Coates' Canons Blog: Understanding the Voting Rights Act

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UPDATE November 2013: In June 2013 the United States Supreme Court declared Section 4 of the Voting Rights Act of 1965 unconstitutional. That ruling made Section 5, discussed in the following post, unenforceable. See these Coates Canon posts: Supreme Court's Voting Rights Decision,Voting Rights Act Preclearance is Dead: Practical Considerations, andA Possible Unexpected Result of the Supreme Court's Voting Rights Decision.

The United States Supreme Court is expected to rule this month on whether Section 5 of the federal Voting Rights Act remains constitutional nearly 50 years after its enactment. Section 5 is just one of two chief operative parts of the act. Even if Section 5 should be declared unconstitutional, the other chief part, Section 2, will remain in effect. For nearly 50 years, people have been confused about the differences between Section 2 and Section 5.

Section 2 prohibits all forms of racial discrimination in the election process everywhere in the United States—in Mecklenburg County and in Bertie County and in the Bronx and Honolulu and Kalamazoo. It is enforced by lawsuits—brought by private citizens or by the federal government. The Section 2 lawsuit has been the driving engine for electoral change, directly challenging voting laws and practices that adversely affected minority voting. In the 1980s and 1990s, Section 2 was used with considerable success to upend at-large elections systems that kept African Americans from being elected to boards of county commissioners, school boards, and city councils. It is the reason for many majority-black election districts used by local governments in North Carolina today.

Section 5, on the other hand, applies only to certain governmental units that had especially low voter-registration rates at the time the Voting Rights Act was passed. In effect, those jurisdictions were presumed to have been discriminating. To prevent the introduction of new election procedures that adversely affect minority voting, governmental units subject to Section 5 must obtain approval from the U.S. Department of Justice ("DOJ") before making any change in an election procedure. The approval process is commonly referred to as "preclearance."

Most southern states are under Section 5 in their entirety, but in North Carolina only 40 of our 100 counties are subject to it. Any change in elections procedures in any of those 40 counties must be precleared. Examples include a switch to or from an at-large election system, any change in the term of office for an elected position, municipal annexations, moving of polling places or precinct lines, new office hours for the board of elections, and a change from one kind of voting machines to another. Because any change in any statewide elections law or procedure obviously affects those 40 counties, all such changes must be precleared before they can become effective.

DOJ reviews each such change to determine whether it places African-Americans or other minorities in a worse position. It does not matter whether that was the intent of the change or not—preclearance will be denied if the effect is to worsen the opportunity of minority voters to participate in the electoral process and elect candidates of their choice. That worsening is termed "retrogression." Here is how the applicable federal regulation states it:

> "A change affecting voting is considered to have a discriminatory effect under section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (*i.e.,* will make members of such a group worse off than they had been before the change) with respect to their effective exercise of the electoral franchise." 28 C.F.R. § 51.54(a)

Few changes are objected to, but it does happen. In 2002 DOJ objected to the post-census redistricting plans for the Harnett County board of commissioners and the county's board of education. In 2007 it objected to a proposed change in the number of districts for elections to the city council for Fayetteville from nine to six combined with the addition of three at-large seats. In 2009 it objected to a charter change in Kinston, approved by a majority of the city's voters in a referendum, that would have moved city elections from a partisan basis to a non-partisan basis. In 2012 it objected to the reduction in the number of members of the Pitt County Board of Education elected from districts coupled with the addition

of an at-large member.

An objection from DOJ prevents the proposed change in electoral practices from going into effect—the law is frozen in its pre-change state—but the objection may be the start of negotiations between the governmental unit and federal officials to alter the proposed change to make it acceptable.

If turned down by DOJ, or even before going there, a local government may seek preclearance from the federal district court for the District of Columbia. For the most part, this option has not been used very often because it takes longer and is more expensive than the DOJ procedure, but in recent years more jurisdictions have tried it, particularly with redistricting plans.

The 40 North Carolina counties subject to the preclearance requirement are listed at the end of this blog. The preclearance requirement also applies to all cities and other governmental units, such as school boards, within these counties. For the other 60 counties, there is simply no Section 5 preclearance requirement.

The responsibility for submitting changes for preclearance is set by state law (G.S. 120-30.9A through -30.9I). The State Board of Elections is responsible for submitting statewide changes that affect all governmental units in the state, while county, city, and school board attorneys are responsible for those that apply to their jurisdictions (even if those changes are enacted by the General Assembly). Once DOJ makes its final decision on a local preclearance request, the notification letter must be filed by the local attorney with the North Carolina Office of Administrative Hearings for publication in the *North Carolina Register.*

It is possible for a jurisdiction, such as a county or a city within the county, to "bail out," or get itself out from under, the pre-clearance requirements of Section 5. Generally, in order to bail out, the jurisdiction must show the federal district court for the District of Columbia that for the previous ten years (1) it has not been found in violation of the Voting Rights Act, (2) it has not used a discriminatory procedure, (3) it has precleared all changes that were required to be precleared, and (4) it has taken positive steps to increase participation by minorities in the election process. Only one North Carolina jurisdiction—Kings Mountain—has gone through the bailout process.

Counties covered by the pre-clearance requirement:

Anson

Beaufort

Bertie

Bladen

Camden

Caswell

Chowan

Cleveland

Craven

Cumberland, Edgecombe

Franklin

Gaston

Gates

Granville

Greene

Guilford

Halifax

Harnett

Hertford

Hoke

Jackson

Lee

Lenoir

Martin

Nash

Northampton

Onslow

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Pitt

Robeson

Rockingham

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Vance

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Wayne

and Wilson.

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