

THE FEDERAL EXAMINER AND OBSERVER PROVISIONS OF THE VOTING RIGHTS ACT

Introduction

Sections 6 through 9 of the Voting Rights Act contain the federal examiner and observer provisions of the Act, which allow federal employees to observe polling place and vote counting activities and serve to document and deter inappropriate conduct. Although these provisions are permanent, the primary way these provisions are utilized is through the Section 5 preclearance coverage formula, which is set to expire in August 2007. Federal observers have been deployed in every year from 1966 to the present, except for 1973. Through December 8, 2003, almost 25,000 observers have been deployed in approximately 1,000 elections. While observer coverage in the early years was almost exclusively designed to protect the rights of black voters in the deep South, in recent years there has been roughly a 50/50 split between "traditional" election coverage, and election coverage designed to protect the rights of minority language voters in various areas of the country.

Coverage Under The Examiner/Observer Provisions

There are two ways jurisdictions can become subject to examiner/observer provisions. First, a court can authorize the temporary or permanent appointment of one or more examiners in a jurisdiction if the court deems it necessary to enforce the voting guarantees contained in the fourteenth and fifteenth amendments. Judicial authority to order the appointment of examiners is nationwide and permanent.

Second, the Attorney General can certify the appointment of an examiner in a jurisdiction when the Attorney General has received twenty or more written complaints from residents that they have been denied the right to vote on account of their race, color, or membership in a minority language group that the Attorney General believes are meritorious. Examiner coverage is also authorized when the Attorney General determines that it is necessary to enforce the voting guarantees contained in the fourteenth and fifteenth amendments. Attorney General authority to appoint examiners is limited to Section 5 preclearance jurisdictions and is set to expire in August 2007. According to the Department of Justice, there are slightly more than 1,000 Section 5 preclearance counties.

Most examiners are appointed through Attorney General certification. According to the website of the Department of Justice's ("DOJ") Voting Section, there are 148 counties and 9 Louisiana parishes that have been certified by the Attorney General, compared to 10 political subdivisions that are eligible for federal examiners as a result of court orders.

Federal Examiners And Observers

Over the past forty years, the nature of the federal examiner has changed. The examiner now usually plays a more administrative role whereas the observer's role has become more central to protecting voting rights.

How they are appointed and who they are

Federal examiners and observers are appointed by the Director of the Office of Personnel Management ("OPM"), who consults DOJ about where and how many examiners and observers are needed. In the past, almost all of the examiners and observers were OPM employees. As the OPM workforce has shrunk and need for observers with minority language proficiency has taken on increased importance, the observers are federal employees from various agencies. The Act authorizes federal employees to be examiners and federal employees and others to be observers.

The role of the federal examiner

As envisioned in the Act, the examiner's primary role was "to prepare and maintain lists of persons eligible to vote in Federal, State, and local elections." These provisions for federally-registered voters were a response to the well-documented refusal of registrars in the South and other parts of the country to register black voters. Over the course of time, the need to have federal examiners register voters has been significantly limited.

Today, the head observer covering an election typically serves as the examiner as well. The main function of the examiner in practice is to receive phone calls from individuals who are reporting problems, although those calls usually are made directly to DOJ attorneys instead.

The role of the federal observer

The Director of OPM assigns observers to monitor elections in any certified jurisdiction for the purpose of observing whether eligible voters are allowed to vote and whether votes cast by eligible voters are properly being counted. The observers essentially serve as witnesses for what occurs in the polling place and during the counting of the vote.

The case of *United States v. Burks County* shows the value of observers in documenting problems within the polls. The United States won the case based upon the court-appointed observers' substantial evidence of hostile and unequal treatment of Hispanic and Spanish-speaking voters by poll officials.

The *Burks* case also illustrates why observers have a deterrent effect. Because pollworkers, election officials, and others involved in the election process know their actions are being observed and recorded, some individuals are going to be discouraged from engaging in inappropriate behavior.