



1992

Recent Developments: Presley v. Etowah County Commission: Only Procedural Changes Directly Related to Voting and Election Processes May Offend Section 5 of the Voting Rights Act

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Recommended Citation

Wilson, Brett R. (1992) "Recent Developments: Presley v. Etowah County Commission: Only Procedural Changes Directly Related to Voting and Election Processes May Offend Section 5 of the Voting Rights Act," *University of Baltimore Law Forum*: Vol. 22 : No. 3 , Article 7.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol22/iss3/7>

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the differences of treatment should be “respected by limiting protection where the text contains a limit and leaving textually unlimited protection just where the Congress apparently chose to leave it.” *Id.* at 575.

This decision had immediate ramifications in Maryland because it implicitly affirmed the fourth circuit’s holding in *Kolkhorst v. Tilghman*, 897 F.2d 1282, *cert. denied*, 112 S. Ct. 865 (1992). In that case, the fourth circuit held that the Baltimore City Police Department could not limit the number of police officers, other than new hires, who are allowed to join active military reserve units. In so doing, the fourth circuit construed section 2024(d), as the Supreme Court did in *King*, as placing no limit on reservists covered under the section.

With the decreasing need for a fully staffed and active military in modern political climates, this decision also has major implications for military policy. It ensures a fully trained and prepared defense structure while enabling cuts in military spending. This would increase the amount of money which would be available to the private sector for things such as loans for small businesses. The burdens placed on employers by the Act could, therefore, be compensated by more government spending in the private sector.

- Shawn Gritz

Presley v. Etowah County Commission: **ONLY PROCEDURAL CHANGES DIRECTLY RELATED TO VOTING AND ELECTION PROCESSES MAY OFFEND SECTION 5 OF THE VOTING RIGHTS ACT.**

After consolidating two Alabama cases, the United States Supreme Court held that changes in an elected official’s authority did not require preclearance under the Voting Rights Act, 42 U.S.C. § 1973c (1975). In *Presley v. Etowah County Commission*, 112 S. Ct. 820 (1992), the Court ruled that such a change must be directly related to vot-

ing and the election process in order to come within the Act’s province.

Before engaging in its analysis, the Court ventured into the history and pertinent parts of the Voting Rights Act (“Act”). The Act was created to remove race discrimination from voting. Section 5 of the Act requires that any changes in voting procedure with respect to “voting qualification or prerequisite to voting, or standard, practice, or procedure” must receive administrative or judicial preclearance. The Act defines voting to include “all action necessary to make a vote effective.” For the purpose of evaluating changes made to a covered district’s voting practices, the Act states that such changes should be compared against the practices that were in use in that jurisdiction on November 1, 1964.

When the Act was created, Etowah County in Alabama employed the Etowah County Commission (“Etowah Commission”) to oversee the maintenance, repair, and construction of the county roads. The county was divided into four districts. A five-member commission was elected at large under a residency district system. Four members would each receive an allotment of funds for discretionary spending on the roads in their respective districts. The Etowah Commission voted as a collective body to determine the initial allotments each of the four members would receive. The fifth member was the chairman who oversaw the solid waste authority, prepared the budget, and managed the courthouse buildings and grounds.

In 1986, the Etowah Commission was restructured and increased to six members, with each member elected by the voters in a specific district. Four members of the new commission were holdovers from the previous commission. The newly-formed fifth district, which was designed to create a black majority district, elected a black man, Lawrence Presley. A black citizen had not previously held a seat on the Etowah Commission in the modern era. Shortly after the new members took office, the

Etowah Commission passed the “Common Fund Resolution.” This resolution effectively removed the individual authority from the commissioners. Instead of allocating monies to each commissioner, road funds were to be kept in common accounts. This allowed a simple majority, such as the holdover members, to decide how to spend the funds.

In the companion case from Russell County, Alabama, the Russell County Commission (“Russell Commission”) originally comprised three commissioners elected at large. The commissioners were responsible for the road shops, crew, and equipment, as well as routine road maintenance, in their respective districts. After one of the commissioners was indicted for corruption, the Russell Commission adopted the “Unit System” which relegated control over road construction to a County Engineer appointed by the Commission. The Unit System was not submitted for preclearance under section 5 of the Act.

The United States District Court for the Middle District of Alabama issued a consent decree in 1985 which increased the Russell Commission to seven members and changed the election system to district-by-district voting. The Department of Justice precleared the decree, but did not mention the Unit System, which effectively denied the commissioners control of the road funds and equipment. Ed Mack and Nathaniel Gosha were elected to the new seats and became the first black commissioners in modern times.

The appellants, Presley, Mack, and Gosha, filed a single complaint in district court which alleged that the county commissions had violated section 5 of the Act by not obtaining preclearance for either the Common Fund Resolution or the Unit System. A three-judge panel convened by the district court found that neither the Common Fund Resolution nor the Unit System required preclearance under the Act.

In reviewing the history of case law

on the Act, the Supreme Court restated that the Act was constitutional and that it required a broad interpretation to protect citizens' equal enjoyment of the right to vote. *Presley*, 112 S. Ct. at 827. Further, the Court noted that the Act was aimed to protect citizens from subtle, as well as obvious, state efforts to deny the right to vote. *Id.*

The Court made clear that the initial step in analyzing claims under section 5 was to determine whether, or not, the changes altered the election law. *Id.* at 828. The Court found four basic typologies indicative, though not exhaustive, of section 5 claims. *Id.* Those typologies involved changes affecting the manner of voting, the candidacy requirements and qualifications, the composition of the electorate, or the creation or abolition of an elective office. *Id.* As a general rule, the Court said that a change must have "a direct relation to voting and the election process." *Id.* at 829.

The appellants, joined by a brief for the United States as amicus curie, argued that the Common Fund Resolution fell within the Act's coverage because the value of each vote had been diminished. *Id.* They reasoned that the value of each vote decreased because the authority of each commissioner decreased. *Id.* Thus, the redistricting system designed to ensure black representation became a token gesture.

The Court, however, defined voting power as being dependant upon increases or decreases in the number of officials, not in the individual power an official holds while in office. *Id.* The Court opined that without drawing a restrained line between governmental decisions affecting voting and those that do not, section 5 would become an omnipotent statute applicable to virtually all facets of governmental activity. *Id.*

As to the Unit System, the Court found that delegating authority to an appointed official was possibly analogous to the replacement of an elected official with an appointed one. *Id.* at 830. Nevertheless, the Court held that

reallocations of authority within government could not constitute voting changes. *Id.* Furthermore, the Court stated that intraconstituency and interconstituency changes in authority may have affected voters, but neither case presented a change in voting for purposes of the Act. *Id.* at 831.

The Court also recognized that the Attorney General's administrative interpretation deserved considerable deference, but noted that "[d]eference does not mean acquiescence." *Id.* The Court determined that Congress unambiguously stated that section 5 only covered changes in the rules governing voting. *Id.* at 833. As such, the Court found the Attorney General's position contrary to the Act and, therefore, not entitled to a high degree of deference. *Id.*

The Court affirmed the decision of the district court but supplanted their own standard that a change must directly relate to the voting process to offend section 5. By making federal law more predictable to the states, the Court sought to enforce federalism as a "practical system of governance and not a mere poetic ideal." *Id.*

In dissent, Justice Stevens, joined by Justices White and Blackmun, pointed to the definition of "voting" given in the Act which includes "all action necessary to make a vote effective." *Id.* at 835 (emphasis added). Justice Stevens coupled this expansive language to the historical deprivation of the right to vote and created a litmus test for deciding whether section 5 would apply. He concluded that whenever significant changes toward the disposition of power were made after a black person had assumed a position of power not historically held, those changes should be held suspect. *Id.* at 838.

It is likely that the Court will use cases such as these as mechanisms to federal restraint. By restrictively defining key terms, the Supreme Court can severely curtail the social effects of federal legislation. The Voting Rights Act provided a system of quick review

of suspect changes in power. Such claims may now be forced through the more expensive and circuitous court system.

- Brett R. Wilson

County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation: THE INDIAN GENERAL ALLOTMENT ACT PERMITS COUNTIES TO IMPOSE AD VALOREM TAXES BUT NOT EXCISE TAXES ON PATENTED LAND OWNED BY TRIBES AND TRIBE MEMBERS.

In an opinion delivered by Justice Scalia, the Supreme Court in *County of Yakima v. Yakima Indian Nation*, 112 S. Ct. 683 (1992), upheld and remanded the decision of the Ninth Circuit Court of Appeals holding that the Indian General Allotment Act ("Act"), permits a county to impose an *ad valorem* tax upon land patented in fee, but does not permit a county to impose an excise tax upon the sale of such land. After reviewing land allotment to Indian tribes since the seventeen hundreds to establish the purpose of the Act and how Congress intended it to affect the Indian nations, the Court concluded the Act was not implicitly repealed by subsequent acts of Congress.

This case involved approximately 1.3 million acres of land, mostly in Yakima County, of which eighty percent was held in trust by the United States. The remaining twenty percent was held in fee patent by Indians and non-Indians. Most of the property was located in Yakima County, Washington. Yakima County ("the County") imposed an *ad valorem* levy on taxable real property and an excise tax upon the sale of the land held in fee patent. When Yakima Indian Nation, ("Yakima Nation"), the owners, refused to pay these taxes, the County attempted to foreclose on their property.

Yakima Nation sought injunctive and declaratory relief in the Federal District Court for Washington State on