

GOVERNMENT AND ELECTION LAW

Expert Analysis

Presidential and Legislative Efforts on Voting Reform

Calls for voting reform continue.¹ In response to the U.S. Supreme Court's gutting of the pre-clearance provision of the Voting Rights Act (VRA) in *Shelby County v. Holder*,² a bipartisan group of legislators recently introduced in Congress a bill intended to respond to the court's constitutional critique.³ Several days later, the Presidential Commission on Election Administration, appointed by President Barack Obama after the 2012 election to address long lines and other voting obstacles, released a set of recommendations to improve our nation's voting experience.⁴

Important for the whole nation, the Voting Rights Bill and the commission report are significant for New York voters in particular. Pre-clearance requirements under the VRA, while originally capturing



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only southern states that discriminated against African-American voters, expanded over the years to include nine states and more than 50 counties or towns to protect a variety of ethnic and language minorities throughout the United States, including Brooklyn, Manhattan and the Bronx.

In a nutshell, no electoral change could occur in these jurisdictions without first being certified by the Department of Justice or a Washington, D.C., federal district court that the change was not discriminatory. So, to name just a few examples, changes in New York's laws relating to term limits or run-offs, the scheduling of our primaries, or how vacancies must be filled, all had to be

approved in Washington prior to going into effect. After the Shelby County decision, the 50-year-old protection that voters in these three counties have had is gone.

Likewise, voting irregularities and administrative nightmares that interfere with voting are not confined to hotly contested swing states. New York has had its share of inefficient election administration, polling place ineptitude, frustrated voters, and, in general, laws that make it more difficult for voters to cast ballots.⁵ For example, New Yorkers do not have "early voting"; we have requirements that prevent many ill or otherwise engaged voters to cast absentee ballots; and we now have paper ballots with fonts so tiny that many elderly or vision-impaired voters cannot easily read them. Indeed, the New York City Board of Elections distributed magnifying glasses during the last election. The presidential commission, while not having the authority to impose any of its recommendations, nevertheless offers data, expertise and best practices to states and Congress on how to address these issues.

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The Bill

The bill to amend the VRA is sponsored by Representative Jim Sensenbrenner, a Republican from Wisconsin who has served in the House since 1978, and Senator Patrick Leahy, a Democrat from Vermont who has served since 1974. The bill tries to repair the impact of *Shelby County* in a number of ways. First, it would enact a new formula for determining which jurisdictions would be required to have electoral changes approved through the pre-clearance process. The amended VRA would have a modernized approach to coverage, looking at specific kinds of violations a jurisdiction has committed in the last 15 years. Second, it expands the list of violations that allow a judge to impose a pre-clearance requirement as a remedy. Third, the bill would require specific localities in certain circumstances to provide new information about election changes, clarify the circumstances under which federal observers could be sent to monitor elections, and establish a new legal standard by which a voter could block a law before it harms voters.

The bill's future, including what form it will take, has no guarantees. It is, however, the most direct effort to revive the important pre-clearance provision that had successfully thwarted discriminatory voting changes in many jurisdictions including New York City. As has been noted before, the U.S. attorney general and voting rights advocates have begun to use the courts to enjoin new laws that impede voting.⁶ But such

stopgap lawsuits, brought to halt restrictive procedures after they are enacted, are of course not as effective as a pre-clearance protocol. The VRA amendment seeks to remedy this.

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The Commission

Similarly, the presidential commission offers suggestions to improve voting procedures. The president announced the commission in his state of the union address last year, responding, in part, to the experience many voters had in the 2012 election of having to wait on line for six to eight hours—"We have to fix that," the president said. Accordingly, he brought together his and Governor Mitt Romney's respective campaign lawyers to co-chair the effort, and appointed eight other election officials and experts.

The commission observed that the country's voting problems were "identifiable and solvable," and recommended a modernized voter registration system, greater access to early voting, more efficient polling-place management, more reliable voting machines and improved ballots. The challenge, of course, will be the enactment of legislation to implement the commission's proposals.

New Yorkers are probably not surprised by these proposed reforms. Albany has studied these issues for many years, and legislative proposals have been routinely offered.

Neither the Voting Rights Act bill nor the presidential commission's recommendations are panaceas for the problems that triggered their work. Nevertheless, they underscore a national commitment to the issues they intend to address, and provide federal and local public officials with important tools to advance the cause of free and fair elections.

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1. See authors' New York Law Journal articles on the subject on Sept. 23, 2013 ("After Shelby County Ruling, Are Voting Rights Endangered?") and May 15, 2013 ("U.S. Supreme Court Examines Voting Rights in Two Cases").

2. 133 S.Ct. 2612 (2013).

3. Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (2014) (companion Senate bill is S.1945).

4. Presidential Commission on Election Administration, "The American Voting Experience: Report and Recommendations" (January 2014), www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf.

5. Examples abound. See, e.g., Editorial, New York Daily News, "The flunkies get flunked," (Jan. 27, 2014).

6. See fn. 1, *supra*.