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The 1965 Voting Rights Act: Some Wrongs Still Not Righted

by Neal Devins

Thomas C. McCain, et al.

v.

Charles E. Lybrand, et al.

(Docket No. 82-282)

To be argued October 31, 1983

ISSUES

When Congress passed the Voting Rights Act in 1965, many observers complacently pointed to increasing number of enfranchised black voters and black public office holders and were satisfied the tides of discrimination were turning. In fact, the tides were turning more slowly than assumed.

Today, eighteen years after the Act took effect, courts are still being called upon to interpret its key provisions.

One of those provisions is section 5, which bars several states, including South Carolina, from changing established election procedures without first getting approval or "preclearance" from either the Attorney General or the D.C. district court.

But what constitutes preclearance under section 5 of the Voting Rights Act of 1965? In deciding *McCain v. Lybrand*, the Supreme Court will answer that question by determining whether the Attorney General approved changes in the voting procedures of Edgefield County, South Carolina.

The McCain case — by way of an inordinately messy fact pattern — will determine the respective responsibilities of the Attorney General in reviewing section 5 submissions and of state/local government in preparing section 5 submissions. Specifically, the Court will address:

1. Whether and under what circumstances the Attorney General's approval of changes in an election procedure can serve as an implicit approval of any unaltered aspects of the earlier election procedure, and
2. Whether and under what circumstances the Attorney General can make section 5 preclearance contingent on future occurrences.

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FACTS

As stated in the 1978 Supreme Court decision, *United States v. Sheffield Board of Commissioners*, the Attorney General preclearance procedure was designed as an alternative to "case-by-case litigation [, which] had proved ineffective in large part because voting suits had been 'unusually onerous to prepare' and 'exceedingly slow' to produce results." (453 U.S. 110, 118) Section 5 thus "[shifted] the advantages of time and inertia from the perpetrators of the evil to its victims." (Id. at 121) In effect, section 5 eliminates those inventive attempts to circumvent federal court dictates banning discriminatory voting practices.

Edgefield County, prior to the enactment of the Voting Rights Act, was governed by a three-member board of commissioners consisting of an elected supervisor of roads and two members appointed by the governor. In 1966, the state legislature created a three-member county council for Edgefield County with all three members elected at-large. Although this legislative measure was subject to preclearance, the state did not seek appropriate review.

In 1971, the state passed an act which increased from three to five both the number of residency districts in and the number of council members from Edgefield County. This act was submitted to the Attorney General for preclearance. After requesting and receiving information — including "a copy of the election statute now in force" — the Attorney General granted preclearance. In South Carolina, even though blacks were and still are a majority of the population — but less than a majority of eligible or registered voters — no black had ever been elected to the county council.

In June, 1975, South Carolina enacted a law which transferred some powers from the state legislature to county officials. This Home Rule Act also afforded each county the opportunity to hold a referendum to determine whether to change its form of government. In the event no referendum were held, the county would "have the form of government including the method of election, number, composition and terms of the governing body most nearly corresponding to the form in effect in the county immediately prior to that date." In August of 1975, the Attorney General precleared the Home Rule Act "insofar as it authorizes each county and city to hold a referendum on the question of the form of its government." The Attorney General, however, noted that additional preclearance would be required by each county

prior to "adopting a form of government under this Act." For the Attorney General, such adoption constituted a change subject to preclearance.

Edgefield County did not hold a referendum under the Home Rule Act but instead adopted an at-large election procedure which the Attorney General refused to preclear.

In April, 1980, the election method in Edgefield County was struck down as unconstitutional. Yet, this decision was nullified that year when the Supreme Court held in *City of Mobile v. Bolden*, (446 U.S. 55) that proof of discriminatory intent was necessary in a voter dilution case. Because of this nullification, blacks in Edgefield County sought to invalidate the at-large election scheme by arguing that the Attorney General refused to preclear that election system. (Note: Due to the intervening amendment of Section 2 of the Voting Rights Act prohibiting any procedure resulting in denial or abridgment of voting rights based on race, Edgefield County blacks are seeking to reinstate the April, 1980 voter dilution judgment. This case is now before the South Carolina federal district court.)

In May, 1982, the South Carolina district court upheld Edgefield County's at-large election scheme and that decision was appealed directly to the Supreme Court.

The voters had argued, unsuccessfully, that the 1971 preclearance was limited to the changes in residency districts and number of council members. The district court, however, held that since the Attorney General had requested and had received "a copy of the election statute now in force," it was reasonable to assume that the Attorney General's review of the 1971 Act "encompassed all aspects of the Act, including the effect of the at-large with residency requirement voting that had been implemented in 1966."

The district court also refused to honor the Attorney General's February, 1979 objection to at-large elections in Edgefield County, holding that the Home Rule Act resulted in no change in election procedures and thus was not subject to section 5 review. The court held that the Attorney General's limited approval of the Home Rule Act extended not only to the holding referendum (as explicitly stated), but also to transfers of power which did not alter county voting procedures. To justify this holding, the court ruled that the Attorney General's conclusion that assignments of forms of government constituted a change subject to preclearance only applied to those assignments which resulted in a change in election procedures.

BACKGROUND AND SIGNIFICANCE

In Edgefield County itself, *McCain* may ultimately be of little practical significance. The related voter dilution case may invalidate at-large elections under Section 2 of the Voting Rights Act. Yet, *McCain* is very important insofar as it should establish parameters for understand-

ing the respective rights and responsibilities of both the Attorney General and state/local government units under Section 5 of the Voting Rights Act.

Although not requiring increased black political representation, section 5 shifted the burden of justifying a change in election procedures to the covered jurisdiction. The *McCain* case will explicate the nature of the burden placed on covered jurisdictions as noted by the United States in an amicus brief. That brief states: "If jurisdictions are not required to identify changes, [such as the 1966 change made in Edgefield County] they will be encouraged to make ambiguous submissions and to attempt subsequently to exploit the ambiguities." On the other hand, it seems apparent that the Attorney General was provided with information detailing the 1966 election procedure.

McCain is also significant because it may hamper the Attorney General from giving limited preclearance to section 5 submissions. Under the district court view, the Attorney General could not give effect to his interpretation of the 1975 limited section 5 preclearance. At the same time, since it is unclear whether Edgefield County changed its election procedures under the Home Rule Act, it might be inappropriate to grant the Attorney General unlimited authority to determine what constitutes a change in election procedures under section 5.

ARGUMENTS

For Black Voters

1. A preclearance submission, such as that made in 1971 by Edgefield County, cannot result in approval of election procedures not contained in the submission.
2. The Attorney General cannot be held to have notice of information not directly related to the terms of a preclearance submission.
3. A state-to-county transfer of powers pursuant to a home rule statute necessarily is a change of procedures subject to section 5 preclearance.
4. Courts should defer to the Attorney General's interpretation of a limited section 5 preclearance.

For Edgefield County

1. A preclearance request extends to all information contained in the original submission and any other information procured at the request of the Attorney General.
2. The Attorney General can only object to "actual" changes in election procedures.
3. There must be an explicit delineation of all limitations desired by the Attorney General in a section 5 preclearance approval.

For Amicus Curiae

At the request of the Court, the United States filed an amicus curiae brief. The United States's argument was identical to that made by the black voters.