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EXPLAINER

Enforcement of the Voting Rights Act in the 21st Century

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The Government Law Center's explainers concisely map out the law that applies to important questions of public policy.

The Fifteenth Amendment to the United States Constitution was ratified in 1870 following the Civil War. It provides that “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” In addition, it authorizes Congress to enforce its provisions “by appropriate legislation.”

In the century following adoption of this amendment, a number of states, many of which had been part of the Confederacy, took actions that effectively denied the right to vote to those protected by this amendment. Recognizing the need for legislation, as authorized by the amendment, Congress, in 1965, enacted the historic Voting Rights Act.¹ This comprehensive Act was intended to end the discriminatory practices that states had adopted. While it has since been amended a number of times, the Act's essential objective remains the same today.² It is now recognized as one of the most important congressional actions of the twentieth century.

The effectiveness of any legislation is determined not only by its substantive provisions, but also by the strength of its enforcement mechanisms. The Voting Rights

Act contains two specific enforcement provisions, one of which is quite unusual. The Supreme Court has addressed both, and its decisions significantly affect the impact of the substantive provisions of the Act upon the states.

Section 2 authorizes judicial challenges to actions related to voting taken by any state or local government. It authorizes courts to hear and determine a claim seeking to invalidate an action taken or policy imposed by a state that is alleged to be violative of the Fifteenth Amendment or the Voting Rights Act. This allows the federal government or any individual or group of individuals affected by the challenged action to seek court review. In July 2021, the Supreme Court interpreted this section and guided future courts in how to approach many of the challenges that are presented.

Section 5, the other enforcement mechanism, is a unique provision. It requires that in “covered” jurisdictions, any statute or other change in election procedures must be pre-approved by the United States Attorney General or a three-judge federal court before the change can take effect. In 2013, the Supreme Court issued a decision that effectively eliminated this pre-approval requirement unless and until Congress takes future action.

We now examine these decisions.

Section 5

In *Shelby County v. Holder*,³ decided in 2013, the Court observed that Section 5 was unusual in two distinct respects. First, it noted that this section provides for federal review and approval before a state law can take effect. This, it said, is “a drastic departure from principles of federalism.” In addition, the Court pointed out that the section applied only to certain “covered” states, which it said was “an equally dramatic departure from the principle that all States enjoy equal sovereignty.”

Despite the unusual aspects of these provisions, the Court recognized that it had previously upheld them in its 1966 decision of *South Carolina v. Katzenbach*.⁴ In that case, the Court said that they could be justified due to “voting discrimination where it persists on a pervasive scale.” It noted “exceptional conditions.” Relying on this decision, as well as on others that had followed, the *Shelby County* decision upheld Section 5. Thus, the pre-approval requirement remains valid.

What the Court did was examine the list of the states and counties that are subject to this pre-approval requirement, a list that is contained in section 4-b of the Act. Fundamentally, the Court examined the states included in section 4-b and found that their inclusion was outdated.

It reached this conclusion by noting that: “In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer

divided along those lines, yet the Voting Rights Act continues to treat it as if it were.”

The Court then went on to say that “history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it.” It noted that the Act had succeeded in its objective of having voting tests abolished and disparities in registration and voter turnout erased. It further recognized that African-Americans held many public offices. This led the Court, in looking at the pre-approval requirement, to conclude that Congress needed to identify the jurisdictions to be covered “in light of current conditions.”

The Court then concluded by saying that “We issue no holding on Section 5 itself, only on the coverage formula.” It recognized that “Congress may draft another formula based on current conditions.”

Despite attempts in the years since 2013, Congress has tried but failed to adopt a new list of covered jurisdictions. Thus, Section 5 remains a valid provision, but it is unusable unless and until Congress acts to bring the list of covered jurisdictions in section 4-b up to date.

Section 2

With Section 5 having been unavailable as an enforcement mechanism since 2013, those who have objected to various state actions have focused their attention on Section 2, using the provisions of this section to bring challenges to allegedly discriminatory state actions. One such challenge was in *Brnovich v. Democratic National Committee*,⁵ where two Arizona regulations were alleged to be in violation of the Act. The Court decided the case in July, 2021 and set forth new factors to be considered in many of the cases brought

under Section 2. These factors are likely to limit the success of challenges presented in future cases.

The state requirements challenged in *Brnovich* were fairly narrow. One provided that voters who choose to vote in person on Election Day must cast their ballot only in the correct precinct. Any vote cast elsewhere will not be counted. The other challenged rule provided that mail-in ballots could not be collected by anyone except an election official, a mail carrier, or a voter's family or household member or caregiver.

The Ninth Circuit, in an *en banc* decision, held that these provisions had a disparate impact on members of minority groups.⁶ It also noted Arizona's history of discrimination, going back to the days before it became a state. With these findings, that court held the challenged provisions to be in violation of Section 2.

The Supreme Court, in a 6-3 decision, reversed and upheld the regulations. The Court noted that it had not previously "considered how Section 2 applies to generally applicable time, place and manner voting rules." Thus, in this respect, *Brnovich* was a case of first impression.

Given this circumstance, the Court said that it declined to announce a test for cases involving rules like those presented. It said that "as this is our first foray into the area, we think it sufficient for present purposes to identify certain guideposts that lead us to our decision in these cases." It then set forth five such guideposts, which, it said, was not an exhaustive list.

The so-called guideposts are as follows:

1 – The size of the burden imposed by the challenged voting rule.

2 – The degree to which a voting rule departs from standard practice at the time Section 2 was last amended in 1982.

3 – The size of any disparities in the rule's impact on members of different racial or ethnic groups.

4 – The opportunities provided by the state's entire system of voting in assessing the burden imposed by the challenged provision.

5 – The strength of the state interests served by the challenged voting rule. As an example, the Court noted that one strong state interest is the prevention of fraud.

In addition to laying out these guideposts, the Court was explicit in rejecting the disparate-impact model used in Title VII employment cases and housing cases brought under the Fair Housing Act.

As Section 2 cases are filed in the future, courts will look to this decision's guideposts in assessing the provision or provisions that are subject to the challenge with which it is presented. As noted, these are neither fixed rules nor the exclusive guideposts, but they are the guidance that lower courts will be following unless and until further guidance is given by the Supreme Court.

Conclusion

In sum, enforcement of the Voting Rights Act looks very different today than at the time when it was enacted or even at the time it was last amended in 2006. Section 5, although still valid on its face, cannot be used as an enforcement mechanism unless Congress determines which states should be covered by its provisions based on recent history. Section 2, while still available to those who wish to challenge voting

provisions, is now often subject to the guideposts laid out by the Supreme Court. At a minimum, this puts an added burden on every such challenge.

Endnotes

¹ 79 Stat. 437.

² The current version of the Act is found at 52 U.S.C. 10301 *et seq.*

³ 570 U.S. 529 (2013).

⁴ 383 U.S. 301 (1966).

⁵ 594 U.S. ____ (2021), Decisions 19-1257 and 1258, July 1, 2021.

⁶ 948 F3d 989 (2020).