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Why the Supreme Court may rule against the Voting Rights Act

by Suevon Lee February 26, 2013

On Wednesday, the Supreme Court will hear arguments in Shelby County v. Holder, a case challenging the constitutionality of a key part of the Voting Rights Act of 1965. The cornerstone provision is known as Section 5, which requires some states and localities to get federal clearance before making any changes to their voting laws.

What is the Voting Rights Act? And why does it matter? Here's a quick guide to what could be, as the influential SCOTUSBlog put it, "one of the most significant rulings of the current term."

What's Section 5 again?
As we've explained before, Section 5 requires nine mostly Southern states — Alabama, Georgia, Louisiana, Mississippi, South Carolina, Alaska, Virginia, Texas and Arizona — and areas of seven others to preclear any change to a voting law or procedure with the federal government.

This review is conducted by the Civil Rights Division of the Department of Justice or a panel of federal judges on the U.S. District Court for the District of Columbia. If a voting change hasn't been submitted for review, the change can be legally unenforceable.

Section 5, which was enacted by the original Voting Rights Act, was meant to address the systemic disenfranchisement of African Americans by state lawmakers in the South since the end of Reconstruction.

Under the provision, covered jurisdictions must prove that any proposed voting change doesn't have a discriminatory purpose or effect or would diminish minorities' ability to elect a favored candidate.

How were these states identified?
When the Voting Rights Act originally passed, the rubric to identify the original bad actors looked at racist voting practices like literacy tests and Census data indicating whether less than 50 percent of eligible voters voted in the November 1964 presidential election.

When Congress reauthorized the Voting Rights Act in 1970 for another five years, it mandated oversight of other states and municipalities with low voter turnout.

By 1975, when Congress extended the act for another seven years, the law was broadened to include discriminatory voting practices against language minorities. For example, states were flagged for offering ballots only in English where language minorities made up more than 5 percent of the voting-age population. (That's how Alaska, Arizona and Texas got federal oversight. It's also the reason why parts of Florida, Michigan, New York and South Dakota are included.)

In both 1982 and 2006, Congress extended Section 5 for another 25 years — without making any significant updates to the coverage triggers, or "formula" as it's called (In 1982, Congress also established standards to allow covered jurisdictions demonstrating good behavior to "bail out" from under federal supervision).

Right now, Section 5 isn't scheduled to expire until 2031 — which brings us to the current debate over its fairness and constitutionality in present-day circumstances.

How useful has Section 5 been?
Nearly everyone agrees that Section 5 once played a critical function to rein in recalcitrant state legislators determined to suppress the African American, and later on language-minority, vote.

It is its present application that's now in dispute.

"America is no longer a land where whites hold the levers of power and minority representation depends on extraordinary federal intervention," argues an amicus brief filed by the Cato Institute in the Shelby County case.

The kinds of voting law changes covered jurisdictions must submit for preclearance — back then, and still today — span large-scale changes like redistricting and voter ID laws to small things like changing a polling place or precinct, as this chart shows.

One way to look at the effectiveness of Section 5 is through the number of times the DOJ has requested more information from a jurisdiction that has submitted a voting change followed by a subsequent withdrawal of that proposal.

In a 2007 paper, Nathaniel Persily, a Columbia University professor of law and political science, concluded that since 1982, the DOJ requested more information from states or local governments 800 times, followed by the withdrawal of proposals in 205 of those instances.

"This represents a tiny fraction" of overall requests since 1982, Persily observes, "but it gives a sense of how many dogs did not bark as a result of the threat of a denial of preclearance."

Just this past year, the provision was the reason federal judges blocked voter ID laws in both Texas and South Carolina, voided new district maps in Texas and prevented early voting reduction of hours in parts of Florida, citing a potential adverse effect on minority voters.

In the past year, the Justice Department objected to a total 16 proposed changes under Section 5, according to a DOJ official.

Does this tell us that Section 5 remains a viable tool concerning these specific jurisdictions? It depends how you look at it.

"There's no question Section 5 covered the most egregious bad actors and the world looks different now," said Heather Gerken, a professor at Yale Law School who specializes in election law. "But the question is, why does the world look different? And in some ways we can't know because of the prophylactic rule."

So who's challenging Section 5?
Shelby County, Ala. In 2008, the city of Calera — located within Shelby County — redrew one of its electoral maps, bringing in hundreds of white voters and significantly decreasing the number of black voters, from 70.9 percent to 29.5 percent.

Since any change that would discriminate against minority voters violates the Voting Rights Act, the Justice Department stepped in and vetoed the proposed map. (The only black representative of the city council also lost his seat that election.)

The Justice Department also said the city relied on unreliable demographic data to justify the new map.

On April 27, 2010, Shelby County filed a lawsuit against the Justice Department in U.S. District Court for the District of Columbia, asking the court to declare Section 5 unconstitutional on its face – meaning, broadly applied, as opposed to just in the county's case alone.

As Reuters details, the case caught the attention of Edward Blum, a conservative advocate who persuaded Shelby County to file a suit, in turn connecting the county with lawyers who could handle an appeal all the way to the U.S. Supreme Court. Blum is also behind the recent Supreme Court challenge to affirmative action in public universities, Fisher v. University of Texas.

After a lower federal court ruled against Shelby County, and the U.S. Court of Appeals for the D.C. Circuit upheld the decision on appeal, Shelby County did just that.

In July 2012, it appealed to the Supreme Court, arguing that Congress, in 2006, lacked sufficient evidence showing that "covered jurisdictions have a latent desire to discriminate that does not exist elsewhere in the country" when it reauthorized the Voting Rights Act.

Lawyers argue that Section 5 should be struck down because it relies on an outdated formula that unfairly singles out certain states, creates a burdensome requirement to clear every proposed voting law change and that the federal government has demonstrated a "needlessly aggressive exercise of preclearance authority."

Didn't the Supreme Court come close to striking down Section 5 before?
Yes. In a 2009 case called Northwest Austin Municipal Utility District No. 1 in Texas v. Holder, or NAMUDNO for short, the Court didn't address the constitutionality of Section 5 — but it did suggest how it might rule in the future.

"The evil that (Section 5) is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance," Chief Justice John Roberts wrote in the majority 8-1 opinion. "The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions."

The 2009 decision also relaxed those "bailout" standards we've mentioned before.

Under this separate provision of the Voting Rights Act, states and localities can be "bailed out" from Section 5 coverage if they can show that in the last 10 years, they've maintained a clean record — in other words, that they've instituted no discriminatory voting practices or been issued any adverse judgments alleging voter discrimination.

But Blum, for one, says the bailout requirements are still very difficult to meet. "A city may draw an objection from the DOJ which makes the entire state ineligible to seek bailout for 10 years," he said.

So exactly how easy is it to bail out from Section 5?
Since 1967, several dozen localities have successfully come out from under Section 5 coverage. In the three years since NAMUDNO alone, more jurisdictions have requested and received bailout than between the years 1984 and 2009 — largely because the Supreme Court relaxed a standard.

Thus, any change since 2009 "has been for the better — i.e., consistent with the presumed goal of the Court in Namudno to enable jurisdictions to bail out from coverage," Gerry Hebert, an attorney who has handled a number of these bailout petitions, told ProPublica.

"To the extent Section 5 is a burdensome intrusion and an infringement on states' rights, bailout not only lessens that burden but it can eliminate it altogether."

Some have accused the DOJ of deliberately relaxing its rate of bailout acceptance.

The state of New Hampshire, where 10 townships fall under the coverage formula, filed a bailout petition in November, becoming the first stand-alone state to do so. A decision is expected sometime next month.

How likely is it that the Supreme Court will strike down Section 5?
Many saw in the Court's 2009 decision an underlying message to Congress to act to amend the Voting Rights Act. Of course, that didn't happen.

Also, some wonder about a current coverage formula that doesn't include states like Ohio and the whole of Florida, places which came under fire this year for scaling back on early voting.

"If you don't have Ohio and Florida, it might suggest that the coverage formula is a little out of whack," said Rick Hasen, professor of law and political science at UC Irvine School of Law. "The way the Supreme Court federalism cases stack up, and the way the conservative justices view these cases, I'm predicting the Court will strike it down."

Gerken, the Yale Law professor, also speculates on why the Court's four liberal justices joined the 8-1 opinion in 2009 that so clearly expressed doubts about the law's constitutionality.

"Maybe they did it because they wanted Congress to do something, or maybe it was a deal to postpone the demise of the Voting Rights Act," she said. "If it was a deal, it seems likely the deal will not last beyond that one case."

What happens if the Supreme Court strikes down Section 5?
Some say it won't matter all that much, because under a separate part of the Voting Rights Act known as Section 2, parties can always bring a lawsuit challenging a discriminatory voting law or practice.

But under that provision, the burden falls on the plaintiff, rather than on the state or municipality, to show that a proposed change is discriminatory. This means litigation comes at a cost — the smaller the change, the less likely litigation may be pursued.

In his 2007 paper, Persily noted that lawmakers recognized the need to update Section 5 coverage criteria to include "the newest generation of voting rights violators," but that politics provided an impossible roadblock. When Congress last reauthorized the Voting Rights Act in 2006, it rejected multiple amendments to change and expand the law.

In the event the Supreme Court strikes down Section 5 next year, some question Congress' ability to go back to the drawing board.

"Assuming they strike it down, they'll obviously provide parameters that Congress could meet if it wanted to pass it again," Gerken said. "Whether this Congress is remotely capable of doing that is another question."