Voting Rights Act Debated at Federalist Society Forum

Is preclearance still needed in the South?

By Josh Kaib
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The Supreme Court ruled part of it unconstitutional, but the debate over the Voting Rights Act continues.

That debate was on display Tuesday during a panel discussion sponsored by the Federalist Society, the Cato Institute, and the Heritage Foundation.

Section 5 is the provision of the Voting Rights Act (VRA) which requires "preclearance" for certain states with a history of discrimination to alter their election laws.

When enacted, it was seen as an important measure to block these states from preventing African-Americans from voting. Today, it is the most controversial part of the law.

Most commentators, including those present at the panel discussion, agree that portions of the law which ban voting discrimination nationwide are still necessary.

Have times changed?

Panelist Ilya Shapiro from the Cato Institute conceded that Section 5 may have been needed when it was enacted in 1965, but "fast forward 50 years, and the situation on the ground is much different."

He noted that it's not justified by current needs, citing high voter turnout for African-Americans in the South.

Section 5 was rendered unenforceable by the Supreme Court's *Shelby County v. Holder* decision.

"The [Supreme] Court got it right by throwing out the coverage formula," Shapiro said.

This refers to the method by which the federal government determines which jurisdictions are subject to the preclearance requirement.

In the *Shelby County* decision, the court struck down that part of the VRA—Section 4(b)—but chose to leave Section 5 intact.

Until Section 4(b) is replaced, Section 5 can't be enforced: there is no way to determine what jurisdictions should be subject to preclearance under the law.

Preclearance on steroids?

Panelist Hans von Spakovsky of the Heritage Foundation echoed Shapiro's sentiments.

"The whole purpose of Section 5 was to solve a problem that hasn't existed literally for decades," he said.

Von Spakovsky warned that not only is the fight far from over, but a bill floating around Congress to replace Section 4(b) could put Section 5 on steroids.

H.R. 3899 is a proposed "remedy" following the *Shelby County* ruling. But von Spakovsky noted it would dramatically expand the Department of Justice's authority over election laws, giving it the ability to seek injunctions for anything it perceives to be in violation of the 14th and 15th Amendments, not just the VRA.

"If this provision had been in place in 2000, the Justice Department could have filed a lawsuit for Al Gore," he humorously noted.

The bill would end the race neutrality of the VRA, which currently does not specify a certain race for special protection at the exclusion of others. H.R. 3899 "provides a new formula based on so-called triggering events" including "persistently low minority turnout," according to von Spakovsky.

The bill specifically excludes whites from this provision ("nonminorities"), even though whites are in the minority in some voting jurisdictions.

In one Mississippi town, whites alleged that the African-American-controlled local government was trying to suppress their votes. H.R. 3899 seems to discount the possibility of this happening. Yet in that case, the Department of Justice filed a lawsuit, and a federal judge found that local officials violated the law.

Are the states equal before the law?

The lone pro-Section 5 panelist, David Gans of the Constitutional Accountability Center, often appeared breathless trying to defend the measure.

"There is no equality of states," he frequently said, asserting that federal law does not need to be equally applied to each state. In the case of Section 5, critics claimed it unfairly singled out certain states for extra federal oversight.

Gans pointed out that Section 5 was enacted to stop discriminatory laws before they could be enacted.

“The point of preclearance was to stop a discriminatory voting measure before it could take hold,” he said.

During the question and answer session of the panel, Gans was asked what formula he would use to determine if preclearance was necessary in a jurisdiction, but he admitted that he didn’t have an answer.

Panel moderator Michael Barone of the American Enterprise Institute frequently drew upon his historical knowledge to add context to the hour-long discussion.