

Articles

Pencils Within Reach and a Walkman or Two: Making the Secret Ballot Available to Voters Who Are Blind or Have Other Physical Disabilities

A Chronology of Litigation History, Theory, and Results

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American society treats people who are blind as second class citizens. Our culture typically approaches blind persons somewhere on a continuum between irrational discrimination and demeaning paternalism. We impose unjustified restrictions on their lives based on our uninformed assumptions about their capabilities, and our biases exclude them from the full life of our community without a second thought. Individuals who are blind face daunting restrictions on educational and employment opportunities, narrowed cultural and recreational activities, and diminished participation in the civic life of the nation. This is especially true in the exercise of the franchise.

To redress this discrimination, Advocacy, Inc.,¹ and the disability community undertook a statewide effort to enforce the Americans with Disabilities Act (ADA) and make elections more accessible to Texans with disabilities. This objective had two facets: adapting the ballot for voters who are blind,² and ensuring polling place access for voters with physical

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1. Advocacy, Inc., is a congressionally created protection and advocacy organization to provide legal assistance to people with mental and developmental disabilities.

2. In this article, for reasons of convenience and economy, "blind" includes both people who have no sight and those with severe visual impairments. Approximately 275,000 adult Texans are either blind or have severe visual impairments. Brief of Appellees at 12, *Lightbourn v. Garza*, 118 F.3d 423 (5th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 700, 139 L. Ed.2d 643 (1998) (No. 96-50564) [hereinafter Brief]. The Texas Commission for the Blind estimates another population of about two times the size that has serious or significant visual impairments. Texas Commission for the Blind, Strategic Plan 1999-2003, 39, (1998). Unfortunately, the data for these various

impairments. This article chronicles those efforts. Texas has lead the way in improving voting conditions for people with disabilities, and yielded an useful model in the endeavor to make the franchise more available throughout the nation to voters with disabilities, both on an interim basis and more permanently in the future.³

I. The Litigation History

A. *Litigation Begins*

In September 1992, Advocacy, Inc. lawyers filed four lawsuits, one in each area of Texas (Hidalgo County,⁴ Jefferson County,⁵ Tarrant County,⁶ and El Paso County⁷). Because El Paso County moved to add the Texas Secretary of State as a necessary party to the suit there, *Lightbourn v. Garza* became the focal case in establishing the rights of Texas voters who are blind.⁸

Five blind voters and a sixth voter with a severe mobility impairment brought the case. VOLAR Center for Independent Living, a private nonprofit group that assists and represents persons with physical and visual disabilities, was also a plaintiff.⁹ They complained of the physically inaccessible polling

classifications is limited and rests primarily on extrapolations from census data and estimates from agencies and organizations that provide assistance to people who are blind or have visual impairments. *Id.*

3. A lawsuit was filed in Arkansas in August 1993 on the same issues raised in *Lightbourn*, as to voters with visual and physical disabilities. *McKay v. County Election Commissioners of Pulaski County, Arkansas*, 158 F.R.D. 620 (E.D. Ark. 1994). That case settled on February 27, 1997. The terms of the agreement reflect many parts of the *Lightbourn* trial court judgment as to the Secretary of State's duties, as described at length *infra*.

Another very similar case, filed after (and as a result of) *Lightbourn* by the Michigan Protection and Advocacy Service, Inc., was recently affirmed in the U.S. Court of Appeals for the Sixth Circuit. At issue was the Michigan Secretary of State's ADA duties with regard to blind voters. In affirming the trial decision, the appellate court held that Michigan law sufficiently accommodates blind voters. *Nelson v. Miller*, 170 F.3d 641 (6th Cir. 1999), *aff'g* 950 F. Supp. 201 (W.D. Mich. 1996).

4. *Raymond Gill v. County of Hidalgo*, Civil Action No. M-94-158 (S.D. Tex.).

5. *Bruce M. James v. Jefferson County, Texas*, No. 1:94CV537 (E.D. Tex.).

6. *Olivia M. Acosta v. Tarrant County*, No.94-59898-1 (County Ct. at Law, No. 1). The Tarrant County litigation limited itself to state law claims.

7. *Lightbourn v. Garza*, 928 F. Supp. 711 (W.D. Tex. 1996), *vacated*, 127 F.3d 33 (5th Cir. 1997), *and cert. denied*, 118 S. Ct. 700, 139 L. Ed.2d 643 (1998). (Ron Kirk was originally the defendant, but his successor in office took his place in the litigation upon election of a new governor).

8. The Tarrant County and Jefferson County cases dealt only with issues of physical accessibility and settled rather quickly. The Hidalgo County litigation also concerned issues of ballot access for blind voters and settled, but not to the degree of the El Paso County settlement discussed in this article. Advocacy, Inc., attorney Martin Coleman of El Paso played a key role in developing the *Lightbourn* litigation.

9. For convenience, this article refers to all seven plaintiffs as "the El Paso voters." (VOLAR was originally called DARE Independent Living Center at the time suit was filed, and subsequently became VOLAR). The individual El Paso voters had also voted in different counties in Texas at earlier times of their lives. Brief, *supra* note 2, at 12 (citing 7 Record on Appeal at 114-15, *Lightbourn v. Garza*, 118 F.3d 423 (5th Cir. 1997) (No. 96-50564) [hereinafter ROA]; 8 ROA, *supra* note 9, at 262, 307, 391).

places used for general and primary elections,¹⁰ and the lack of a secret ballot for blind citizens who wished to cast their votes without the assistance of a third person.¹¹

The El Paso voters filed *Lightbourn* as a class action against El Paso County and the local Republican and Democratic Parties under both Title II of the ADA and Section 504 of the 1973 Rehabilitation Act (29 U.S.C. §794).¹² After El Paso County impleaded the Secretary of State, the El Paso voters added him as a defendant as well.¹³ They alleged that the Secretary played a key role in the fact that a high number of polling sites throughout Texas were inaccessible to voters with mobility impairments.¹⁴ They claimed also that he contributed to the denial of the secret ballot to blind voters.¹⁵

United States District Judge David Briones of El Paso certified a statewide and a countywide class on behalf of voting age citizens who are blind or have mobility disabilities.¹⁶ He dismissed the local Republican Party because none of the plaintiffs had voted in a Republican primary.¹⁷ El Paso County and the local Democratic Party settled,¹⁸ leaving the Secretary as the sole defendant. The judge bifurcated the trial against the Secretary into liability and, if necessary, remedy phases.¹⁹

As part of the settlement, El Paso County committed itself to ensuring that all its polling places would be physically accessible under ADA standards. The County also provides a mechanism for blind voters to cast a secret ballot: a Walkman-like receiver that plays a pre-recorded tape. Instructions on the tape allow blind voters to count indentations or holes down the length of the ballot and match them with candidate names or ballot propositions, as described on the tape. Blind voters thus punch their ballots accurately without having to divulge their choice to election workers.²⁰ The November 5, 1996 election inaugurated this process, and it has worked relatively well since.

The most striking fact the *Lightbourn* evidence showed was that, until the settlement with El Paso County and the local Democratic Party, not a single polling place in Texas provided a means for a blind citizen to cast a secret ballot. The El Paso voters proved this was not for lack of technology, but for lack of vision by public officials. They failed to use the simple technologies that could readily modify existing systems and accomplish ballot secrecy for blind voters.

10. In Texas, party precinct conventions are held at the location of the primary elections, immediately upon closing of the polls. Thus, an inaccessible polling place for a primary election also would be inaccessible for the party precinct convention. See TEX. ELEC. CODE ANN. §§ 174.021, 174.022, 174.025, & 174.026 (Vernon's 1993).

11. See Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at 5, *Lightbourn v. Garza*, ___ U.S. ___, 118 S. Ct. 700, 139 L. Ed.2d 643 (1998).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. The appeals court upheld the class certification. *Lightbourn v. Garza*, 118 F.3d 421, 426 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 700 (1998).

17. Brief, *supra* note 2, at 7 (citing 3 ROA, *supra* note 9, at 689-90).

18. *Id.* (citing 4 ROA, *supra* note 9, at 733-50, 775-76).

19. *Id.* (citing ROA, *supra* note 9, vols. 7-9 (liability trial), 10-11 (remedies trial)).

20. One should note that this system helps many other persons apart from those with visual disabilities (for example, people who lack literacy skills, have language difficulties, or who have reading disabilities like dyslexia).

This also occurred in large part because the Secretary did not require that voting systems provide secret balloting for blind voters prior to approving the systems. Under state law, the Secretary is the sole approving authority for election systems used in Texas.²¹

Mobility-impaired citizens did not fare much better: the record showed widespread non-compliance throughout Texas with ADA physical accessibility requirements, which discouraged and impeded voters with disabilities from voting. At trial, the El Paso voters presented three surveys to show the geographical breadth of inaccessible polling sites. First, data from the Federal Elections Commission, which the Secretary had gathered over a ten year period and forwarded to the FEC pursuant to the Voter Accessibility Act for Elderly and Handicapped Persons,²² demonstrated that 800 polling places around Texas were physically inaccessible in some fashion.²³

Secondly, a survey by Advocacy, Inc., of Texas counties, using ADA Accessibility Guidelines (ADAAG),²⁴ found that, of the 69 responding counties, 16 (25%) reported having inaccessible polling places (25% of the places in Tarrant County, where Fort Worth is located, for example, were inaccessible in some fashion).²⁵ The fact that the counties self-reported the data to Advocacy, Inc., added weight to the findings, because even though reporting was diminished (69 out of 254 counties), it contained admissions of possible ADA violations by the counties themselves.

Third, a survey of all polling places in El Paso County by an elections judge using ADAAG, showed that 33% of the polls were inaccessible in some manner.²⁶ These places lacked simple accessibility features like handicapped parking, ramps, curb cuts, and lowered voting booths.²⁷

The blind El Paso voters described the humiliation and embarrassment they felt at the polls, and how it is exacerbated on days of heavy voting when there are lines and confusion. Often, they had great difficulty finding someone to take the time to read them the ballot bond issues and amendments, then asking that it be re-read so they could satisfactorily understand it before voting.²⁸ Sometimes, the experiences are so bad that they discourage blind people from voting for years.²⁹

21. TEX. ELEC. CODE ANN. §§ 122.001, 122.031 (Vernon's 1993).

22. 42 U.S.C. § 1973ee-1 (1984). This law, an amendment to the Voting Rights Act, concerned federal elections only, and not state and local elections; its reporting requirements expired in 1994.

23. Brief, *supra* note 2, at 10-11. These surveys, which the Plaintiffs introduced into evidence at trial, used accessibility criteria from the Voter Accessibility Act, which are substantially narrower in scope and weaker than the ADA Accessibility Guidelines (ADAAG).

24. 28 C.F.R. § 35.105(a) (1999).

25. Brief, *supra* note 2, at 11.

26. *Id.* at 11-12 (citing 8 ROA, *supra* note 9, at 395). The Secretary's invocation of early voting as an alternative did not resolve these issues because early polling places had the same accessibility problems. *Id.* at 13 (citing 5 ROA, *supra* note 9, at 53 (testimony of Margarita Lightbourn)). Nor does early voting cure inaccessible party precinct conventions. More to the point, access to early voting, a right all Texans enjoy, is not a substitute for access on election day itself.

27. *Id.* at 13. At the remedy phase of the trial, El Paso County elections administrator, Helen Jamison, agreed that prior to settlement, many polling places in the county were physically inaccessible. *Id.* at 11 n.15 (citing 10 ROA, *supra* note 9, at 829, 830-31).

28. *Id.* at 14 (citing 5 ROA, *supra* note 9, at 61-62; 7 ROA, *supra* note 9, at 81).

29. *Id.*

Often, polling officials are confused about how to deal with blind voters.³⁰ Sometimes, they talk to each other about helping a blind person as if that person were not present.³¹ Another common complaint of blind voters is that when they have to tell a third person their choice for the ballot, it is virtually impossible for others not to overhear.³² And then there is always the fear that, because of political preference, a polling place assistant actually may not mark the ballot as the blind voter desired.³³

A primary goal of the ADA is to ensure and protect the independence of persons with disabilities. This is precisely the focus of the El Paso voters: it was very important for them to function as independently as possible and that was why they wanted to cast a secret vote by an adapted ballot.³⁴ They also wanted the same ability that other citizens have to spend time studying a ballot issue or an amendment and then appropriately voting.³⁵

The plaintiffs testified it was important to be able to vote on the actual day of the election because of last minute electoral shifts, and because issues become more focused a few days before the election.³⁶ These are the same reasons why sighted voters wait, rather than taking advantage of early voting opportunities.³⁷

After the liability phase of the trial, the district judge found, *inter alia*, that: (1) the secret ballot is a fundamental, constitutional right in Texas; (2) the Secretary is the chief elections officer for the state, on whom political subdivisions call for advice and who bears responsibility for assuring uniformity in the various voting systems used in Texas; (3) the Secretary could accommodate voters with disabilities without affecting how non-disabled persons vote (that is, without fundamentally altering the nature of the vote for other citizens); and (4) the Secretary was in violation of the ADA for not modifying his duties and practices to accommodate voters with disabilities.³⁸ The judge urged the parties to negotiate a settlement before the remedy phase,³⁹ but the Secretary declined.⁴⁰

Although there was considerable testimony at the remedy phase of the trial (and at the liability phase) about creating secret balloting systems for blind voters, the El Paso voters did not ask the court to implement any particular system, nor did the judge. Rather, the El Paso voters simply proved that such systems were easily achievable. That meant that the Secretary should apprise voting system manufacturers to develop their systems accordingly, if they

30. *Id.* at 14-15 (citing 8 ROA, *supra* note 9, at 262 (testimony of O. Schonberger), 311, 335-38 (testimony of G. Downey)).

31. *Id.* at 15 (citing 8 ROA, *supra* note 9, at 387 (testimony of Ann Lemke)).

32. *Id.* (citing 8 ROA, *supra* note 9, at 262 (testimony of O. Schonberger); 7 ROA, *supra* note 9, at 84 (testimony of F. Lozano)).

33. *Id.* (citing 8 ROA, *supra* note 9, at 392 (testimony of A. Lemke)).

34. *Id.* (citing 8 ROA, *supra* note 9, at 290-91 (testimony of Burns Taylor)).

35. *Id.* (citing 7 ROA, *supra* note 9, at 81 (testimony of F. Lozano)).

36. *Id.* at 16 (citing 5 ROA, *supra* note 9, at 52 (testimony of M. Lightbourn); 8 ROA, *supra* note 9, at 285 (testimony of O. Schonberger)).

37. Party precinct conventions are held on primary election days when the polls close, usually at the place of the primary itself, allowing people to vote at the end of the day and remain for the precinct convention.

38. Lightbourn v. Garza, 904 F. Supp. 1429, 1431-34 (W.D. Tex., 1995).

39. *Id.* at 1434.

40. Lightbourn v. Garza, 928 F. Supp. 711, 711 (W.D. Tex., 1996), *vacated*, 127 F.3d 33 (5th Cir. 1997), *and cert. denied*, 118 S. Ct. 700, 139 L. Ed.2d 643 (1998).

wanted him to approve them. This also meant that he would have information at hand to advise local election authorities about adapting their current systems so as to comply with the ADA.

Adapting current balloting systems was simple enough that the El Paso voters themselves designed two methods, and a variety of easy applications, to allow blind voters to cast a secret ballot.⁴¹ The components of the El Paso voting system, which is typical of that used in other areas of Texas, are a portable box-like container about 24" x 18," with an attached stylus, a punch card ballot, and a set of pages with candidate/proposition information. The punch card and candidate/ proposition information pages are inserted into the top of a container, which sits on a table inside the voting booth.⁴² The punch card is set underneath the candidate/proposition information so that the information corresponds to specific punch-out holes on the card.⁴³ The punched ballot goes to an electronic counting system that collates, reads, and stores the ballots.⁴⁴

An easier and less expensive adaptation was use of a tape recording, a cassette player and earphones.⁴⁵ The tape recording contains candidate/proposition information and step-by-step instructions for using the system. The end result, a punch card ballot with holes, is deposited in the ballot box, indistinguishable from all other punch cards.⁴⁶

Three other voting systems are commonly used in Texas: a method that electronically scans and counts paper ballots, the traditional paper ballot, and a lever machine.⁴⁷ By designing systems that preserve secrecy for blind voters, the El Paso voters showed the possibility of easily-achievable alternatives. That it took them two and one-half hours to develop the tape method demonstrated how simple, inexpensive, and "low-tech" it was to adapt the ballot.⁴⁸

For paper ballot systems, the *Lightbourn* plaintiffs suggested inserting the ballot into a three dimensional template. The template has holes that correspond to the choices on the paper ballot that blind voters can identify by touch. A tape cassette conveys candidate/amendment information, as with the punch card system. The voter uses a pencil to fill in the hole marking his/her ballot choice.

Following the remedy phase of the trial, the court issued its Final Judgment and crafted relief for the Secretary's ADA violations.⁴⁹ The judge

41. Brief, *supra* note 2, at 17.

42. *Id.*

43. *Id.*

44. *Id.* The first adaptation incorporated the candidate/proposition information onto a Braille printout, along with step-by-step instructions for use of the system. *Id.* The Braille instructions advise the user as to which holes, from top to bottom, matched each ballot choice. *Id.* at 18. Once a blind voter identifies the hole corresponding to the desired ballot choice, the voter uses the stylus to perforate the punch card below. *Id.* With this simple adaptation, blind persons who read Braille may vote a secret ballot like sighted voters. *Id.* However, there is a limited number of persons who can read Braille fluently enough to vote this way. *Id.*

45. *Id.* The system allowed for write-in votes as well. *Id.* at 20 n.24.

46. *Id.* at 18.

47. *Id.* at 19. Lever machines, although no longer in much use because of their bulk and weight, adapt even easier than paper ballot systems. *Id.* at 19-20. Lever machines are three dimensional and merely need raised candidate/amendment information taped on the machine with a tape as a guide. *Id.* at 20.

48. *Id.* at 19 n.20 (citing 8 ROA, *supra* note 9, at 324).

49. *Lightbourn v. Garza*, 928 F. Supp. 711 (W.D. Tex. 1996). The trial judge also found the Secretary in violation of the 1973 Rehabilitation Act (§ 504). See *Lightbourn*, 904 F.3d at 1432-34.

found that: (1) the Secretary administered his licensing and certification system for Texas voting systems in such a way as to illegally discriminate against blind voters; (2) even though, by law, the Secretary funds virtually all election expenses for political party primaries (about \$10-\$12 million), he allows the parties to hold primaries at polling sites that are physically inaccessible and does not require use of a secret ballot adapted for blind voters; and (3) this all occurred in part because the Secretary did not conduct a self-evaluation of that segment of the voting program for possible discriminatory effects as to mobility-impaired and blind voters.⁵⁰

One of the district judge's remedial orders required that after December 31, 1996, the Secretary not approve any new voting system that was not ADA-accessible and did not preserve ballot secrecy for blind voters.⁵¹ He required the Secretary to distribute guidelines and instructions to manufacturers seeking approval of their voting systems that the systems be accessible to blind voters and those with mobility disabilities.⁵²

The district court basically required the Secretary to tailor his non-delegable mandatory election duties with those duties imposed on him by the ADA. The final order addressed "only those matters over which the Secretary has direct control."⁵³ In essence, the judge looked at those unique election functions that the Secretary performed, and found that everything he did, he did wrong for ADA purposes. And that he had done nothing to comply with the ADA.

B. *The Appeal*

The Secretary appealed, and the U.S. Fifth Circuit Court of Appeals decided that the Secretary had no duty to ensure that those steps that belonged to him needed to comply with the ADA. In short, the court held that the ADA was not a voting law and therefore did not apply to the Secretary's functions vis-a-vis conducting elections.⁵⁴

The Secretary's functions vary according to elections. For the Republican and Democratic Party primaries, he is actually the principal funder, providing 80% to 90% of the money needed to run an election.⁵⁵ However, the Secretary's role in general elections, basically providing advice, is more modest. He also has some oversight duties, but one of his main statutory functions is compiling a list of approved voting systems from which local electoral entities purchase.⁵⁶

However, because § 504 claims parallel ADA claims, and since the Court of Appeals did not reach the § 504 claim for technical reasons, this article does not discuss it, other than to note it was litigated in tandem with the ADA claim.

50. *Id.* at 712-14.

51. *Id.* at 716.

52. *Id.*

53. *Id.*

54. The Court of Appeals also reversed, on other grounds, judgment in favor of the El Paso voters' § 504 claim. The appellate panel invalidated the parties' stipulation that § 504 applied to the Secretary because his office had received federal funds. *Lightbourn v. Garza*, 118 F.3d 421, 427 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 700 (1998).

55. *See Lightbourn*, 928 F. Supp. at 713.

56. *See TEX. ELEC. CODE ANN.* § 122.031 (Vernon's 1993).

Should they choose a system not on the list, they must secure the Secretary's approval.⁵⁷

As this article discusses later, the nexus of any of the Secretary's functions was not sufficiently persuasive for the Court of Appeals. The panel also held that, to show impermissible ADA discrimination by the Secretary, plaintiffs would have to show that he took some step that adversely affected their right to vote.⁵⁸ This appears to be a rather amazing reading of the ADA. The ADA is a proactive law, requiring government agencies to do a self-evaluation and take affirmative steps to remove discrimination, whether intentional or resultant, particularly when the discrimination is brought to the attention of the governmental entity. Nevertheless, the Fifth Circuit had little problem turning the statute on its head.

C. *Changing Emphasis after Litigation*

The setback in the Fifth Circuit by no means ended the saga. The *Lightbourn* ruling eliminated uniform ADA statewide compliance and access to the ballot, but it did not destroy causes of action against local election authorities. Unfortunately for local officials, the gist of the opinion devolves upon them the entire responsibility for making the secret ballot available to blind voters and ensuring physically accessible polling places.

After unsuccessfully trying to convince the United States Supreme Court to hear the case,⁵⁹ the Texas Civil Rights Project,⁶⁰ Advocacy, Inc.,⁶¹ various blind individuals, and organizations that represent people who are blind initiated a cooperative effort to bring local election authorities to the same place to which they had brought El Paso County. On January 26, 1998, they filed lawsuits against Bexar County⁶² and Cameron County.⁶³ Simultaneously with the litigation initiative, they entered into negotiations with Harris County and Travis County.

The objective of the litigation and the non-litigation initiatives was twofold, as in *Lightbourn*: first, the Counties would ensure that, when they purchased new voting machines in the future, the new systems would have built-in adaptations for voters who are blind; and, second, in the meantime, the Counties would provide an adapted ballot, perhaps similar to that used by El

57. *Id.*

58. *Lightbourn*, 118 F.3d at 432.

59. The American Council of the Blind sought to file an amicus curiae brief in the Supreme Court, supporting the El Paso voters. Before it could do so, however, the justices denied certiorari.

60. The Texas Civil Rights Project (TCRP) is a nonprofit, tax-exempt foundation that attempts to bring about social, racial, and economic justice through litigation and education. TCRP entered the *Lightbourn* litigation as co-counsel in January 1995.

61. Advocacy, Inc., attorney Richard Lavallo played a key role in coordinating the litigation and in working with the Secretary of State to develop proposed legislation, described in note 67 and in the Conclusion, *infra*.

62. *Donna J. McBee v. Bexar County, Tex.*; Civil Action No. SA-98-CA-67 (W.D. Tex.).

63. *Federico Vásquez v. Cameron County*; Civil Action No. B-98-021 (S.D. Tex.).

Paso County.⁶⁴ To their credit, each County showed great willingness to participate in significant negotiations. Local officials were keen on making their voting systems usable by people who are blind. This spirit of negotiation produced great creativity.

For example, under the careful tutelage of Houston attorneys James Passamano and Beth Sufian and the expert assistance of County Clerk, Beverly Kaufman; and Elections Administrator, Tony Sirvello; Harris County pulled together in a remarkably short time a very workable program.⁶⁵ Harris County uses punch card ballots like El Paso County. The original adaptation in Spring 1998 involved using receivers similar to a Walkman without the radio component. After the Bexar County experiment (described in the following paragraphs) Harris County moved from pre-recorded tapes to a telephone headset (or a receiver shoulder rest, as an alternative) that allowed blind voters to talk on the phone, receive instructions, and use both hands to punch the card ballot. The Houston officials entered into negotiations with a desire to make them succeed, and undertook a solid public information and awareness campaign directed toward the blind community.⁶⁶

Bexar County developed a telephone-based approach. Its voting system, comprised of paper ballots that are marked by pencil and scanned, initially caused difficulty because of the necessity of devising a guide that could direct blind voters as to how to mark their ballot options. The plaintiffs originally suggested a kind of Mylar or plastic overlay to which the paper ballot would be attached or a sleeve where the ballot would be inserted and then lined up with the Mylar. Holes in the Mylar would allow blind voters to receive headset instructions about counting down the different holes in order to mark them appropriately for their candidate or ballot proposition of choice.

However, a serious problem remained of ensuring that the paper ballot was properly lined up with the overlay, so that when a voter marked the ballot with pencil, the voter was actually marking inside the circle and not outside the ballot circle. If one marks outside the circle, the scanner cannot read and count the ballot. Bexar County prided itself on being able to resolve this problem. At the urging of County Judge, Cyndi Krier, County Clerk, Gerry Rickoff, and his election assistant, Cliff Burofsky, devised a less expensive and more workable method.

Under the Bexar County plan, a certain number of ballots are printed without names and the "yes" and "no" for propositions. Those ballots are simply coded with lettering. Instead of reading "Irma Brook" and "Tom Rodriguez" for the position of state representative, for example, the ballot simply has "A" and "B." These letters would be scrambled so they do not correspond to the lineup

64. The Arkansas settlement in McKay, *supra* note 3, has no provision for interim voting measures for blind voters, as do the settlements with El Paso County, and with the other counties mentioned in this article.

65. See James A. Passamano and Beth Sufian, Summary and Report of the Results of the Test of an Audio Tape Accommodation for Blind and Visually Impaired Voters in Harris County, Texas (conducted March 12, 13, and 14, 1998) (on file with this journal).

66. See *id.*

on a ballot printed with names.⁶⁷ The blind voter receives such a coded ballot and calls a central location from a phone that the County provides at each polling place. The person answering the phone tells the voter that the letter "A," for example, represents Tom Rodriguez and "B" represents Irma Brook. The voter then instructs a polling place worker how to mark the ballot. If the ballots are scrambled, the local official will not know how to figure out for whom the voter is casting the ballot. This system is efficient and not expensive.⁶⁸

All the counties, as part of their agreements, committed themselves to purchasing new systems that are adapted for voters who are blind at the point they would normally purchase them.⁶⁹ Between the method adopted by Bexar and Harris Counties and that used by El Paso County, any election authority should be able to devise an interim system that can ensure a secret ballot for blind voters, until it purchases a new system.⁷⁰

Having succeeded in these endeavors, the Texas Civil Rights Project and Advocacy, Inc., have set their sights on Tarrant, Travis, and Dallas Counties. Dallas County has already committed itself to securing an adapted voting system when it purchases its next new system.

An intriguing legal point lurks under the table. All these counties, under Texas law, must secure permission of the Secretary of State in order to use their adapted systems.⁷¹ That puts the Secretary in the legal position of committing the direct action that the Fifth Circuit said was necessary to raise the specter of ADA liability, should he refuse to certify and permit these new adaptive systems. For that reason, and given the new climate of cooperation with the Secretary, as noted in the conclusion of this article, no problems are anticipated in winning approval.

Both the Texas Civil Rights Project and Advocacy, Inc., have made their positions clear to voting entities around Texas, that adapting their ballots for blind voters and ensuring physical access is of the highest priority.

II. The Legal Theory

This section sketches the respective ADA responsibilities of local and statewide election authorities to assure ballot access.

67. Without a court order, legislative change is needed for this step. See TEX. ELEC. CODE ANN. §§ 52.092, 122.001 (Vernon's 1986). Such a change will be proposed during the 1999 legislative session, with the support of all interested parties.

68. The County hopes to arrange for a local telephone company to provide telephones gratis for balloting, which will allow both it and the telephone company to present a good face to voters.

69. Cameron County has indicated it will adopt the Bexar County method.

70. This assumes as well that ballots counted by hand are counted in a central location.

71. TEX. ELEC. CODE ANN. § 122.031 (Vernon's 1986).

A. *Liability of Local Elections Officials*

By its plain terms, Title II's general prohibition of discrimination applies to anything a public entity does,⁷² including discriminatory election practices. Title II provides, without exception, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."⁷³ The Texas program of voting by secret ballot is a program for ADA purposes.⁷⁴

The ADA applies to voting and elections, and Congress apparently intended that it do so. The ADA's statement of findings, singled out "voting" as one of the "critical areas" in which "discrimination against individuals with disabilities persist[s]."⁷⁵ The Senate Report accompanying the Act quoted the testimony of the Illinois Attorney General, who "focused on the need to ensure access to polling places: 'You cannot exercise one of your most basic rights as an American if the polling places are not accessible.'"⁷⁶ The issue of voting accessibility also arose in the floor debates.⁷⁷

Nor may a public entity contract away its ADA responsibilities:

A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing or other arrangements, on the basis of disability . . . [a]fford a qualified individual with a disability an opportunity to participate in or

72. 28 C.F.R. § 35.102(a) (1999) (Part 35 contains the Justice Departments Standards of Accessible Design "JDSAD," which are ADAAG guidelines that the Justice Department promulgates as regulations). *See also* *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222, 232 (S.D.N.Y. 1996) (finding "nothing in the text or the legislative history of the ADA to suggest that . . . any other governmental activity was excluded from its mandate."); H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 7 (1990) (Title II applies "to all actions of state and local governments.").

73. 42 U.S.C. § 12132 (1995).

74. The Court of Appeals never considered that a fundamental element of the right to vote in Texas is the secret ballot. This right is guaranteed by the state constitution, and delineated in Texas case law. As to casting a secret ballot being a fundamental constitutional right under Texas law, *see* *Wood v. State ex rel. Lee*, 126 S.W.2d 4, 9 (Tex. 1939) (upholding constitutionality of voting machines because they "accorded a secret ballot" to voters, as guaranteed by state constitution); *Carroll v. State*, 61 S.W.2d 1005, 1007-08 (Tex. Crim. App. 1933) (construing mandate of Tex. Const. art. VI, § 4, that elections be by ballot to mean by secret ballot). *Cf. Oliphint v. Christy*, 299 S.W.2d 933 (Tex. 1957) (stating that a court may not compel a qualified voter to disclose content of secret ballot in election contest). The privacy component of the right to vote is critical, and it is what the El Paso voters sought to protect in this litigation. Ignoring this issue gave the appellate court greater flexibility in ruling as it did. Had it focused on the fundamental right to a private ballot, its ADA analysis should have been substantially different.

75. H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 2 (1990).

76. S. Rep. No. 116, 101st Cong., 1st Sess., at 12 (1989).

77. *See, e.g.*, 135 Cong. Rec. S10753 (1989) (remarks of Senator Gore) ("As a practical matter, many Americans with disabilities find it impossible to vote. Obviously, such a situation is completely unacceptable and unconscionable. We must take strong action to end the tradition of blatant and subtle discrimination that has made people with disability second-class citizens."); 135 Cong. Rec. S10793 (1989) (remarks of Sen. Biden).

benefit from the aid, benefit, or service that is not equal to that afforded others.⁷⁸

A voting system is an aid, benefit, and service that permits voters to cast a secret ballot. Voting systems or equipment may not discriminate against voters with disabilities by denying them an equal opportunity to vote a secret ballot.

This discrimination, which the ADA sought to cure, may go undiscovered if the entity fails to perform a self-evaluation. The duty to remove discrimination discovered through the self-evaluation process is mandatory,⁷⁹ with very narrow exceptions.⁸⁰ 28 C.F.R. § 35.105 requires that a public entity “shall, within one year of the effective date of this part [January 26, 1992], evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent that modifications of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.”⁸¹ This regulatory language is plain, comprehensive, and proactive.

Title II does not require a plaintiff to demonstrate that a public entity intended to pay no heed to the plaintiff. Instead, Title II mandates that a public entity evaluate which of its current services, policies, and practices (and the effects thereof) are discriminatory, and then “proceed to make the necessary modifications” to eliminate such discrimination.⁸² Whether a public entity intended to discriminate by non-accommodation is of no import under the ADA. The only inquiry is whether discrimination results. Title II regulations make it clear that an intent to discriminate is not necessary to show an ADA violation, only the effects: “a public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: . . . [t]hat have the *effect* of subjecting qualified individuals with disabilities to discrimination on the basis of disability.”⁸³

Title II also should be read in harmony with Title I of the ADA (the employment provision of the ADA), which defines “discriminate” as “utilizing standards, criteria, or methods of administration . . . that have the *effect* of discrimination on the basis of disability”⁸⁴

Congress clearly intended the ADA to undo the effects of discrimination as part of its purpose “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁸⁵ The discrimination that Congress sought to remedy through the ADA was of the kind

78. 28 C.F.R. § 35.130(b)(1)(ii) (1999).

79. *See, e.g.*, 28 C.F.R. § 35.105; *Tyler v. City of Manhattan*, 849 F. Supp. 1429, 1437 (D. Kan. 1994) (examining city liability for not conducting ADA self-evaluation of all programs, services, and facilities and not consulting with disability community).

80. 28 C.F.R. § 35.105 (1999). Section 35.105 also mandates that interested persons with disabilities, and representative organizations, participate in the self-evaluation process. *Id.* § 35.105(b) & (c). The Secretary, in *Lightbourn*, never contacted any such individuals on behalf of blind voters. He failed to involve even the Texas Commission for the Blind, the agency that assists persons with severe visual impairments, and has a mailing list of 25,000 people who are blind.

81. *Id.* § 35.105(a).

82. *Id.*

83. *Id.* § 35.130(b)(3)(i) (1999) (emphasis added).

84. 42 U.S.C. § 12112(b)(3)(A) (1995) (emphasis added).

85. *Id.* § 12101(b)(1).

born more out of ignorance than ill will. To require voters with disabilities to show that a government entity intentionally refused to accommodate them is to impose a burden that Congress did not create.

The ADA does not have an intent requirement, as does standard Fourteenth Amendment litigation. Rather, the ADA is remedial in nature and more closely akin to Title VII employment law⁸⁶ and the Voting Rights Act.⁸⁷

Local elections authorities thus have a clear Title II obligation to make their elections as completely accessible as possible to voters who are blind or have physical disabilities.

B. *Liability of Statewide Elections Officials*

The Secretary of State, as Texas' chief elections officer, plays a pivotal statutory role in elections held in Texas, at all levels. He has certain mandatory duties under the law to assure the functioning of voting by secret ballot.⁸⁸ The El Paso voters argued that the Secretary did nothing to reasonably accommodate voters with disabilities in the exercise of the secret ballot. As such, he discriminated against them; the ADA expressly prohibits discrimination based on inaction. The Court of Appeals disagreed, however. This section discusses the appellate opinion, which delineates the ADA responsibilities of statewide election officials.⁸⁹

1. *The Fifth Circuit Held That Texas' Chief Elections Officer Has No Legal Duty Under the ADA to Modify His Election Practices and Procedures to Assure That Citizens With Disabilities Have an Equal Opportunity to Cast a Secret Ballot.*

The Court of Appeals decided that the Secretary had no ADA duty to take steps to ensure that local election officials comply with the ADA. This holding stemmed from the premise that "the ADA is not an election law."⁹⁰ Although the opinion is not clear what an "election law" is, that the ADA is not an election law is irrelevant. The opinion missed the point: the ADA does apply to elections, just as it applies to all facets of government programs.

The appellate panel faulted the El Paso voters for using their lawsuit to ensure that local officials comply with the ADA. Why that bothered the court is unclear. The El Paso voters only attempted to compel the Secretary to do what the ADA required, nothing more and nothing less. The district judge recognized that his order would have a beneficial "trickle down" effect.⁹¹

86. *Id.* § 2000e to e4; *see generally*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

87. 42 U.S.C. § 1973 (1998).

88. *See supra* note 74.

89. As observed in the beginning of this article, *supra* n.3, the Arkansas settlement requires its Secretary of State to undertake many of the administrative steps described in this section and which the trial judge had ordered eight months earlier against the Texas Secretary of State

90. *Lightbourn v. Garza*, 118 F.3d 421, 430 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 700 (1998).

91. "the Court has jurisdiction only over the Secretary in this case. Therefore, only those matters over which the Secretary has direct control are addressed. The ruling of this Court does not directly burden local election officials. However, the Court does acknowledge that, as in many other cases, changes at the top will work changes at the bottom. This holding will, among other things,

Title II of the ADA and its regulations contemplate the joint administration of government programs by different agencies and officials. Such is the case with regard to voting in Texas. Bringing one agency or official into compliance with the ADA, one step at a time, has an ameliorative effect on the entire program. The El Paso voters wanted to make the secret ballot accessible, and focused on a pivotal figure in that scheme. They wanted the Secretary to modify his non-delegable, mandatory election duties under Texas law to accommodate voters with visual and physical disabilities.⁹²

While the ADA may not be an election law per se, it does apply to voting and elections, and Congress apparently intended that it do so. As noted earlier, Title II reaches any state action that subjects persons with disabilities to discrimination as defined in the ADA. By this measure, the Secretary's certification and approval of inaccessible voting systems—part of a program or activity of his office—discriminates against blind voters and violates the ADA. The same goes for the Secretary's funding of political party primaries that use inaccessible places and equipment.

a. The Secretary failed to assure that new voting systems or equipment used in Texas elections are accessible to voters with disabilities.

The Secretary's most singular violation of the ADA, in the view of the El Paso voters, was his refusal to assure that the new voting systems and equipment were accessible to voters with disabilities. The Secretary had the ultimate say in the approval and use of voting systems and voting equipment in Texas, except for simple hand-marked paper ballots.⁹³ Yet, he made no effort to administer this program in compliance with Title II.

Counties that purchase voting systems or equipment must select them from a list approved by the Secretary (or they may develop their own system, which the Secretary must then approve). At time of the *Lightbourn* trial, the Secretary's list contained approximately twenty-seven approved systems, none of which allowed blind voters to cast a secret ballot and few of which accommodated voters with physical disabilities.

Title II obliges the Secretary to not deny the benefits of the services, programs, or activities of his office to individuals with disabilities on the basis of their disability. Sections 121.031 and 121.038 delineate a mandatory program or

remove a major impediment to a local voting authority seeking to comply with the ADA, namely the failure of the Secretary to approve an ADA-compliant system." *Lightbourn*, 928 F. Supp. at 716.

92. The Fifth Circuit relied on *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986), for finding that the violations alleged by the El Paso voters could not be attributed to the Secretary. *Bush* held that the Texas Jail Standards Commission has no state-created duty to enforce Fourteenth Amendment jail standards in county jails throughout the state as part of its own minimum jail standards. In other words, the circuit would not read Fourteenth Amendment standards into Texas statutory minimum jail standards. However, if Congress decides in the exercise of its Fourteenth Amendment powers to do so, it could pass a statute requiring that such be done with regard to jail conditions. The Court of Appeals chose to read *Bush* as controlling the ADA. Congress, however, intended the ADA to override and overcome the very problem created by *Bush*, and to assure that federal standards apply as to individuals with disabilities.

93. Section 122.031 of the Election Code provides that: "[b]efore a voting system or voting system equipment may be used in an election, the system and a unit of the equipment must be approved by the secretary of state . . ." TEX. ELEC. CODE ANN. § 122.031 (Vernon's 1997). See also § 122.038 (secretary shall approve system or equipment that satisfies applicable requirements).

activity of the Secretary. As such, this program—the certification and approval of voting systems—must be made accessible to voters with disabilities.⁹⁴

The Texas Election Code sets out the eleven criteria that the four examiners, designated by statute, must use in recommending the Secretary's approval of a voting system.⁹⁵ The first on the list is assurance of secret balloting.⁹⁶ The ADA dovetails perfectly with this criterion since the El Paso voters invoked the ADA to achieve that very benefit, and constitutional right.

Although having the duty and power to do so, the Secretary never developed or promulgated any ADA criteria to assure that voting systems, which he approves, are accessible to persons with disabilities, and that secret balloting is afforded to visually-impaired voters.⁹⁷

And, because the examiners did not receive any ADA information or training from the Secretary, they never asked any voting systems manufacturers about physical access issues or secret balloting for blind voters.⁹⁸ Had there been criteria or instructions, the examiners would have insisted on such features, and market forces would then have helped build access features into new voting systems.⁹⁹ It would not be an undue burden to require ADA accessibility as part of the approval process.¹⁰⁰

Because none of the systems approved by the Secretary were accessible to blind voters and because many of them have inaccessible features for voters with physical disabilities (such as high voting booth counters), the Secretary actually put Texas counties at legal peril. The counties must purchase their voting systems or equipment from the Secretary's list, but the list only had inaccessible choices. The counties, then, violate federal law by using the list, and violate state law by not using it.

b. The Secretary failed to assure that the political party primaries are accessible.

The Court of Appeals ignored the Secretary's failure to ensure that primary elections which he funds are held in compliance with the ADA, perhaps because there was no way of excusing it. The Secretary's ADA duties seem clear and direct on this point.

94. The Fifth Circuit wondered where in §§ 122.031 and 122.038 the El Paso voters found “this expansive duty” to approve equipment that provides for a secret ballot for blind voters. *Lightbourn*, 118 F.3d at 431. They found it in the plain language of Title II. *Id.*

The court also misconstrued what the El Paso voters sought: they did not, as the court wrote, seek to “oblig[e] the Secretary to take affirmative steps to solicit and approve equipment that ensures a completely secret ballot for blind voters.” *Id.* Rather, they requested only that the Secretary not certify equipment that failed to provide blind voters the opportunity to cast a secret ballot.

95. TEX. ELEC. CODE ANN. § 122.001 (Vernon's 1993).

96. *Id.*

97. One of the four examiners, appointed by the Secretary to recommend approval of voting systems to him, testified there was no problem with setting up appropriate ADA criteria—all the examiners needed was the Secretary's fiat. Brief, *supra* note 2, at 27. But that never came.

98. *Id.*

99. *Id.*

100. *Id.*

The Secretary has joint responsibility with local officials for carrying out elections; the degree of responsibility varies according to the type of election.¹⁰¹ For party primaries, he plays an expansive role. He is the principal funder and the sole source of approval for any relocation of polling sites away from those already approved for county use.¹⁰² As such, his ADA responsibilities are correspondingly greater.

The Secretary controls the use of voting systems and equipment by party officials through his certification process. He also pays approximately 90% of the primary elections costs (\$10-\$12 million per election) through contracts with political parties and local elections officials, who in turn must use a voting system he has approved, none of which assure a secret ballot for blind voters.¹⁰³

The ADA clearly imposes liability on the Secretary in this instance. As noted earlier:

A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing or other arrangements, on the basis of disability . . . (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.¹⁰⁴

The Secretary had not imposed any conditions on the political parties to assure ballot accessibility; nor had he required or suggested that the parties, as a condition of receiving primary funds from him, familiarize themselves with the ADA and assure accessible polling places.¹⁰⁵ Although he routinely mailed information to political parties about conducting primaries, he never included ADA material.¹⁰⁶

c. The Fifth Circuit decided the Secretary has no duty under the ADA to conduct a "self-evaluation" of the election services, policies, and practices he administers.

The Secretary also failed to conduct a self-evaluation process pursuant to 28 C.F.R. § 35.105(b) to measure whether the election program, practices, and

101. *Id.* at 29 (citing 9 ROA, *supra* note 9, at 637).

102. *See* TEX. ELEC. CODE ANN. § 43.034 (Vernon's 1986).

103. Brief, *supra* note 2, at 29 (citing 9 ROA, *supra* note 9, at 657).

104. 28 C.F.R. § 35.130(b)(1)(ii) (1999).

105. Brief, *supra* note 2, at 29 (citing 9 ROA, *supra* note 9, at 672).

106. The El Paso County Democratic Party representative acknowledged physical access difficulties in polling places throughout El Paso County (and East Texas, where he had practiced law for a number years). *Id.* at 13 (testimony of Robin Collins). He said the party never received information from the Secretary about choosing accessible sites, even though the Secretary routinely sent out information about other matters he deemed important. *Id.* at 14. Nor did he ever suggest that the party do an ADA self-evaluation, or mention the ADA in any mailout. *Id.* Like other witnesses, he indicated that directives from the Secretary would greatly improve ADA access in all 254 Texas counties. *Id.*

policies he administers discriminate against voters with disabilities, and, if so, modify them to remove the discrimination.¹⁰⁷

The Fifth Circuit eviscerated this legal duty by holding that § 35.105(a) “merely” required the Secretary to evaluate his department, and not his services, practices, and policies, and the effects thereof.¹⁰⁸ This ruling was plainly wrong, and contrary to specific ADA language. The regulation's breadth is sweeping, covering all services and practices of the Secretary. This surely includes his approval of voting systems and equipment for use in elections, as well as his funding the party primaries.

Despite the Fifth Circuit's opinion, it seems clear that any statewide elections official has a mandatory duty under the ADA to evaluate and explore, through all means reasonably available, solutions to the discrimination faced by blind voters. Not undertaking that process virtually guarantees adverse consequences for voters with disabilities.

d. The Secretary failed to adapt and modify the advisory functions of his office.

Despite a duty to do so, the Secretary did not adapt and modify the duties of his office to issue advisories and directives that affect the franchise to include information about ADA compliance in elections.¹⁰⁹

Since the Secretary has the obligation to provide counties information about their legal responsibilities,¹¹⁰ he should inform them of what the ADA requires. The counties rely on, and comply with, the Secretary's advice because of their budgetary constraints, his expertise, the desire and need for uniformity, and because he is the chief elections officer by law.¹¹¹ The counties depend on him for guidance in compliance with both state and federal law.¹¹²

Nevertheless, the Secretary never advised counties they should conduct ADA-accessibility surveys, although he had considerable knowledge about the lack of accessibility around the state by virtue of the reporting done through him to the Federal Elections Commission between 1985 and 1994 under the Voter Accessibility Act.¹¹³

107. The *Lightbourn* plaintiffs argued that a chief reason for the Secretary's breach of his ADA duties is that he never conducted a self-evaluation to measure his level of compliance with the ADA. See *Lightbourn v. Garza*, 118 F.3d 421, 432 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 700 (1998).

108. *Lightbourn*, 118 F.3d at 432. Section 35.105 also calls for interested persons with disabilities, and representative organizations to participate in the self-evaluation process. 28 C.F.R. § 35.105 (1999). The Secretary, however, never contacted any such individuals on behalf of blind voters. He failed to involve even the Texas Commission for the Blind, the agency that assists persons with severe visual impairments, and has a mailing list of 25,000 people who are blind.

109. See Brief, *supra* note 2, at 29-30. The Circuit court did find that the Secretary “arguably breached” his duty to assure uniformity in the administration of elections statewide with regard to accessibility issues, but, nevertheless, the breach of “that duty . . . could not have denied any benefit to the [El Paso voters].” *Lightbourn*, 118 F.3d at 432. The court offered no explanation of its logic, which actually seems counter-intuitive. Certainly, it would benefit voters with disabilities to have uniform voting practices.

110. TEX. ELEC. CODE ANN. § 31.003 (Vernon's 1997).

111. Brief, *supra* note 2, at 24.

112. *Id.*

e. The Secretary failed to adapt and modify the informational functions of his office.

The Secretary operates an 800 toll-free telephone number for information about elections and voting. Although it would be easy to provide a tape recording about ballot propositions, like constitutional amendments, and statewide candidates for blind voters to access through the 800 number, the Secretary never considered this service.¹¹⁴ Further, he never suggested to counties that they set up an audio-tape system for blind voters in local elections.¹¹⁵

The Secretary never considered modifying his public service announcements to direct them to voters with physical or visual disabilities, although he easily could have done so.¹¹⁶ Moreover, the Secretary never prepared ballot instructions or voter information in Braille or large print for statewide candidates or ballot propositions, although it is as simple as changing the font size on a computer (and Braille printers are available for word processors), and audio tapes are easily duplicated.¹¹⁷ These simple steps would have served 90-95% of voters with visual impairments.¹¹⁸

2. The Fifth Circuit erroneously incorporated a virtual "intent-to-discriminate" requirement into the ADA, rather than an "effects" test.

One striking assertion of the Fifth Circuit's opinion was its effective incorporation, in conflict with the ADA's express text, of an intent-to-discriminate requirement into the Act. That would change radically a plaintiff's burden in advancing a discrimination claim under Title II. An intent requirement turns the ADA on its head, and defeats Congress's efforts to remove disability discrimination from governmental institutions and society as quickly as possible.

The Court of Appeals misconstrued the El Paso voters' argument to be that §§ 122.031 and 122.038 of the Election Code obligated "the Secretary to take affirmative steps to solicit and approve equipment that ensures a completely secret ballot for blind voters"¹¹⁹

Title II however, does not require a plaintiff to demonstrate that a public entity intended to discriminate. Rather, Title II requires that a public entity "evaluate its current services, policies, and practices, and the effects thereof" to determine if any are discriminatory, and then "proceed to make the necessary modifications" to eliminate such discrimination.¹²⁰ The Secretary did not do this, and the Fifth Circuit approved of his non-compliance with the ADA.

113. Brief, *supra* note 2, at 24 (citing 9 ROA, *supra* note 9, at 618-20, 622-23, 640). See *supra* notes 22 & 23, and accompanying text.

114. Brief, *supra* note 2, at 29-30 (citing 8 ROA, *supra* note 9, at 589, 680).

115. *Id.* at 30 (citing 8 ROA, *supra* note 9, at 594; 10 ROA, *supra* note 9, at 977).

116. *Id.* (citing 8 ROA, *supra* note 9, at 591-92, 646; 10 ROA, *supra* note 9, at 934).

117. *Id.* (citing 10 ROA, *supra* note 9, at 869-70).

118. *Id.* at 31 (citing 8 ROA, *supra* note 9, at 292-93).

119. "The [El Paso voters'] assertion that a voting machine for blind voters exists does not prove that the Secretary violated the ADA because [they] do not allege—let alone prove—that they presented any voting machine to the Secretary or that he failed to approve such a machine. Perhaps the [El Paso voters] could state a claim under the ADA if they demonstrated that the Secretary wrongly refused to approve such equipment after it was presented to him for approval." *Lightbourn*, 118 F.3d at 431.

120. 28 C.F.R. § 35.105(a).

Whether a public entity intended to discriminate by non-accommodation is not the issue. The only inquiry under the ADA is whether the entity's services, policies, and practices, and effects thereof, result in discrimination. The El Paso voters met this burden: the Secretary's practices denied voters with disabilities the right to a secret ballot.

Moreover, the appellate bench ignored Title II regulations prohibiting a public entity, directly or through contractual or other arrangements, from "utiliz[ing] criteria or methods of administration that have the *effect* of subjecting individuals with disabilities to discrimination."¹²¹ To require voters with disabilities to show that the Secretary intentionally refused to accommodate them is to impose a burden that Congress did not mandate. Very likely, this part of the opinion will be recognized for the unjustified Texas-specific dictum that it was and suffer an early demise.

III. Conclusion

The Fifth Circuit's judgment in *Lightbourn* diminished the most fundamental element of a representative democracy, the right to a secret ballot. No court would tolerate the discrimination that the Court of Appeals sanctioned were it based on race or sex.

Though one battle was lost, the future was not. The joint efforts of Advocacy, Inc., the Texas Civil Rights Project, and Texas' disability community have wrought great results in the state's major metropolitan areas. And successive Secretaries of State, with the able guidance of Ann McGeehan, the deputy for elections, now facilitate and actively encourage access to the secret ballot for people with disabilities.

The El Paso voters sought to breathe life into the promise that Congress made to Americans with disabilities; the long years of second-class citizenship and discrimination must come to an end. All that people with disabilities seek is that Promised Land where they can exercise that same democratic right that citizens without disabilities enjoy on election day. The *Lightbourn* litigation helped Texas move in that direction, and is now a guide for other jurisdictions in the country.

121. *Id.* § 35.130(b)(3)(i) (1999) (emphasis added).