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Section 5 of the Voting Rights Act: Necessary then and necessary now.

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INTRODUCTION

WHAT IS THE BEST ARGUMENT FOR KEEPING THE VOTING RIGHTS ACT? This simple question was brought up in 2006 when Congress had to decide whether or not to reenact the Act for another 25 years. 7 years ago, they decided that even though times have changed in America since 1965, they had not changed enough for us to do away with such an important piece of legislative framework. Today, due to an Alabama attorney from Shelby County, AL the question has once again been posed. What is the best argument for keeping the Voting Rights Act? Better yet, does discrimination still exist and if so does it exist enough so to make the Voting Rights Act necessary? “Well, Congress had to take up that question in 2006, and they did. And over the course of nine months, they determined that it does exist. The 15,000 pages of testimony that were described earlier, the 90 witnesses who testified, the 1,200 objections that the Justice Department had to make to voting changes, the 650 objections, over 400 of which were a determination that there was discriminatory purpose in voting changes throughout the jurisdictions that are covered by Section 5, that was the evidence that was before Congress in 2006. And based on that evidence, not opinion, they determined that we still do need Section 5.” Yet for some reason, Shelby County has deemed this provision of the voting rights act (Section 5) as unnecessary and unconstitutional. This county thinks that discrimination is no longer apparent in voting practices, but in the 2012 presidential election it was more inherent than ever when multiple counties all over the country tried to reduce the hours on polling places and wanted to do away with early voting. If there is still evidence of discriminatory practices when it comes to voting, then this provision is in place to reduce that. Not only should section 5 of the Voting Rights Act not be repealed, it should be applied to even more states who try to create their own voting rules at the drop of a hat. Section 5 of the Voting Rights Act was necessary then and it is still necessary now.

I. WHAT IS THE VOTING RIGHTS ACT?

THE VOTING RIGHTS ACT of 1965 (VRA) was originally supposed to be temporary, however it has become a landmark piece of legislation in the United States that outlawed discriminatory voting practices aimed at minorities, specifically African-Americans, in the United States. The Voting Rights Act echoes the 15th Amendment of the Constitution, which made it unconstitutional for states to deny otherwise qualified people from voting through use of pre-voting qualifications. Section 5 is the major source of importance within the VRA. Section 5 makes it so that new voting procedures in certain states have to be reviewed before they are put into place. They would either need to be reviewed by administrative review by the United States attorney general or after a lawsuit before the United States District Court of Columbia.

The certain states or counties that Section 5 applies to are known as covered jurisdictions. In order to become a covered jurisdiction there was a formula put into play. “The first element in the formula was that the state or political subdivision of

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the state maintained on November 1, 1964, a "test or device," restricting the opportunity to register and vote. The second element of the formula would be satisfied if the Director of the Census determined that less than 50 percent of persons of voting age were registered to vote on November 1, 1964, or that less than 50 percent of persons of voting age voted in the presidential election of November 1964. Application of this formula resulted in the following states becoming, in their entirety, "covered jurisdictions": Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. In addition, certain political subdivisions (usually counties) in four other states (Arizona, Hawaii, Idaho, and North Carolina were covered." 2 In accordance with the VRA, these covered jurisdictions are unable to make changes to any voting without gaining preclearance for such provisions from the Department of Justice.

Covered Jurisdictions and Preclearance

Section 5 mostly applied to states in the South with longstanding histories of discriminatory voting practices. Therefore, as a result these states and counties now have to go through the process of preclearance before they embark on any new voting procedures. The process of preclearance is the blueprint for Section 5 of the VRA. In order to gain preclearance, these jurisdictions must prove that a proposed voting change is not put into effect to discriminate based on race or color. If this not found to be the case then the District Court denies the request.

Special Provisions for Covered Jurisdictions

In some places, it is necessary that covered jurisdictions proved that a proposed change does not have the purpose of discriminating against a “language minority group.” Therefore, there was an additional coverage formula create that looked at the presence of tests or devices and levels of voter registration and participation as of November 1972.3 “In addition, the 1965 definition of "test or device" was expanded to include the practice of providing election information, including ballots, only in English in states or political subdivisions where members of a single language minority constituted more than five percent of the citizens of voting age. This third formula had the effect of covering Alaska, Arizona, and Texas in their entirety, and parts of California, Florida, Michigan, New York, North Carolina, and South Dakota.”4

Justice Department Policies for Preclearance

Furthermore, the Justice Department has 60 days to respond to a request for a voting change. If the Justice Department or federal court rejects a request for Preclearance, the jurisdiction may continue the prior voting practice or adopt a substitute and seek Preclearance for it. Almost all of the voting changes that have been submitted to the Attorney General under Section 5 have been approved with the exception of 1%. The Attorney General publishes guidelines for how jurisdictions can submit their voting changes under

3 Id.
4 Id 2.
section 5 and how these voting changes are subsequently reviewed. Voting changes that have not been reviewed for preclearance are legally unenforceable⁵.

Since its inception, the Voting Rights Act of 1965 has been renewed four times. The last time the act was renewed was in 2006 when Congress chose it for another 25 years.

II. LEGAL CONTROVERSY SURROUNDING SECTION 5 OF THE VRA

There has been some controversy over whether or not the Voting Rights Act is still necessary in today’s day and age. Lawmakers in the southern states that are the target of Section 5 are trying to get the Supreme Court to repeal it. The four conservative Supreme Court justices seem keen on backing the repeal of Section 5. Specifically Supreme Court Justice Antonin Scalia. He stated in February that Section 5 was a "perpetuation of racial entitlement" that "will be re-enacted in perpetuity unless a court can say it does not comport with the Constitution.... It's a concern that this is not the kind of a question you can leave to Congress ... even the Virginia senators ... are going to lose votes if they do not re-enact."⁶ In addition to that, four years ago Chief Justice John Roberts wrote, “things have changed in the South.”⁷ Likewise, people have gone so far as to say that this provision is both unnecessary and unconstitutional. They feel that it is no longer fair to use the same criteria that was used in 1965 to determine if states/counties should be seen as covered jurisdictions. As time goes on, there have been some very outspoken opponents of Section 5. Even, liberals have started to call into question the necessity for keeping Section 5 intact. Two law professors at Duke University School of Law and Indiana University Maurer School of Law respectively, Guy-Uriel E. Charles and Luis Fuentes-Rohwer, stated in an article for the Los Angeles Times, "although it is politically incorrect to say, and it pains us as good liberals to admit it, the court's striking down of Section 5 would actually help move voting rights policy into the 21st century."⁸ With so many recent calls for a change in terms of Section 5, this legal controversy is on the verge of coming to a head.

III. SHELBY COUNTY V. HOLDER

With the controversy that has for many years surrounded Section 5 of the Voting Rights Act, it was not all that surprising that on February 27, 2013, there was a case in opposition of Section 5 brought to the Supreme Court. Petitioner Shelby County, AL maintains that Congress has overstepped its boundaries in enforcing the Fourteenth and Fifteenth Amendments by upholding Section 5 of the VRA. Shelby County also states that this provision violates the Tenth Amendment and Article IV.⁹ In a similar fashion, other covered jurisdictions have complained that VRA is a double standard and violates states’ sovereignty rights. Meanwhile, Attorney

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⁵ Id 2.
⁷ Id 6.
General Holder argued that these restrictions are necessary in order to fight regression that could possibly occur in some of the covered jurisdictions that at one time had observed discriminatory practices in voting. Also, Holder believed that preclearance is still an important exercise for Congress and coupled with VRA’s “bailout” system it creates a coverage program that complies with Congress. As a result of this trial, there are now two important questions that have been presented. The first being: Did Congress’s decision in 2006 overstep their boundaries when they decided to reauthorize Section 5 of the VRA under the pre-existing coverage formula, thus violating the Tenth Amendment and Article IV of the Constitution? Secondly: Did Congress’s 25-year extension of the VRA exceed its power to enforce the Fourteenth and Fifteenth Amendments. At the present time, the Supreme Court has yet to make a verdict on this case. However, when the decision comes down in late June 2013, it will surely have an enormous impact on both state rights vs. minority rights and the electoral college process.

IV. Section 5 of the VRA Should Not Be Repealed

Taking a look at some of the current happenings in America exemplifies the fact that there is still a need for Section 5 of the VRA. Therefore, when the Supreme Court decides to rule on this case they should hopefully see all of the evidence in favor of keeping the provision intact. When Congress decided to reauthorize the act for another 25 years in 2006, they did an immense amount of research that proved that Section 5 was a helpful tool in putting an end to discriminatory practices in voting. Furthermore, one of the big arguments that the Shelby County attorney, Frank Ellis Jr., is trying to make is that Section 5 is “unnecessary” and “unconstitutional”. On the contrary, Section 5 cannot be deemed as unconstitutional since it was authorized under the Section 5 of the Fourteenth Amendment. A Harvard Law Review Essay states, “But if section 5 of the VRA is unconstitutional, why wasn’t section 5 of the Fourteenth Amendment itself unconstitutional? For that section — and indeed every section — of the Fourteenth Amendment was itself adopted by a process in which certain states were subject to a kind of selective preclearance. In the very process by which Section 5 and the rest of the Fourteenth Amendment were adopted, certain states with sorry electoral track records were obliged to get preapproval from federal officials in order to do things that other states with cleaner electoral track records were allowed to do automatically.” It cannot be said that Section 5 is unconstitutional because it is appropriate and legal under the same pretenses that legitimized the Fourteenth Amendment of the United States Constitution.

In addition, the Supreme Court justices should see that although times have changed in America since the 1960s, they have not changed enough to do away with

10 Id. 9
11 Id. 9
12 Id. 6
13 Id. 6
this act altogether. Specifically, the southern states that are covered jurisdictions have claimed that they are doing better with lessening discrimination in their voting practices, but that does not seem to be the case. While, they have gotten better, there have still been instances that are questionable in terms of the progress that has been made.

Instances of Discriminatory Voting Practices Recently
During the 2012 election, Florida tried to reduce early voting hours in their five counties that are covered jurisdictions. As a result of Section 5, they were unable to do so thanks to a panel of judges. Another example was in Texas where they tried to impose new photo identification laws that made it more difficult on the poor and minorities. People would have been permitted to vote with a gun license, but not with a student or veteran’s ID.15 Also, Texas took it upon themselves to redistrict after the 2010 census but due to Section 5 they were not allowed to do so. The irony is that Texas had been awarded four new congressional seats due to the growth in their Hispanic population, but in almost every way possible they made it so that Hispanics were minimized in the number of districts in which they could elect a candidate of their choice.16

Although these covered jurisdiction states claim that they have changed for the better, it does not appear that things have changed that drastically when there is still evidence of discriminatory voting practices that could be taking place. This is even further driven home by the fact that the Department of Justice denied 16 proposed changes under Section 5 during the 2012 election.

V. Section 5 of the VRA Should Be Applied to Even More States
Despite the controversy that surrounds Section 5 of the Voting Rights Act, it is necessary that it be applied to even more states than just the original covered jurisdictions. We can allow this by advocating for more states and counties to be examined for the bail in policy. States/counties that are proven to take part in discriminatory practices should become covered jurisdictions whether they are in traditional Section 5-targeted areas or not17. This idea behind opening up the bail in policy to non-traditional Section 5 targeted areas came from some of the happenings during the 2012 presidential election. In Ohio there were some problems that arose. Ohio State University election law expert Daniel P. Tokaji stated, “Here in Ohio, as in many other parts of the country, we have seen rules adopted in the past decade -- and especially in the past year -- that make it more difficult for eligible citizens to vote and have their votes counted.”18 Some of the restrictions that were witnessed in Ohio

References
15 Id. 6
17 Id. 2
During the past election were curbs on organizations that register new voters, requirements that voters present photo IDs to vote and proof of citizenship to register, cutbacks in early voting periods and limits on voting by felons who have been freed from prison. Had Ohio been a covered jurisdiction or even just specific counties in Ohio then perhaps these measures would not have been able to take place. Likewise in Florida, Republican Gov. Rick Scott refused to extend the voting hours for early voting even as it caused confusion and chaos. All states that have some suspicious voting practices in play that can be deemed as discriminatory need to be included as covered jurisdictions specifically in states like Ohio and Florida.

There is a solution for states that feel they do not need to be covered jurisdictions and that is the bail in and bail out policy. If states are able to maintain a clean record of no discrimination in their voting practices for ten years, they should be able to be taken off the covered jurisdiction list. So for the counties like Shelby County, they should work to bail out of being a covered jurisdiction before they are so quick to want to tear down the entire premise of the Voting Rights Act. Perhaps if they had the good behavior to bail out, they would not even need to argue their case at the Supreme Court.

Conclusion

When President Lyndon B. Johnson signed Section 5 of the Voting Rights Act in 1965, it was a landmark piece of legislation during the Civil Rights Movement. It is still a landmark piece of legislation today as evidenced by the fact that it is still making headlines. There has been quite a lot of controversy surrounding Section 5 over the years and it is nowhere near over.

Frank Ellis Jr. embarked on a case on behalf of his client, Shelby County, AL, on February 27, 2013 that could have serious implications on the voting practices of the United States for the rest of time. In his argument, he made claims that the Voting Rights Act was unnecessary and unconstitutional in current times. However, last year’s election proved that this provision is still necessary when it comes to discriminatory voting practices. Times have changed in America, but not so much so that discrimination in voting is not a factor. In fact, America’s landscape is now more diverse than it has ever been. This is not the time to change a provision that could possibly lead to regression.

The Supreme Court has a choice to make now. Those nine justices have the burden of deciding: What is the best argument for keeping the Voting Rights Act? Better yet, does discrimination still exist and if so does it exist enough so to make the Voting Rights Act necessary? When they look at all of the evidence they will hopefully make the decision not to repeal Section 5 of the Voting Rights Act. It is a constitutional provision and should remain in place as long as there are counties/states that might be suspected of using discrimination to deter voter turnout. There have been many examples.

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19 Id. 18
21 Id. 2
OVER THE PAST YEAR THAT PROVE THAT SECTION 5 IS STILL USEFUL AND STUDIES HAVE SHOWN THAT IT CAN HELP TO REDUCE DISCRIMINATION IN VOTING PRACTICES. NOT ONLY SHOULD IT NOT BE REPEALED, IT NEEDS TO BE APPLIED TO EVEN MORE COUNTIES AND STATES THAN THOSE THAT CURRENTLY SERVE AS COVERED JURISDICTIONS. IF A STATE OR COUNTY SUCH AS SHELBY COUNTY FEELS THAT THEY ARE ABOVE THIS PROVISION THEN LET THEM PROVE IT BY BECOMING A COVERED JURISDICTION THAT IS ABLE TO COMPLETE THE BAIL OUT PROCESS. SECTION 5 OF THE VOTING RIGHTS ACT WAS CREATED IN HOPES THAT THERE WOULD BE NO MORE DISCRIMINATION IN OUR VOTING PRACTICES. ALTHOUGH AMERICA HAS MADE A LOT OF HEDWAY SINCE 1965, TODAY IN 2013 WE ARE NOT YET COMPLETLEY WHERE WE NEED TO BE. THEREFORE, SECTION 5 WAS NECESSARY THEN AND LAST YEAR’S ELECTION PROVED THAT IT IS STILL NECESSARY NOW UNTIL WE GET TO A PLACE OF VOTING PRACTICES THAT MAXIMIZE VOTING POTENTIAL FOR EVERY VOTER AND NOT MINIMIZE IT.

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