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The John R. Lewis Voting Rights Advancement Act of 2021, S. 4 (117th Congress): Legal Overview

The John R. Lewis Voting Rights Advancement Act of 2021, S. 4 (117th Congress), currently pending in the Senate, would primarily amend the Voting Rights Act of 1965 (VRA). In part, S. 4 appears to respond to Supreme Court decisions that evaluated provisions of the VRA. This In Focus provides background regarding relevant Court rulings and an overview of selected provisions of S. 4.

Brnovich v. DNC Interpreted Section 2

Section 2 of the VRA, codified at 52 U.S.C. § 10301, authorizes the federal government and private citizens to challenge discriminatory voting practices, including minority vote dilution. Specifically, Section 2(a) prohibits any state or political subdivision from imposing a voting practice that "results in a denial or abridgement of the right … to vote" based on race, color, or membership in a language minority. Further, Section 2(b) provides that a violation is established if, "based on the totality of circumstances," electoral processes "are not equally open to participation" by members of a racial or language minority group in that the group's members "have less opportunity than other members of the electorate to elect representatives of their choice."

Historically, Section 2 of the VRA has been invoked primarily to challenge redistricting maps, known as "vote dilution" cases. In a 2021 ruling, *Brnovich v. Democratic National Committee (DNC)* (141 S. Ct. 2321), which is considered a "vote denial" case, the Supreme Court interpreted Section 2 of the VRA in the context of state voting rules. While not establishing a standard to govern all Section 2 challenges to state voting rules, the Court identified "certain guideposts," including five specific circumstances for courts to consider:

- amount of the burden imposed by the challenged voting rule;
- degree to which the challenged voting rule differs from voting practices in effect in 1982, when Congress last amended Section 2, including whether the voting rule "has a long pedigree";
- amount of any disparities in how the challenged voting rule affects "members of different racial or ethnic groups";
- opportunities afforded by a state's "entire system of voting"; and
- strength of the governmental interests served by the challenged voting rule, writing that prevention of election fraud is a "strong and entirely legitimate state interest."

Shelby County v. Holder Invalidated Section 4(b)

Section 4(b) of the VRA established criteria, known as a coverage formula, prescribing which states and jurisdictions with a history of discrimination were required to obtain prior approval or preclearance under Section 5 before changing a voting law. In a 2013 ruling, *Shelby County v. Holder* (570 U.S. 529), the Supreme Court invalidated the coverage formula in Section 4(b), thereby rendering the preclearance requirements in Section 5 inoperable. Section 4(b) covered nine states and jurisdictions within six other states in 2013. Prior to *Shelby*, under Section 5, those jurisdictions were required to obtain preclearance from either the Department of Justice or the U.S. District Court for the District of Columbia for any proposed change to a voting law (including changes to redistricting maps), based on the coverage formula established by 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 was unconstitutional because it departed from the "fundamental principle of equal sovereignty" among the states without justification based on current data.

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

Section 101. Vote Dilution and Denial Claims

Currently, Section 2(a) of the VRA expressly provides that violations occur when a state voting law "results" in denying or abridging the right to vote. Section 101 would amend Section 2(a) to expand violations to state laws enacted "for the purpose of" denying or abridging the right to vote.

Section 101 would also amend Section 2(b) of the VRA by providing that a violation of Section 2(a) applies expressly to vote dilution claims, instructing courts to apply the legal standard set forth in a 1986 Supreme Court ruling, *Thornburg v. Gingles* (478 U.S. 30), to adjudicate such claims. In *Gingles*, the Court held that Section 2 requires that vote dilution challenges to redistricting maps 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. Section 101 would further specify that a protected class "may include a cohesive coalition of members of different racial or language minority groups."

For vote denial claims, Section 101 would clarify the statutory language interpreted by the Supreme Court in *Brnovich*, and would specify that a violation is established

if the state voting rule "imposes a discriminatory burden" on the protected class in that its members "face greater difficulty" complying with the voting rule and, at least partially, that greater difficulty is related to "social and historical conditions" producing discrimination. Section 101 would generally codify a list of factors for assessing the totality of circumstances, augmenting the list that originated in the VRA Section 2 legislative history. This list includes a state's history of voting discrimination and whether election campaigns have included "overt or subtle racial appeals." 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 whether it was in effect on an earlier date.

Section 102. Diminishment of Voting Rights

Section 102 would amend Section 2 of the VRA to provide that Section 2 is violated if a state "enacts or seeks to administer" any voting law with the purpose or effect of "diminishing the ability" of citizens to vote on account of race, color, or membership in a language minority group, and would apply to state actions occurring on January 1, 2021, or later.

Section 103. 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 103 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 104. Rolling Coverage Formula

Section 104 would amend Section 4(b) of the VRA (52 U.S.C. § 10303(b)) and establish a rolling coverage formula for Section 5 preclearance to replace the formula invalidated by the Court in *Shelby County*. The formula would apply to a state or jurisdiction 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 one of which the state itself (instead of a political subdivision) committed.

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

Section 104 defines a *voting rights violation* to include any final judgment or preliminary relief granted in a challenge under the Fourteenth or Fifteenth Amendments or under certain provisions 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.

Section 105. Practice-Based Preclearance

Section 105 would add a new Section 4A preclearance process where, under certain circumstances, states and political subdivisions would be required to obtain preclearance for specific election practices, including changes to election methods; jurisdiction boundaries; redistricting; voter identification (ID) requirements; multilingual voting materials; voting locations or opportunities, such as a reduction of Sunday voting hours or a prohibition on providing food or nonalcoholic beverages; or voter registration list maintenance processes.

Section 202. Protection of Election Workers

Section 202 would amend 18 U.S.C. § 245, prohibiting voter intimidation, to expand protections to include election workers and increase penalties for violations.

Section 305. Voter Registration Sites for Native Americans

Section 305 would amend a provision of the National Voter Registration Act, 52 U.S.C. § 20506, to require voter registration at any federal facility that primarily provides services to an Indian Tribe.

Section 306. Accessible Tribal Polling Places

Section 306 would require states to provide a minimum of one polling place per precinct where eligible voters reside on Indian lands; prohibit the reduction of polling places on Indian lands on the basis of population; and establish additional polling places "if, based on the totality of circumstances," without such additional polling places, those living on Indian lands would have "less opportunity to vote than eligible voters" in the state who live elsewhere.

Section 307. Removing Polling Places on Indian Lands

Section 307 would restrict states from eliminating, moving, or consolidating polling places and voter registration sites on Indian lands unless certain requirements are met.

Section 308. Tribal Voter Identification

Section 308 would require states prescribing ID for voting or registration in federal elections to accept ID issued by federally recognized Indian Tribes and other federal agencies that issue ID to eligible Indian voters.

Section 309. Permitting Voters on Indian Lands to Designate Persons to Return Ballot

Section 309 would require states to permit any person to return the sealed ballot of a voter residing on Indian lands to a post office on Indian lands, drop box, or other specified locations so long as the person is not compensated based on the number of ballots returned.

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.

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