The John C. Stennis Institute of Government

At Mississippi State University

Policy Matters: Considering Section 5 of the Voting Rights Act of 1965

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01/25/2010 by Lydia Quarles, JD, Senior Policy Analyst

According to records of complaints maintained by the Civil Rights Division of the Department of Justice, Section 5 of the Voting Rights Act of 1965 is the section that seems to rankle most. It is the section that requires preclearance from the United States Department of Justice before any procedural change to voting can (should) occur. Section 5 is not a permanent section of the Voting Rights Act; it currently remains in effect, however, until 2031.

The purpose of this section of the Act was to ensure that no election policies, practices or administrative functions are changed unless and until there has been either an administrative review and approval of the changes and their impact on the voting jurisdiction by the Department of Justice (usually referred to as “preclearance”), or after the jurisdiction has litigated the viability of the changes to a satisfactory conclusion and obtained a Declaratory Judgment in its favor in the United States District Court for the D.C. District with the United States as a named defendant.

The jurisdiction must establish that the proposed voting change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color or [membership in a language minority group]." The status of a voting change that is the subject of

a declaratory judgment review action is that it is unenforceable until the declaratory judgment action is obtained and the jurisdiction may not implement or use the voting change.

Section 5 rankles for a number of reasons when the population is surveyed, but principally the complaints lodged against it in the past reflect that the objection to the section centers around the fact that it does not apply to every voting jurisdiction, just specified ones. The specified jurisdictions are designated by "qualifiers", to-wit:

- The state or political subdivision of the state maintained on November 1, 1964, a "test or device" which restricted the opportunity to register to vote; or
- Less than 50% of persons of voting age were registered to vote on November 1, 1964 or less than 50% of persons of voting age voted in the presidential election of November 1964 as determined by the Director of the Census.

As a result of these qualifiers, the states of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina and Virginia became "covered jurisdictions" initially, as well as political subdivisions in 4 other states (Arizona, Hawaii, Idaho and North Carolina). When seeking a change in voting, any state or electoral jurisdiction must seek either a judicial determination or be "precleared" by the Department of Justice. The vast majority of jurisdictions seek preclearance because it is generally a more streamlined process (more timely – the Voting Section of the DOJ must interpose an objection to the application within 60 days of the submission or the submission is deemed approved) and less costly than litigation. The submission required by the Department of Justice is well established in federal regulation and requires proof that the proposed change does not deny or abridge the right to vote on account of race, color or membership in a protected language minority group. In 2008, the U. S. Attorney General's Office suggested that only 1% of submissions are disapproved by the DOJ's Voting Section.

Originally Section 5 was set to expire in 1970, but it became apparent to Congress that the 1970 sunset date was premature, so the Section 5 provisions were renewed for an additional 5 years. It also adopted an additional coverage qualifier which referred to November 1, 1968 as the relevant date for the presence of testing or devices, voter registration levels or electoral participation levels. As a result, a portion of 10 states became "covered jurisdictions".

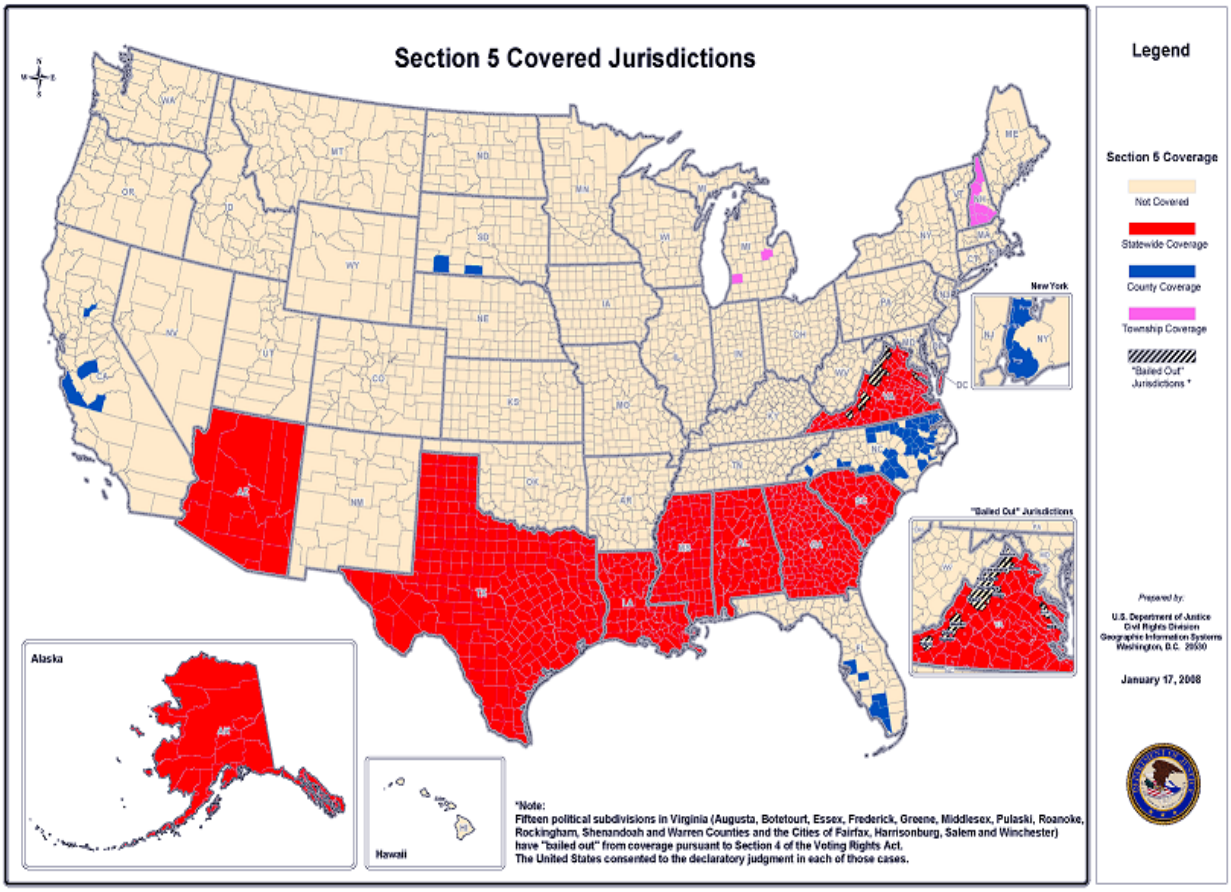
Congress determined to extend Section 5's special provisions for another 7 years in 1975 when it was scheduled to expire. The 1975 amendments added the "language minority group" protection to the Act. The qualifier date for action, as a result of the 1975 amendments became presence of tests or devices, levels of voter registrations and levels of voter participation as of the November 1972 presidential election, and, as an adjunct to the addition of the "language minority group" protection, the definition of tests or devices was expanded to include the practice of providing election information and ballots in English only in electoral jurisdictions where members of one of the language minority groups constitutes more than 5% of the citizens of voting age in the jurisdiction. This qualifier brought the following states into the list of "covered jurisdictions": Alaska, Arizona and Texas, and also brought parts of California, Florida, Michigan, New York, North Carolina, and South Dakota into the list of "partially covered jurisdictions" as a result of a significant voting age population of indigenous language groups or Spanish origin language groups.

In 1982, Congress extended the application of Section 5 for an additional 25 years; in 2006, it was also extended for an additional 25 years, or to 2031.

As referenced earlier, the Department of Justice has established, by regulation, the contents required of a submission, published at 28 C.F.R. Part 51. Essentially, the regulations establish various general requirements, found in Part 51, Section 26, including sources of any statistical orestimated information, advice on submissions when information sought is unknown, unavailable or inapplicable, etc.

Section 27 lists the required contents of a submission, which are to include:

- A copy of the ordinance, order, legislation or regulation which proposes the change affecting voting
- A copy of the ordinance, order, legislation or regulation which would be repealed or otherwise changed if the proposal were approved
- If not otherwise present, a clear statement of the change which explains the difference between the proposal and prior practice



- The name, title and contact information of the person making the submission on behalf of the electoral jurisdiction
- The name of the submitting authority and jurisdiction, including the county and state in which the submitting authority is located
- Identification of the body responsible for making the change and the mode of decision-making (e.g., State legislature, state statute)
- Authority under which the jurisdiction undertakes the change
- Date of adoption of the change
- Proposed effective date of the change
- Statement that the change *is not yet in force and will not be administered or enforced until approval is secured*, or an explanation of why such a statement cannot be made
- An explanation of the scope of change, if less than the entire submitting jurisdiction

- Reasons for the change (e.g., municipal annexation and expansion of boundaries)
- Statement of anticipated effects of the change on members of racial or language majority groups
- Statement which identifies any past or pending litigation concerning this submission or related voting practices
- Statement that all prior election practices have been precleared (and date of preclearance) or that prior election practices have not been subject to preclearance
- *For redistricting and annexation*, those items listed in Part 51.28 (a) (1), (b) (1) and (c) (3)
- Other information required to enable the Attorney General to evaluate the purpose or effect of the submission which is not included in the original submission (the submitting authority will be notified of additional information requested, but is encouraged to provide ample information with the first submission, as requests for additional information will extend the time for the DOJ to make objections to the submission)

The vast majority of applications is for the purpose of *redistricting and annexation* or extension of boundaries, and requires additional information, including:

- Relevant demographic information
- Total and voting age population, before and after, by race and language group
- Number of registered voter, before and after, *by voting* precinct, by race and language group
- Estimates of population, by race and language group, made in connection with the adoption of the change
- Demographic data (to be based on the Bureau of Census Public Law 94-171 file with unique block identity code of state, county, tract and block)
- Table of equivalencies, including:
    - Each census block record with district assignments
    - Right justified, blank filled if less than 4 characters
    - File structure to be as demonstrated below:

Field	PL 94-171 reference name	Length	Data type
State	STATEFP	2	Numeric.
county	CNTY	3	Numeric.
tract	TRACT/BNA	6	Alpha/Numeric.
block	BLCK	4	Alpha/Numeric.
plan 1 District	User supplied	4	Alpha/Numeric.
plan 2 District	User supplied	4	Alpha/Numeric.
plan 3 District	etc	.....	
plan n District	User supplied	4	Alpha/Numeric.

In addition, there are obligatory submissions for more than one plan per submission (e.g., state senate, state congressional, county board, city council, school board, etc) as well as the "adopted" plan, any "alternative" plan submissions and sponsors of all. In addition, there are requirements for deviation or alteration of a TIGER/line graphic file, and a requirement for extensive mapping which includes: prior and new boundaries of the voting unit or units; prior and new boundaries of the voting precincts; location of racial and language minority group; location of natural boundaries or geographical features which influenced the selection of the prior or new boundaries; the location of prior and new polling places; the location of prior and new voter registration sites.

In annexations, the following additional information is required: present and future use of annexed lands; estimate of expected population, by race and language group, when anticipated development is completed; prior election returns (candidate name, race or language group of each candidate, position sought, number of votes received by candidate and by precinct, outcome of each contest, number of registered voters, by race and language group, for each voting precinct *–ten years will normally be sufficient*); language usage; publicity and participation (public announcements, public meetings, etc.); availability of the submission for public inspection; minority group contacts (including name, address, phone and other contact numbers or addresses, organizational affiliation, if appropriate, who may be familiar with the changes and who have been interested/active in the process).

The DOJ has an expedited review process which may be requested when a submission is provided for preclearance; however, expedited review requests are not automatically granted. An "expedited consideration" request should be contained in the submission letter or as a cover thereto, and must describe why same should be granted, specifically outlining special conditions in the jurisdiction and

specifying the date by which the jurisdiction would like approval to be received. Expedited consideration will not be available in all cases and, although the Attorney General's staff attempts to accommodate all reasonable requests, a submission that does not contain all necessary documentation required will not be suitable for expedited consideration. The moral to that story: provide ample information in the first submission.

The significance of preclearance is that it removes the prohibition on enforcement of a voting change that is contained in Section 5. This decision, made by the DOJ on behalf of the Attorney General of the United States, cannot be challenged in court, per the Supreme Court's holding in *Morris v. Gressette*, 432 U.S. 491 (1977). However, the voting change is still subject to challenge on any other ground. For example, a redistricting plan which has been precleared can still be challenged for a violation of Section 2 or any other applicable provision of federal or state law, even after preclearance. In fact, the Attorney General can preclear a plan and *then determine to, and challenge* the plan in Court for violations of Section 2 or any other statute that the Attorney General is authorized by law to enforce.

As mentioned previously, the requirements of Section 5 rankle, and the submission requirements may be considered onerous, but it is risky to ignore Section 5, to say the very least. Voting changes that have not been reviewed under the conditions of Section 5, either by submission or Declaratory Judgment, are legally unenforceable. The United State Attorney General can file suit to enjoin a Section 5 violation, and a private right of action by a disgruntled citizen was bestowed in *Allen v. State Board of Elections*, 393 U.S. 544 (1969). This type of litigation is known as a Section 5 enforcement action and it is heard by a 3 judge panel of the United States District Court in the district where the alleged violation is said to have occurred. The enforcement action is limited to a review by the 3 judge panel to determination only: whether or not a voting change has occurred; if so, whether the requirements of Section 5 have been obtained; if implementation of the change would/did violate Section 5; and, if not, what relief would be appropriate. *Only the United States District Court for the District of Columbia can make a finding that a voting change is not discriminatory in purpose or effect. Lopez v. Monterey County*, 519 U.S. 9 (1996). The local federal court can only consider an appropriate equitable remedy, for example, to restore the voting situation which existed prior to the change. Occasionally this type of relief will include other, more sophisticated relief, such as voiding the results of illegally-conducted elections, enjoining upcoming elections, ordering a special election and the like.

As a final consideration, if a jurisdiction is a "covered jurisdiction" under Section 5, is there any way *not to be* a covered jurisdiction anymore? Yes. While not widely used, there is a "bail-out" provision that enables a jurisdiction to come before the DOJ and request a bail-out. In order to be entitled to bail-out of

Section 5 coverage, a voting jurisdiction must prove (1) it has been in compliance with the preclearance requirement for the past 10 years; (2) no test or device has been used to discriminate on the basis of race, color or language minority status; and (3) no lawsuits against the jurisdiction alleging voting discrimination are pending. Because the requirements for using the bail-out provision are clear (burden of proof), the procedure has not been used to any significant degree by voting jurisdictions which are covered by Section 5. Recently, however, a tiny voting district near Austin, Texas, serving some 3,000 residents, sought to bail-out. The bail-out process was an unusual one.

Last April 29, 2009, the United States Supreme Court heard oral arguments in an appeal from the United States District Court for the District of Columbia in a case styled *Northwest Austin Municipal Utility District Number One v. Holder, et al.* The Court issued its opinion on June 22, 2009. A review of this case is relevant.

The plaintiff/appellant, Northwest Austin Municipal Utility District Number One [hereinafter MUD] is a small utility district near Austin, Texas, which services approximately 3,000 individuals and has an elected board. Because it is located in Texas, a covered jurisdiction under Section 5 of the Voting Rights Act, it must seek preclearance before it can change anything about its election process, even though there is no evidence that the district has ever discriminated on the basis of race or language in their board elections. The district sought a bailout under the Voting Rights Act, which allows a "political subdivision" to be released from preclearance. The Federal District Court rejected the district's request, concluding that a bailout is only available to counties, parishes and sub-units that register voters, not entities like MUD which do not register its own voters. The district court also confirmed that the 2006 amendment to the Voting Rights Act, and specifically the extension of Section 5 for another 25 years, was constitutional. MUD appealed to the U. S. Supreme Court.

In ruling in favor of MUD, the Supreme Court evaded and avoided MUD's direct claim that the Voting Rights Act, and particularly the 2006 amendment, was unconstitutional, by determining that there existed some other ground on which to dispose of the case. [citing *Escambia County v. McMillan*, 466 U.S. 51 (1984)] The Court determined that the District Court erred when it determined that MUD, because it did not register its voters, could not seek or be afforded bail-out from the preclearance requirements of Section 5. Finding that MUD is undisputedly a political subdivision in "the ordinary sense"; it further reasoned that because the definition of "political subdivision" under Section 5 "was intended to operate only for purposes of determining which political units in non-designated States may be separately designated for coverage" under Section 5, if a state has been designated (as Texas has), then the definition has no further significance. Therefore, it should not constrict the availability of bail-out of a political

entity such as MUD. The Supreme Court, noting in *dicta* that the contrary interpretation had helped to render bailout provisions all but a nullity – "[s]ince 1982, only 17 jurisdictions out of the more than 12,000 covered political subdivisions have successfully bailed out of the Act" – reversed and remanded. Its concluding statement is worthy of consideration:

"More than 40 years ago, this Court concluded that 'exceptional conditions' prevailing in certain parts of this country justified extraordinary legislation otherwise unfamiliar to our federal system (citations removed). In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today. We conclude instead that the Voting Rights Act permits, all political subdivisions, including the district in this case, to seek relief from its preclearance requirements."

To that end, the Supreme Court reversed the prior decision of the District Court and remanded the case back to the District Court for further proceedings consistent with the opinion as articulated.

Pundits had suggested, based on the energy spent on the oral arguments in this case, that the Supreme Court would consider declaring Section 5 unconstitutional; the Court would not go that far, but it is clear a significant majority or simple minority may be interested in dismantling Section 5 piece by piece. The MUD decision provides food for further thought. It also is an encouraging opinion for those electoral jurisdictions which believe that they may be entitled to a Section 5 bail-out.

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About the Author

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Lydia Quarles is a Senior Policy Analyst at the John C. Stennis Institute of Government, Mississippi State University. She received her Juris Doctorate from Cumberland School of Law, Samford University, and her MA and BA from Mississippi University for Women, in 1972 and 1971 in political science and communication. After over a dozen years in the private practice of law in Alabama and Mississippi, she joined the Mississippi Workers' Compensation Commission as an Administrative Judge in 1993. Eight years later, in 2001, she was appointed Commissioner of the agency. In 2006, she resigned to join the Stennis Institute. Quarles remains active in bar work, and currently chairs the Women in the Profession Committee, a standing committee of the Mississippi Bar. She is a fellow of the Mississippi Bar Foundation, a recipient of the Mississippi Bar's Distinguished Service Award, and was recently honored by the American Bar Association for her lifetime contribution to Administrative Law and Regulatory Practice by receipt of the Mary C. Lawton Award which recognized her contributions to the Mississippi Workers' Compensation Commission in the areas of alternative dispute resolution and access for Hispanic labor. Quarles serves as a member of the Mississippi School for Math and Science Foundation Board and parliamentarian of Mississippi's First Alumnae Association. Quarles has been named one of Mississippi's 50 Leading Business Women by the Mississippi Business Journal; the Journal recognized her service to the State as a Commissioner as well as entrepreneurial skills developed in her property management business in Starkville, Spruill Property Management, LLC. Quarles, who is not a full-time employee of the Institute, also engages in the private practice of law and owns and directs a consulting business, WPF, LLC. She may be contacted at lydia@wpf-adr.com.

About the Institute

Elected to the United States Senate in 1947 with the promise to "plow a straight furrow to the end of the row," John C. Stennis recognized the need for an organization to assist governments with a wide range of issues and to better equip citizens to participate in the political process. In 1976, Senator Stennis set the mission parameters and ushered in the development of a policy research and assistance institute which was to bear his name as an acknowledgment of his service to the people of Mississippi.

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