of the law and the information he possessed at the time, and he was entitled to qualified immunity. *Engleman v. Murray*, 546 F. 3d 944 (8th Cir. 2008). ML

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of the questions presented does not warrant plenary review here." Opposing the motion to affirm, the utility district noted that the "appeal puts before the Court the most federally invasive law in existence," arguing that the 2006 reenactment of §5 is not a congruent and proportional response to present-day voting-rights circumstances; it was, rather, an improper and unconstitutional extension of a response appropriate to the scope and scale of problems two generations past into a never-ending future." Specifically, it points out that the "America that has elected Barack Obama as its first African-American president is far different than when §5 was first enacted in 1965. Appellees barely acknowledge the deep-rooted societal change, preferring to assume that conditions remain similarly dire despite overwhelming evidence to the contrary. There is no warrant for continuing to presume that jurisdictions first identified four decades ago as needing extraordinary federal oversight through §5 remain uniformly incapable or unwilling to fulfill their obligations to faithfully protect the voting rights of all citizens in those parts of the country."

Clearly, this case has important implications for states and local governments; the question is, how will the Supreme Court weigh in? ML

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inherent authority.[16] The final third of the brief focuses on the Province of British Columbia. In Canada, federal and provincial governments split up the responsibility for environmental policy. British Columbia passed, and received royal assent for, a law that enables the adoption of California's regulations.[17] Unfortunately, the law will not be effective unless California is permitted to utilize its own adopted standards. This action by the Province demonstrated the brief's argument that the problem of climate change is one that requires "international, national, and subnational efforts."

It is anyone's guess as to how far this case will go. During his campaign, President Obama stated that he would have approved California's waiver request, and the new EPA Administrator will certainly start the approval process.[18] As we've seen before, it's another waiting game, but when the issue is global warming, just how long can we wait?

Notes

1. Massachusetts v. EPA, 127 S. Ct. 1438 (2007).
2. Clean Air Act, 42 U.S.C. § 7521 (West 2008).
3. No. 08-1178, 2008 WL 416849 (D.C. Cir., filed on May 5, 2008).
4. IMLA is participating in a brief managed by the Constitutional Accountability Center, along with the National Association of Counties, National League of Cities, National Conference of State Legislatures, National Association of Clean Air Agencies, American Planning Association, City of New York, King County (Washington), and the Canadian Province of British Columbia. *Brief for National Conference of State Legislatures, International Municipal Lawyers Association, et al. as Amici Curiae Supporting Petitioners, California v. EPA*, No. 08-1171, 2008 WL 416849 (D.C. Cir., filed on May 5, 2008).
5. California State Motor Vehicle Standards, 73 Fed. Reg. 12156 (Mar. 06, 2008). Under the law, automakers will have to reduce greenhouse gas emissions by 30% by 2016.
6. 42 U.S.C. § 7543(a) (West 2008).
7. 42 U.S.C. §7543(b) (West 2008).
8. *Id.*
9. California State Motor Vehicle Standards, 73 Fed. Reg. 12,156 (Mar. 06, 2008).
10. *Id.* at 12160.
11. Order re: *California v. EPA*, No 08-70011 (9th Cir. July 25, 2008).
12. The brief is available at http://www.theusconstitution.org.
13. IMLA brief, citing *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F. 2d 1095, 1115 (D.C. Cir. 1979).
14. IMLA brief, citing statement of Sen. Murphy, 113 Cong. Rec. S32,476 (1967).
15. 73 Fed. Reg. 12,163 (Mar. 06, 2008).
16. IMLA brief at 12.
17. *Greenhouse Gas Reduction (Vehicle Emissions Standards) Act*, S.B.C. 2008, c. 21.
18. Zachary Coile, *Obama Expected to Back Auto-Emission Waiver*, San Francisco Chronicle, Nov. 11, 2008, at A1. ML