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THE VOTING RIGHTS ACT OF 1965
42 USC §§ 1971-1974--FEDERAL REGULATION OF STATE ELECTIONS

W. Jeffrey Kuhn[1]
Fulbright & Jaworski L.L.P.
300 Convent Street, Suite 2200
San Antonio, Texas 78205
(210) 224-5575
(210) 270-7205
wkuhn@fulbright.com

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***THE VOTING RIGHTS ACT OF 1965*, 42 USC §§ 1971-1974--FEDERAL REGULATION OF STATE ELECTIONS**

I. Purpose

A. To rid the country of racial discrimination in voting

B. Prohibits states from diluting votes through discriminatory legislation (See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966))

II. Section 4 of the Federal Voting Rights Act (the "Act")

A. Identifies which jurisdictions are covered by Section 5 of the Act

B. Texas

1. Covered Statewide under Section 5 (28 C.F.R. pt. 51, Appendix)

2. Date used to determine coverage: November 1, 1972

III. Section 5 of the Act

A. Suspends enactment or administration of any new voting law or regulation until it has been cleared by the United States Attorney General or the District Court for the District of Columbia

1. Voting changes in covered jurisdictions may not be used until Section 5 preclearance has been obtained

B. Applies only to jurisdictions were Congress has identified a persistence of discrimination on a persistent scale (including Texas)

C. Political subdivisions must preclear any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that as it existed on the date of coverage

1. Preclearance will be denied if the proposed change has not been shown to be free of the purpose and the effect of discriminating on the basis of race or membership in a language minority group

2. Municipality carries burden of proof in proving that a change in voting lacks discriminatory purpose and effect

D. Two alternatives for requesting preclearance

1. Judicial Preclearance

a. Petition for declaratory judgment in United States District Court for District of Columbia

b. District Court is asked to determine that the activity is not a change affecting voting

c. District Court's decision may be appealed directly to the United States Supreme Court

2. Administrative Preclearance (most common)

a. Written submission to United States Attorney General, Civil Rights Division

b. The Attorney General is asked to determine whether it has any objection to the change in voting

c. May be appealed to the United States District Court for District of Columbia

d. Much quicker process than judicial preclearance- Attorney General has 60 days to review

e. Most voting changes are submitted to the Attorney General and over the past decade the Attorney General has received submissions of between 14,000 and 22,000 voting changes per year (see http://www.usdoj.gov)

E. Administrative guidance found in the *Code of Federal Regulations* (28 C.F.R. § 51 et seq.)

1. Scope of preclearance requirement

a. Very broad- "any change affecting voting, even though it appears to be minor and indirect…" (28 C.F.R. § 51.12) (see *Allen v. State Board of Elections*, 393 U.S. 544 (1969))

2. Changes affecting voting

a. See 28 C.F.R. § 51.13- very broad and non-exclusive list

(i) Section 51.13(j)- Any changes affecting the necessity of or methods for offering issues and propositions for approval by referendum

b. *Allen v. State Board of Elections*, 393 U.S. 544, 565 (1969)

(i) Nonexclusive list of three categories in which voting changes covered under Section 5 would normally fall

(a) Changes in the manner of voting;

(b) Changes in candidacy requirements and qualifications;

(c) Changes in the composition of the electorate that may vote for candidates for a given office; and

c. Changes affecting the creation or abolition of an elective office

3. Contents of submission

a. Required- see 28 C.F.R. § 51.27

b. Supplemental- see 28 C.F.R. § 51.28

4. Expedited consideration

a. May be requested from Attorney General when necessary

(i) Must show good cause

(ii) Should not be requested as a matter of routine

b. Should explain why expedited consideration is needed and provide date by which determination is required

5. Special elections

a. Are subject to preclearance to the extent that there is a "change in voting practice or procedure under the Act"

b. Discretionary setting of a date on which to hold a special election is a change in voting

6. Computation of Attorney General's 60-day period

a. The Attorney General of the United States has 60 calendar days in which to interpose an objection to a political subdivision's submitted change affecting voting

b. 60-day period commences upon receipt by the United States Department of Justice of a submission and the day of receipt of the submission is not counted

c. If the final day of the 60-day period falls on a Saturday, Sunday, federal holiday or any other day that is not a regular business day for the Department of Justice, the Attorney General shall have until the close of the next full business day to interpose an objection

d. The date of the Attorney General's response shall be the day the response is mailed to the submitting authority

e. It is unlawful to enforce a change affecting voting without obtaining preclearance

f. Recommended practices:

(i) Texas Secretary of State recommendation- submit preclearance request 75 days before election day (see Tex. Sec'y State Election Advisory No. 2004-10 available at http://www.sos.state.tx.us/elections/laws)

(ii) Conservative recommendation- submit preclearance request so as to expect response from the Attorney General before the beginning of early voting

F. The "bail out" provision (see *Rome v. United States*, 446 U.S. 156)

1. Process by which a municipality may remove itself from the preclearance requirement, by showing:

a. No "test or device" used by jurisdiction;

b. During preceding 10 years; and

c. For purpose or with the effect of denying or abridging the right to vote on account of race or color.

G. Section 5 is scheduled to lapse in 2007- subject to renewal

IV. Minority Language Provisions

1. Certain states and political subdivisions are required by federal law to provide voting materials in languages other than English (see 28 C.F.R. § 55 et seq.)

a. Section 4(b) of the Act- see 42 U.S.C. 1973b(4)(b)

(i) Contains formulas determining whether jurisdictions are subject to special remedial provisions of the Act. Jurisdictions are covered if they used a "test" or device for voting in the 1964, 1968, or 1972 presidential elections. Coverage is determined by the United States Attorney General and the Director of the Census, and is not judicially reviewable

b. Section 4(f)(4) of the Act- see 42 U.S.C. 1973b(f)(4)

(i) For coverage formulas- see 28 C.F.R. § 55.5

(ii) For covered jurisdictions- see 28 C.F.R. § 55, Appendix

(iii) Jurisdictions covered under Section 4(f)(4) must obtain Section 5 preclearance for all changes affecting voting

c. Section 203 of the Act- see 42 U.S.C. §§ 1973aa-1a

(i) Covered jurisdictions- see 67 Fed. Reg. 48,871 (July 26, 2002) (not yet published in the *Code of Federal Regulations*) and attached map

(a) Jurisdictions covered under Section 203 are subject to the Section 5 preclearance requirements as long as such jurisdictions are also covered under Section 4(f)(4)

(b) Jurisdictions covered under Section 203 but not under section 4(f)(4) are subject to the Section 5 preclearance requirements as long as such jurisdictions were covered under Section 4(b) prior to 1975.

(ii) Whenever any State or political subdivision covered by Section 203 provides registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language

(iii) Section 203 requirements apply to all elections conducted within the boundaries of the jurisdiction- primary and general elections, bond elections and referenda, and to elections of each municipality, school district or special purpose district within the designated jurisdiction.

2. Political Action Committees- do language requirements apply?

V. Preclearing Bond Elections

1. Bond issue elections are special elections that are subject to preclearance to the extent that there is a "change in voting practice or procedure under the Act" (see 28 C.F.R. § 51.17)

2. Necessity of preclearing bond elections? (see *The Voting Rights Act's Other Legacy: Pre-Clearing Bond Votes* available at www.bondbuyer.com, Aug. 5, 2004)

a. Special bond election during uniform election date

b. Special bond election during non-uniform election date

c. Bond referendum concurrent with general election

3. Cases

a. *Lucas v. Townsend*, 908 F.2d 851 (11th Cir. 1990)

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[1] Jeff Kuhn is a partner in the Public Finance and Administration Department of Fulbright & Jaworski L.L.P., resident in the San Antonio office. Jeff's practice is devoted exclusively to public finance matters. In his practice, Jeff serves as bond counsel, underwriters' counsel, and

trustee's counsel for various political subdivisions, investment banking firms, and banks located throughout the State of Texas. Additionally, Jeff regularly advises counties, cities, school districts, and other Texas political subdivisions on public finance issues and general municipal and public law, including election law issues, implementing their economic development programs, and assisting political subdivisions in structuring and implementing innovative financing techniques. Jeff is a frequent lecturer on public finance topics throughout the State of Texas and at national bond attorney seminars. He is a member of the State Bar of Texas, the American Bar Association, and the National Association of Bond Lawyers.