From the Desk of David Richards

Memorandum

To: Matt Angle, Lone Star Project Director
From: Dave Richards
Re: Authority of Texas AG to pursue and/or settle state litigation
Date: January 20, 2014

Prompted by questions as to the accuracy of statements made by Texas Attorney General Greg Abbott implying that he is compelled as the state's legal counsel to pursue ongoing litigation regarding the constitutionality of the Texas school finance system, you asked my opinion regarding the power of the Attorney General to settle pending litigation. My opinion is as follows:

Without a doubt the office of Attorney General has ample authority to resolve pending lawsuits by settlement. Somewhat recent examples are the settlements in the long running *Ruiz* litigation over Texas prison conditions and *Morales v. Turman,* which was the suit against the Texas Youth Commission, as well as redistricting litigation in the 1980s, which was resolved by settlement and a consent decree.

Nor is the Attorney General obligated to appeal every adverse court decision affecting the constitutionality of state statutes. A number of years ago, I sued and obtained a judgment declaring unconstitutional the then existing durational residency requirement for voting. The state elected not to appeal and the judgment became final. During the first year of the Mattox administration, we confronted a trial court decision rendered during the Mark White administration, that declared the Texas sodomy statute unconstitutional, and he elected not to appeal that decision. That same year Mattox faced a court decision ordering Texas A&M to admit women to the marching band. He refused to appeal the court order and successfully opposed the Regents' efforts to appeal the matter themselves.

On a more current note, it is obvious that this is a matter of pure discretion on the part of the Office of the Attorney General. I am involved in a current lawsuit challenging the constitutionality of the statute governing the election of the Edwards Aquifer Authority Board of Directors. When suit was filed, we notified the Attorney General, as we are required to do when suing to challenge the constitutionality of a state law. The purpose of this is to allow the Attorney General to intervene and participate in defense of the challenged law. General Abbott's office did not intervene and, indeed, when we sought to bring the state in as a party to defend the law, the Attorney General's office resisted being joined in the case at all.

Additionally, Texas' Constitution and case law provide clear precedent that establishes the Attorney General's discretionary power to settle cases. For example, in 1991, there was an attempted settlement during the redistricting challenge to the state senate. The Supreme Court scuttled the settlement, but it did say—in an opinion by Nathan Hecht, now Chief Justice—the following:

“The Attorney General, as the chief legal officer of the State, has broad discretionary power in conducting his legal duty and responsibility to represent the State. See Tex. Const. art. IV, § 22; Tex.Gov't Code § 402.021; see also *Maud v. Terrell*, 109 Tex. 97, 200 S.W. 375 (1918); *Lewright v. Bell*, 94 Tex. 556, 63 S.W. 623 (1901); *Bullock v. Texas Skating Ass'n*, 583 S.W.2d 888, 894 (Tex.Civ.App.—Austin 1979, writ ref'd n.r.e.). This discretion includes the authority to propose a settlement agreement in an action attacking the constitutionality of a reapportionment statute. The Attorney General has participated in such settlements on previous occasions. *Terrazas*, 581 F.Supp. at 1321; *Graves*, 408 F.Supp. at 1052. Although the Attorney General appears to have acted throughout this litigation only on behalf of the state defendants and not for himself, he had the authority, certainly for his clients and even on his own, to suggest possible remedies after the district court rendered an interlocutory summary judgment holding Senate Bill 31 unconstitutional. He also had the power to negotiate a settlement with the plaintiffs and to execute an agreement with them. To hold that he did not would be to give him less authority than any party or any other attorney participating in the case.” *Terrazas v. Ramirez*, 829 S.W.2d 712, 722 (Tex. 1991).

Based on precedent, past actions and informed interpretation of law, it is certainly within the power of the Attorney General to settle cases of this nature.