Coates' Canons Blog: The Supreme Court's Voting Rights Decision

By Michael Crowell

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An obligation that many North Carolina counties, school boards and cities have worked under since the mid-1960s ended yesterday. You have probably already read about the United States Supreme Court's decision in *Shelby County, Alabama v. Holder*, the challenge to the constitutionality of Section 5 of the federal Voting Rights Act — the preclearance requirement which is now dead. There will be plenty of news coverage of the larger implications of the decision, so let's just summarize briefly the effect on local governments in North Carolina.

Bob Joyce recently explained on this blog the differences between Sections 2 and 5 of the Voting Rights Act. Section 2 prohibits discrimination in elections anywhere in the country. In the 1980s and 1990s it was used to invalidate at-large elections for many boards of county commissioners, school boards and city councils in North Carolina, requiring that they be replaced with district elections in which some districts are drawn with African American majorities. Section 2 is not affected by yesterday's decision. It remains in effect and will continue to be used by minorities to sue over election methods and practices they believe are discriminatory.

Section 5, on the other hand, has affected only 40 counties in North Carolina (and the state as a whole when the legislature makes changes that apply in those 40 counties, including legislative and congressional redistricting). It is the part of the Voting Rights Act that has required all changes in election practice and procedure to be precleared by the United States Justice Department or the federal district court for the District of Columbia before they could take effect. The review was intended to prevent any changes that make it more difficult for African Americans to vote or elect candidates of their choice. The burden has been on the local government submitting the change to show that its effect would not be discriminatory.

Who was subject to Section 5 was determined by a formula found in Section 4 of the act. In a nutshell, counties were subject to the Section 5 preclearance requirement if they had fewer than 50 percent of eligible voters registered or voting in the 1964 presidential election and previously had used a literacy test for voting. Forty counties in North Carolina met that test, most in the eastern part of the state. Yesterday the Supreme Court said Section 4 is so out of date that it no longer can be used to determine which jurisdictions are subject to preclearance. Too much has changed in the last 50 years, said the court.

The court did not declare Section 5 itself unconstitutional. Theoretically, Congress still could require preclearance of election changes in some parts of the country, but to do so it will have to come up with a new Section 4 formula based on current circumstances. The odds of Congress being able to agree on a new formula seem slim. Without a valid Section 4 formula, there is nothing in the law to say which jurisdictions are subject to Section 5, meaning the preclearance requirement presently is of no effect.

For the 40 counties in North Carolina previously subject to Section 5 — you know who you are — and the school boards, municipalities, boards of election and other governmental entities within those counties, there is no longer any need to seek preclearance of election changes.

The most obvious and significant effect of yesterday's decision will occur when commissioners, school boards and city councils in those counties next redistrict, after the 2020 census. The redistricting plans will not have to be sent to Washington. They will take effect as soon as enacted. Likewise, annexations by cities in those counties no longer have to be precleared (annexations have been subject to preclearance because they change the make-up of the electorate). Also, now if a board of commissioners or city council wants to tinker with its method of election — increasing or decreasing the size of the board, changing terms of members, switching from districts to at large or vice versa, etc. — it may do so

without having to count on the additional time required for preclearance. If the legislature decides to step in and change the elections for the board of commissioners, school board or city council through a local act, those changes will not require preclearance either.

Of less consequence, but of interest particularly to boards of elections, is the elimination of the need for preclearance of the numerous minor election changes that are noncontroversial but, even though they are routinely approved by the Justice Department, still have required preclearance. Those would be changes like splitting precincts, moving a polling place, changing voting equipment, altering the ballot design, setting a date for an ABC election, revising the office hours for the board of elections, opening a new one-stop voting site, and so on. The additional paperwork and the lag time for preclearance will no longer be needed.

Lastly, and once again, do not forget that the Supreme Court decision does not affect Section 2. If a local government, or the legislature, changes a local election plan to put African Americans or other minorities at a disadvantage, those citizens still may bring a lawsuit to challenge the change. What's different is that the local government does not have to first prove the non-discriminatory nature of the change to the Justice Department.

Links

- www.supremecourt.gov/opinions/12pdf/12-96_6k47.pdf
- canons.sog.unc.edu/?p=7146