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Revised Procedures for the Administration of
Section 5 of the Voting Rights Act

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In accord with your request of August 29, 1977, we have reviewed the form and legality of the proposed revised guidelines for administration of Section 5 of the Voting Rights Act, 5 U.S.C. 1973c (1975 Supp.). In our opinion, before this material is submitted to the Attorney General, certain modifications should be considered. The first part of this memorandum discusses several major modifications or legal issues. The second part discusses other legal issues. The third part lists typographical errors and suggests a number of stylistic changes.

1. Major modifications or issues.

a. Summary for Federal Register

The proposed Federal Register notice includes a brief summary and a table showing the relation between sections of the proposed guidelines and sections of the existing guidelines, 28 C.F.R. part 51. There is, however, no discussion of the substance of the proposed guidelines. We suggest that such a discussion be added to the Federal Register notice. It should identify and explain the most significant aspects of the proposed revision of the guidelines (e.g., specifying that political parties and "political subunits" are subject to Section 5). Such a discussion would assist covered jurisdictions and other interested parties in their evaluation of the proposed revision.

b. Changes affecting language minority groups

The provisions of the Voting Rights Act concerning coverage distinguish between (1) jurisdictions whose coverage is tied to discrimination on account of race or color and

(2) those whose coverage is tied to contravention of Section 4(f)(2), 42 U.S.C. 1973b(f)(2) (1975 Supp.), which prohibits denial of a person's right to vote "because he is a member of a language minority group." Under Section 4(a), 42 U.S.C. 1973b(a) (1975 Supp.), a jurisdiction in the former category could obtain termination of coverage by establishing that, during the requisite period, no test or device ^{1/} had been used for the purpose or with the effect of discrimination based on race or color. On the other hand, jurisdictions covered as a result of the 1975 Amendments may not secure termination of coverage unless they make the additional showing that no test or device (including the practice of conducting elections solely in English) was used in contravention of Section 4(f)(2)'s prohibition against discrimination based upon membership in a language minority group.

Regarding Section 5, as amended in 1975, it is not clear whether the two categories of jurisdictions are to be subject to the same standard. A declaratory judgment preclearing a change in voting laws is to be issued if the jurisdiction establishes that the change "does not have the purpose and will not have the effect of denying ... the right to vote on account of race or color, or in contravention of the guarantees set forth in Section 4(f)(2)...." In order to obtain preclearance, must a jurisdiction whose coverage is tied solely to racial discrimination show that there is no violation of Section 4(f)(2)? If so, what does such a showing entail? Does the legislative history of the 1975 Amendments deal with these questions?

Because all or almost all "language minority groups" are also groups defined by race, the foregoing issues may not have

^{1/} Regarding jurisdictions covered under the 1965 Act or the 1970 Amendments, the applicable definition of "test or device" is that set forth in Section 4(c), 42 U.S.C. 1973b(c). That definition does not encompass the practice of conducting elections solely in English. The latter concept was added in 1975, see Section 4(f)(3), 42 U.S.C. 1973b(f)(3) (1975 Supp.), but applies only with regard to determinations concerning voter participation in the 1972 presidential election.

practical significance. Still, there may be a difference between (1) discrimination based on race or color and (2) violation of Section 4(f)(2). ^{2/} The language of the Act may suggest that ordinarily the latter violations involve failure to use minority languages in the voting process. If so, how, if at all, does Section 4(f)(2) apply to jurisdictions which are not subject to the Act's bilingual requirements?

We have not attempted to resolve these issues, but we suggest that you consider them further. Many sections of the revised guidelines refer to language minority groups. e.g., §51.26(d) [p. 26]; §51.39(a) [p. 35]. It might be advisable to make clear in the guidelines whether or how the minority-language provisions apply to jurisdictions covered solely on the basis of racial discrimination.

c. Coverage of political parties

The existing guidelines do not address the matter of the applicability of Section 5 to actions of political parties. Proposed §51.7 [p. 13] would do so. It reads, in part, as follows:

To the extent that a political party acts under authority explicitly or implicitly granted by a covered jurisdiction ... and to the extent that a party conducts public electoral functions, any change affecting voting effected by a political party is subject to ... Section 5. * * *

Because of the broad range of political-party activities which might be regarded as "changes affecting voting," we

^{2/} Suppose, for example, that a county in Alabama has a sizable Spanish-heritage population, but such persons account for less than five percent of the voting-age citizens. The county is to have an election on a bond issue and it adopts an ordinance providing for the posting of English language notices and explanations throughout the county. There is no basis for holding that the ordinance has the purpose or effect of racial discrimination. Still, Spanish-heritage persons who can read Spanish but not English might assert that the ordinance violates Section 4(f)(2).

suggest that §51.7 be clarified. When is authority "implicitly granted" to a political party by a state or subdivision? What is the meaning of "public electoral functions"?

We suggest that examples be given of party activities which are subject to Section 5 and those which are not.

Another issue is whether §51.7 is consistent with the decision in Williams v. Democratic Party of Georgia. In that case, a three-judge court (which included Judge Bell) held that Section 5 did not apply to a state party's rules for the selection of national convention delegates. The decision of the district court, Civ. Action No. 16286, N.D. Georgia (1972), was affirmed by the Supreme Court, 400 U.S. 809 (1972). Would proposed §51.7 apply to such party rules, or is the Williams-type situation one in which the party's action is not authorized by the state? Under what circumstances is selection of national convention delegates a "public electoral function"?

If proposed §51.7 would call for a result different from that reached in Williams, what is the justification for differing with a decision affirmed by the Supreme Court? Is there a basis in the legislative history of the 1975 Amendments for adopting a different interpretation of the statute?

2. Other legal issues

The remaining issues are discussed, by section, in numerical order.

a. Political subunits, §51.6 [p. 12] - We agree that political subunits (e.g., cities) within a covered jurisdiction are subject to Section 5. Of course, an adverse decision on this issue by the Supreme Court in the Sheffield case ^{3/} would necessitate changing the guidelines.

^{3/} United States v. Board of Commissioners of Sheffield, No. 76-1662, 1977 Term (argued on October 11, 1977).

b. Court-ordered changes, §51.16 [p. 18] - Should this section state explicitly that changes ordered by a state court are subject to Section 5?

What is the practice of the Department regarding a change which, during the 60-day period, is the subject of a Fifteenth Amendment or Voting Rights Act suit in a federal court? See Georgia v. United States, 411 U.S. 526, 533, footnote 6 (1973). Should the practice followed in such situations be discussed in the guidelines?

c. Party making a submission, §51.21 [p. 20] - Section 5 refers to submission of changes in voting laws "by the chief legal officer or other appropriate official of ... [the] State or subdivision." Proposed §51.21 would provide, in addition, for submission "by any other authorized person on behalf of the submitting authority." Is it proper to go beyond the statute in this regard and to permit submissions by persons who are not public officials?

d. Required contents of submissions, §51.25 [p. 22] - This section would expand the list of items required to be included in all submissions. Regarding non-complex changes, is it proper to impose the additional requirements?

e. Confidentiality of individuals' names, §51.27(d) [p. 29] - This section states, as do the present guidelines (28 C.F.R. §51.12(c)), that the Department "shall comply with the request of any individual that his identity not be disclosed outside the Department." Ordinarily, the names of persons who provided information regarding a change in voting laws could be withheld under Freedom of Information Act exemption (6) or (7), each of which covers certain disclosures constituting an unwarranted invasion of personal privacy. 5 U.S.C. 552(b)(6), (7) (1975 Supp.). Still, in some circumstances, the Department might be unable to claim an exemption for the identity of such persons. Accordingly, we suggest that the following clause be added to the first sentence of §51.27(d): "To the extent permitted by the Freedom of Information Act, 5 U.S.C. 552,". A similar change should be made in the second sentence of §51.47(d) [p. 42].

f. Supplementary submissions, §51.37 [p. 34] - This section would state that whenever a submitting authority provides documents and information supplementing a submission, the 60-day period will be calculated from the receipt of the supplementary information. Are there any limits on application of this rule? Would it not be proper to provide at least for a de minimis exception? That is, the guidelines could state that the providing of supplementary information of minor importance would not affect the running of the 60-day period.

3. Typographical errors; stylistic changes.

a. Federal Register notice [p. 4] - the list of statutory citations need not include "Pub. L. 94-73."

b. Table of Contents [p. 6] - In the heading of Subpart C, "submissions" should be "Submissions."

c. Authority [p. 7] - The reference to "Pub. L. 94-73" should be omitted.

d. §51.2(j) [p. 11] - In the first sentence, "are" should be "is".

e. §51.7(c) [p. 12] - In the second sentence, "staff of the Civil Rights Division of" should be deleted.

f. §51.11(b) [p. 15] - The phrase "the informing or assisting of citizens in registration or voting" is awkward.

g. §51.19 [p. 19] - This section should be broken into two sentences.

h. §51.23 [p. 21] - The last sentence should read: "In other circumstances, a jurisdiction may withdraw a submission only if it shows good cause for such withdrawal."

i. §51.28 [p. 29] - In the heading, "communications" is misspelled.

j. §51.36(b) [p. 34] - The first sentence should state who is to take the steps to provide public notice.

1. Appendix [p. 44] - The parenthetical sentence after the listing of Arizona should say: "The following Arizona counties"

4. David Marblestone has discussed most of our suggestions for substantive change with David Hunter. Please let us know if you would like to discuss further any of the matters we have raised.

After you have considered our suggestions and made any changes you deem appropriate, please return the material to our office for review and submission to the Attorney General. After the Attorney General has approved the proposed guidelines, we will send them to the Federal Register.

Leon Ulman
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