The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965

John P. MacCoon

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The Voting Rights Act of 1965 has been widely hailed as the most effective civil rights legislation ever enacted. Seeking to end racial discrimination in voting, Congress devised a complex array of procedural and substantive requirements that are unique in the law. A central element in this scheme is section 5 of the Act, which in recent years has become one

* Attorney, Civil Rights Division, United States Department of Justice; J.D., 1974, Columbia University. The views expressed herein are solely the author's. Since the completion of this article the author has been appointed Director of the Section 5 Unit of the Civil Rights Division.

2. See generally Comment, Section 5: Growth or Demise of Statutory Voting Rights?, 48 Miss. L.J. 818 (1977). The Voting Rights Act is a complex statute providing several sophisticated mechanisms to ensure enforcement of minority voting rights. It is the purpose of this article to discuss only one of those mechanisms — enforcement actions brought pursuant to § 5 of the Act.
5. 42 U.S.C. § 1973c (1976). Section 5 provides in pertinent part:
Whenever a State or political subdivision . . . [covered under section 4] . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on . . . [the applicable date of comparison — i.e., November 1, 1964 for jurisdictions covered in 1965; November 1, 1968 for those covered in 1970; and November 1, 1972 for those covered in 1975] . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the
of the most useful statutory tools for the enforcement of voting rights.\(^6\) Essentially, this section is designed to prohibit the implementation in covered jurisdictions of any change in the electoral process which has the potential for affecting voting rights until prior approval (preclearance) is obtained from the United States Attorney General or the United States District Court for the District of Columbia.\(^7\) In obtaining preclearance for an electoral change, the jurisdiction bears the burden of persuading the Attorney General or the district court that the proposed change would have neither the purpose nor the effect of discriminating against either racial or certain language minorities.\(^8\) Thus, in enacting section 5, Congress has effectively reversed the usual burdens of litigation, giving potential plaintiffs the upper hand.

In the early years after its enactment, the Voting Rights Act was rarely employed to challenge electoral changes, partly due to a lack of certainty regarding the scope of section 5’s coverage.\(^9\) In the 1970’s, however, covered jurisdictions have witnessed increasingly active administrative and judicial enforcement efforts, paralleling the continually broad interpretations of section 5 by the federal courts. As is often the case with civil rights statutes, now that the extent of section 5’s coverage has been

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8. Since the jurisdiction must prove to the Attorney General or the District Court for the District of Columbia that the change does not have the purpose or effect of discriminating against protected minorities, see 42 U.S.C. § 1973c (1976), a § 5 enforcement action can thus be used to block the implementation of electoral changes until the defendant carries the burden of proof under § 5. See Georgia v. United States, 411 U.S. 526, 538 (1973); notes 32-36 and accompanying text infra.
more clearly delineated, the focus of litigation is beginning to shift to remedial issues.\(^\text{10}\)

This article will trace the development of section 5 litigation from its earlier stages, when coverage questions predominated, to the present, in which relief questions are coming to the fore. Practical considerations in filing section 5 enforcement actions will also be discussed in order to provide a useful source for attorneys who wish to avail their clients of its protection, particularly in view of the many changes in electoral systems that will take place in connection with the reapportionments of election districts following the 1980 census.\(^\text{11}\)

I. Section 5 Coverage

Jurisdictions are subject to the preclearance requirements of section 5 when they exhibit certain characteristics chosen by Congress as triggers for the Act's coverage. Specifically, section 4(b) of the Act\(^\text{12}\) provides for coverage when a state or political subdivision\(^\text{13}\) has maintained a "test or device," as defined in section 4(c),\(^\text{14}\) and has had a voting turnout of less than

\(^{10}\) For example, litigation under Title VII of the Civil Rights Act of 1964 followed a similar pattern. See Cooper, Equal Employment Law Today, 5 COLUM. HUMAN RIGHTS L. REV. 263, 263-79 (1973).


\(^{13}\) A "political subdivision" as defined by the Act is either a county or, if the county does not register voters, any other local voter-registering entity. 42 U.S.C. § 1973l(c)(2) (1976).

\(^{14}\) Section 4(c) of the Act, 42 U.S.C. § 1973b(c) (1976), defines "test or device" as: (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

This definition of "test or device" was recently expanded to include the holding of English-only elections, where more than five percent of the citizens of voting age are members of one of the language minorities protected by the Act. Id. § 1973b(f). These language minorities
fifty percent of the voting age population at the time of the presidential elections in either 1964, 1968, or 1972. In such circumstances, coverage becomes effective upon publication of notice in the Federal Register that a particular jurisdiction is covered.\textsuperscript{15}

Once it has been established that a geographical area — either a state or political subdivision — is covered by section 5, two additional jurisdictional questions arise. The first concerns whether a change in a law or practice is a voting change within the meaning of section 5. The second relates to which political sub-units within a covered jurisdiction are subject to section 5’s preclearance requirements.

\textit{A. Voting Changes Subject to Section 5 Coverage}

The Supreme Court did not address the first question concerning section 5 coverage until 1969, in \textit{Allen v. State Board of Elections}.\textsuperscript{16} The issues in \textit{Allen} were whether changes from single-member districts to at-large elections,\textsuperscript{17} changes in candidate qualifications, changes from elective to appointive offices, and changes in the procedure for casting write-in votes fell within the purview of section 5. Reversing the district court, the majority held that Congress intended to include within the scope of section 5 any

\begin{itemize}
  \item For a discussion of how such devices were used to disenfranchise blacks, see Derfner, \textit{supra} note 3, at 533-34.
  \item For a listing of jurisdictions covered by § 5 prior to 1975, see \textit{1975 House Hearings, supra} note 9, at 180-81. For a listing of jurisdictions covered by § 5 as a result of the 1975 amendments, see the appendix to 28 C.F.R. § 55.24 (1978). All of the Maine jurisdictions, along with McKinley County, New Mexico, Choctaw, and McCurtain Counties, Oklahoma have removed themselves from § 5 coverage through “bail out” suits filed pursuant to § 4 of the Act. \textit{See 42 U.S.C. § 1973b(a)} (1976).
  \item 393 U.S. 544 (1969). Shortly after its enactment in 1965, the Voting Rights Act was subjected to its first constitutional challenge in South Carolina v. Katzenbach, 383 U.S. 301 (1966). The Supreme Court in \textit{Katzenbach} upheld the new law as a valid exercise of Congress’ enforcement powers under the fifteenth amendment. \textit{See Roman, supra} note 9, at 113-16. \textit{See also Christopher, supra} note 4, at 15-23.
  \item At-large elections are those where all residents of the political jurisdiction vote for all representatives to a particular political body. Single-member district, or ward, elections are those where residents of each geographical district vote only for the representative of their district. \textit{See generally Parker, County Redistricting in Mississippi: Case Studies in Racial Gerrymandering, 44 Miss. L.J. 391 (1973)}.}

\end{itemize}
voting change which altered election laws "in even a minor way" in order to give section 5 the "broadest possible scope." The Court reasoned that because each change had the "potential" for abridging the voting rights of protected minorities, it became subject to section 5 preclearance. Additionally, the Court held that the Act implied a private right of action for individuals to enforce section 5 before a three-judge federal court. As a result of this expansive interpretation of section 5 in Allen, the Attorney General, as well as private litigants, began to employ section 5's protections more rigorously.

Two years later, the Supreme Court again addressed the coverage of section 5 in Perkins v. Matthews, in which the coverage of polling place changes, annexations, and a change from single-member districts to at-large elections were at issue. The contested change from ward to at-large elections had been mandated by state law prior to the statutory date from which section 5 changes are to be measured, but ward elections continued to be held after that date. The lower court dismissed the action, finding the changes non-discriminatory. The Supreme Court reversed, holding that by examining the effects of the changes, the three-judge court had exceeded its jurisdiction which was limited to determining whether the changes were covered and had been precleared pursuant to section 5. Deferring to the Attorney General, the Court then found all of the changes at issue to have the "potential for racial discrimination in voting"

18. 393 U.S. at 566.
19. Id. at 566-67.
20. Id. at 569-71.
21. Id. at 555. For a discussion of the three-judge court requirement, see notes 83-91 and accompanying text infra.
22. See 1975 House Hearings, supra note 9, at 169-71.
25. See note 17 supra.
26. The date prescribed by the Act from which all election procedure changes are to be measured for jurisdictions initially covered in 1965 is November 1, 1964. 42 U.S.C. § 1973c (1976).
29. See 400 U.S. at 391. In determining which changes have the potential for racial discrimination in voting, the Court announced that it would show "great deference" to the Attorney General's interpretation of § 5. Id. The Attorney General's determinations are not reported. Instead, they take the form of letters to submitting authorities and are made available to the public in the files of the Voting Section of the Civil Rights Division. See 28 C.F.R. § 51.26 (1978).
and thus were subject to section 5. Finally, the Court dismissed the argument that the change from ward to at-large elections was not subject to section 5 scrutiny merely because it was mandated by state law prior to the effective date of the Act's applicability. Looking to the election procedures "in fact" in force or effect at the time of the attachment of section 5 coverage, the Court determined that the effective date of the change, for section 5 purposes, was that of actual implementation, rather than the date when it was required to be instituted under state law.

The Supreme Court next addressed the scope of section 5 in *Georgia v. United States*, where the change in question was reapportionment of the state legislature. The Court found that by extending the coverage of section 5 for another five years in 1970, Congress had ratified the expansive interpretation given section 5 in *Allen and Perkins*. Again, the Court held that section 5 covered the electoral change at issue by applying the principle that coverage turns upon the given change's "potential" for abridging minority voting rights. In addition, the Court reaffirmed both the constitutionality of section 5 and Congress' allocation of the burden of proof to the covered jurisdiction in obtaining section 5 preclearance.

This pattern of broad inclusivity in coverage interpretations has continued unabated. The recent case of *Dougherty County, Georgia, Board of Education v. White*, concerned a rule adopted by the local board of education mandating that teachers and other public employees take unpaid leave while running for public office. The three-judge district court below had found the rule to have a potential for discriminating — conceivably by narrowing the field of candidates from which minorities could choose — and therefore covered by section 5. The Supreme Court affirmed the lower court's decision by a five-to-four margin after noting the "consistent...
ently expansive constructions of section 5" emanating from the Court, the implicit congressional ratification in twice extending the Act in 1970 and 1975, and the Attorney General’s inclusive regulations. Although stressing the impact of the rule on the electoral process as justification for its inclusion, the majority appears to have limited coverage only to those changes explicitly connected to that process. The Court observed that the board of education’s rule was “not a neutral personnel practice governing all forms of absenteeism. Rather, it specifically addressed the electoral process, singling out candidacy for elective office as a disabling activity.”

In a dissent joined by Chief Justice Burger and Justices Rehnquist and Stewart, Justice Powell argued that the employment rule was insufficiently related to voting to qualify as a “standard, practice, or procedure with respect to voting” within the meaning of section 5. Justice Powell observed that, given the majority’s attention to indirect impact, few if any state or local enactments would escape section 5 coverage.

Indeed, the parameters of section 5 coverage are still not completely defined. If mere potential impact on the electoral process is the test, then section 5’s coverage may be expansive to a degree that some would consider excessive. Zoning changes, for example, can fence out minority voters just as effectively as gerrymandering of political district lines. Likewise, the location of housing projects and educational facilities could also have consequences for minority voting strength. Mere impact on the political process as the defining principle for section 5 coverage, therefore,

40. 99 S. Ct. at 373. The § 5 guidelines, promulgated by the Attorney General in 1971, provide that “[a]ll changes affecting voting, even though the change appears to be minor or indirect . . . must either be submitted to the Attorney General or be made subject to an action for declaratory judgment in the U.S. District Court for the District of Columbia.” 28 C.F.R. § 51.4(a) (1978). The Court reaffirmed that the Attorney General’s interpretation is entitled to “particular deference.” 99 S. Ct. at 373.
41. Id. at 374.
42. Id. at 373. Note that the change must be in a “standard, practice, or procedure with respect to voting” to be covered by § 5. 42 U.S.C. § 1973c (1976). Personnel changes among those individuals whose responsibilities impinge upon the electoral process, although potentially impacting upon minority voting rights, have never been construed by the Attorney General as being a “standard, practice, or procedure with respect to voting.” See, e.g., Beatty v. Esposito, 439 F. Supp. 830, 832 (E.D.N.Y. 1977) (political committee chairman’s changing of election inspectors not a change covered by § 5).
43. 99 S. Ct. at 377 (emphasis added).
44. Id. at 380.
45. The Department of Justice has never taken a position on whether zoning changes and the location of housing projects fall within § 5 coverage. Were such changes subject to preclearance, however, the administrative resources currently available for handling § 5 submissions could well be taxed to the breaking point. Currently the Justice Department’s staff of 11 § 5 analysts handle an average of about 50-75 submissions per week. Interview with D.
could lead to a slippery slope down which falls nearly everything that a political jurisdiction does. Congress probably did not intend section 5 to become such an all-encompassing mechanism.

Apparently to avoid this result, the Dougherty County majority placed significant weight on the language of the personnel rule explicitly relating to candidacy for political office, that is, to the electoral process itself. The test of coverage thus appears to be governed by two questions. First, does the type of change at issue have the potential to affect voting rights? Second, is the change within the bounds of the electoral process? If the answer to both questions is in the affirmative, the case law suggests that the change is covered by section 5. Importantly, this test is compatible with Congress' basic intent to protect the guarantees of the fifteenth amendment through section 5 preclearance.

B. Jurisdictions Subject to Section 5 Coverage

For over ten years after the enactment of the Voting Rights Act there was virtually no litigation concerning the jurisdictional entities covered by section 5. The first case addressing this area to reach the Supreme Court was United States v. Board of Commissioners. Sheffield, Alabama, a city that did not conduct voter registration, argued that it was not subject to section 5 requirements because the Act, by its own terms, applies only to "states and political subdivisions." Section 14(c)(2) of the Act defines "political subdivision" as a county or other political entity which conducts voter registration. In rejecting Sheffield's contention, the Supreme Court held that this definition is relevant only for purposes of determining geographical coverage where a whole state is not covered. The Court further noted that both congressional intent and the Attorney General's interpretation of the Act supported the proposition that all political entities within a covered state or political subdivision are subject to preclearance when they implement changes affecting voting. Since Sheffield is geographically within Alabama, a covered state, the Court concluded that it was
subject to section 5 requirements.\textsuperscript{51}

To date, the only other Supreme Court case concerning the kinds of jurisdictions subject to section 5 is Dougherty County.\textsuperscript{52} The board of education in Dougherty County contended that it was not within section 5's coverage because it did not conduct elections. The Court found the Sheffield decision dispositive, however, reaffirming the principle that any political entity within a covered area — state or political subdivision — is covered if it conducts any function impacting upon the electoral process.\textsuperscript{53} Since the school board had promulgated a rule concerning candidacy qualifications,\textsuperscript{54} and since it was located within a covered state, it was found to be subject to section 5.\textsuperscript{55}

A related coverage question involves the situation where a state or other political unit, not itself covered by section 5, exercises some electoral control over a subunit, such as a county that is covered by section 5.\textsuperscript{56} This was the case in United Jewish Organizations v. Carey,\textsuperscript{57} in which a reapportionment plan enacted by the state of New York constituted the challenged change in the election process. Although Kings, New York, and Bronx Counties are specifically covered by section 5, the state of New York is not. Nonetheless, the Supreme Court confirmed the apparent understanding of all parties that the state statute was subject to section 5 review insofar as it affected the covered counties.\textsuperscript{58}

Although the question has not reached the Supreme Court, the lower courts are divided on whether political parties are subject to the require-

\textsuperscript{51} Id. at 124-29. See also Hereford Independent School Dist. v. Bell, 454 F. Supp. 143 (N.D. Tex. 1978) (following the Sheffield decision in holding that cities and school districts in Texas — a covered state — are covered by § 5).


\textsuperscript{53} 99 S. Ct. at 375-76. The Court, in Sheffield, declared that § 5 coverage extends to "all entities having power over any aspect of the electoral process within designated jurisdictions, not only to counties or to whatever units of state government perform the function of registering voters." 435 U.S. at 118.

\textsuperscript{54} See text accompanying notes 37-38 supra.

\textsuperscript{55} 99 S. Ct. at 376.

\textsuperscript{56} A variant of this situation exists in South Dakota where, for example, Todd County — an unorganized county — is covered by § 5, while Tripp County — an attached, organized county exercising electoral control over the unorganized county (Todd) — is not covered. The State of South Dakota also exercises some electoral control over covered counties, but is not itself covered.


\textsuperscript{58} 430 U.S. at 149. See also Clayton v. North Carolina State Bd. of Elections, 317 F. Supp. 915 (E.D.N.C. 1970) (North Carolina statute extending prohibition against electioneering at the polling place held subject to § 5 preclearance in covered counties).
The coverage of political parties, at least as to primary elections, would appear clearly mandated by the Act's definition of "vote," which specifically mentions party primaries, as well as general elections. The territorial approach to coverage confirmed by the Court in Sheffield and Dougherty County suggests that all political entities exercising state action to control any aspect of the electoral process within a covered geographical area are covered, including political parties. Although the Department of Justice has always considered parties to be covered, few submissions have been received from them under section 5.

C. Court-Ordered Reapportionment Plans

Court-ordered reapportionment plans and other court-ordered electoral changes are the only exceptions to the rule requiring preclearance for changes effected in jurisdictions subject to section 5. This exemption for court-ordered changes originated in Connor v. Johnson, where, after striking down a reapportionment plan designed by the Mississippi legislature, the district court fashioned its own reapportionment plan for the entire state. On appeal, the Supreme Court, for unstated reasons, simply held section 5 to be inapplicable to court-ordered plans.

Although it was clear in the wake of Johnson that changes designed and ordered by a federal court would be characterized as "court-ordered," the exact parameters of this category of exempt plans remained undefined.


61. Interview with D. Hunter, then Attorney Advisor, Section 5 Unit, Voting Section, Civil Rights Division, U.S. Dep't of Justice (March 20, 1979).

62. For example, § 5 records (as of March 20, 1979) reveal that only 18 submissions have been received from political parties outside of the state of Texas. See generally Case Comment, MacGuire v. Amos: Application of Section 5 of the Voting Rights Act to Political Parties, 8 HARV. C.R.-C.L. L. REV. 199, 208 (1973) (suggesting criteria for determining which actions of political parties are governmental in nature and should be covered by § 5 and which are private and thus should not).

63. 402 U.S. 690 (1971) (per curiam).

64. The reapportionment plan of the Mississippi legislature was ruled unconstitutional because it allowed impermissibly large variations in the number of persons distributed among the House and Senate districts. Connor v. Johnson, 330 F. Supp. 506 (S.D. Miss. 1971).

65. 402 U.S. at 691.
The next Supreme Court discussion of this exception appeared in *East Carroll Parish School Board v. Marshall*,\(^6^6\) where, in a footnote, the Court indicated that defendant-drawn plans, made effective solely by the order of a federal district court, are also to be considered "court-ordered" and thus exempt from section 5.

The definition of court-ordered plans has been most recently refined in *Wise v. Livscomb*.\(^6^7\) In *Lipscomb*, the district court had determined that Dallas' at-large election system unconstitutionally diluted minority voting rights by denying minorities fair access to the political process.\(^6^8\) The district court then "gave the City of Dallas an opportunity to perform its duty to enact a constitutionally acceptable plan."\(^6^9\) The city responded by passing an ordinance reapporportioning the city into single-member districts. Although the district court approved the plan, the Supreme Court found the plan to be legislative rather than judicial, and thus not exempt from section 5.\(^7^0\) The Court distinguished *East Carroll Parish* by noting that the school board in that case could not have purported to act legislatively since the relevant state enabling legislation had been previously objected to by the Attorney General under section 5. The school board in *East Carroll Parish* merely submitted a plan to the district court which that court's order alone rendered effective.\(^7^1\) In contrast, the city of Dallas had the legislative power to enact a reapportionment plan and had exercised that power.\(^7^2\) Thus, whether a plan will be considered court-ordered and exempt from section 5 coverage, is dependent, not upon who draws the plan, but upon the source of the authority by which it becomes effective. If judicial, rather than legislative authority enacts the plan, then section 5 does not apply, at least where federal courts are concerned.

Electoral changes ordered by state courts, like federal court-ordered changes, have been held by lower courts not to be within the scope of


\(^{67}\) 437 U.S. 535 (1978).

\(^{68}\) 399 F. Supp. 782, 790 (N.D. Tex. 1975). The election requirement originally contested in *Lipscomb* was a city charter provision which required all city council members to be elected on an at-large basis. After considering the city's past history of discrimination and the customary restricted access of minority voters, to the process of slating candidates, the district court found that this procedure unconstitutionally diluted the voting strength of minorities, most of whom were located in a small definable area of the city. *Id.*

\(^{69}\) 437 U.S. 535 (1978).

\(^{70}\) 437 U.S. at 546. In finding the City Council's revised election scheme to be legislative, the Supreme Court overruled the Fifth Circuit's interpretation of it as court-ordered. See *Lipscomb v. Wise*, 551 F.2d 1043 (5th Cir. 1977).

\(^{71}\) 437 U.S. at 545.

\(^{72}\) *Id.* at 545-46.
section 5. In *Gangemi v. Sclafani*, the United States Court of Appeals for
the Second Circuit determined without an articulated analysis that state
court orders, like those of a federal court, are not subject to section 5. Sim-
ilarly, in *Webber v. White*, the United States District Court for the
Northern District of Texas construed section 5 to cover only state legisla-
tive enactments, not state judicial decisions which result in voting changes.
The *Webber* court found no indication in either the legislative history of
section 5 or in the Attorney General's guidelines that state court-ordered
changes are within section 5's reach. Additionally, the court saw practi-
cal problems in requiring state executives to submit state judicial rulings to
section 5 preclearance, because of the independence of the two branches
and the concomitant potential for disagreement between them.

In *Williams v. Sclafani*, the United States District Court for the South-
ern District of New York agreed with *Webber* that problems of comity, if
not constitutionality, would result from requiring state executives to
preclear state judicial decisions over which they have no control. The
*Williams* court, however, expressly indicated that it was speaking only of
state courts acting judicially in construing statutes and that state court
quasi-legislative actions, such as annexation proceedings, would not be ex-
empt from section 5.

The exemption of state court-ordered changes creates an unwarranted
gap in section 5 coverage. To the extent that a state can shift responsibility
for changes detrimental to minority voting rights to its judiciary, it can
evade section 5 scrutiny, thereby frustrating congressional intent. The ra-
tionale offered by the lower courts for this exemption is unconvincing.
The mere absence of specific language addressing state court-ordered
changes in the Attorney General's section 5 guidelines, as well as the Act's
legislative history, should be accorded little significance. The section 5
guidelines explicitly disavow completeness in listing covered changes. Fur-
thermore, Congress cannot reasonably be expected to have specifically
foreseen and mentioned every electoral change which section 5 was in-

73. 506 F.2d 570, 572 (2d Cir. 1974).
75. Id. at 427.
76. Id. at 427-28.
78. Id. at 904.
79. Id. at 903. See City of Richmond v. United States, 422 U.S. 359 (1975); Perkins v.
Matthews, 400 U.S. 379 (1971) (applying § 5 to annexations in which state courts partici-
ipated in a quasi-legislative capacity pursuant to state law but where the issue of requiring
state executives to submit state judicial decisions under § 5 was not raised).
80. See 28 C.F.R. § 51.4(c) (1978).
tended to cover. The possible conflict between state executive and state judicial interests relied upon by the lower courts is likewise unpersuasive. Although there is a potential for conflict between state executive and legislative branches, changes of legislative origin are routinely submitted under section 5 and defended by the state executive. By its express terms section 5 seeks to afford federal preclearance protection from state action affecting voting. It makes sense to exempt federal court action since state action was the only target of coverage. It is unreasonable, however, to exempt a state court’s order, for it is merely another manifestation of state action.

II. THE SECTION 5 ENFORCEMENT ACTION

Having determined that a jurisdiction covered by section 5 has implemented an unprecleared change, a private party or the Attorney General may then file suit in federal court to obtain relief. In filing a section 5 enforcement suit, one must bear in mind several peculiar features of such an action.

A. Three-Judge Court Requirement

Section 5 explicitly requires the convening of a three-judge district court in the district where the covered jurisdiction is located or where venue is otherwise proper. It should be noted, however, that in Broussard v. Perez the United States Court of Appeals for the Fifth Circuit construed section 5 to allow a preclearance enforcement action to be decided by a single judge where the issues presented are “insubstantial” or “frivolous.” In deviating from the strict three-judge requirement, the Fifth Circuit relied on Bailey v. Patterson where the Supreme Court had carved out a similar exception for a more general three-judge court statute, requiring a three-judge court in cases where injunctions are sought to restrain the enforcement of state statutes on constitutional grounds. Finding the policy of lessening federal-state friction equivalent in both statutes, the Broussard court applied the Supreme Court’s Bailey exception to the three-judge court requirement of section 5. The court equated

81. See note 5 supra.
84. 572 F.2d 1113 (5th Cir.), cert. denied, 99 S. Ct. 610 (1978).
85. 572 F.2d at 1118.
86. 369 U.S. 31 (1962) (per curiam).
88. 572 F.2d at 1118.
“frivolous” or “insubstantial” issues with those which are “controlled by Supreme Court precedent or which cannot be seriously contested.”

Although state courts have entertained section 5 enforcement actions, the three-judge federal court requirement would appear to deny state courts the jurisdiction necessary to hear these disputes.

B. Jurisdictional Limitations of Section 5 Actions

The jurisdiction of a three-judge court in an enforcement action brought pursuant to section 5 is rather narrow. The court may decide only whether the political jurisdiction and the change in question are covered, and if so, whether the change has been precleared. Any inquiry into the merits of the change is reserved to the Attorney General or the District Court for the District of Columbia. Moreover, where a covered change has not been precleared, federal courts may not address the merits of the new electoral device under any other federal or state statute. The three-judge court’s jurisdiction is circumscribed further by the prohibition against judicial review of any Attorney General determinations relating to the merits of the voting change at issue.

When a successful enforcement action brought solely under section 5 invalidates an unprecleared change, the result is restoration of the electoral system which existed prior to the change. If there are legal deficiencies in this prior system, they may not be attacked under the court’s section 5 jurisdiction. A separate basis for jurisdiction must be asserted. For example, if a malapportioned legislative body redistricted, and the redistricting failed to obtain section 5 preclearance, complete relief would have to be achieved by a complaint alleging two separate counts—one under section 5, and one under the fourteenth amendment and title forty-two of the

89. Id. at 1119. Accord, United States v. St. Landry Parish School Bd., 601 F.2d 859 (5th Cir. 1979).
91. See Beatty v. Esposito, 411 F. Supp. 107, 110-11 (E.D.N.Y. 1976) (mem.) (state supreme court justice has no power to determine whether alleged practice was subject to the Voting Rights Act).
93. Id. at 385. See text accompanying note 102 infra.
94. See Connor v. Waller, 421 U.S. 656 (1975) (per curiam) (no cognizable legal entity exists to be attacked under any other statutory or constitutional provision unless and until § 5 preclearance has been obtained).
97. Id. at 645-47.
If a three-judge court is convened in a section 5 enforcement action and the prechange electoral system is also attacked upon an independent jurisdictional basis, a question arises as to how the court should proceed. Presumably, the section 5 count must be heard first. If it is determined that the change is legally unenforceable, the claim against the prechange electoral system then may be considered. Such claims would ordinarily be tried by a single judge to whom the three-judge court would remand the suit. A three-judge court might, however, exercise ancillary jurisdiction to decide such a claim if there is a close relationship between the section 5 claim and the single-judge claim.

Interestingly, two New York decisions have held that a good faith allegation of racial discrimination is necessary to state a claim in a section 5 enforcement action, apparently in an effort to prevent the use of section 5 for purely political purposes where there is no legitimate question of discrimination against protected minorities. Such a requirement, however, is contrary to the rule established in Perkins, which bars consideration of the merits of a section 5 change by any forum other than the United States District Court for the District of Columbia or the Attorney General.

III. RELIEF IN SECTION 5 ENFORCEMENT ACTIONS

An area of growing concern to the courts is the fashioning of an appropriate form of relief in section 5 enforcement litigation. The relief sought in these actions may be either prospective — the court enjoining the future implementation of the proposed change, or retrospective — the court remediying the past implementation of the change. Since most voting changes are implemented in elections, prospective relief usually consists of the court enjoining future elections which would implement an unprecleared change. Retrospective relief, on the other hand, usually involves the court overturning or otherwise correcting the results of past elections and ordering new elections.

98. See 42 U.S.C. § 1983 (1976) (allowing individuals to bring civil actions for the deprivation of any rights or privileges caused by the constitutional violation).
99. See text accompanying note 94 supra.
102. See text accompanying note 94 supra.
103. Not all covered changes, of course, are implemented through elections. For example, changes in voter registration procedures are implemented independently of an election.
A. Prospective Relief

In a section 5 enforcement action a plaintiff may seek to enjoin a covered jurisdiction from future implementation of the challenged change, unless and until preclearance is obtained. If implementation of a nonvalidated change is imminent, a preliminary injunction or temporary restraining order may be sought in the local federal court by the Attorney General or by private litigants. 104

In weighing applications for preliminary injunctive relief, one of the factors which courts have traditionally considered is whether the plaintiff will suffer irreparable injury if the injunction is not granted. 105 Some courts have treated violations of section 5 as per se irreparable injury. 106 Courts do not, however, automatically issue preliminary injunctions against the implementation of unprecleared changes. Eleventh hour injunctive actions have failed where courts deemed that the equities warranted denial of such relief. 107 Where election procedures are already in motion, other courts have on occasion allowed elections implementing such changes to go forward but have enjoined certification of the results of the elections pending a final determination of the section 5 claim on the merits. 108 Courts do, however, often enjoin the holding of impending elections because of noncompliance with section 5. 109


105. Other factors the courts will consider include the likelihood of success on the merits, the potential harm to the defendants, and the public interest. See, e.g., Canal Authority v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974).

106. See United States v. Board of Trustees, No. SA-78-CA-84 (W.D. Tex. March 29, 1978); Horry County v. United States, 449 F. Supp. 990 (D.D.C. 1978); Silva v. Fitch, No. SA-76-CA-126 (W.D. Tex. April 28, 1976). See generally United States v. City of Philadelphia, 573 F.2d 802 (3rd Cir.), cert. denied, 99 S. Ct. 105 (1978); Smallwood v. National Can Co., 583 F.2d 419 (9th Cir. 1978); United States v. Hayes Int'l Corp., 415 F.2d 1038 (5th Cir. 1969) (violations of a statute providing for injunctive enforcement is per se irreparable harm). Unfortunately, many similar three-judge court decisions construing § 5 are unreported and unavailable in any library reference material. Copies of these decisions can be obtained, however, by writing the clerk of the particular federal court.


108. Cf. Charlton County Bd. of Educ. v. United States, 459 F. Supp. 530 (D.D.C. 1978) (imminent elections implementing an unprecleared change from appointive to elective selection of the Board were not enjoined partly because of the last minute timing of the government's suit); LeRoy v. City of Houston, No. 75-H-1731 (S.D. Tex. Nov. 6, 1975) (city elections enjoined pending submission of annexations to the Attorney General shortly after § 5 coverage attached to Texas).

In view of the congressionally imposed responsibility upon covered jurisdictions to obtain preclearance of changes prior to their implementation and the now well-established expansive scope of section 5 coverage, unprecleared changes should ordinarily be enjoined. In *Horry County v. United States,*\(^{110}\) for example, the three-judge court enjoined an election that would have violated section 5 even though those who would hold over in office as a result of the injunction were themselves elected in violation of section 5. The court found that “the intent of section 5 is clear: black voters are not to be made to wait through election after election under untested and potentially discriminatory laws.”\(^{111}\)

At least one three-judge court has unequivocally ruled that, even on the eve of the election, it had “no discretion to deny injunctive relief” where the plaintiffs sought to enjoin implementation of a change previously submitted and objected to by the Attorney General.\(^{112}\) The enjoining of such changes whenever preliminary or temporary relief is sought should be the norm. In the absence of this relief, covered jurisdictions are encouraged not to comply with the statutory mandate until ordered to do so by a federal court.\(^{113}\)

Once a change has been enjoined, the result is restoration of the prechange situation. It may occur, however, that no legally viable prechange situation exists. For example, where a reapportionment is adjudged unconstitutional and the jurisdiction changes to a new apportionment that fails to survive section 5 scrutiny, a legal void is created. New elections must be ordered to ensure that the jurisdiction will hold legally acceptable elections and not hold over incumbents indefinitely, which would

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111. *Id.* at 996-97.


113. The court in *Heggins v. City of Dallas,* 469 F. Supp. 739 (N.D. Tex. 1979) (mem.), espoused this view:

> While we recognize that an injunction is a harsh measure to be utilized with care, we are of the opinion that Congress and the Supreme Court intended injunctions against elections to be the normal remedy afforded against defendants who attempt to hold elections before obtaining preclearance. The threat and pressure of an injunction provides a strong incentive for compliance with the Act.

*Id.* at 743. For a synthesis of the case law regarding prospective § 5 injunctive relief, see *id.* at 742-43.
itself be a change subject to section 5 requirements. 114 This situation occurred in Moore v. LeFlore County Board of Election Commissioners. 115 In Moore, a three-judge court allowed the impending elections to proceed on an at-large basis while shortening the terms of those elected pursuant to a timetable established by the court for the enactment of a constitutionally viable reapportionment plan utilizing the prechange single-member district system. 116

B. Retrospective Relief

Courts are often faced with the task of devising the proper form of retrospective relief in actions where an election implementing a covered change has already been held without first having obtained section 5 preclearance. Several factors have emerged in the developing case law bearing upon the fashioning of appropriate relief in these circumstances.

One factor is whether or not the jurisdiction could reasonably be expected to have known that it was in violation of section 5 when it held the election. Such was the case in Allen v. State Board of Elections, 117 where the Supreme Court refused to void the past elections and order new ones because of the then novel nature of the coverage issues involved. Instead, in view of each jurisdiction's apparently unintentional violation of the Act, the Court merely remanded the consolidated cases to the district courts with instructions to enjoin future elections utilizing the changes unless and until section 5 approval was obtained. 118 In Perkins v. Matthews, 119 the Supreme Court identified several other factors to be considered by the three-judge district court in determining the proper relief. Included were the nature of the changes involved and whether or not federal preclearance had been sought. Presumably, the implementation of a minor change without section 5 preclearance, such as the movement of a single polling place a short distance, would not justify voiding the election involved. Conversely, a more substantial change, particularly one which might have changed the outcome of the election, would justify overturning the election and ordering a new one. Where no submission of the implemented change has been made under section 5, the Court in Perkins suggested that it may be appropriate to give the jurisdiction a period of time in which to seek

114. The theory that "holding over" incumbents as a result of § 5 enforcement is itself a § 5 change (tantamount to lengthening terms of office) has not yet been tested in any court.
116. Id. at 852-53.
118. 393 U.S. at 572.
preclearance and to order a new election only if preclearance is not obtained.\(^\text{120}\)

In *Berry v. Doles*,\(^\text{121}\) the most recent section 5 case discussing retrospective relief, the Supreme Court adopted the remedial approach suggested by *Perkins*. The covered change was a statute staggering the terms of a local political body implemented in an election without preclearance.\(^\text{122}\) The lower court enjoined the future enforcement of the statute but refused to set aside the past elections in light of the technical nature of the changes and the absence of discriminatory intent.\(^\text{123}\) The Supreme Court remanded the case and directed the lower court to enter an order allowing the covered jurisdiction thirty days to submit the change pursuant to section 5.\(^\text{124}\) The Court, with two Justices dissenting,\(^\text{125}\) noted that if preclearance were either denied or not sought, the district court might then properly order all members of the political body to be elected simultaneously at the general election, which was, at the time of the Court’s decision, four months away.\(^\text{126}\)

Although the factors described in *Allen* and *Perkins* have justified previously held elections which implemented unprecleared changes in certain circumstances, the ordering of new elections to cure section 5 violations in past elections has been a familiar form of relief. In *United States v. Garner*,\(^\text{127}\) a small Georgia municipality implemented numbered post provisions and a majority vote requirement without seeking preclearance. The three-judge district court, construing section 5 strictly, voided the previous elections and ordered new ones without the unprecleared changes.\(^\text{128}\) Similar relief was granted after an election in *United States v. Kemper County*,\(^\text{129}\) in which the county had converted from single-member to at-large districting without section 5 validation. In *United States v. Meriwether County*,\(^\text{130}\) special elections were ordered in the wake of a county

\(^{120}\) *Id.* at 396-97.

\(^{121}\) 438 U.S. 190 (1978).

\(^{122}\) *Id.* at 190-91.

\(^{123}\) *Id.* at 191.

\(^{124}\) *Id.* at 192-93.

\(^{125}\) *Id.* at 202-03 (Rehnquist and Stevens, J.J., dissenting).

\(^{126}\) *Id.* at 193. The change was subsequently precleared by the Attorney General.


\(^{128}\) *Id.* at 1056. See also Cantu v. Board of Trustees, No. 2-79-32 (N.D. Tex. March 20, 1979) (ordering a new election to remedy a past § 5 violation).

\(^{129}\) No. 74-65(c) (S.D. Miss. Nov. 21, 1974).

\(^{130}\) No. 74-35N (N.D. Ga. Sept. 30, 1974). See also *United States v. Board of Comm’rs*, No. 76-M-1086 (N.D. Ala. Feb. 27, 1979) (on remand from the Supreme Court, the court gave the city six months to obtain preclearance for its newly devised election system or face specially ordered elections to be held under the prechange electoral system).
election, where, despite a section 5 objection by the Attorney General, the county nevertheless switched to at-large districting and conducted the election. A virtually identical situation was remedied in this manner in *United States v. Twiggs County*. 131

Still an open question is whether preelection diligence requirements, normally applied to plaintiffs seeking retrospective electoral relief, are applicable in section 5 actions. In *Toney v. White*, 132 the court ruled that a plaintiff is foreclosed from seeking retrospective relief if the plaintiff had the opportunity to contest the violation in preelection adjudication but failed to do so. 133 The apparent basis of this policy is to give both the courts and the jurisdictions concerned a chance to remedy illegalities before the election occurs, thereby avoiding the unnecessary public expense and inconvenience of holding a second election. In view of section 5's basic policy of placing the burden of litigation on covered jurisdictions rather than on plaintiffs 134 and the congressional mandate that changes be legally unenforceable until preclearance is obtained, 135 ordinary preelection diligence requirements are inappropriate in the section 5 context. The duty should rest upon the covered jurisdiction to seek preclearance and to bring the change forward for preelection adjudication. When it fails to do so and holds an election implementing a change, it should properly be held to act at its own risk.

Besides preelection diligence, recent case law outside of the section 5 context, has suggested two other possible prerequisites for seeking retrospective relief in section 5 enforcement actions: that the electoral change have affected the outcome of the election; and that the electoral illegality be "gross, spectacular and wholly indefensible." 136

These requirements are likewise inapposite in regard to section 5 enforcement actions. In view of the burden of obtaining preclearance which the Act places squarely upon the covered jurisdictions, it would undermine

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131. No. 2825 (M.D. Ga. Jan. 31, 1973). In *United States v. County Comm'rs*, 425 F. Supp. 433 (S.D. Ala. 1976), aff'd mem., 430 U.S. 924 (1977), the three-judge district court allowed the scheduled election to proceed with the unsubmitted change to at-large elections provided the defendants agreed to: (1) file a § 5 submission with the Attorney General within 15 days; (2) if objected to, file with the District of Columbia District Court for a § 5 declaratory judgment within 30 days of the objection; (3) advise the court within 60 days of the Attorney General's or District of Columbia District Court's disposition; (4) hold a new election promptly if federal preclearance is not granted. *Id.* at 436-37.

132. 488 F.2d 310 (5th Cir. 1973) (en banc).

133. *Id.* at 314. See also *Coalition for Educ. v. Board of Elections*, 495 F.2d 1090 (2d Cir. 1979) (per curiam).

134. See text accompanying note 8 *supra*.


the congressional scheme to require the plaintiff to carry the burden of proving that the election results might have been affected or that the violation was "gross, spectacular and wholly indefensible." Moreover, to place such a burden on plaintiffs would encourage covered jurisdictions to violate section 5 quietly so that they may avoid pre-election injunctive enforcement actions in the hope that the plaintiffs would be unable to meet their burden of proof, thereby causing any post-election enforcement action to be unsuccessful. Furthermore, to place in issue matters concerning the merits of the section 5 violation — whether the outcome of the election may have been affected, or whether the discrimination was gross — involves the three-judge court in matters which the Supreme Court has held to be reserved to the Attorney General or the United States District Court for the District of Columbia. If, however, these issues are held by the courts to be proper considerations in allowing retrospective relief, at the very least it would be appropriate to require the covered jurisdiction to carry the burden of proving that the election results could not have been affected, and that the violation of section 5 was not "gross, spectacular and wholly indefensible."

IV. Conclusion

As a result of the growing recognition of the usefulness of section 5 as a means for enforcing the voting rights of racial and language minorities, section 5 litigation is on the rise. Since the Act's coverage was extended for seven years by the 1975 amendments to the Voting Rights Act, it will apply to the many electoral changes that will attend the traditional decennial reapportionments of covered states and local jurisdictions following the 1980 census. The impact of section 5 thus can be expected to grow. Civil rights advocates have a powerful tool at their disposal.


138. For a discussion of the jurisdictional limitations of § 5 enforcement actions, see text accompanying notes 92-100 supra.

139. The Supreme Court appears to have indicated that the impact of the § 5 violation on the outcome of the election might be a valid consideration in granting retrospective relief. See, e.g., Berry v. Doles, 438 U.S. 190, 192 (1978) (noting without comment the plaintiff's claim that the outcome of the election had been affected by the § 5 violation). See also the discussion of Perkins in text accompanying notes 25-31 supra.

In Charbonnet v. Braden, No. 78-1238 (E.D. La. Dec. 8, 1978), sum. aff'd, 47 U.S.L.W. 3782 (U.S. June 4, 1979), a three-judge court refused to overturn an election which implemented an objected to polling place change. The court found Toney wholly applicable to § 5 enforcement actions without any discussion of its rationale, inexplicably characterized the impact of the change on the election results as political rather than racial, and refused to disturb the election results.