

Imminent Elections for a Districting Plan Not Yet Precleared

*Petteway v. Galveston (Kenneth M. Hoyt, Emilio M. Garza,
and Melinda Harmon, S.D. Tex. 3:11-cv-511)*

A federal complaint sought to enjoin the use of new county-commission district lines until the new lines could be precleared pursuant to section 5 of the Voting Rights Act. The district judge assigned the case issued a temporary restraining order, but the other two judges of a three-judge district court empaneled to hear the section 5 claim determined that the injunction was unnecessary while preclearance procedures were pending. Preclearance required adjustments to the new districting plan, and the court ordered adjustments to the election calendar to accommodate the late-drawn district lines. The district judge assigned the case awarded attorney fees and costs to the plaintiffs, but the court of appeals determined that they were not prevailing parties in the litigation because the injunction did not have an impact on the preclearance process.

Subject: District lines. *Topics:* Section 5 preclearance; malapportionment; three-judge court; enjoining elections; attorney fees; intervention.

County incumbents filed a federal complaint on November 14, 2011, alleging that new district lines for their offices drawn after the 2010 census and to be used in 2012 elections violated the U.S. Constitution and the Voting Rights Act.¹ In addition to a voter, the plaintiffs included two county commissioners, two justices of the peace, and three constables.² With the complaint, the plaintiffs filed an application for a temporary restraining order and a preliminary injunction³ and an application for a three-judge district court to hear a challenge to the new districts as not precleared pursuant to section 5 of the Voting Rights Act.⁴

The new district lines retained four precincts for the county commission and reduced the number of precincts for constables and justices of the peace from eight to five.⁵ The county's litigation position was that preclearance was pending and the new lines would not be used until they had been precleared.⁶

1. Complaint, *Petteway v. Galveston*, No. 3:11-cv-511 (S.D. Tex. Nov. 14, 2011), D.E. 1; *Petteway v. Henry*, 738 F.3d 132, 135 (5th Cir. 2013); see Harvey Rice, *Suit Claims Galveston County Redistricting Illegal*, Hous. Chron., Nov. 17, 2011, at 2.

2. Complaint, *supra* note 1, at 8–10.

3. Application, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Nov. 14, 2011), D.E. 2; see 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).

4. Application, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Nov. 14, 2011), D.E. 3.

5. *Petteway*, 738 F.3d at 135.

6. *Id.*

Preclearance was sought on October 14, and the Justice Department's response was due on December 13.⁷ The scheduled candidacy filing period for March 6 primary elections was November 28 to December 15.⁸

The court set the case for hearing before Judge Kenneth M. Hoyt on November 21.⁹ Because the preclearance process was underway, Judge Hoyt denied the application for a three-judge court,¹⁰ but Judge Hoyt issued an order enjoining the use of district lines before they had been precleared.¹¹

On November 22, Judge Hoyt decided that a three-judge court was necessary after all¹² and set another hearing for November 30.¹³ The circuit's chief judge appointed Circuit Judge Emilio M. Garza¹⁴ and District Judge Melinda Harmon, Southern District of Texas, to join Judge Hoyt on the three-judge court.¹⁵ On November 23, Judge Hoyt ordered briefing on "the constitutional permissibility of permitting the current, uncleared plan to be implemented versus conducting an election under the old Commissioners' Court map."¹⁶

The defendants' brief explained that if new precinct lines for justices of the peace and constables were not precleared in time, old lines could be used, because precinct boundaries were properly set more to reflect caseload than to reflect population.¹⁷ For the county commission, the plaintiffs proposed a districting plan for the court to adopt while preclearance of the county's plan was pending.¹⁸ Three other voters moved to intervene so that they could propose an alternative plan,¹⁹ and the court granted intervention.²⁰ The court denied²¹ a motion²² by the intervenors to delay the litigation.

Judge Hoyt heard the case on November 30 and December 1, with Judges Harmon and Garza's chambers listening by telephone.²³ On December 9, the

7. *Id.*; see Transcript at 18, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Nov. 30, 2011, filed Dec. 5, 2011), D.E. 29 [hereinafter Nov. 30, 2011, Transcript].

8. Transcript at 21–25, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Nov. 21, 2011, filed Sept. 25, 2012), D.E. 96; Nov. 30, 2011, Transcript, *supra* note 7, at 25–26.

9. Notice, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Nov. 15, 2011), D.E. 4; Docket Sheet, *id.* (Nov. 14, 2011).

10. Order, *id.* (Nov. 21, 2011), D.E. 10.

11. Order, *id.* (Nov. 21, 2011), D.E. 11; Clarification Order, *id.* (Nov. 23, 2011), D.E. 16; see Harvey Rice, *Panel to Reconsider Voting Districts*, Hous. Chron., Nov. 24, 2011, at 3.

12. Order, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Nov. 22, 2011), D.E. 14.

13. Order, *id.* (Nov. 22, 2011), D.E. 13.

14. Judge Garza retired on January 5, 2015. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

15. Order, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Nov. 29, 2011), D.E. 19.

16. Order, *id.* (Nov. 23, 2011), D.E. 15.

17. Defendants' Brief at 4, *id.* (Nov. 28, 2011), D.E. 18; see *Petteway v. Henry*, 738 F.3d 132, 136 n.2 (5th Cir. 2013).

18. Plaintiffs' Brief, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Nov. 28, 2011), D.E. 17.

19. Intervention Motion, *id.* (Nov. 30, 2011), D.E. 21.

20. Nov. 30, 2011, Transcript, *supra* note 7, at 11.

21. *Id.* at 11, 33.

22. Continuance Motion, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Nov. 30, 2011), D.E. 22.

23. Transcript, *id.* (Dec. 1, 2011, filed Dec. 5, 2011), D.E. 30; Nov. 30, 2011, Transcript, *supra* note 7.

court vacated the temporary restraining order and ruled that no remedy was necessary in advance of the December 13 deadline for preclearance response.²⁴ Judge Hoyt dissented and would have adopted the plaintiffs' interim commission plan.²⁵ Following a December 12 advisory by the plaintiffs that the Justice Department understood the preclearance deadline to be December 19, the court modified its order to postpone consideration of a remedy until December 19.²⁶

On December 20, the court ordered briefing by the following day on the status of the case.²⁷ The plans were not precleared; on December 19, the Justice Department asked for additional information.²⁸ On January 20, 2012, the court agreed to enjoin use of unprecleared plans but declined to yet adopt interim substitute plans.²⁹

The Justice Department found all of the plans retrogressive.³⁰ Following a March 23, 2012, hearing on the status of the case,³¹ the court issued that day an order approving a negotiated substitute plan for the county commission and the use of the 2001 precinct lines for the constables and the justices of the peace.³² The court ordered adjustments to the primary-election calendar to accommodate the late adoption of the new district lines.³³

On May 22, Judge Hoyt awarded the plaintiffs \$254,790.28 in attorney fees and costs.³⁴ The court of appeals, however, ruled on December 17, 2013, that the plaintiffs were not prevailing parties, because "the injunction had no effect on the implementation of the electoral map."³⁵

24. Opinion, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Dec. 9, 2011), D.E. 32, 2011 WL 6148674.

25. *Id.* at 6–22.

26. Amended Opinion, *id.* (Dec. 12, 2011), D.E. 34; *see* Advisory, *id.* (Dec. 12, 2011), D.E. 33.

27. Order, *id.* (Dec. 20, 2011), D.E. 35.

28. Ex. 1, Defendants' Brief, *id.* (Dec. 21, 2011), D.E. 36; *Petteway v. Henry*, 738 F.3d 132, 135 (5th Cir. 2013).

29. Order, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Jan. 20, 2012), D.E. 45; *Petteway*, 738 F.3d at 135.

30. *Petteway*, 738 F.3d at 136; *see* Harvey Rice, *Feds Say New Map Dilutes Minority Vote*, Hous. Chron., Mar. 7, 2012, at 2.

31. Transcript, *Petteway*, No. 3:11-cv-511 (S.D. Tex. Mar. 23, 2012, filed Sept. 15, 2012), D.E. 94 (Judge Garza, presiding).

32. Order, *id.* (Mar. 23, 2012), D.E. 69 [hereinafter Mar. 23, 2012, Order]; *Petteway*, 738 F.3d at 136.

33. Mar. 23, 2012, Order, *supra* note 32.

34. Order, *Petteway*, No. 3:11-cv-511 (S.D. Tex. May 22, 2012), D.E. 80 (\$143,437.92 for the county commissioners); Order, *id.* (May 22, 2012), D.E. 79 (\$111,332.36 for the other plaintiffs); *see Petteway*, 738 F.3d at 136; Order, *Petteway*, No. 3:11-cv-511 (S.D. Tex. July 10, 2012), D.E. 86 (denying reconsideration).

35. *Petteway*, 738 F.3d 132, *cert. denied*, 573 U.S. 931 (2014).