

A Change in the Mayor's Power Does Not Require Preclearance

Patterson v. Esch

(*William H. Barbour, Jr., S.D. Miss. 3:09-cv-438*)

A mayor filed a federal complaint claiming that a board of selectmen's pending vote to reduce the mayor's powers violated section 5 of the Voting Rights Act, which prohibited changes in voting procedures in covered jurisdictions without federal preclearance. The district judge determined that mayoral powers were not covered by section 5.

Subject: Voting irregularities. *Topic:* Section 5 preclearance.

The mayor of McComb, Mississippi, filed a federal complaint on July 24, 2009, against members of the city's board of selectmen and civil-service commission, alleging that defendants were planning to vote on July 28 to diminish the authority of the mayor in violation of section 5 of the Voting Rights Act.¹ Three days later, on Monday, July 27, the mayor filed a motion for a temporary restraining order or a preliminary injunction.²

Judge William H. Barbour, Jr., issued an order on July 28 denying the mayor an ex parte temporary restraining order for failure to comply with Federal Rule of Civil Procedure 65, holding in abeyance consideration of a preliminary injunction pending the mayor's seeking the empaneling of a three-judge district court to hear the section 5 claim.³

Acting alone, Judge Barbour denied the mayor relief on August 5.⁴ "The Court finds that as the subject amendments 'affect only the distribution of power' among the officials of the City of McComb, and do not have a 'direct

1. Complaint, *Patterson v. Esch*, No. 3:09-cv-438 (S.D. Miss. July 24, 2009), D.E. 1; see Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (2014) (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. *Shelby County v. Holder*, 570 U.S. 529 (2013).

2. Motion, *Patterson*, No. 3:09-cv-438 (S.D. Miss. July 27, 2009), D.E. 3.

3. Order, *id.* (July 28, 2009), D.E. 4; see *id.* at 3 ("As *Patterson* is seeking an injunction under the Voting Rights Act, his motion for preliminary injunction must be heard by a three-judge court."); see also John Surratt, *Judge Denies Mayor's Motion*, *McComb Enterprise-J.*, July 29, 2009.

Judge Barbour died on January 8, 2021. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

4. Opinion, *Patterson*, No. 3:09-cv-438 (S.D. Miss. Aug. 5, 2009), D.E. 11 [hereinafter Aug. 5, 2009, Opinion], 2009 WL 2424408; see Matt Williamson, *Judge Nixes Mayor's Suit*, *McComb Enterprise-J.*, Aug. 6, 2009.

relation to voting and the election process,' they are not subject to Section 5 of the Voting Rights Act."⁵

5. Aug. 5, 2009, Opinion, *supra* note 4, at 5; see Opinion, *Patterson*, No. 3:09-cv-438 (S.D. Miss. Oct. 15, 2009), D.E. 23 (again denying the plaintiff relief following additional briefing); see also Order, *id.* (Dec. 16, 2010), D.E. 49 (dismissing the case).