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IN FOCUS

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Voting Rights Act and H.R. 4 (117th Congress): An Overview

The Voting Rights Act (VRA) was enacted to protect equal access to elections for all eligible Americans. In particular, and in response to widespread disenfranchisement between the post-Civil War period and the 1960s, the VRA protects voters in racial and language minority groups. The VRA rests principally on congressional authority to enforce the Fifteenth Amendment to the U.S. Constitution, which prohibits voting denial or abridgment based on color, race, or previous condition of servitude.

H.R. 4, the John R. Lewis Voting Rights Advancement Act of 2021 (VRAA), proposes several VRA amendments. This In Focus provides an overview of H.R. 4's proposed changes to key sections of the VRA, primarily Sections 2 and 4. Applying nationwide, Section 2 prohibits voting discrimination based on race, color, or membership in a language minority. Before the Supreme Court ruled it unconstitutional, Section 4 established criteria, known as a coverage formula, for determining those jurisdictions required to obtain prior approval or *preclearance* for proposed voting changes. H.R. 4 proposes new standards for Section 2 claims and a new Section 4 coverage formula. As discussed below, two recent Supreme Court rulings have substantial implications for the VRA and appear to form the basis for many of H.R. 4's provisions.

Those favoring H.R. 4 generally argue that the bill is consistent with previous statutory changes to protect minority voting rights and responds to Supreme Court rulings. Opponents generally argue that H.R. 4 infringes on state election authority and is unnecessary because nationwide VRA protections still apply.

Background

Congress passed the Voting Rights Act (P.L. 89-110) in 1965. Congress amended the act several times between 1970 and 2006. Among other provisions, the VRA (52 U.S.C. §§10101-10702) currently

- prohibits states and political subdivisions (e.g., cities or counties) from using race- or color-based qualifications, standards, or practices in registration, voting, or redistricting;
- prohibits tools previously used to disenfranchise voters, such as poll taxes or literacy tests;
- permits voting assistance and promotes polling place access for elderly and disabled voters; and
- authorizes the Department of Justice (DOJ) to monitor elections to protect voting rights.

Recent Congressional Developments

Throughout the spring and summer of 2021, the House Judiciary Committee and the Committee on House Administration held hearings on voting and election administration issues, including the VRA and effects on members of various groups of voters. Representative Sewell introduced H.R. 4 on August 17, 2021. The bill was referred to the House Judiciary Committee. In the 116th Congress, the House passed (228-187) a precursor bill, also numbered H.R. 4, on December 6, 2019. The Senate considered a companion measure, S. 4263.

Brnovich v. DNC and Section 2 Claims

Historically, Section 2 of the VRA has been invoked primarily to challenge redistricting maps, known as "vote dilution" cases. For the first time, in July 2021, in *Brnovich v. Democratic National Committee (DNC)* (141 S. Ct. 2321), the Supreme Court interpreted Section 2 in the context of state voting rules, known as "vote denial" cases. The Court held that two Arizona voting rules do not violate Section 2. Interpreting the language of Section 2, the Court held that voting must be "'equally open' to minority and non-minority groups alike" and that courts should apply a broad totality of circumstances test to determine whether state voting rules violate Section 2. The Court did not establish a standard to govern all Section 2 challenges to voting rules, but identified "certain guideposts," including five specific circumstances for courts to consider.

Shelby County v. Holder and Section 4 Coverage

In a 2013 ruling, *Shelby County v. Holder* (133 S. Ct. 2612), the Supreme Court invalidated the coverage formula in Section 4(b) of the VRA, thereby rendering the preclearance requirements in Section 5 inoperable. Under Section 5, nine states and jurisdictions within six other states were covered under Section 4(b). Those jurisdictions were required to obtain preclearance from either DOJ or the U.S. District Court for the District of Columbia for any proposed change to a voting law, including changes to congressional redistricting maps. The coverage formula was based on voter turnout and registration data from the 1960s and early 1970s. The Court held that the application of the coverage formula to the covered states and jurisdictions departed from the "fundamental principle of equal sovereignty" among the states without justification "in light of current conditions."

Overview of H.R. 4 (117th Congress), as Introduced

Section 2. Vote Dilution, Denial, and Abridgement

Section 2 of H.R. 4 would amend Section 2 of the VRA (52 U.S.C. §10301), which authorizes the federal government and individuals to challenge discriminatory voting practices

or procedures; it applies nationwide. Generally, Section 2 of the VRA prohibits voting practices, standards, or procedures that result in the denial or abridgement of voting rights based on race, color, or membership in a language minority.

Section 2 of H.R. 4 proposes a two-part test for courts to apply in evaluating a vote denial claim, clarifying the statutory language that the Supreme Court interpreted in *Brnovich v. DNC*. Generally, a violation would be established if the challenged voting rule imposes "a discriminatory burden" on citizens protected under VRA Section 2, meaning that "members of the protected class face greater difficulty in complying with" the voting rule. The court must consider "the totality of the circumstances," and find that the greater difficulty is "caused by or linked to social and historical conditions that have produced," on the date that the challenge is brought, "discrimination against members of the protected class." Factors relevant to evaluating the totality of circumstances would expressly *not* include, among others, the degree to which the voting rule "has a long pedigree" or was in effect on an earlier date; access to alternative voting methods; and the "[m]ere invocation of interests" in preventing voter fraud.

Section 2 also would generally codify a 1986 Supreme Court ruling, *Thornburg v. Gingles* (478 U.S. 30), establishing threshold conditions for challenges to redistricting maps based on vote dilution claims. Section 2 would require challengers to show that members of the protected class compose a majority in a single-member district and are politically aligned; and that the other residents in the district vote as a bloc to defeat the protected class's preferred candidates. Further, Section 2 would generally codify a list of factors, which originated in the VRA Section 2 legislative history, relevant in assessing the totality of circumstances. Those factors include the history of voting discrimination within the state; the extent of racially polarized voting; and whether election campaigns have included "overt or subtle racial appeals."

Section 3. Retrogression

Section 3 of H.R. 4 would amend Section 2 of the VRA (52 U.S.C. §10301), to provide that a voting rule violates Section 2 if it is challenged before it is "imposed or applied in an election" and "has the purpose or will have the effect of ... abridging" voting rights based on race, color, or membership in a language minority, "within the meaning of" Section 5 of the VRA.

Section 4. Court-Ordered Preclearance

Known as the "bail-in" provision, Section 3(c) of the VRA (52 U.S.C. §10302(c)) allows a court to retain jurisdiction over a state or political subdivision and require preclearance based on violations of the Fourteenth or Fifteenth Amendments. Section 4 of H.R. 4 would amend Section 3(c) to also allow courts to exercise similar authority based on violations of the VRA or of any federal law prohibiting voting discrimination based on race, color, or membership in a language minority group.

Section 5. Rolling Coverage for Preclearance

Section 5 of H.R. 4 would amend Section 4(b) of the VRA (52 U.S.C. §10303). It would establish a new, rolling coverage formula for Section 5 preclearance to replace the formula held unconstitutional in *Shelby County v. Holder*. The formula would apply for 10 years if, during the previous 25 years

- 15 or more voting rights violations occurred in the state; or
- 10 or more voting rights violations occurred in the state, at least 1 of which the state itself (instead of a political subdivision) committed; or
- 3 or more voting rights violations occurred within the state and the state administers the elections within the state or political subdivision where the violation occurred.

Separately, a political subdivision (e.g., a city or county) would be covered if three or more voting rights violations occurred during the previous 25 years.

Section 5 defines a *voting rights violation* to include any final judgment or preliminary relief granted in a challenge under the Fourteenth or Fifteenth Amendments; a challenge under any provision of the VRA; a final judgment denying a declaratory judgment under Sections 3(c) or 5 of the VRA; an objection by the Attorney General under Sections 3(c) or 5 of the VRA; or a consent decree adopted by a court or containing an admission of liability by the defendant, resulting in a change to a discriminatory voting practice. Each voting rule invalidated would constitute a separate violation (e.g., within a redistricting map, each violation would constitute a separate violation).

Section 6. Practice-Based Coverage

Section 6 of H.R. 4 would add a new Section 4A to the VRA. This language proposes a new preclearance process and specifies voting practices that would subject states or political subdivisions to that process. Seven categories of election practices would trigger preclearance. These include changes to election methods; jurisdiction boundaries; redistricting; voting documentation or qualification requirements, such as voter ID; multilingual voting materials, such as ballots; voting locations or opportunities, such as a reduction of Sunday voting hours or prohibiting providing food or nonalcoholic beverages; or registration list maintenance, such as new criteria for removing voter names.

For additional discussion, see CRS Legal Sidebar LSB10624, *Voting Rights Act: Supreme Court Provides "Guideposts" for Determining Violations of Section 2 in Brnovich v. DNC*, by L. Paige Whitaker; and CRS Testimony TE10033, *History and Enforcement of the Voting Rights Act of 1965*, by L. Paige Whitaker.

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