The Supreme Court Rules

The U.S. Supreme Court ruled on two elections-related cases at the end of June, one dealing with the Voting Rights Act and the other with Arizona’s proof-of-citizenship requirement at the time of registration. What exactly was decided in each of these cases, and how will they affect state lawmaking? The Canvass examines the significance of each case below.

Voting Rights Act

In June, the U.S. Supreme Court handed down a 5-4 decision on the closely-watched Voting Rights Act (VRA) case of Shelby County v. Holder.

The decision appears to put a stop to a requirement that jurisdictions in 16 states receive federal “preclearance” prior to implementing election law changes as a method of preventing racial discrimination in voting.

However, Attorney General Eric Holder said in late July that the Department of Justice will “keep taking appropriately aggressive action against any jurisdiction that attempts to hinder free and fair access to the franchise,” and he will begin using parts of the Voting Rights Act not affected by the Shelby County v. Holder case to do so.

The Court did not rule on the constitutionality of Section 5 of the VRA, as many observers had expected. Section 5 describes the “preclearance” procedures.

Instead, it addressed Section 4, which established the formula for determining which jurisdictions are covered by Section 5. (The formula was established in 1965 when the VRA was first enacted, and involved two criteria:

Proof of Citizenship

In Arizona v. Inter Tribal Council of Arizona, the U.S. Supreme Court struck down a requirement established in 2004 that new voters in the Grand Canyon State show proof of citizenship at the time of registration.

The opinion did not deal with whether non-citizens should be on voter rolls; it is clear that only citizens can vote in federal and state elections. (It’s worth noting that Maryland permits townships to decide whether non-citizens can vote in local races; Takoma Park has permitted this since 1993.) And the opinion did not address whether showing proof of citizenship is an undue burden on citizens as they become voters.

Instead, the ruling held that Arizona, like all states, must accept a federal form for voter registration, per the National Voter Registration Act of 1993. That form does not include a requirement for showing proof of citizenship.

The ruling leaves open the possibility that Arizona could request that the federal form be changed to include proof of citizenship for Arizona. Doing so is difficult because it requires a vote of the U.S. Election Assistance Commission, which has no sitting commissioners.
Voting Rights Act (cont. from page 1)

1) whether the jurisdiction used discriminatory tests as a prerequisite for voting, and 2) whether it had low voter registration and turnout rates. If a jurisdiction exhibited both criteria, it was covered under Section 5 of the VRA.

In this ruling, the Court acknowledged that voter discrimination unquestionably still exists in the United States, but determined that the criteria under VRA Section 4 is no longer appropriate today. It noted that since the date of enactment, the U.S. has made great strides in eliminating discriminatory practices at the polling place and that Section 4, virtually unchanged since the 1960s, no longer reflects current conditions.

The Court also focused on the VRA as an extraordinary piece of legislation with implications for the notion of equal sovereignty for states. The Court concluded that the federalism impact, coupled with Congress’ inaction in revising the standards in the VRA’s Section 4, required it to strike down Section 4 as unconstitutional. The Court invited Congress to re-draft Section 4 based on current conditions. In July, hearings were held in the U.S. Senate and the House of Representatives.

What does this mean for states?

All states continue to be subject to Section 2, which permits lawsuits to be brought against any jurisdiction in any state based on discriminatory election practices. (Section 2 provides an after-the-fact remedy; Section 5 provides a before-the-fact remedy.)

“When they wrote (Section 5 of the Voting Rights Act), it was meant to be temporary. I would be the first to say that I understand why we were doing it in 1965. It has now been 48 years, though. That is absolutely abominable. I’ve said in the past, either get rid of it, or put all 50 states under it, and now we’re out from under it. Mississippi today has more elected minority officials than any state in the United States of America.”

Mississippi Representative Bill Denny (R)

In addition, Attorney General Holder proposes using Section 3, a provision that can put states or jurisdictions under preclearance procedures based on proven discriminatory actions. He is requesting that Texas be “bailed in” under this provision, and says “it will not be our last” action of this sort. How this might work was outlined in a Yale Law Review article.

For now, Alabama, Mississippi and Texas have indicated that, based on the ruling, they will move forward with implementation of already-enacted photo voter ID legislation. In North Carolina, a voter ID bill passed by the House in the spring was held for consideration by the Senate until after the Supreme Court ruling. The Senate then passed an elections overhaul bill, the House agreed to it, and it is on the governor’s desk.

News reports indicate a rush of legislation based on the Supreme Court ruling, but it is too early to judge. Over two thirds of states are out of session for the year, and in those states no new legislation can be proposed until next year (or in the case of states that hold biennial sessions, such as Texas, until 2015).

NCSL will be watching as the legal dust settles and the next legislative year begins.

—by Susan Parnas Frederick, Senior Federal Affairs Counsel in NCSL’s Washington, D.C., office.

“Informed by the long and recent view of voting history across the South, I am deeply concerned about allowing states to re-institutionalize structural impediments to voting. The democratic integrity of our republic requires that we remain vigilant and expand opportunities to vote, not pretend, as this ruling does, that discrimination is a relic of the past.”

Arkansas Senator Joyce Elliott (D)
Proof of Citizenship (cont. from page 1)

There are no indications that Congress will make recommendations for commissioners to the President, who formally appoints them.

Other options for Arizonans? They can sue in federal court for relief, or they can work to change federal law. That’s the approach taken by Arizona Representative Matt Salmon (R), who introduced HR 2409, which would permit states to require proof of citizenship for all prospective voters.

Other states with laws requiring proof of citizenship at the time of registration—Alabama, Georgia, Kansas and Tennessee—are considering how the Supreme Court’s ruling may affect their laws.

The Alabama and Georgia laws have not been implemented yet, and will remain on hold for now, say state officials.

Tennessee’s law (Tenn. Code Ann. §2-2-141), unlike the others, does not require proof of citizenship for all first time registrants, and instead only requires it when there is doubt: "If evidence exists that a particular registered voter is not a citizen of the United States, the coordinator of elections shall notify the county election commission where the person registered to vote that the registered voter may not be a citizen of the United States." From there, the local election official deals with the question.

Kansas’ law went into force in January 2013. So far at least 12,000 people have filled out applications for voter registration without providing evidence of U.S. citizenship, and therefore are not on the voter rolls yet. Every county election office is reaching out to these applicants by mail, phone and other means, informing them that proof of citizenship must be provided before they can vote, according to a spokesperson for the Kansas secretary of state. It is not clear yet whether Kansas’ law is similar enough to Arizona’s that the Supreme Court ruling would be applicable to Kansas as well.

For those who’d like to consider that question further, the Kansas law (KSA §25-2309(I)) states, “The county election officer or secretary of state’s office shall accept any completed application for registration, but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship.”

The Arizona law (ARS §16-166(F)) states, “The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship.”

Other states are exploring different approaches to confirming citizenship for voters. For instance, some states are beginning to compare their voter rolls to various data lists that may shed light on citizenship, a step that may or may not require legislation. (The U.S. has no comprehensive list of citizens.)

Colorado and Florida each attempted this prior to the 2012 general election. In both cases, they compared their voter lists to the Systematic Alien Verification for Entitlements (SAVE) list from the Department of Homeland Security. While these attempts may not have netted many noncitizens who were attempting to vote (and did spark controversy), it is likely that these and other states will learn from these early data-matching efforts and try again.

Kansas enacted a bill this year, HB2164, that requires state courts to transmit citizenship information gathered through the juror selection process to the secretary of state’s office. California has a similar bill, AB301.

And in Washington, SB5380 would have required the state to determine citizenship through the driver’s license process and provide that information to the secretary of state for voter registration purposes. (The bill died.) Additionally in 2013, Massachusetts, Missouri, Nevada, Oklahoma, Oregon (H2364 and H3428), South Carolina, Texas and Virginia also had proof of citizenship legislation introduced. None has been enacted yet.
President Obama mentioned long voting lines in his November 2012 acceptance speech. That led to an executive order to create a 10-member Presidential Commission on Election Administration, a fast-tracked, blue-ribbon group of experts that is developing voluntary best practices for states and local jurisdictions to consider. The commission must wrap up its work in six months, and the clock started ticking on June 28, when the commission held the first of four public hearings. The remaining hearings are scheduled for Aug. 8 (Denver), Sept. 4 (Philadelphia) and Sept. 20 (Ohio). On Aug. 14, two of the commission members will be at NCSL’s Legislative Summit in Atlanta, providing an opportunity for NCSL members to speak up. The commission’s website will post election-related resources and livestream hearings, so check it often. The topics of interest are:

(i) the number, location, management, operation and design of polling places;
(ii) the training, recruitment and number of poll workers;
(iii) voting accessibility for uniformed and overseas voters;
(iv) the efficient management of voter rolls and poll books;
(v) voting machine capacity and technology;
(vi) ballot simplicity and voter education;
(vii) voting accessibility for individuals with disabilities, limited English proficiency and other special needs;
(viii) management of issuing and processing provisional ballots in the polling place on Election Day;
(ix) the issues presented by the administration of absentee ballot programs;
(x) the adequacy of contingency plans for natural disasters and other emergencies that may disrupt elections; and
(xi) other issues related to the efficient administration of elections that the co-chairs agree are necessary and appropriate to the commission’s work.

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**Legislative Action Bulletin**

**Regarding 2013 elections-related legislation:**

- 2263 bills introduced
- 277 bills enacted
- 15 bills pending gubernatorial action
- 783 bills failed to pass
- 270 bills carried over to 2014 session
- 10 bills vetoed

**Online voter registration**, aka **electronic registration**, has been on many legislative agendas this year.

- Illinois (HB2418), Virginia (H2341) and West Virginia (S477) have all enacted legislation to permit online registration.
- New Mexico (H225) now permits citizens to register to vote electronically while at the motor vehicle division, and permits voters to electronically update their registrations (under H497).
- Bills to permit online voter registration are pending in New York (A149 and S1991), North Carolina (H102, H633, H689 and S688), Massachusetts (H581 and S313), Ohio (H78) and Pennsylvania (H1505).
- In New Jersey, last year’s bills to permit online voter registration (A2870 and S2168) are still pending in the Senate Committee on Budget and Appropriations.
- Legislation for online voter registration died this year in Montana (S206) and Texas (H313 and S315).
From the Chair

Senator Dennis Pyle chairs Kansas’ Senate Ethics, Elections and Local Government Committee. He points out that Kansas has a “citizen legislature,” and that he is first and foremost a farmer. Senator Pyle spoke with The Canvass in April. Excerpts:

- It’s important to make sure that Kansas citizens who have the legal right to vote can do it as simply and easily as possible, and that we have fair and legitimate elections. In some countries, they dip fingers in ink to make sure everyone only votes once. I am not saying that should be our approach, but insuring that each voter votes only once is critical.

- The big debate this year has been about moving election dates from the spring to the fall. We get such low turnout at spring elections. There are mixed opinions on this; some think it would be easy to do, while others don’t want to move the dates. There were questions about ballot length and costs, for example. There is a lot to look at, and we’ll probably give election dates more consideration next session.

- As a chair, I’m learning to value the input of those who are directly involved with elections on an everyday basis.

Read the full interview here for more from Representative Pyle.

The Election Administrator’s Perspective

Lynn Bailey has been the executive director of the Richmond County Board of Elections in Augusta, Georgia, since 1993. Richmond County is a mix of urban and rural areas, with 106,000 voters. Bailey spoke with NCSL on June 27. Excerpts:

- We have several large Housing and Urban Development renewal projects in our city. We’ve worked hard, using our Geographic Information System (GIS), to come up with a layer on the mapping system to identify where vacant lots are located and compare that layer to the voter registration list to identify people who are registered at addresses that are now vacant.

- The Supreme Court ruling (on the Voting Rights Act) in no way obviates the state from the requirements of Section 2 of the VRA, which requires that things be done in a fair manner. I hope we’ll do business in the same way we’ve always done business, by being fair.

- We are very fortunate to have the Center for Election Systems at Kennesaw State University. The people at the Center have taught us how to properly test and store our equipment, and have given us a broader perspective on best practices, generally.

Read the full interview here for more from Lynn Bailey.

One big number

534,927

That’s the number of Federal Post Card Applications (FPCAs) received by local election officials prior to the 2012 general election. The FPCA is a single form that is accepted all across the nation for voter registration and requesting an absentee ballot. It is intended for UOCAVA voters—basically, military and overseas voters. This number, and many others dealing with the voting experiences of military service members and their spouses, are available in the 2012 Post-Election Report from the Department of Defense’s Federal Voting Assistance Program.
Worth Noting

- The elections team at Pew Charitable Trusts is rolling out a series of election snapshots focused on each state’s 2012 general election experiences. So far, Arizona, California, Colorado, DC, Florida, Maryland, Nevada, Ohio, Washington and Wisconsin are complete.

- “Electronic delivery of a blank ballot, when combined with the postal return of the voted ballot, remains the most responsible method for moving forward until such time applicable federal security guidelines are adopted by the EAC.”—2010 Electronic Voting Support Wizard (EVSW) Technology Pilot Project Report to Congress, May 2013.

- Colorado’s Senate President John Morse and Senator Angela Giron will face recall elections on Sept. 10. Historically, recall elections for state legislators are uncommon, but 11 recall elections were held in 2011 (nine in Wisconsin) and four (all in Wisconsin) were conducted in 2012.

- Felon voting rights is a sleeper issue in most of the nation, but always active in Virginia. This month Governor Bob McDonnell (R) outlined his plans to automatically restore voting rights to thousands of Virginians whose crimes are categorized as nonviolent.

- Some say that political operatives don’t really care about turnout; they’re happy if just three people show up to vote—as long as two of them vote their way. If that’s not true for you, and you do care about turnout, hang onto Turnout in the 2012 Election by Michael McDonald.

- Remember the Field Guides to Ensuring Voter Intent, four cute little books that help election administrators do their jobs well? Now there are four more from the same source, Dana Chisnell and CivicDesigning.org. These mini-books are intended to provide nuts-and-bolts help for administrators, but they also offer policymakers clear and simple guidance on what works well in the real world. The new booklets are: Choosing how to communicate with voters, Designing voter education booklets and flyers, Designing election department websites and Guiding voters through the polling place.

- Estonia, which has used Internet-based voting for five elections, recently released the source code for its server software. The code was previously available to those who signed a confidentiality contract; now it is open to anyone. The idea is to allow outsiders to contribute to the security of the system.

- Rhode Island has joined the National Popular Vote (NPV) compact, becoming the ninth state (plus DC) to do so. If enough states join the NPV compact to represent more than 270 of the nation’s electors—the number needed to win the presidency—the NPV states will send their electors in support of the winner of the national popular vote. With Rhode Island in the fold, the compact now represents 136 electors.

- “It’s not the voting that’s democracy; it’s the counting.”—Tom Stoppard, Jumpers, Act 1 (1972)

From NCSL’s Elections Team

We hope to see many of you at NCSL’s Legislative Summit in Atlanta, August 12-15, where elections take top billing. At least, that’s how it seems to us election geeks. The full agenda is tantalizing: registration is open; and Atlanta will be a good place to meet your peers and pick up new ideas. Expect redistricting on Monday, and elections on Tuesday. The Presidential Commission on Election Administration joins us on Wednesday, and we’ve got a dynamic session on Voting Technology: The Coming Crisis in Elections for Thursday. To see the agenda for just redistricting and elections, call Wendy Underhill or Morgan Cullen at 303-364-7700 or email NCSL.

Jennie Bowser, Susan Frederick and Wendy Underhill

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