

THE PRECLEARANCE AND BAIL OUT PROVISIONS OF THE VOTING RIGHTS ACT

Introduction

Section 5 of the Voting Rights Act (“VRA”) requires certain covered states and political subdivisions to obtain federal or judicial preapproval or “preclearance” of any voting law changes or practices before those changes and practices can legally take effect. Section 5 oversight has resulted in the detection and prohibition of many harmful voting laws and practices. However, the deterrence effect of the law cannot be underestimated; legislators or local officials who are aware that they will be expected to show that a new law or practice satisfies the §5 standards are far less likely to propose voting changes that would be prohibited in order to avoid unnecessary additional costs and disruption.

Section 4(a) of the VRA sets forth the coverage formula that establishes which jurisdictions are required to obtain §5 preclearance. In addition, §4(a) also sets forth the means by which covered jurisdictions may make a showing sufficient to demonstrate that they should no longer be covered by the VRA’s §5 preclearance provisions. This provision of the VRA is known as the “bail-out” provision.

Coverage Formula

Pursuant to §4(a), a jurisdiction is covered by Section 5 if it meets two requirements:

1) The jurisdiction maintained a voting “test or device” – such as a “good moral character” test or a literacy requirement – as a prerequisite for voting or registration as of November 1, 1964, 1968, **or** 1972

and

2) Less than 50% of the voting-age residents in the jurisdiction were registered to vote, or actually voted, in the presidential elections of 1964, 1968, **or** 1972.

Although not expressly mentioned, voting discrimination against racial or language minorities played a role in crafting the coverage formula. When the coverage formula was first drafted, tests and devices were used for discriminatory purposes, and many of the most aggressively discriminating jurisdictions adopted voting obstacles to effectively suppress voter registration and turnout of racial or language minorities. The coverage formula sought to utilize readily discoverable proxies to identify many – but not all – of the jurisdictions whose history of voting discrimination against their minority populations could justify the imposition of the VRA’s preclearance requirements.

Summary of Covered Jurisdictions

Nine entire states:

- | | | |
|------------|----------------|-------------------|
| 1) Alabama | 4) Georgia | 7) South Carolina |
| 2) Alaska | 5) Louisiana | 8) Texas |
| 3) Arizona | 6) Mississippi | 9) Virginia |

Parts of seven other states (*See Appendix for a complete listing of covered jurisdictions*):

- | | |
|-----------------------------|---------------------------------|
| 1) California (4 counties) | 5) New York (3 counties) |
| 2) Florida (5 counties) | 6) North Carolina (40 counties) |
| 3) Michigan (2 townships) | 7) South Dakota (2 counties) |
| 4) New Hampshire (10 towns) | |

Preclearance Procedure and Standards

Jurisdictions covered by §5 must receive approval from the Attorney General or a three-judge panel of the United States District Court for the District of Columbia for all proposed voting changes. This approval requires proof sufficient to convince the Attorney General or the court that the proposed changes do “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].”

In 1976, a leading §5 case established that, under the preclearance provisions, a jurisdiction is required only “to insure that no voting practice or procedure changes would be made that would lead to a retrogression in the position of minorities with respect to the effective exercise of the franchise.” Under current legal standards, §5 prohibits only those voting changes that are retrogressive – that is those changes that worsen the position of minority voters when measured against the status quo ante.

In recent years the Supreme Court has construed §5 more and more narrowly. Section 5 today no longer operates as a tool for improving electoral opportunities for minority populations; rather, it only serves as a safeguard the reduction of existing levels of minority electoral power. Indeed, §5 allows covered jurisdictions a fair amount of leeway in satisfying their obligations. Collectively, the Supreme Court decisions have reduced the effectiveness of Section 5; however, it remains an important tool for protecting minority voting rights gains obtained through the courts and/or the political process.

The U.S. Department of Justice (DOJ) handles the overwhelming majority of preclearance submissions, which is generally more expeditious and cost-effective for covered jurisdictions. The covered jurisdiction bears the burden of establishing both that the proposed voting change (1) does not have a retrogressive purpose, and (2) will not have a retrogressive effect.

While many of the §5 issues deal with redistricting following a decennial Census, it is very important to recognize that the voting changes subject to §5 preclearance is extensive and ranges from relocation of polling places to annexations of other territory or political subdivisions. Accordingly, §5 is an important safeguard against minority electoral opportunity backsliding in both obvious and subtle ways.

Under the “effect” prong of the test, a jurisdiction must prove that the change is not retrogressive. Under the “purpose” prong of the test, a jurisdiction must prove that the change is not intended to be retrogressive. According to the Supreme Court, a voting change that was adopted with a discriminatory intent but not a retrogressive intent does not violate the preclearance provisions. Satisfaction of the §5 preclearance standard does not insulate a voting change from a constitutional attack or from a challenge under §2 of the VRA or other causes of action.

To meet the administrative approval requirements, a jurisdiction must submit its proposed change to DOJ in writing. The Attorney General has 60 days to object to the change. If DOJ requests additional information from the jurisdiction, then the running of the 60 day period is stopped. If the Attorney General does not object and no additional information is requested, after 60 days the jurisdiction can implement its proposed change. If the Attorney General objects to the proposed change, the jurisdiction may seek preclearance from a three-judge panel of the United States District Court for the District of Columbia, which will make a determination without regard to the DOJ’s findings. Significantly, interested individuals and organizations are permitted to offer written or oral comments to DOJ during the administrative preclearance process and often provide useful information regarding the purpose or effect of the change.

Similarly, to meet the judicial approval requirements, a jurisdiction must make the same showing as to both the purpose and effect prongs before the United States District Court for the District of Columbia. Interested parties may intervene and participate in judicial preclearance proceedings if they satisfy the legal standards for intervention. Any appeal from the District Court’s decision goes directly to the Supreme Court. If a jurisdiction does not seek or receive preclearance but nonetheless implements the change, a private party or the Attorney General may file suit before a local three-judge district court (i.e., a federal district court outside Washington, D.C.) to stop the implementation. These types of cases are known as §5 enforcement actions.

IV. Bail-out Provisions

As part of the 1982 amendments and reauthorization of the VRA, Congress established a new mechanism to create an incentive for covered jurisdictions to comply with §5 of the VRA. Under this “bail-out” mechanism, a jurisdiction can be removed from coverage if it can show that (1) it has been in full compliance with the preclearance requirements 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. Although some jurisdictions have utilized the “bail-out” provisions which set forth clear and demonstrable standards, they have not been widely used.

APPENDIX

From the DOJ website:

States Covered by Section 5 in their Entirety

	<u>Applicable Date</u>	<u>Fed. Register</u>	<u>Date</u>
Alabama	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Alaska	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975
Arizona	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975
Georgia	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Louisiana	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Mississippi	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
South Carolina	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Texas	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975
Virginia ¹	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965

Covered Counties in States Not Covered in their Entirety

	Applicable Date:	Fed. Register	Date:
California:			
Kings County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Merced County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Monterey County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Yuba County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Yuba County	Nov. 1, 1972	41 FR 784	Jan. 5, 1976.
Florida:			
Collier County	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976.
Hardee County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Hendry County	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976.
Hillsborough County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Monroe County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
New York:			
Bronx County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Bronx County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
Kings County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.
Kings County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975.
New York County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971.

¹ Three political subdivisions in Virginia (Fairfax City, Frederick County and Shenandoah County) have "bailed out" from coverage pursuant to Section 4 of the Voting Rights Act. The United States consented to the declaratory judgment in each of those cases.

	Applicable Date:	Fed. Register	Date:
North Carolina:			
Anson County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Beaufort County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Bertie County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Bladen County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Camden County	Nov. 1, 1964	31 FR 3317	Mar. 2, 1966.
Caswell County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Chowan County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Cleveland County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Craven County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Cumberland County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Edgecombe County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Franklin County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Gaston County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Gates County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Granville County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Greene County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Guilford County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Halifax County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Harnett County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Hertford County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Hoke County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Jackson County	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975.
Lee County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Lenoir County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Martin County	Nov. 1, 1964	31 FR 19	Jan. 4, 1966.
Nash County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Northampton County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Onslow County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Pasquotank County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Perquimans County	Nov. 1, 1964	31 FR 3317	Mar. 2, 1966.
Person County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Pitt County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Robeson County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Rockingham County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Scotland County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Union County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966.
Vance County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Washington County	Nov. 1, 1964	31 FR 19	Jan. 4, 1966.
Wayne County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.
Wilson County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965.

	Applicable Date:	Fed. Register	Date:
South Dakota:			
Shannon County	Nov. 1, 1972	41 FR 784	Jan. 5, 1976.
Todd County	Nov. 1, 1972	41 FR 784	Jan. 5, 1976.

Covered Townships in States Not Covered in their Entirety

		Applicable Date	Fed. Register	Date
Michigan:				
Allegan County:	Clyde Township	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976
Saginaw County:	Buena Vista Township	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976
New Hampshire:				
Cheshire County:	Rindge Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Coos County:	Millsfield Township	Nov. 1, 1968	39 FR 16912	May 10, 1974
	Pinkhams Grant	Nov. 1, 1968	39 FR 16912	May 10, 1974
	Stewartstown Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
	Stratford Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Grafton County	Benton Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Hillsborough County	Antrim Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Merrimack County	Boscawen Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Rockingham County	Newington Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Sullivan County	Unity Town	Nov. 1, 1968	39 FR 16912	May 10, 1974