

Consent Litigation Over Section 5 Preclearance

Walker v. Cunningham
(*Lisa Godbey Wood, S.D. Ga. 2:12-cv-152*)

After the Justice Department denied preclearance for county district lines already used in a July 2012 primary election, the incumbents and the county engaged in consent litigation to obtain new district lines from the federal court. A three-judge district court enjoined use of the election results. Enlisting the cooperation of the state's reapportionment office, the court drew new district lines, which were used for a special election to be held in May 2013.

Subject: District lines. *Topics:* Malapportionment; section 5 preclearance; three-judge court; enjoining elections; intervention; primary election.

After the Justice Department denied preclearance for county district lines already used in an election, the incumbents and the county engaged in consent litigation to obtain new district lines from the federal court.

On September 11, 2012, the five members of Long County's board of commissioners and the five members of the county's board of education filed a federal complaint in the Southern District of Georgia against the three members of the county's board of elections, claiming that the July 31 primary election for the commission and the school board violated, among other things, section 5 of the Voting Rights Act, because the district lines drawn in 2012 had not been precleared.¹ Among the relief sought by the plaintiffs were court-drawn district lines for use in the November election.²

The 2012 district lines were drawn by the defendants to remedy population disparities that arose since the lines were drawn in 1988, and the 2012 plan was approved by the state's legislature and governor.³ On August 27, after elections were held for all positions on the two boards, the Justice Department denied preclearance of the district lines.⁴

On September 14, recognizing the case as "extremely time-sensitive, as many Voting Rights Act cases are," Judge Lisa Godbey Wood, the district judge in the court's Brunswick Division, which includes Long County, ordered briefing by September 17 on whether a three-judge district court need-

1. Complaint, *Walker v. Cunningham*, No. 2:12-cv-152 (S.D. Ga. Sept. 11, 2012), D.E. 1; see Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. *Shelby County v. Holder*, 570 U.S. 529 (2013).

2. Complaint, *supra* note 1, at 3, 15.

3. See *id.* at 7-8.

4. See Ex. C, *id.*

ed to be appointed.⁵ On September 19, Judge Wood requested that the circuit's chief judge appoint a three-judge court,⁶ which he did that day.⁷ Because of the case's time pressure, Judge Wood contacted Chief Judge Joel F. Dubina directly and immediately to let him know that her request was coming.⁸

Judge Dubina named Circuit Judge Beverly B. Martin, who sat in Atlanta, and District Judge James Randal Hall, who sat in Augusta, to join Judge Wood on the three-judge court.⁹ Judge Wood contacted the other two judges by telephone, and they agreed to meet together in Brunswick on the earliest possible date.¹⁰

The plaintiffs filed on September 19 an unopposed motion for a temporary restraining order against use of the July 31 election results.¹¹ The three-judge court issued a temporary restraining order on September 21.¹²

On September 20, the court issued an expedited scheduling order (1) setting a hearing for September 28, (2) setting September 27 as the deadline for intervention motions, and (3) prescribing text for a newspaper notice of the proceedings.¹³ Judge Wood found proactive scheduling orders to be very useful in managing time-pressured cases.¹⁴

Five voters moved to intervene on September 26.¹⁵ The court denied intervention without prejudice because the voters sought the same relief as the plaintiffs, but the court permitted the voters to participate as amici curiae, and the court granted them notification rights.¹⁶

On October 2, the court issued a consent order extending the temporary restraining order and agreeing to draw district lines.¹⁷ The court enlisted the cooperation of Georgia's legislative and congressional reapportionment office to draw the lines; the three judges met in Atlanta with one of the office's districting experts.¹⁸ The court presented a draft districting map for public

5. Order, *Walker*, No. 2:12-cv-152 (S.D. Ga. Sept. 14, 2012), D.E. 7; see 28 U.S.C. § 90(c)(5).

Tim Reagan interviewed Judge Wood for this report by telephone on January 25, 2013.

6. Order, *Walker*, No. 2:12-cv-152 (S.D. Ga. Sept. 19, 2012), D.E. 17.

7. Designation Order, *id.* (Sept. 19, 2012), D.E. 25.

Judge Martin retired on September 30, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

8. Interview with Hon. Lisa Godbey Wood, Jan. 25, 2013.

9. Designation Order, *supra* note 7.

10. Interview with Hon. Lisa Godbey Wood, Jan. 25, 2013.

11. Temporary-Restraining-Order Motion, *Walker*, No. 2:12-cv-152 (S.D. Ga. Sept. 19, 2012), D.E. 21.

12. Temporary Restraining Order, *id.* (Sept. 21, 2012), D.E. 27.

13. Order, *id.* (Sept. 20, 2012), D.E. 26.

14. Interview with Hon. Lisa Godbey Wood, Jan. 25, 2013.

15. Intervention Motion, *Walker*, No. 2:12-cv-152 (S.D. Ga. Sept. 26, 2012), D.E. 33.

16. Consent Order at 9–10, *id.* (Oct. 2, 2012), D.E. 34; Interview with Hon. Lisa Godbey Wood, Jan. 25, 2013.

17. Consent Order, *supra* note 16, at 13–14.

18. Interview with Hon. Lisa Godbey Wood, Jan. 25, 2013.

comment and adjusted the districts a bit in response to comments.¹⁹

On December 14, the court adopted new lines for a special election to be held on May 7, 2013.²⁰

19. *Id.*

20. Order, *Walker*, No. 2:12-cv-152 (S.D. Ga. Dec. 14, 2012), D.E. 55.