Coates' Canons Blog: Voting Rights Act Preclearance is Dead: Practical Considerations

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Section 4 of the Voting Rights Act of 1965 is unconstitutional. So said the Supreme Court of the United States on June 25, 2013, in the case of *Shelby County v. Holder*. Section 4 identified the jurisdictions in the nation that were required under Section 5 of the Act to submit changes related to voting for approval by the U.S. Department of Justice, in a process known as "preclearance." With Section 4 unconstitutional, Section 5 is left without force. It is, for all practical purposes, dead. See Michael Crowell's blog post here.

What, exactly, does that mean for North Carolina's 40 counties that were covered by Section 4? For decades, those counties and their cities and school boards and boards of elections have been required to submit elections changes for preclearance. For elections changes made starting now they no longer have to do that. Their preclearance obligation with respect to those future changes has ended.

But what about elections changes already made? How are they affected? My best guesses follow. Let me say that again. What follow are my best guesses. There is no statute in place that describes how the *Shelby County* decision affects changes already made. There is no obvious legal precedent from other contexts to clearly show the way; as Chief Justice Roberts said, in his *Shelby County* opinion, Sections 4 and 5 were "extraordinary measures," unique in their enforcement mechanism. And, it appears, no guidance has yet come from the Attorney General of the United States or from the Voting Section of the U.S. Department of Justice.

Below are the situations I can think of. To consider about these situations, imagine, in a Section 5 jurisdiction, a city council enacts, in the regular course of things, an ordinance changing the terms of the city council members from two years to four.

1. All of the following happened before June 25, 2013: the ordinance was enacted, it was submitted for preclearance, and the Justice Department precleared it.

- Current consequence: The ordinance is in effect.
- Why? Everything happened according to then-applicable law.
- What is required now? Nothing.

2. Before June 25, 2013, the ordinance was enacted but it was never submitted for preclearance. Instead, it was simply put into effect.

- Current consequence: The ordinance is effective.
- Why? It should not have gone into effect, but it did, and it remains in effect. This may be the most difficult situation to consider and I realize that there is a counter argument to be made here. That argument would say that the ordinance never lawfully became effective, under the law previously applicable, and the *Shelby County* decision does not act to cure the old defect. I understand this argument, but I do not believe that it is the better argument. That's my guess.
- What is required now? Nothing, except that in an abundance of caution, the council could reenact the ordinance.

3. All of the following happened before June 25, 2013: the ordinance was enacted, it was submitted for preclearance, the Justice Department interposed an objection, and no further action was taken.

- Current consequence: The ordinance is not in effect.

- Why? Under law then-applicable, it never went into effect. The subsequent declaration of unconstitutionality of the statute under which its effectiveness was blocked does not revive it. Otherwise, uncertainty would reign. What other changes previously enacted but blocked might be lingering around forgotten? What other changes subsequently enacted would be adversely affected by the unexpected reinvigoration of the old enactments? A bill currently pending in the North Carolina General Assembly—S 406—will, if enacted, explicitly repeal any state or local government law, ordinance, or resolution to which the Department of Justice objected. That bill would confirm the answer to this situation.
- What is required now: The ordinance would have to be reenacted in order to become effective.

4. Before June 25, but recently, the ordinance was enacted and submitted for preclearance. By June 25, the Justice Department had as yet neither precleared nor interposed an objection.

- Current consequence: The ordinance is effective.
- Why? The statute under which its effectiveness was pending has been declared unconstitutional and cannot block the effectiveness. Nonetheless, a statement attributed today to the head of the Voting Section of the Department of Justice makes it appear that as of this moment the Department of Justice intends to continue to process submissions currently pending. If that is in fact the case, it is puzzling, since it would seem, to me at least, that an objection interposed by the Department of Justice as part of this post-*Shelby County* processing of submissions would have no effect.
- What is required now? Nothing, except that in an abundance of caution, perhaps the submission should be withdrawn. In further caution, the council could (1) pass a resolution declaring the effectiveness of the ordinance without preclearance or (2) reenact the ordinance.

5. Before June 25, but recently, the ordinance was enacted and the intent has been to submit it for preclearance, but that has not yet happened.

- Current consequence: the ordinance is effective.
- Why? Preclearance is no longer required; Section 5's requirement that the ordinance cannot take effect until it is precleared is no longer effective.
- What is required now? Nothing, except that in an abundance of caution, the council could (1) pass a resolution declaring the effectiveness of the ordinance without preclearance or (2) reenact the ordinance.

6. After June 25, the ordinance is enacted and it is not submitted for preclearance.

- Current consequence: the ordinance is effective.
- Why? Section 4's unconstitutionality renders Section 5's preclearance requirement a nullity.
- What is required now? Nothing

Suppose, once upon a time, a Section 5 jurisdiction wished to make a change related to voting, but the Justice Department objected and the change never went into effect. Perhaps the change was from elections by districts to at-large elections, or from partisan elections to non-partisan. And suppose that after the *Shelby County* decision that same jurisdiction wishes to re-enact that same change. May it? The answer to that question is Yes. It may enact the change and that change would not have to be submitted for preclearance. But the change would still be subject to a challenge, in the form of a lawsuit, under Section 2 of the Voting Rights Act. As Michael Crowell explains in his blog, Section 2 continues in full force and effect. Whether challengers would prevail in such a lawsuit is by no means an easy prediction. But what is sure is that preclearance under Section 5 would not be required.

Links

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