

VOTING RIGHTS IN the U.S. AND VIRGINIA: PAST AND PRESENT

A BRIEF SUMMARY

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Early this summer the Supreme Court handed down two significant decisions in the areas of elections and voting. In this issue we will provide some background information, summarize the decisions made by the Court, and discuss possible implications for Virginia elections and voters. We will also mention some of the recent changes in Virginia's election system occurring in the Commonwealth due to legislative and executive actions earlier this year.

For approximately the first 175 years of the nation, there was little variation or change in laws and customs governing voting and elections; if you were white, male and a person of property, you generally could vote to select those who enacted and enforced the laws. After the Civil War and the introduction of Reconstruction, there was a period of change during which the 14th and 15th Amendments to the United States Constitution were adopted (1868-1869). However, the promise the amendments reflected would take nearly a century to achieve.

Article XIV (Fourteenth Amendment)

Section 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article XV (Fifteenth Amendment)

Section 1 The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2 The Congress shall have the power to enforce this article by appropriate legislation.

The right of women to vote, which is another story and not the focus of this review, would not be achieved until ratification of the 19th Amendment in 1920. Virginia did not formally ratify the Amendment until 1952.

Post-Civil War to the Cold War

Enactment of the amendments and implementing legislation resulted in large numbers of African-American registrations and the election of African-American candidates, as newly-freed slaves began to play a role in their government. However, it was generally short-lived as reaction to the changes and the end of Reconstruction occurred, and a long period of violence and overt discrimination followed. Aided by gerrymandered districts, white control of state legislatures returned. "Jim Crow" laws were enacted and basically upheld in *Plessy v. Ferguson* in 1896. This was certainly the case in Virginia, where in the early part of the 20th century, its Constitution, laws and policies were designed to disenfranchise African-Americans, and women continued to be unable to vote. This period of disenfranchisement lasted in Virginia and other southern states for over half a century.

Anytime a group of long-time League of Women Voters (LWV) members discuss voting in Virginia in the 1960s, you are guaranteed to hear stories of how they registered to vote by going to a registrar's home by first calling and making an appointment, and how they had to pay a poll tax before voting – or remember getting the poll tax bill in the mail. (The poll tax was prohibited in federal elections by the 24th amendment in 1964 and applied by the Supreme Court to state elections in 1966.) These, plus Virginia's history of using literacy tests and discriminatory registration "gimmicks" such as blank-sheet registration forms to disqualify African-American citizens from registering to vote verify the validity of Virginia's inclusion in the list of jurisdictions subject to "pre-clearance" under the 1965 Voting Rights Act.

The \$1.50 poll tax as a requirement to vote kept some people from the polls, as did the requirement that the tax be paid three years in a row at least six months before the election. The result of these and other laws led to Virginia having one of the lowest voter participation rates in the country. And Virginia's legislative district lines were drawn to exclude the possibility of a minority getting elected to office and to keep power in the rural areas of the state. (Commentary by Delegate Ken Plum in the July 10-16, 2013 edition of the

Reston Connection)

While there had been periods of reaction and sporadic attempts to end “Jim Crow” laws, embedded segregation, KKK activity, and outright murder as occurred in the lynching of African-Americans during the first half of the twentieth century, the 1955 action of Rosa Parks refusing to give up her seat on a bus to a white passenger in Montgomery, Alabama is often marked as the beginning of the most significant period of civil rights activity in the nation. There is no need to repeat any specific events here; we have access to the information in all forms of the media, especially in our area. And by the time we are discussing this topic in our LWVFA meetings, the 50th anniversary of the historic August 28, 1963 March on Washington will have occurred with its expected historical documentation. It is generally held that the efforts during this time to achieve civil and voting rights for African-Americans and the violent response of southern whites to this activity directly resulted in the enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

The Civil Rights Act of 1964

The Civil Rights Act of 1964 was signed into law by President Lyndon Johnson in July 1964. This landmark legislation included protections against discrimination based on race, color, national origin, sex, or religion. It ended unequal application of voter registration requirements and racial segregation in schools, in the workplace, and in facilities that served the general public (known as “public accommodations”). The law continues to serve as a potent tool for combating discrimination. The Act:

- Barred unequal application of voter registration requirements though it did not eliminate literacy tests nor address other steps used to repress nonwhite voters.
- Outlawed discrimination based on race, color, religion or national origin in hotels, motels, restaurants, theaters, and all other public accommodations engaged in interstate commerce; however, it exempted private clubs without defining the term “private”.
- Prohibited state and municipal governments from denying access to public facilities on grounds of race, color, religion or national origin.
- Encouraged the desegregation of public schools and authorized the U.S. Attorney General to file suits to enforce the act.
- Expanded the Civil Rights Commission (established by the earlier Civil Rights Act of 1957) with additional powers, rules and procedures.

- Prevented discrimination by government agencies that receive federal funds.

The Voting Rights Act of 1965

The Voting Rights Act, signed into law by President Lyndon Johnson on August 6, 1965, aimed to overcome legal barriers at the state and local levels that prevented African Americans from exercising their right to vote under the 15th Amendment to the Constitution of the United States. The act significantly widened the franchise and is considered among the most far-reaching pieces of civil rights legislation in U.S. history.

Echoing the language of the 15th Amendment, the act prohibits states from imposing any “voting qualification or prerequisite to voting, or standard, practice, or procedure ... to deny or abridge the right of any citizen of the United States to vote on account of race or color.” The most important provisions include:

Section 2: Prohibits, on a nationwide basis, voting procedures and practices that discriminate on the basis of race, color, or membership in a language minority group. It prohibits both election-related practices (including redistricting plans, poll worker hiring, registration procedures, etc.) that are intended to be racially discriminatory as well as those that are shown to have a discriminatory impact. Section 203, which now applies to Fairfax County, requires covered jurisdictions to provide bilingual election materials and assistance.

Section 3: Allows the federal government to subject jurisdictions with recent records of deliberate discrimination to the pre-clearance requirements of section 5.

Section 4: Establishes the criteria for determining whether a jurisdiction is covered under the special provisions of the Act, including the review of voting under section 5. It specifically addressed states and part of states that had a history of discriminatory practices. The provisions applied to states and political subdivisions (mostly in the South) that had used a “device” to limit voting and in which less than 50 percent of the population was registered to vote in 1964.

Section 5: Freezes changes in election practices in certain states and parts of states until the new procedures have been determined by the Department of Justice or court review to have neither a discriminatory purpose nor effect, i.e., the pre-clearance requirement.

Improving Voter Registration and Voting Opportunities

By the early 1990s, it became clear that the lack of uniformity in state registration laws depressed voter turnout, leading to efforts to enact federal legislation to establish a modicum of uniformity for some elements of registration systems across the nation. **The 1993 National Voter Registration Act of 1993 (NVRA)**, also known as “**Motor Voter**,” was enacted to establish procedures to increase the number of eligible citizens who register to vote; protect the integrity of the electoral process by ensuring that accurate and current voter registration rolls are maintained; and to enhance the participation of eligible citizens to vote. It requires states to give citizens the opportunity to register to vote at the same time as they apply for or renew their driver’s license; at social services agencies; and by using mail-in forms, obtained from individual voter registration drives. Section 6 of the NVRA requires each state to accept and use the federal mail registration form developed by the U.S. Election Assistance Commission (EAC). In addition, however, states may also develop and use their own form if it meets specified criteria.

Following enactment of the NVRA, Virginia amended its Constitution in 1994 (effective in 1995) to implement the law. Until then, Virginia required all voters to register in person. The recently issued report of the federal EAC indicates the effectiveness of the law: In 1992, 62.7 percent of Virginia’s voting age population was registered to vote; in 2012, it was 85.8 percent (or 92.3 percent of the citizen voting age population). The source of the more than 3 million voter registration forms received in the 2010-12 period in Virginia is also quite telling. Approximately 26 percent were received by mail and 40 percent received through the DMV, compared with just 9 percent completed in person.

Enacted to correct the problems brought to light by the 2000 presidential election, **the Help America Vote Act (HAVA) of 2002** was enacted to make reforms in the nation’s voting process and systems. It requires that each state develop and use a single, uniform, official, centralized, interactive, computerized statewide voter registration system to store and manage the lists of registered voters throughout the state. This database is used to ensure accurate voter registration lists for use at all elections. The law established the EAC, created mandatory minimum standards in key areas of election administration and provided funding to help states meet the standards. It addressed programs and procedures covering: provisional voting; voting information; updated and upgraded voting equipment; statewide voter registration databases; voter identification procedures, and

administrative complaint procedures. Implementation was left almost entirely in the hands of the states, which have great latitude in how they meet the minimum requirements.

The Last Decade

Opponents of the VRA pre-clearance provisions had long complained that it covered only some jurisdictions – mostly states in the Deep South. While that might have made sense in the 1960s, they say, the South has changed and the choice of what are known as “covered jurisdictions” affected by pre-clearance no longer makes sense. Although Congress disagreed with this contention as it renewed (for 25 years) the VRA, in 2006 the Chief Justice and others on the Court indicated that they agreed with the pre-clearance opponents when issuing a decision in a 2009 case. The die was cast. On the state level, there has been a surfeit of election legislation during this period. There is no quick and easy way to summarize its full scope, but readers can visit the website of the National Conference of State Legislatures (NCSL) for very complete information, including maps and tables. <http://www.ncsl.org/legislatures-elections.aspx?tabs=1116,114,796#1116>. As an illustration, the following NCSL table shows the amount of election legislation introduced in state legislatures for the first five months of 2013.

Legislative Action Bulletin

- 172 bills enacted
- 30 bills in conference or pending gubernatorial action
- 145 bills pending in the second chamber
- 1,056 bills pending in chamber of origin
- 477 bills failed to pass
- 82 bills carried over to 2014 session
- 5 bills vetoed

To summarize

- 2,213 total election bills introduced in 2013
- 25 states are in session
- States likely to adjourn by the end of the month are AZ, IA, KS, NE, OK and TX

In recent years there have been increasing attempts to restrict access to the polls on the basis of presumed fraud – enacting legislation to solve a problem that has been found not to exist. As we have seen in Virginia, voter ID has been a major component of these efforts. According to NCSL, nearly 1,000 voter ID bills have been introduced since 2001 in 46 states: 24 states passed major legislation during the period 2003-2012 (not including the 2011 gubernatorial vetoes), with eight states enacting voter ID laws and another five where the legislation was vetoed by the governor in 2011 alone. The 2013 bills include voter ID bills in 12 states,

proposals to strengthen existing photo ID laws in seven states, and other changes to existing photo ID laws in 11 states.

It is the contention of many that the record of legislation designed to repress voter registration and turnout would have been much worse if the VRA pre-clearance provision did not exist. It served, as it were, as a deterrent to even more egregious legislation.

The June 2013 Supreme Court Voting Rights Decisions

The Supreme Court handed down two important voting rights decisions in June 2013, which were greeted quite differently by the LWV and other voting rights proponents. The first case was that of *Arizona v. Inter Tribal Council of Arizona*, which examined whether the NVRA prevents states from passing laws that restrict the voter registration process. The Court, in a 7- 2 (Alito and Thomas) split decision delivered by Justice Scalia, upheld the 9th Circuit Court of Appeals determination that the Arizona requirement that persons seeking to register to vote provide proof of their citizenship was pre-empted by federal law in the NVRA. The Court held that “Arizona’s evidence-of-citizenship requirement, as applied to Federal Form applicants, is pre-empted by the NVRA’s mandate that States ‘accept and use’ the Federal Form.” See: http://www.supremecourt.gov/opinions/12pdf/12-71_7148.pdf.

The LWV had been continuously involved in this case, reflecting its support of the viability of voter registration by mail and its commitment to its founding goals and to maintaining the integrity of the NVRA. See: http://www.lwv.org/files/VOTE.Gonzalez.12-71%20bsac%20League%20of%20Women%20Voters_3.pdf.

The second case was that of *Shelby County, Alabama, v. Holder*, in which the Supreme Court, in a 5 to 4 decision, held that section 4 of the VRA, which provides the formula used as a basis for section 5 coverage, was unconstitutional. The decision did not strike down section 5, which authorizes the pre-clearance requirement, but without section 4, it has no significance or effect. As was expected from the Court’s comments in 2009, the basis of the ruling was that the section 4 formula was “based on 40-year old facts having no relationship to the present day.”

What will happen next? As this is being written, it is too early to tell. The obvious first step will be to ask Congress to enact an amended section 4 based on current data. LWV

President Elisabeth McNamara has said: “We will be going to Congress to fix this issue and ask them to restore the VRA to its full strength.” Assuming that Congress could overcome its current gridlock to decide to address this politically-charged issue, it is even more questionable that it could agree on a formula, or group of formulas, to replace those in the current section 4. A discussion of possible formulas can be found at: http://www.nytimes.com/interactive/2013/06/23/us/voting-rights-act-map.html?_r=0. Some have also pointed out that there is no guarantee that the current or future Court would uphold section 5 under conditions of a revised section 4.

Some opponents of pre-clearance had argued that since the entire nation is covered by Section 2, which allows the government to sue after a state discriminates against voters of color, there is no need for Section 5 as well. But, as noted in an earlier ruling on the VRA, “lawsuits to enjoin discriminatory voting laws [after they take effect] are costly, take years to resolve, and leave those elected under the challenged law with the benefit of incumbency.”

Some have suggested that section 3 could be used to determine which jurisdictions should be subject to section 5. However, its effectiveness is limited to the fact that it requires a high standard of proof. That is, one would have to prove that a jurisdiction **intended to discriminate**, not that its actions had a discriminatory effect.

Until action is taken at the national level to overcome the effects of the decision, which were seen as Texas and other jurisdictions immediately put into effect laws that had been blocked, citizens will need to be even more vigilant to protect voting rights at the state level. This is certainly true in Virginia, where we have normally had to depend on federal legislation and court action to overcome a history of discrimination.

Significant Election Law Legislation from the 2013 Virginia General Assembly

The 2013 Virginia General Assembly session proved to be a banner year for the introduction of legislation on registration and voting. While close to 150 bills were introduced (based on an informal tally of bills referred to the privileges and elections committees), fewer than 20 made it through both houses and approval by the governor. Those that didn’t pass include bills on topics that the League has supported for many years: nonpartisan redistricting, no-excuse absentee voting, and the automatic restoration of the civil rights of felons. However, the General Assembly enacted four laws that LWV members should be aware of:

Online voter registration: HB 2341 was passed with little opposition in either house, was signed by the governor, and was effective on July 1, 2013. This law, supported by the LWV, makes online voter registration and name and address changes available to Virginia citizens who have a valid Virginia driver's license or DMV-issued ID. The portal for online voter registration became available on the SBE website in July 22, 2013.

Guidelines for third party registration drives: SB 1008 was also passed without significant opposition in the General Assembly, and was effective on July 1, 2013. The legislation was viewed as a reaction to the publicity given to a progressive group that pre-populated registration forms and sent them to prospective registrants which, due to use of a faulty data base, included deceased persons and family pets (e.g. Fido and Fluffy) and accusations that a contracted canvasser for the Republicans had tossed completed registration forms into the trash. This law, which was not supported by the LWV, requires that persons, both individuals and those acting as agents for an organization, who pick up 25 or more voter registration forms from the State Board of Elections (SBE) or local registrars offices must complete training and sign an affidavit/registration form. It also reduces the time--from 15 to 10 days--for submission of completed forms to the registrar's office. The training can be done at the SBE, at local registrar's offices, or online. The online training became available on the SBE web site on July 23, 2013. A database will be developed to include all those who are trained and sign the affidavit (registration) throughout the state. The guidelines can be found at: <http://www.sbe.virginia.gov/Files/VoterRegistration/VoterRegistrationDrives/guidevoterregdrive.pdf>

Photo ID for Voting: In spite of the fact that the 2012 General Assembly enacted legislation that added additional eligible forms of ID for voting at the polls and spent close to \$2 million to furnish and publicize the mailing of (non-photo) voter registration identification cards to all registered voters in Virginia, it again took up the issue in 2013 and reversed its actions of just the year before. SB 1256, which passed on a nearly party-line vote in the House and a tie vote in the Senate, is scheduled to be effective on July 1, 2014. All non-photo IDs were eliminated as eligible forms of ID for voting and the SBE is to provide a free voter registration card containing a photo if the voter does not have a satisfactory eligible ID. Since the bill is not effective this year and plans have not been developed for its implementation, additional information is not being provided at this time. According to an executive order issued by the governor upon signing the

legislation, the LWV and other groups are to be involved in its implementation and public outreach efforts.

Department of Elections: SB 1229 provided for changing the name of the agency called the SBE to the Department of Elections, and naming the head of the agency the Commissioner of Elections, who is to be appointed by the governor. This change is to be effective on July 1, 2014 and should be taken into account by Leagues who currently refer to the SBE in their voters service materials.

Restoration of the Civil Rights of Felons

Following the failure of the 2013 General Assembly session to address this issue, the governor took matters into his own hands. On May 29, 2013, Governor McDonnell announced that he was taking administrative action to establish a procedure that would automatically restore voting rights to non-violent felons. The procedure took effect on July 15, 2013.

A felony is defined as: *A serious crime, characterized under federal law and many state statutes as any offense punishable by death or imprisonment in excess of one year.* (Legal Dictionary the freedictionary.com)

Prior to the new procedure, Virginia permanently disenfranchised all citizens convicted of a felony; it was one of only four states to do so, the other three being Florida, Kentucky and Iowa. The only way to regain voting rights was through a lengthy application procedure, and one that had to be sanctioned by the governor. There was no guarantee that voting rights would be restored after such an application and there was no process of appeal; however, felons could reapply after one year.

The new procedure only affects felons convicted of non-violent crimes; felons who have been convicted of violent crimes must still wait for five years to apply for their voting rights to be restored, at the discretion of the governor. Some examples of non-violent felonies are: embezzlement, identity theft, forgery. Drug possession is listed as a non-violent felony; all other drug-related felonies are classified as violent.

To be eligible for restorations of voting rights a felon has to:

- Have been convicted of a non-violent felony in a Virginia court, or convicted in a U.S. District Court, military court or a court of another state or territory
- Have completed serving the prison sentence and been released from probation or parole; and
- Have paid all court costs, fines to the Commonwealth

and restitution to the victims, satisfied all court-ordered conditions, and have no pending felony charges.

For non-violent felons who will finish their sentence after July 15, 2013, the process should be relatively straightforward: they will receive a notification letter in the mail. For those who have recently applied or been denied, again the process should be fairly straightforward, as the state has all these applications and can reprocess them; they too will receive a notification letter in the mail. Where the situation becomes complicated is for the thousands of non-violent felons who have served their sentences over the last few years; there is no central database of these people, and they have to make themselves known to the Secretary of the Commonwealth. This is an opportunity for nonprofit organizations to get the word out as to who is eligible for restoration of voting rights.

The most important points to remember are: 1) although this process is automatic for non-violent felons, once they have completed all the steps listed above, it is **not** instantaneous; 2) individuals **must** receive their restoration of voting rights from the governor before they register to vote; and 3) individuals who have had their rights restored must still register to vote, as all non-felon citizens are required to do.

For more detailed information see the following link:

<http://www.commonwealth.virginia.gov/News/viewRelease.cfm?id=1895>

General Sources

Much of the information in this study, other than personal knowledge, is based on Internet sources and includes:

- Reports and newsletters of the: National Conference of State Legislatures, Brennan Center for Justice, Pew Center on the States, and U.S. Election Assistance Commission;
- Websites of the Civil Rights Section of the U.S. Department of Justice, U.S. Supreme Court; League of Women Votes of the U.S., Virginia's General Assembly Legislative Information System; Virginia State Board of Elections, Wikipedia, and news sources commenting on the 2013 Supreme Court cases and decisions including the Washington Post, New York Times, Richmond Times Dispatch and Hampton Roads Pilot Online; and
- LWVUS, LWV-VA and LWVFA studies and articles on voting and election laws.
- Additional information about the new procedure for the restoration of rights for non-violent felons may be found at: <http://www.commonwealth.virginia.gov/JudicialSystem/Clemency/restoration.cfm?CFID=26597228&CFTOKEN=a6a23059bf05d5d2-FF3D6B7B-03AC-69F8-C6A10B8514F49CED>.

Discussion Questions for September

1. What experiences have you or family members had regarding voting impediments? In Virginia? Elsewhere?
2. How did the Voting Rights Act of 1965 affect Virginia elections?
3. What was the impact of the National Voter Registration Act of 1993 on Virginia?
4. Do you think that the recent Supreme Court decisions will affect the Virginia election process or politics?
5. What legislation on registration and voting would you like to see enacted in Virginia? Would you be willing to help the League make it happen?
6. If you have served as an election official, was voter ID ever a problem?
7. What type of information would you like to receive on a periodic or consistent basis about registration and voting issues or changes?
8. Is the differentiation between non-violent and violent felons a fair one, as far as restoring voting rights?