national lawyers guild

REVIEW

Volume 69
Number 1
Spring 2012

A journal of legal theory and practice

"In the end, that human rights shall be more sacred than property interests."

—Preamble, NLG Constitution

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FREE BUT NO LIBERTY: HOW FLORIDA CONTRAVENES THE VOTING RIGHTS ACT WITH DISENFRANCHISEMENT OF FELONS

Introduction

The United States has a long history of denying minorities their right to vote—of practicing racially-motivated disenfranchisement. In early 2011, Florida Governor Rick Scott continued this tradition by issuing an executive order permanently denying convicted felons their right to vote, unless they petition for executive clemency after a five-year waiting period following the completion of their sentences. These new procedures are a step backward for Florida to previous policies that disproportionately disenfranchised African-Americans. Actions like Governor Scott's demonstrate why the Voting Rights Act (VRA) of 1965,[1] most recently re-authorized in 2006, is still needed to prevent racially discriminatory voting practices.

This article argues that Florida's executive re-enfranchisement policies contravene the Voting Rights Act and should be nullified. A review of felon disenfranchisement in the United States and Florida, the VRA's basic mechanics, and Florida's recent challenge to the Act's constitutionality will help make this clear. The VRA continues to be a constitutional exercise of congressional power that requires Florida to seek pre-clearance for changes to felon disenfranchisement procedures under Section 5 of the Act, and would likely forbid the proposed changes under either a purposeful discrimination or disparate impact analysis under Section 2 of the Act. The article concludes that Florida must submit its proposed changes for pre-clearance, and that if it fails to do so, the U.S. Justice Department should act to prevent the implementation of arguably the harshest felon disenfranchisement procedures in the nation.

I. On felon disenfranchisement and the Voting Rights Act

Felon disenfranchisement strips certain civil rights, including the right to vote, from people convicted of certain crimes, sometimes for life. Globally, the

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United States is one of the few outlier countries with severe disenfranchisement laws that reach such a broad range and high number of people.[2] In the United States, felon disenfranchisement is regulated by the states, in accordance with Article 1, Section 4 of the U.S. Constitution, which gives states control over the time, place, and manner of federal voting, subject to congressional regulation.[3] As of 2011, approximately 5.3 million people in the United States are ineligible to vote due to state felon disenfranchisement laws.[4]

Individual states have taken different approaches to felon disenfranchisement. Only two states, Maine and Vermont, allow all people with criminal convictions to vote, even those who are incarcerated.[5] The remaining 48 states impose disenfranchisement at some stage of the post-conviction process.[6] While some argue that felon disenfranchisement is an appropriate punishment for those convicted of crimes, others worry that felon disenfranchisement inhibits rehabilitation, thus preventing convicted persons from fully reintegrating into society.[7] These concerns have prompted many states to automatically restore civil rights to convicted people after the completion of their sentences or after a waiting period. Florida, Iowa, Virginia, and Kentucky are the only four states that disenfranchise convicted felons for their entire lives.[8] The only method by which felons in these states can restore their civil rights is through clemency from the governor.[9]

Racial discrimination was the impetus for many of the felon disenfranchisement laws enacted after the ratification of the Fifteenth Amendment.[10] To this day, African Americans continue to be disproportionately impacted by disenfranchisement laws and stringent re-enfranchisement requirements. African American men, in particular, are disenfranchised at seven times the national average. Estimates indicate that if current incarceration levels stay the same, 30 percent of African American men are expected to be disenfranchised during their lives.[11] Therefore, felon disenfranchisement (and corresponding re-enfranchisement procedures) must be considered in the context of prophylactic laws aimed at preventing racial discrimination in voting, such as the Voting Rights Act of 1965.

A. Florida's re-enfranchisement policies and recent developments

Since Florida's original constitution was approved in 1868 it has mandated that, "No person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights."[12] The civil rights restoration procedures have varied by the political administration in power. Following public outcry after the 2000 presidential election, Governor Jeb Bush began a process, which was expanded by his successor, Governor Charlie Crist, to

automatically restore civil rights for felons convicted of non-violent crimes in certain circumstances.[13]

In the 2004 presidential election, 600,000 to 960,000 citizens in Florida were unable to participate in the electoral process because they had been convicted of a felony.[14] Up to 25 percent of those excluded were African-American men.[15] Some argue that the impact of the state's felon disenfranchisement law was a deciding factor in the election of President George W. Bush in 2000, who won by a mere 537-vote margin in Florida.[16]

In response to the ensuing controversy, Governor Jeb Bush made minor changes to the disenfranchisement laws. Previously, all convicted felons who had completed their sentences could apply for re-enfranchisement, but had to do so at a hearing before the executive clemency board.[17] The executive clemency board could only hear the individual appeals of about 200 people per year.[18] Governor Jeb Bush's changes established that people who had not committed a violent offense and had not committed another crime within five years could apply to have their civil rights automatically restored without an individual hearing.[19] Additionally, any person who had been arrest-free for 15 years, regardless of the nature of her or his conviction, could also have her or his civil rights restored without a hearing.[20]

In January 2007, Republican Charlie Crist took office as the newly elected governor of Florida. On April 5, 2007, the Florida Executive Clemency Board, which consisted of Governor Crist and three executive branch members,[21] voted to automatically restore civil rights to felons convicted of non-violent crimes after their sentences were completed.[22] The Florida Advisory Committee to the U.S. Civil Rights Commission, in a 2008 report praising the new policy, noted that Governor Crist's actions restored the rights of an estimated 154,000 people,[23] among the estimated one million Florida citizens stripped of their rights by the state's permanent disenfranchisement law.[24] By taking these steps Florida came into alignment with the majority of states that grant automatic restoration for citizens who have completed their sentences.[25]

Rick Scott was elected Governor of Florida in 2010.[26] In 2011, promptly after his election, Governor Scott issued an executive order that permanently disenfranchised people convicted of felonies and imposed at least a five year waiting period to apply for rights restoration (seven years for "violent" offenders). Governor Scott's executive order not only reversed Governor Crist's historic reforms, but it also bucked the national trend toward automatic restoration by including further steps to prevent citizens convicted of felonies from restoring their rights.[27] The addition of the waiting period was significant because if a person were arrested at any point during the five-year waiting period, the clock would start over, even if no charges were ever filed against

the person.[28] Under these regulations, Florida now has the most burdensome felon re-enfranchisement procedures in the United States, which we argue violates the VRA.[29]

B. Overview of the Voting Rights Act of 1965

The Voting Rights Act of 1965 (VRA) is considered the most important voting rights law because it broadly protects citizens against racial discrimination in exercising their franchise.[30] Congress passed the VRA in 1965 to enforce the protections guaranteed by the Fifteenth Amendment[31] on a wave of momentum coming off the passage of the Civil Rights Act in 1964, and with the encouragement of President Johnson. The VRA prohibits voting discrimination based on race or minority language group, and authorizes federal government oversight of new election measures enacted by jurisdictions with discriminatory histories under certain criteria.[32] There are two particularly relevant sections of the VRA: sections 2 and 5.

The general prohibition against racial discrimination appears in section 2, which provides a right of action against any state or political subdivision that applies a 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," and following reauthorization in 1975, because of membership in a "language minority group."[33] These prohibitions forbid the use of "tests or devices," such as poll taxes or literacy exams, as a means of preventing members of protected groups under the Act from exercising their right to vote.[34]

In 1980, the Supreme Court held that section 2, as originally passed, was essentially a restatement of Fifteenth Amendment protections.[35] Under this analysis, a plaintiff had to show that there was an invidious purpose or discriminatory intent behind the voting standard, practice, or procedure.[36] In 1982, Congress amended section 2 to explicitly reject what became known as the "intent test," instead allowing a cause of action when, given the totality of the circumstances, the effect of a standard, practice, or procedure denied a protected group an equal opportunity to vote.[37] The so-called "effects test" was subsequently endorsed by the Supreme Court in a section 2 case involving voter dilution, though it has come under scrutiny by Circuit Courts in felon disenfranchisement cases over the last twenty years.[38]

Section 5 of the VRA requires federal pre-clearance before any changes to voting laws may take effect in a "covered jurisdiction" as defined by section 4.[39] "A state or political subdivision is covered by the VRA if it satisfies two elements under section 4. First, on November 1, 1964, the state or political subdivision must have maintained a test or device that restricted the

opportunity to vote or register to vote.[40] Second, the Director of the Census must determine that in that same state or political subdivision fewer than 50 percent of voting age persons were registered to vote on November 1, 1964, or that fewer than 50 percent of voting age persons had voted in the presidential election of November 1964.[41] As part of an application for pre-clearance approval, the covered jurisdiction has the burden of showing that any proposed changes would not worsen or prove "retrogressive" toward the opportunity for racial minorities to vote.[43]

In 1970, Congress renewed these provisions, setting November 1968 as the relevant date for both elements of the formula.[43] In 1975, two revisions were made: the provisions were extended to cover both race and language minority groups and the trigger date was changed to November 1972.[44] The coverage formula was extended again in 1982 and 2006.[45] Section 4, along with sections 5 and 8, which depend on it, will expire in 2031.[46] Under the 1972 based coverage formula, there are currently five Florida counties that are covered jurisdictions under the section four formula[47]—Collier County, Hardee County, Hendry County, Hillsborough County, and Monroe County.[48]

The concept of a "covered jurisdiction," as determined by the section 4 formula, is the foundation for the federal government's broad and important powers under section 5. The Supreme Court, in a seminal test case decided shortly after the VRA's passage, *Allen v. State Board of Elections*, interpreted section 5 to be a broad grant of authority to review all proposed changes affecting voting.[49] The Court interpreted section 5 as requiring review of the "subtle, as well as the obvious, state regulations" because Congress intended that "all changes, no matter how small, be subject to section 5 scrutiny."[50] As a result, section 5 has proven to be a vital mechanism for enforcing voting rights since its enactment.

There are two ways that a covered jurisdiction may comply with section 5.[51] The first and by far most common is for the covered jurisdiction to seek administrative review of proposed changes by submitting them to the Civil Rights Division of the Department of Justice, which has been delegated review power by the Attorney General of the United States.[52] If the Attorney General does not object to the change within sixty days, the covered jurisdiction may enforce its proposed change[53] and that decision may not later be challenged in court.[54] This prohibition, however, does not prevent a legal challenge under section 2 or other applicable law.[55]

The second, and less common method of complying with section 5, is through filing an action for declaratory judgment before the United States District Court for the District of Columbia.[56] Under this method, the covered jurisdiction has the burden of proving that the proposed voting change(s)

"neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color or [membership in a language minority group]."[57] These actions are brought against the United States or the Attorney General and may be appealed directly to the Supreme Court.[58] If a jurisdiction brings a declaratory judgment action after the Attorney General has entered an objection during administrative review, the declaratory judgment action is heard de novo, as it is not considered an appeal of the Attorney General's decision. Finally, if a covered jurisdiction fails to comply with the pre-clearance requirements of section 5, the Attorney General may file suit to enjoin the enforcement of the changes and any person or organization with standing may also sue seeking injunctive relief.[59]

Covered jurisdictions may also apply to terminate coverage under the VRA's section 5 "bailout" provisions.[60] To obtain a bailout, the covered jurisdiction must apply for a declaratory judgment to demonstrate that continued supervision is unnecessary. Specifically, it must prove that no discriminatory tests or devices have been used in the past five years and that all voting changes in the jurisdiction have been cleared under section 5.[61] An increasing number of jurisdictions have successfully taken advantage of the bailout provision since the important *Northwest Austin Municipal Utility District No. 1 v. Holder* ("*NAMUDNO*") decision of 2009.[62] Eleven jurisdictions have bailed out in the three years since the decision, compared to seven in the previous three years, and only seventeen in the decade preceding the decision.[63]

Despite repeated attacks, the Supreme Court has ruled that the VRA is constitutional. The Supreme Court held in *South Carolina v. Katzenbach* that the promulgation of the VRA fell within the full remedial powers to prevent racial discrimination granted Congress by the Fifteenth Amendment.[64] Accordingly, the VRA section 5 pre-clearance requirements were ruled constitutional in 1966.[65] In *NAMUDNO*, the Supreme Court declined to decide whether the 2006 extension of the VRA was constitutional, but instead found that any covered political sub-division could apply to bail out.[66] Despite many Supreme Court observers' fears that the conservative Roberts Court would strike down the landmark law, the Court made a strategic choice to reach a "compromise" decision, which dodged the question of the VRA's constitutionality (though hinting at certain bases for a future challenge) and explicitly encouraged localities to take advantage of the bailout provisions.

Since *NAMUDNO*, however, there have been two notable developments related to the VRA's constitutionality. First, in September 2011, in *Shelby County v. Holder*, the D.C. District Court issued a very significant ruling which held that ample evidence supported the continued constitutionality of

section 5 of the 2006 VRA extension.[67] *Shelby County* addressed the very questions of the VRA's constitutionality that the Supreme Court skirted in *NAMUDNO*.[68] This decision was appealed to the U.S. Court of Appeals for the District of Columbia with oral arguments heard January 19, 2012. Many predict, and some fear, that this case is likely to reach the Supreme Court, where the conservative-leaning court will more heavily scrutinize constitutionality of section 5.[69]

Moreover, in October 2011, Florida filed a complaint before the District Court of the District of Columbia, seeking either pre-clearance for several proposed voting regulation changes or a finding that section 4 and section 5 are unconstitutional.[70] The complaint argues that "subjecting Florida counties . . . covered exclusively under the language minority provisions of the VRA to pre-clearance is not a rational, congruent, or proportional means of enforcing the Fourteenth and/or Fifteenth Amendments and violates the Tenth Amendment and Article IV of the U.S. Constitution."[71] The Court has yet to rule on this issue, though it seems like a weaker challenge in light of the *Shelby County* ruling.

II. Defending the VRA's constitutionality and expanding its reach to re-enfranchisement clemency schemes

The VRA remains a valid constitutional exercise of congressional power because it serves as a remedial statutory arm of the Fourteenth and Fifteenth Amendments against a backdrop of continued racial voting discrimination. The VRA's reach should extend to discriminatory executive clemency rules, such as those in Florida, because although the Supreme Court has yet to rule on this specific issue, the VRA applies broadly to cover all voting changes, even those made by executive order. The Justice Department should review Florida's procedures under section 5 as statewide changes to voting procedures must still be pre-cleared even if only five jurisdictions are covered. We argue that the Department should to refuse to pre-clear Florida's disenfranchisement-related changes because the procedures have the purpose or effect of denying racial minorities' ability to exercise their franchise. Further, we argue that Florida's procedures also violate VRA section 2 and the Equal Protection Clause because African-American Florida citizens are disenfranchised at a far higher rate than non-racial minorities.

A. The VRA remains an appropriate and constitutional exercise of Congressional power

The Supreme Court has held that the VRA is constitutional.[72] Not surprisingly, the first failed challenge to the VRA came in 1964, before the Act became law. In *South Carolina v. Katzenbach*, South Carolina, along with Alabama, Georgia, Louisiana, Mississippi, and Virginia, petitioned the Court

asking for an injunction against the enforcement of the VRA.[73]In *Katzenbach*, as with Florida's current challenge, South Carolina did not challenge the constitutionality of the VRA in its entirety, but rather specific sections of the Act, including section 4 and section 5 on Article III, Fifth and Fifteenth Amendment grounds.[74] The Court, in upholding the VRA's constitutionality, applied a rational basis test.[75] It reasoned that South Carolina's argument that Congress' enactment of the VRA was beyond the scope of its power failed because section 2 of the Fifteenth Amendment gives Congress the power to enforce the Amendment by appropriate legislation.[76] Thus, the VRA was found to be a valid exercise of congressional power because it was rationally intended to further the aim of the Fifteenth Amendment, which expressly allowed for Congress to act in such a fashion.[77]

The VRA essentially went unchallenged for years following *Katzenbach*. Some of the factors that contributed to this were the initial congressional findings justifying the law, the Act's continued enforcement over time, and the strength of the *Katzenbach* decision. Then, in 2009, the issue of VRA's constitutionality was raised once again in *NAMUDNO*, but the Supreme Court declined to expressly rule on the 2006 extension's constitutionality. Instead, it re-opened the door to future constitutional challenges by questioning the Act's "federalism costs" and continued necessity.[78]

NAMUDNO's challenge hinged on the continued constitutionality of section 5, which had long been considered controversial. In *NAMUDNO*, a Texas utility district sought to bail out of the pre-clearance requirements.[79] The Court found that because the VRA considered the district a political sub-division subject to pre-clearance coverage, the district was entitled to the corresponding right to bail out.[80]

More importantly, however, the Court called into question the continued necessity of the Act because of recent improvements in minority voter registration and turnout.[81] In the Court's estimation, these perceived improvements, while likely the result of the VRA itself, also weighed against the Act's continued validity because it "imposes current burdens and must be justified by current needs."[82] This determination led the Court to endorse the argument put forth in *Boerne v. Flores* that the VRA should be assessed for "congruence and proportionality" between the injury the Act seeks to prevent or remedy and the means adopted to that end, instead of merely assessing whether the VRA passes a rational basis examination.[83]

Nonetheless, in *Shelby County v. Holder*, the U.S. District Court for the District of Columbia found that even under a congruence and proportionality test, the 2006 extension was an appropriate and constitutional exercise of congressional power.[84] In a 151-page opinion, the Court examined the his-

tory of the Fifteenth Amendment, past Supreme Court cases upholding the constitutionality of the VRA, and the 15,000 page legislative record outlining continued patterns of voting discrimination.[85] The Court held that the VRA was constitutional because it enforced the Fifteenth Amendment, remedied past discrimination, preserved gains against discriminatory practices, and was still necessary to protect the fundamental right to vote of racial and language minorities.[86]

Thus far, VRA section 5 critics have made only modest steps toward reforming the law. The new application of the congruence and proportionality test to VRA section 5 does little to attack the provision's constitutionality because ample evidence still unfortunately exists to support its continued necessity. Since the 2006 extension, the Department of Justice has denied clearance to many proposed changes in the voting regulations of covered jurisdictions[87] including, most recently, restrictive voter identification laws.[88]

Arguments that the VRA is obsolete because minority voter registration has increased are flawed because such claims rely on misinterpreted data.[89] For example, in his dissent in *NAMUDNO*, Justice Thomas argued that African American and white voter registration rates are nearly the same.[90] However, Latino registration rates are considerably lower than white registration rates, yet Latino voters, as non-African Americans, were factored into white registration rates, since many Latinos (an ethnicity category) are racially classified as white.[91] Such misrepresentations affect the overall non-African American registration rate, making it appear to be near the same level as African American registration rates.[92] In reality, non-Hispanic white data clearly show that registration rates for whites are much higher than African Americans rates.[93] Florida's constitutional challenge of the VRA should fail, given long precedent upholding the law and revived concerns about minority voter suppression.[94] The voluminous legislative history supporting the VRA's extension, repeated endorsement of the Act by the lower courts, and the indisputable evidence of continued discrimination in voting procedures all weigh heavily against Florida.

B. Florida's executive clemency scheme is subject to VRA section 5 even though Florida is only partially covered

Florida's new procedures ban people convicted of felonies for life, unless they petition to the governor for restoration at least five years after the completion of their sentences. These procedures, established by executive order, should be subject to the pre-clearance under section 5. As such, they may not be implemented in the five Florida counties covered under section 5 until they are approved by the Justice Department or United States District Court for the District of Columbia. The Justice Department should review

Florida's re-enfranchisement scheme because statewide voting changes in partially covered states must be pre-cleared under VRA section 5.

There are seven states that are only partially covered by the VRA.[95] In those states, statewide voting changes must be submitted to the Justice Department or the D.C. District Court for review if they directly affect voting in the covered jurisdictions.[96] In 2002, the Justice Department objected to a Florida statewide redistricting plan that would have eliminated the only majority-Hispanic district in the state, which was located in a covered jurisdiction.[97] Of the five pre-clearance denials that the Justice Department has made to Florida voting procedures since 1984, four of them have been for state-wide voting changes.[98] The fifth denial was to a change in voting procedures taking effect specifically in a covered county, and was later withdrawn.[99]

Past objections to Florida's voting procedures align with the Supreme Court's decision in *Lopez v. Monterey County*, which held that statewide voting changes that affect covered counties must be pre-cleared by the Justice Department.[100] In *Lopez*, the Court determined that even though only some counties in California were covered under section 5 of the VRA, measures enacted by the state were subject to pre-clearance to the extent that such measures would affect the covered county.[101] Therefore, the covered county was not allowed to administer the changes until after it had received pre-clearance by the Justice Department.[102]

The *Lopez* decision strongly suggests that covered jurisdictions in Florida, like California, must submit changes to felon disenfranchisement procedures for pre-clearance.[103] In *Lopez,* Monterey County, not the state of California, had to submit the changes for pre-clearance.[104] Similarly, the covered counties in Florida must submit the felon disenfranchisement procedures to the Justice Department. Until pre-cleared, the covered counties are not allowed to administer the changes that the stricter Florida disenfranchisement procedures require.

If the Department of Justice denied preclearance to the executive order, it could lead to a an odd situation in which some Florida counties would be allowed to ban felon civil rights, while the covered counties could not. The administrative details of how this would work are complex, but it is possible that ex-felons who live in covered jurisdictions would be automatically allowed to vote after completing their sentences, as they could before Governor Scott's executive order, while in the rest of the state, ex-felons would be subject to Governor Scott's executive order.

State rules about election uniformity further complicate this process. In 1998, the Secretary of State Sandra Mortham issued an opinion that Florida

election laws must be consistent throughout the state.[105] The continued validity of this opinion is unclear, as a challenge by the American Civil Liberties Union (ACLU) to the implementation of a statewide voting change in the non-covered counties prior to pre-clearance was dismissed in June 2011 on procedural grounds.[106] Yet, because of the complexity, confusion, and possible violation of state law that would result if the felon voting procedures were different in different counties, it is imperative that the covered counties in Florida submit the felon disenfranchisement procedure to the Department of Justice. Since Florida's changes are likely to face an objection, Governor Scott may have to issue a new executive order that would comply with the VRA without leading to the complexity and confusion of having different rules in different counties.

1. The re-enfranchisement scheme must be pre-cleared because executive orders are voting changes that are subject to section 5.

VRA section 5 does not distinguish among the source of election law changes.[107] The Supreme Court, in *Foreman v. Dallas County*, held that even changes to the selection process of election judges who monitor voting in precincts was subject to pre-clearance requirements.[108] Further, Florida itself has consistently acknowledged the breadth of the pre-clearance requirement, as it has previously submitted House bills, redistricting plans, and home rule charters for Justice Department approval.[109] All of these submissions are consistent with section 5's broad mandate that all "standard[s], practice[s], and procedure[s]" must be submitted to the DOJ to be pre-cleared if they affect the voting process.[110]

The Northern District of Alabama is currently considering whether Governor Riley's executive order that changes voting procedures is subject to VRA pre-clearance, but the challenge there is less clear than in the Florida case.[111] In Alabama, an amendment to the state constitution was approved by referendum and then pre-cleared by the Department of Justice in accordance with section 5.[112] The pre-cleared amendment allowed a Local Constitutional Amendment Commission to decide whether a proposed local constitutional amendment affects more than one county or more than one subdivision in one or more counties.[113] As a condition of pre-clearance, the Justice Department required Alabama to remove a provision allowing the Governor to veto any decisions.[114]

In the years preceding this amendment, several Alabama counties approved local constitutional amendments that authorized bingo operations within their jurisdictions.[115] Governor Riley has since sought to stop the bingo operations in Greene County through executive orders and police actions.[116]