

Voting Rights in U.S. Territories



**Advisory Memorandum
Connecticut Advisory Committee
U.S. Commission on Civil Rights**

October 2021

**Connecticut Advisory Committee to
U.S. Commission on Civil Rights**

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Advisory Memorandum

To: U.S. Commission on Civil Rights
From: Connecticut State Advisory Committee
Date: October 4, 2021
Subject: Advisory Memorandum on Voting Rights in U.S. Territories

In keeping with its responsibilities to the U.S. Commission on Civil Rights (Commission),¹ the Connecticut State Advisory Committee (Committee) convened a virtual online briefing in July of 2021 to examine the voting rights in federal elections for citizens of U.S. territories.

The following advisory memorandum is the result of testimony provided to the Committee during the online briefing. It begins with a brief background of voting rights for citizens of U.S. territories, highlighting how state and federal absentee voting laws functionally deny citizens of U.S. territories the right to vote. It then concludes with assertions and themes.

While this memorandum highlights the shortcomings of federal law in providing citizens of U.S. territories the right to vote, the primary focus is on the disenfranchisement of former citizens of Connecticut now residing in Puerto Rico, Guam, and the U.S. Virgin Islands who are currently excluded from absentee voting under Connecticut law.

Introduction

“Th[e] right to vote is the basic right without which all others are meaningless. It gives people, people as individuals, control over their own destinies.”² Addressing voting rights has been an important focus of the U.S. Commission on Civil Rights (Commission) and its state advisory committees. Most recently, in 2018 the Commission released *An Assessment of Minority Voting Rights Access in the United States*, a report “examin[ing] the current and recent state of voter access and voter discrimination for communities of color, voters with disabilities, and limited-English proficient citizens. It also examine[d] the enforcement record of the United States Department of Justice regarding the provisions of the Voting Rights Act of 1965 since the Act’s last reauthorization in 2006, and particularly since the Supreme Court decision in *Shelby County v. Holder* in 2013.”³

An often-overlooked way in which citizens of the U.S., primarily those from traditionally marginalized communities, are denied the right to vote is through the deprivation of the right to vote to residents of U.S. territories. Neil Weare, the president and founder of Equally American,

¹ Per its statutory mandate, the U.S. Commission on Civil Rights establishes advisory committees and charges them with collecting and providing information, findings, and recommendations about civil rights matters in their states to the Commission.

² Lyndon B. Johnson, President of the United States, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (Aug. 6, 1965) (transcript available at <https://www.presidency.ucsb.edu/documents/remarks-the-capitol-rotunda-the-signing-the-voting-rights-act>).

³ Letter of Transmittal from Catherine E. Lhamon to President Donald J. Trump, Vice President Mike Pence, and Speaker of the House Paul Ryan (Sept. 12, 2018), https://www.usccr.gov/files/pubs/2018/Minority_Voting_Access_2018.pdf.

testified before the Committee that millions of residents of the five U.S. territories are denied full enjoyment of the right to vote – despite paying nearly \$4 billion in federal taxes, providing high rates of military recruits, and having a population equivalent to that of the five smallest U.S. states combined.⁴

Denial of the Vote to Citizens of U.S. Territories

In last year’s presidential election, 3.5 million Americans were denied the fundamental right to vote for our nation’s president: the citizens of U.S. territories – 98 percent of whom are racial or ethnic minorities. Both the Democratic and Republican National Committees permit these citizens to participate in the nomination of their candidates for President and Vice President. Further, residents of U.S. territories are able to vote for nonvoting delegates within the U.S. House. But, for most citizens of the United States who choose to live in the U.S. Virgin Islands, Puerto Rico, Guam, the Northern Mariana Islands, or American Samoa, their participation ends there. Based solely on place of residence, Americans who live in the territories are denied voting representation in either house of Congress, even though Congress possesses plenary authority over local territorial matters, according to the testimony of Neil Weare.⁵

Although virtually all residents of these five territories are systematically disenfranchised, federal and state laws permit certain individuals who previously resided in one of the 50 states or the District of Columbia who then move to one of the territories to continue to vote, by absentee ballot, in elections in their former state of residence. The most notable of these laws is the federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), which mandates that all 50 states and the District of Columbia permit their former residents who move to either a foreign country or the Northern Mariana Islands to continue to vote in that state by absentee ballot.⁶ While states retain the discretion to pass their own laws to permit former residents who move to the U.S. Virgin Islands, Puerto Rico, Guam, or American Samoa to continue to vote by absentee ballot, most have not done so, and instead have only enacted laws implementing the mandatory provisions of the Uniformed and Overseas Absentee Voting Act.⁷

Connecticut Background

Although federal law requires states to extend absentee voting rights to former residents either in foreign countries or the Northern Mariana Islands, extending voting rights to the rest of their former residents in other American territories, including Puerto Rico, Guam, the U.S. Virgin Islands, and American Samoa is discretionary.⁸ Despite having this authority, most states—including Connecticut—have failed to afford most of these citizens the right to vote.⁹

⁴ Neil Weare Testimony, Briefing Before the Connecticut State Advisory Committee to U.S. Commission on Civil Rights, Hartford, CT, Jul. 7, 2021.

⁵ *Ibid.*

⁶ Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301—20311 (2018).

⁷ *Id.*

⁸ *Id.*

⁹ *See e.g.*, <https://www.courthousenews.com/seventh-circuit-rejects-bid-to-extend-voting-rights-to-territories/>.

Connecticut General Statutes Chapter 145 § 9-158b grants eligibility to overseas voters no longer residing in the U.S. who, prior to leaving the U.S., were residents of Connecticut.¹⁰ Specifically, §9-158b states that:

Each citizen of the United States who is at least eighteen years of age, is a former resident and who has not forfeited such citizen's electoral privileges because of a disfranchising crime, may vote for presidential and vice-presidential electors, but for no other offices, in the town in this state in which such citizen formerly resided...

Each citizen of the United States who is at least eighteen years of age; who resides outside the United States and who, immediately prior to moving outside the United States, was a bona fide resident of a town in this state; who is not registered to vote and is not voting in any other state or election district of a state or territory or in any territory or possession of the United States, who has a valid passport or card of identity and registration issued under the authority of the Secretary of State of the United States or alternative form of identification and who has not forfeited his electoral privileges because of a disfranchising crime, may vote in federal elections in the town in this state in which he formerly resided immediately prior to his departure from the United States in the manner provided in sections 9-158c to 9-158m, inclusive.¹¹

Section 9-158b further permits those born outside of the U.S. who are at least eighteen years of age to vote if they are not registered in any other state or territory of the U.S. and their parent or guardian was a bona fide resident of Connecticut immediately prior to moving out of the U.S.¹² Connecticut law requires that, to be eligible to vote under this statute, a person must live outside the “United States” and not be registered to vote in any other state. For the purposes of determining whether an individual is eligible to vote under §9-158b, the statute defines the term “state” as “any of the several states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.”¹³ Further, it defines “United States” as “the several states, the District of Columbia, the Commonwealth of Puerto Rico, Guam and the Virgin Islands.”¹⁴ Notably, both definitions exclude American Samoa and the Northern Mariana Islands. Thus, under Connecticut state law, former Connecticut residents may maintain their absentee voting rights if they move to a foreign country or these two U.S. territories, but not if they move to Puerto Rico, Guam, or the U.S. Virgin Islands. This is only slightly more expansive than UOCAVA, which does not require absentee voting for former state residents who move to American Samoa.¹⁵

This differential treatment means that Connecticut discriminates against similarly situated former state residents depending not just on whether they move to a foreign country or a U.S. territory, but also *which* U.S. territory they move to. As a result, a resident of Connecticut who moves to American Samoa or France to take care of an elderly parent would retain the right to vote in Presidential and Congressional elections in Connecticut by absentee ballot, but the same resident

¹⁰ Conn. Gen. Stat. § 9-158b.

¹¹ *Id.*

¹² *Id.*

¹³ Conn. Gen. Stat. § 9-158a(6).

¹⁴ Conn. Gen. Stat. § 9-158a(7).

¹⁵ Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301—20311 (2018).

would completely lose the right to vote for President and voting representation in Congress if he or she moved to Puerto Rico for the same reason. This kind of differential treatment presents a possible violation of the equal protection guarantees found in the United States and Connecticut Constitutions.¹⁶ Former state residents living in Puerto Rico, Guam, and the U.S. Virgin Islands have filed equal protection challenges to this discriminatory statutory regime, with a District Court in Hawaii recently denying motions to dismiss by federal and Hawaiian defendants.¹⁷

Assertions and Themes

The Committee examined the denial of the right to vote to citizens of U.S. territories, with a particular emphasis on the disenfranchisement of residents of one of the 50 states or the District of Columbia who relocate to Puerto Rico, Guam, or the U.S. Virgin Islands. The reason for this latter emphasis is that such disenfranchisement is not compelled by the United States Constitution or federal law but is within the control of state governments who can amend their absentee voting laws to treat Puerto Rico, Guam, and the U.S. Virgin Islands on the same basis as American Samoa, the Northern Mariana Islands, and foreign countries.

The Commission was established in 1957 with the initial charge of addressing voting rights. Commission reporting on pervasive voting discrimination in the 1950s and 60s contributed to the passage of the Voting Rights Act.

The testimony before the committee included two policy recommendations:

1. The Commission should recommend that Congress address the disenfranchisement of citizens living in U.S. territories. The Uniformed and Overseas Citizens Absentee Voting Act compels the minimum protection for former residents of the 50 states in their ability to participate in presidential elections via absentee ballot. The Commission should recommend that Congress expand this protection to all U.S. territories, including the U.S. Virgin Islands, Puerto Rico, Guam, and American Samoa.
2. The Connecticut General Assembly should amend Connecticut General Statutes Chapter 145 § 9-158 to permit former Connecticut residents to vote by absentee ballot for presidential electors regardless of the foreign country or U.S. territory they move to. This amendment would expand the current statute to provide absentee voting rights to former Connecticut residents who reside in the U.S. Virgin Islands, Puerto Rico and Guam.

¹⁶ See U.S. CONST. amend. XIV, § 2; CONN. CONST. art. I., § 20.

¹⁷ See *Borja v. Nago*, No. 20-00433 JAO-RT, (D. Haw. Sept. 2, 2021) (Order Denying Defendants' Second Motion to Dismiss for Lack of Subject Matter Jurisdiction).

Appendix

Federal Background

The Voting Rights Act (VRA) was passed in 1965 to ensure that state and local governments do not deny American citizens the equal right to vote based on their race, color, or membership in a minority language group. This legislation enshrines the right of every citizen an equal opportunity to participate in American democracy and was enacted in response to voter suppression in the 1960s by state and local governments and law enforcement. After it was signed into law, Congress amended it five more times to expand its scope and offer more protections. These protections continue to be under examination to ensure that states are guaranteeing citizens the right to vote. This section briefly reviews the history of the Voting Rights Act of 1965 and the National Voter Registration Act.

The United States Voting Rights Act

The right to vote is one of the most fundamental components of democracy. It is so important that the United States Constitution includes four amendments protecting it:

Amendment XV guarantees the right to vote regardless “of race, color, or previous condition of servitude”;¹⁸

Amendment XIX guarantees that the right to vote will not be denied “on account of sex”;¹⁹

Amendment XXIV guarantees that the right to vote will not be denied “by reason of failure to pay any poll tax or other tax”;²⁰

Amendment XXVI guarantees the right to vote for all citizens aged 18 years or older.²¹

Although it does not explicitly address such rights, the Fourteenth Amendment also protects voting rights, by granting citizenship to “[a]ll persons born or naturalized in the United States” and guaranteeing “equal protection of the laws” to all within its jurisdiction.²²

Despite these protections, throughout much of American history, state and local jurisdictions utilized techniques to disenfranchise people of color.²³ Techniques such as gerrymandering and inappropriate or unequally applied voter qualifications have been systemically used to create hurdles for voters from marginalized populations.²⁴ For example, states implemented

¹⁸ U.S. CONST. amend. XV, § 1.

¹⁹ U.S. CONST. amend. XIX.

²⁰ U.S. CONST. amend. XXIV, § 1.

²¹ U.S. CONST. amend. XXVI, § 1.

²² U.S. CONST. amend. XIV, § 1.

²³ U.S. Department of Justice, *Before the Voting Rights Act*, <https://www.justice.gov/crt/introduction-federal-voting-rights-laws> (website last updated August 16, 2018, last accessed Oct. 21, 2021).

²⁴ *Ibid.*

discretionary, often inconsistently applied voting requirements such as poll taxes, literacy tests, and vouchers of “good character.”²⁵ Disqualification for “crimes of moral turpitude” was also used to suppress the African American vote.²⁶ All this was done under the guise of preserving the integrity of the electoral process.²⁷ In addition, terrorist organizations such as the Ku Klux Klan and the Knights of the White Camellia used harassment and violence to keep African American voters away from the polls and intimidate opposing political parties.²⁸

In 1965 the United States Congress passed the Voting Rights Act (VRA)²⁹ in response to the Jim Crow laws and other restrictions of African Americans’ voting rights across the Deep South. This landmark federal legislation enforced the Fifteenth Amendment’s guarantee that no persons shall be denied the right to vote because of their race or color.³⁰ The VRA included key provisions for voter access, including banning the use of literacy tests³¹ and giving the U.S. Attorney General the power to send federal examiners and observers to monitor elections.³² Up until 2013, Section 5 of the VRA also froze new election practices or procedures in certain states until the new procedures had been reviewed by a three-judge court or by the U.S. Attorney General.³³ During the review, the procedures were examined for discriminatory purpose or effect, to screen out potentially negative impacts on minority voting rights.³⁴ The 1965 VRA was amended in 1975, extending to include protections against voter discrimination toward “language minority citizens” and bringing more jurisdictions under its preclearance requirements.³⁵ In 1982, the VRA was again amended to ensure that violations of the VRA’s nondiscrimination section could be established without having to prove discriminatory purpose.³⁶ That is, under Section 2 of the VRA, if the voting requirements of a particular jurisdiction have a discriminatory impact, a VRA violation exists regardless of intent.³⁷

Despite the VRA and the constitutional amendments established to protect voting rights in the United States, there are still justified concerns regarding disparities in access to and participation

²⁵ Ibid.

²⁶ *Hunter v. Underwood*, 471 U.S. 222 (1985).

²⁷ U.S. Department of Justice, *Before the Voting Rights Act*, <https://www.justice.gov/crt/introduction-federal-voting-rights-laws> (website last updated August 16, 2018, last accessed Oct. 21, 2021).

²⁸ Ibid.

²⁹ Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.) (formerly at 42 U.S.C. 1971, 1973 to 1973bb-1).

³⁰ 52 U.S.C. §§ 10301–14; U.S. CONST. amend. XV § 1.

³¹ 52 U.S.C. §§ 10101, 10301, 10303, & 10501.

³² 52 U.S.C. §§ 10302, 10305.

³³ See *Shelby County v. Holder*, 570 U.S. 529, 534–37 (2013) (holding it unconstitutional to use the coverage formula in Section 4(b) of the VRA to determine which jurisdictions are subject to the preclearance requirements of Section 5 of the VRA).

³⁴ U.S. Dep’t of Justice, *Statutes Enforced by the Voting Section*, <https://www.justice.gov/crt/statutes-enforced-voting-section#vra> (last accessed on Oct. 20, 2021).

³⁵ Act of Aug. 6, 1975, Pub. L. 94-73, 89 Stat. 400 (formerly codified at 42 U.S.C. §§ 1973 to 1973bb-1).

³⁶ Voting Rights Act Amendments of 1982, Pub. L. 97-205, 96 Stat. 131 (codified as amended at 52 U.S.C. §§ 10101, 10301, 10303, 10503, 10508) (2020).

³⁷ *Id.*

in the country's electoral system.³⁸ On June 25, 2013, in a historic decision, *Shelby County v. Holder*,³⁹ the U.S. Supreme Court ruled that the formula used to determine which jurisdictions should be subjected to "preclearance" requirements under the VRA was outdated and therefore, unconstitutional.⁴⁰ In the majority opinion, authored by Chief Justice Roberts, the Court emphasized that the preclearance formula had been enacted at a time when states had voter requirements that prevented African Americans from voting.⁴¹ It reasoned that, voter access issues appeared to have significantly improved since then and thus the formula was no longer justifiable under Congress's limited authority.⁴² Section 5's preclearance requirement, a core component of the VRA, was rendered effectively inoperative unless and until Congress enacts a new coverage formula.⁴³

Following the *Shelby County* decision, states across the country almost immediately began enacting voting laws previously barred by federal preclearance requirements. For example, within 24 hours of the ruling, Texas announced that it would implement a strict photo ID law as part of its voting requirement.⁴⁴ A month later, North Carolina attempted to pass a restrictive voting law that a federal appeals court struck down as an unconstitutional effort to "target African Americans with almost surgical precision."⁴⁵ Collectively, previously covered states have purged voters off their rolls at a significantly higher rate than non-covered jurisdictions and at least eight states have enacted new voting restrictions.⁴⁶

The National Voter Registration Act

In 1993, Congress enacted the National Voter Registration Act (NVRA), which was designed to protect voting rights by making it easier to for all Americans to register to vote and to maintain their registration.⁴⁷ The NVRA requires states to allow citizens to register to vote at the same

³⁸ Cohen, Andrew. "After 50 Years, the Voting Rights Act's Biggest Threat: The Supreme Court." *The Atlantic*, Feb. 22, 2013.

<https://www.theatlantic.com/national/archive/2013/02/after-50-years-the-voting-rights-acts-biggest-threat-the-supreme-court/273257/> (last accessed March 30, 2020).

³⁹ *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013)

⁴⁰ *Id.* at 557; *see also* Schwartz, John. "Between the Lines of the Voting Rights Act Opinion." *New York Times*, Jun. 25, 2019. <https://archive.nytimes.com/www.nytimes.com/interactive/2013/06/25/us/annotated-supreme-court-decision-on-voting-rights-act.html> (last accessed on Oct. 21, 2021).

⁴¹ *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 530, 537, 546 (2013).

⁴² *Id.* at 554—57.

⁴³ *See generally* *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013) (upholding the constitutionality of the Section 5's preclearance requirement while striking the coverage formula that requires specified jurisdictions to gain preclearance).

⁴⁴ Sullivan, John. "5 Years Later; the Effects of Shelby County Are Acutely Felt." *Demos*.

<https://www.demos.org/blog/5-years-later-effects-shelby-county-are-acutely-felt> (last accessed on Oct. 21, 2021).

⁴⁵ *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016); *see also* Liptak, Adam and Wines, Michael. "Strict North Carolina Voter ID Law thwarted After Supreme Court Rejects Case." *New York Times*, May 15, 2017. <https://www.nytimes.com/2017/05/15/us/politics/voter-id-laws-supreme-court-north-carolina.html> (last accessed on Oct. 21, 2021).

⁴⁶ Weiser, Wendy and Feldman, Max. "The State of Voting 2018." *Brennan Center for Justice at New York University School of Law*.

https://www.brennancenter.org/sites/default/files/publications/2018_06_StateOfVoting_v5%20%281%29.pdf (last accessed on Oct. 20, 2021).

⁴⁷ National Voter Registration Act of 1993, Pub. L. 103-31, 107 Stat. 77 (1993) (codified as 52 U.S.C. 20501-20511); *see also* U.S. Department of Justice, Civil Rights Division, "About the National Voter Registration Act,"

time they apply for their drivers' licenses, or seek to renew their licenses; it also requires the state to then forward voters' completed registration applications to the appropriate election official.⁴⁸ In addition, the NVRA requires voter registration support for individuals with disabilities and those seeking public assistance; it requires the option for voters to register by mail; sets forth requirements for how states maintain their voter registration applications; and under certain circumstances, protects citizens' right to vote regardless of a change in address.⁴⁹

A comprehensive background on voting rights can be found in the Commission's 2018 report on voting rights, found at

https://www.usccr.gov/files/pubs/2018/Minority_Voting_Access_2018.pdf

<https://www.justice.gov/crt/about-national-voter-registration-act> (last updated May 21, 2019) (last accessed Oct. 21, 2021).

⁴⁸ 52 U.S.C. §§ 20501-20511.

⁴⁹ *Id.*