Sen. Murkowski Substitute – The John R. Lewis Voting Rights Advancement Act (2021) Analysis

Overview

Senator Lisa Murkowski (R-AK) introduced a substitute to H.R. 4, the John R. Lewis Voting Rights Advancement Act of 2021, which would amend the Voting Rights Act (VRA). It includes essentially the same ill-conceived policy contained in the prior version introduced in 2021. Instead of repairing some of the prior version's constitutional defects, Sen. Murkowski's substitute would still result in a federal takeover of both election processes and judicial proceedings. Furthermore, Sen. Murkowski devotes dozens of pages to the Native American Voting Rights Act, which this memo does not analyze.

Updated Factors for Vote Dilution Claims under Section 2 of the VRA

Sen. Murkowski's substitute removes the enumerated factors of the prior version that a court would be required to use in a totality of the circumstances analysis for vote dilution claims. Courts would now be free to consider any relevant factor to determine whether protected classes have equal opportunity to participate in the electoral process. Most significantly, the substitute requires the standard articulated in *Thornburg v. Gingles*, 478 U.S. 30 (1986), to control in vote dilution claims.

Updated Factors for Vote Denial or Abridgment Claims under Section 2 of the VRA

Sen. Murkowski's substitute mildly amends the prior version's standards for vote denial claims, clarifying that vote denial occurs where:

1. Persons face "disproportionate costs" (as opposed to greater difficulty) in complying with the requirements—a retreat from the prior version's attack on the "ordinary burdens of voting" standard that has long been used by courts to uphold reforms, and
2. Disproportionate costs or burdens (as opposed to greater difficulty) are caused by or linked to social and historical conditions that have produced or currently produce discrimination against members of the protected class.

While this clarification is an improvement, the substitute still has fatal flaws.

For vote denial claims, Sen. Murkowski's substitute requires courts to consider most of the former factors to determine if there is a violation, such as:

A. The history of official voting discrimination in the state or subdivision,
B. The extent to which voting in the elections is racially polarized,
C. The existence of discrimination outside of voting processes – such as employment, education, and health – that hinder effective participation of the protected class in the political process,
D. The use of overt or subtle racial appeals either in political campaigns or surrounding the adoption or continuance of the procedure, and

E. The extent to which members of the protected class have been elected to public office in the jurisdiction. The substitute removes but one factor included in the former version—the extent the jurisdiction has used photo voter ID, proof of citizenship or residence, or other voting procedure beyond federal law that impair minority access to voting. While many will tout removing this factor as a grand compromise, it does nothing to change how the bill requires courts to give undue weight to the remaining factors to overturn duly enacted election procedures, especially when challengers are not required under the Act to show any particular number or combination of factors to establish a violation.

While once optional factors the court could consider in the prior version to determine vote denial and abridgment claims, the substitute would require the court to weigh two additional factors:

A. Whether officials have failed to cater to the particular needs of the protected class in the political process, and
B. Whether the policy behind the use of the procedure is tenuous.

Where the former version of H.R. 4 explicitly sought to uproot Justice Alito's totality of circumstances factors from the Supreme Court's 6-3 decision in *Brnovich v. DNC*, Sen. Murkowski's substitute is no better. Instead of explicitly saying the court cannot consider the factors enumerated in *Brnovich* like the prior version, Sen. Murkowski's substitute says these factors can be considered but *cannot weigh against* a finding of a violation. This has the same effect.

Coverage Formula and Violations Changes

Sen. Murkowski's substitute makes *de minimus* changes to the previous proposed coverage formula and minor changes to practice-based coverage. While the substitute rolls back some practice-based coverage for voter identification laws compared to the former version, every state would still be required to obtain preclearance from bureaucrats at the federal Department of Justice where the state enacts a change that makes its voter identification requirements *more stringent* if the John Lewis Voting Rights Advancement Act were enacted. This would indefinitely tie states' hands behind their backs, preventing them from ever strengthening their voter ID laws. Responsibly, the substitute removes laws prohibiting line-warming from its practice-based coverage formula.

Sen. Murkowski's substitute contains most of what the former version considered to be violations that could subject a state or jurisdiction to preclearance. However, the substitute prevents judicial grants of temporary relief from being considered violations, where the older version once did, and now requires a final judgment on the merits for there to be a violation. Additionally, the substitute would require an admission of liability for a consent decree or settlement to count as a violation—voluntary continuations of these agreements would not count as violations. However, the substitute would now find an additional violation to occur where a covered jurisdiction fails to receive preclearance before implementing a new voting law, unless it is ultimately cleared.

Additional Changes from Prior Version

Sen. Murkowski's substitute prescribes a violation where the voting procedure is implemented with the intent to dilute the voting strength of or to deny the right to vote to a protected class. While this seems unsurprising, if

this intent is ever so slightly part of the motive to pass the voting measure, a violation can be sustained, even if the main intent in passing the measure was to benefit a particular party or group. Furthermore, no proof of a violation actually occurring is required to overturn a voting method when there exists any evidence of discriminatory intent. Alarmingly, a court would now be permitted to consider recent context around the challenged practice, specifically concerning actions by "official decisionmakers" in prior years or in other contexts preceding the implementation of the challenged practice. As fate would have it, the court would now be permitted to consider actions by predecessor government actors or individuals to find this discriminatory intent. The ability of this provision to be used improperly by Washington bureaucrats to overturn a reasonable voting law is not hard to contemplate.

The Murkowski substitute still upends the *Purcell* Doctrine, which requires federal courts to refrain from changing election procedures when an election is near. The substitute makes it clear, as did the prior version, that proximity to the election cannot prevent a challenged practice from being overturned unless the defendant overcomes the insurmountable burden of proving with clear and convincing evidence that doing so would be so close to the election as to cause irreparable harm to the public interest or such relief would impose serious burdens on the defendant. The new version simply extends the presumptive safe harbor of when a law may be challenged to within 30 days of the new reform's enactment or more than 60 days, up from 45, out from an election.

Conclusion

Sen. Murkowski's substitute contains practically all the concerning provisions the prior version contained. This bipartisan "compromise" remains highly concerning for how it would undermine the neutrality of the judiciary and preclude a court from utilizing relevant factors when ruling on vote denial claims.