Testimony on "The Voting Rights Act after the Supreme Court's Decision in *Shelby County*"

*By Hans A. von Spakovsky**

Note from the Editor:

This article is based on testimony given by the author before the U.S. House Judiciary Committee's Subcommittee on the Constitution on July 18, 2013. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to further discussion and debate about the Voting Rights Act and the Supreme Court's decision in *Shelby County v. Holder*. To this end, we offer links below to different testimony on the issue from the same hearing, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

Related Testimony:

- Testimony of Robert A. Kengle, Co-Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law: http://judiciary.house.gov/hearings/113th/hear_07182013/R%20Kengle%207-18-2013.pdf
- Testimony of Spencer Overton, Professor of Law, The George Washington University Law School: http://judiciary.house.gov/hearings/113th/hear_07182013/Overton%20%207-18-13.pdf
- Testimony of J. Christian Adams, Founder, Election Law Center: http://judiciary.house.gov/hearings/113th/hear_07182013/C%20Adams%207-18-2013.pdf

Introduction

My name is Hans A. von Spakovsky.[1] I am a Senior Legal Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation and Manager of the Election Law Reform Initiative. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

I appreciate the invitation to be here today to discuss *Shelby County v. Holder*[2] and the enforcement of the Voting Rights Act. The Voting Rights Act is one of the most important statutes ever passed by Congress to guarantee the right to vote free of discrimination. After the U.S. Supreme Court's correct decision in *Shelby County*, the VRA remains a powerful statute whose remedies are more than sufficient to protect all Americans. Both the Justice Department and private parties have the ability to stop those rare instances of voting discrimination when they occur using the various provisions of the VRA that protect individual citizens when they register and vote.

Prior to joining the Heritage Foundation, I was a Commissioner on the Federal Election Commission for two years. Before that I spent four years at the Department of Justice as a career civil service lawyer in the Civil Rights Division. I started as a trial attorney and was promoted to be Counsel to the Assistant Attorney General for Civil Rights, where I helped coordinate the enforcement of federal voting rights laws, including the Voting Rights Act and the National Voter Registration Act. I was privileged to be involved in dozens of cases on behalf of Americans of all backgrounds to enforce their right to register and vote in our elections.[3]

I. The *Shelby County* Decision and Section 5

As the Supreme Court said in its decision, "history did not end in 1965." Section 5 was originally passed as a temporary, emergency provision set to expire after 5 years. It was instead renewed four times, including in 2006 for an additional 25 years

Section 5 was an unprecedented, extraordinary intrusion into state sovereignty since it required covered states to get the approval of the federal government for voting changes made by state and local officials—either the Department of Justice or a three-judge court in the District of Columbia. No other federal law presumes that states cannot govern themselves as their legislatures decide and must have the federal government's consent before they act. As the Supreme Court said, Section 5 "employed extraordinary measures to address an extraordinary problem."

Section 5 was necessary in 1965 because of the widespread, official discrimination that prevented black Americans from registering and voting as well as the constant attempts by local jurisdictions to evade federal court decrees. The disfranchisement rate was so bad that only 27.4 percent of blacks were registered in Georgia in 1964 and only 6.7 percent in Mississippi, compared to white registration of 62.6 percent and 69.9 percent, respectively. That disparity between black and white registration (and turnout) was a direct result of the horrendous discrimination suffered by black residents of those states.

The coverage formula of Section 4 was based on that disparity and Congress specifically designed it to capture those states that were engaging in such blatant discrimination. Thus, coverage under Section 4 was based on a jurisidiction maintaining a test or device as a prerequisite to voting as of Nov. 1, 1964, and registration or turnout of less than 50 percent in the 1964 election. Registration or turnout of less than 50 percent in the 1968 and 1972 elections was added in successive renewals of the law. That was the last time the coverage formula was revised, and Section 4 did not employ more current information on registration and turnout when Section 5 was last renewed in 2006.

Section 5 was needed in 1965. But as the Court recognized, time has not stood still and "[n]early 50 years later,

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things have changed dramatically." The systematic, widespread discrimination against black voters has long since disappeared. As the Court recognized in the *Northwest Austin* case in 2009: "Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."[4]

As an example, in Georgia and Mississippi, which had such high disenfranchisement rates in 1964, black registration actually exceeded white registration in the 2004 election, just two years before Congress was considering the renewal of Section 5. Black registration exceeded white registration by 0.7 percent in Georgia and by 3.8 percent in Mississippi. The Census Bureau's May 2013 report on the 2012 election showed that blacks voted at a higher rate than whites nationally (66.2 percent vs. 64.1 percent).[5]

That same report shows that black voting rates exceeded that of whites in the census region represented by Virginia, South Carolina, Georgia, Alabama, and Mississippi, which were covered in whole by Section 5, and in North Carolina, and Florida, portions of which were covered by Section 5. Louisiana and Texas, which were also covered by Section 5, were also in a Census region that showed no statistically significant disparity between black and white turnout.[6] Minority registration and turnout are consistently higher in the formerly covered jurisdictions than in the rest of the nation.

No one can rationally claim that there is still widespread, official discrimination in any of the covered states, or that there are any marked differences between states such as Georgia, which was covered, and states such as Massachusetts, which was not covered (except that Massachusetts has worse turnout of its minority citizens). As the Supreme Court approvingly noted and as Judge Stephen F. Williams pointed out in his dissent in the District of Columbia Court of Appeals, jurisdictions covered under Section 4 have "*higher* black registration and turnout" than noncovered jurisdictions.[7] Covered jurisdictions also "have *far more* black officeholders as a proportion of the black population than do uncovered ones."[8] In a study that looked at lawsuits filed under Section 2 of the VRA, Judge Williams found that the "five worst uncovered jurisdictions…have worse records than eight of the covered jurisdictions."[9]

Arizona and Alaska, which were covered under Section 5, had not had a successful Section 2 lawsuit ever filed against them in the 24 years reviewed by the study. The increased number of current black officeholders is additional assurance that official, systemic discriminatory actions are highly unlikely to recur.

Without evidence of widespread voting disparities among the states, continuing the coverage formula unchanged in 2006 was irrational. As the Court said in the *Shelby County* decision, Congress "did not use the record it compiled to shape a coverage formula grounded in current conditions."[10] Instead, it reenacted Section 4 "based on 40-year-old facts having no logical relation to the present day."[11] It was no different than if Congress in 1965 had based the coverage formula not on what had happened in the prior year's election in 1964, but had instead opted to base coverage on registration and turnout from the Hoover era in 1928 or the Roosevelt election in 1932.

Section 5 was also unprecedented in the way it violated fundamental American principles of due process: it shifted the burden of proof of wrongdoing from the government to the covered jurisdiction. Unlike all other federal statutes that require the government to prove a violation of federal law, covered jurisdictions were put in the position of having to prove a negative—that a voting change was not intentionally discriminatory or did not have a discriminatory effect. While such a reversal of basic due process may have been constitutional given the extraordinary circumstances present in 1965, it cannot be justified today.

Congress also made another fatal mistake when it *expanded* the prohibitions in Section 5 in 2006. The Supreme Court had warned Congress that broadening Section 5 coverage would "exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5's constitutionality."[12] As the Court said in *Shelby County*, "the bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved."[13]

Finally, two other serious problems must be noted with how Section 5 was interpreted and enforced. First, the "effects" test of Section 5 has led to a virtual apartheid system of redistricting, causing race to become a predominant factor in redistricting in covered jurisdictions. Jurisdictions are often forced to engage in racial discrimination to meet the Section 5 standard and create majority-minority districts. Rather than helping eliminate racial discrimination in voting, Section 5 has perpetuated it in redistricting and provided a legal excuse for legislators of both parties to engage in such discriminatory behavior when drawing boundary lines, manipulating district lines and isolating particular voters based entirely on their race. This is the exact opposite of the intention of the VRA, which the Supreme Court said was to "encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life."[14]

Second, the Civil Rights Division of the Justice Department has abused its authority and power under Section 5 on numerous occasions. South Carolina was forced to spend $3.5 million in 2012 litigating a specious objection filed by the Division against its voter ID law. A federal court found that there was no basis for the objection.

Similarly, during the Clinton administration, the American taxpayers were forced to pay over $4.1 million in attorneys' fees and costs awarded to defendants falsely accused of discrimination by the Division, including in several Section 5 cases.

For example, in *Johnson v. Miller*, which involved Georgia's 1992 legislative redistricting plan, a federal court severely criticized the Division for its unprofessional relationship with the ACLU, the "professed amnesia" of its lawyers when questioned by the court over their activities (which the court found "less then credible), and the Division's "implicit commands" to the Georgia legislature over how to conduct its redistricting.[15] This case cost American taxpayers almost $600,000 in attorneys' fees and costs awarded to Georgia.

The district court found that the "considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment."[16] The court was surprised that the Justice Department "was so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote."[17] As the U.S. Supreme Court found, instead of basing its decision on Georgia's redistricting plan on whether there was evidence of discrimination as required under Section 5, "it would appear the Government was driven by its policy of maximizing majority-black districts."[18]

In related cases filed in the early 1990s, a federal district

court similarly criticized the Division, finding that it was trying to use its power "as a sword to implement forcibly its own redistricting policies."[19] The court found that the Louisiana legislature "succumbed to the illegitimate preclearance demands of the Justice Department" that "impermissibly encouraged – nay, mandated – racial gerrymandering."[20] Those cases cost the American public $1.1 million in attorneys' fees and costs awarded to Louisiana.

In 2012, the Division sent a legally preposterous letter to Florida claiming that the state government was violating Section 5 because it had not precleared the state's removal of noncitizens who had unlawfully registered to vote (five Florida counties are covered under Section 5). This despite the fact that noncitizens commit a federal felony when they illegally register to vote. As the *Federal Prosecution of Election Offenses* manual for federal prosecutors, published by the Criminal Division of the Justice Department, explains on pages 67-69, submitting false citizenship information in order to register to vote violates 18 U.S.C. §§ 1051(f) and 911.

The Supreme Court's decision in *Shelby County* was correct under the facts, the law, and our Constitution. Section 5 was needed in 1965 – it is not needed today and the coverage formula of Section 4 no longer reflects current conditions. Treating different states differently can no longer be justified.

II. Congressional Action after *Shelby County*

The question now becomes whether Congress should take any actions as a result of this decision. The answer to that question is "no." The other provisions of the VRA are more than adequate to provide the Justice Department and private parties with the tools they need to go after discrimination on those infrequent occasions when it does still occur.

The "heart" of the VRA today is Section 2, not Section 5. Section 2 applies nationwide, not just in a limited number of states and counties, and it is permanent; it will never expire. It forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority. Discriminatory measures or actions can be stopped before an election through temporary restraining orders and injunctions. Private plaintiffs can have their attorneys' fees and costs reimbursed if they are the prevailing party. Section 2 was not at issue in the *Shelby County* case and the Supreme Court's decision "in no way affects the permanent, nationwide ban on racial discrimination in voting found in §2."

Section 2 is an effective remedy when it is utilized by the Civil Rights Division of the Justice Department. During the eight years of the Bush administration, the Division filed 17 Section 2 lawsuits and obtained one out-of-court settlement. The current administration has barely utilized Section 2, having filed only one lawsuit since it came into office, and that suit was actually the outcome of an investigation started during the Bush administration. A recent report by the Inspector General of the Justice Department concluded that the "statistical evidence did not support" the claim that the Bush administration was hostile to Section 2 cases, particularly in light of the fact that the number of cases brought during the Bush administration far exceeded the number of cases brought during the current administration."[21] The decreasing number of Section 2 cases maybe an indication that discrimination is abating, further demonstrating that enforcement through Section 5 is not essential, or even necessary.

In order to meet the requirements of the Constitution, to justify federal supervision, a new Section 5 would have to identify those jurisdictions for which Section 2, because of systemic racial discrimination, would not be effective. That will not be possible because there is no evidence of systemic racial discrimination in voting in the states formerly covered under Section 4.

The lack of Section 5 enforcement does not mean jurisdictions can never be overseen by federal authorities. Another provision of the VRA, Section 3, can be used to supervise any jurisdictions that have a pattern of racial discrimination in voting. While the Supreme Court struck down the coverage formula of Section 4, Section 3 was not an issue in *Shelby County*. Section 3 has rarely been used, but it allows both for federal examiners and prior approval of voting changes.

If a jurisdiction has engaged in repeated discrimination and a court finds it is necessary to prevent future discrimination, Section 3 provides that that the court can essentially place the jurisdiction into the equivalent of Section 5 coverage. Under a Section 3 finding, "no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless" the court or the Attorney General has precleared the change and found that it "does not have the purpose and will not have the effect of denying or abridging the right to vote." This preclearance thus becomes a tool to remedy discrimination that has been proven in court, rather than Section 5's blanket burden on all jurisdictions, regardless of their actual history and actions.

The point here is that the Supreme Court in *Shelby County* found that the general conditions in covered states today do not justify their continued exception from general constitutional principles and strictures. However, a court can still appoint federal examiners and place a particular jurisdiction into the equivalent of Section 5 preclearance if it finds sufficient evidence of current discrimination under Section 3's requirements. Also, unlike the due process problems inherent in Section 5, Section 3 does not shift the burden of proof for preclearance to covered jurisdictions *until* the government or a private plaintiff has *proven* that the jurisdiction has engaged in discrimination.

The VRA has other provisions that also remain in force to protect voters. This includes Section 11, which prohibits anyone from intimidating, threatening, or coercing any person for voting or attempting to vote. Sections 203 and 4(f)(4) require certain jurisdictions to provide bilingual registration and voting materials, including ballots, as well as interpreters and translators.

Conclusion

The Supreme Court correctly found that the coverage formula of Section 4 does not reflect current conditions and is therefore unconstitutional. As the Court concluded, "there is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago."[22] If Congress had first considered it in 2006, "it plainly could not have enacted the present coverage formula" because it "would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story."[23]

The other provisions of the VRA such as Section 2 and Section 3 provide strong federal provisions to remedy voting

discrimination if and when it occurs. My discussion of the robust provisions of the VRA that guarantee the right to vote does not even include the many other protections for voters that exist outside of the VRA in the National Voter Registration Act, the Uniformed and Overseas Citizens Absentee Voting Act, and the Help America Voting Act.

There is no reason for Congress to take any action to reinstate the coverage formula of Section 4. There is, in fact, no evidence that particular states are engaged in systematic discrimination that would justify treating them differently from other states.

Endnotes

1 The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work.

2 570 U.S. ___(2013).

3 I was also a member of the first Board of Advisors of the U.S. Election Assistance Commission. I spent five years in Atlanta, Georgia, on the Fulton County Board of Registration and Elections, which is responsible for administering elections in the largest county in Georgia, a county that is almost half African-American. In Virginia, I served for three years as the Vice Chairman of the Fairfax County Electoral Board, which administers elections in the largest county in that state. I formerly served on the Virginia Advisory Board to the U.S. Commission on Civil Rights. I have published extensively on elections, voting, and civil rights issues, including the management of the Civil Rights Division and the handling of its enforcement responsibilities. I am a 1984 graduate of the Vanderbilt University School of Law and received a B.S. from the Massachusetts Institute of Technology in 1981.

4 Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009).

5 *The Diversifying Electorate – Voting Rates by Race and Hispanic Origin in 2012 (and Other Recent Elections*, United States Census Bureau, P20-568 (May 2013).

6 Figure 5, Non-Hispanic White Voting Rates Compared to Black Voting Rates: 2012.

7 Shelby County v. Holder, 679 F.3d 848, 891 (D.C. Cir. 2012).

8 679 F.3d at 892.

9 679 F.3d at 897.

10 Shelby County, Slip Op. at 21.

11 Shelby County, Slip Op. at 21.

12 Reno v. Bossier Parish School Board, 528 U.S. 320, 336 (2000).

13 Shelby County, Slip Op. at 16-17.

14 Georgia v. Ashcroft, 539 U.S. 461, 490-491 (2003).

15 864 F.Supp. 1354 (S.D. Ga. 1994), aff'd, Miller v. Johnson, 515 U.S. 900 (1995).

16 Johnson v. Miller, 864 F.Supp. at 1368.

17 *Id.*

18 Miller v. Johnson, 515 U.S. at 924-925.

19 Hays v. State of Louisiana, 839 F.Supp. 1188, 1196 (W.D. La. 1993).

20 Hays. v. State of Louisiana, 936 F.Supp. 360, 369 (W.D. La. 1996).

21 A Review of the Operations of the Voting Section of the Civil Rights Division, Office of Inspector General, U.S. Department of Justice (March 2013), page 32.

22 Shelby County, Slip Op. at 23.

23 Shelby County, Slip Op. at 23-24.