

S. HRG. 109-823

**RENEWING THE TEMPORARY PROVISIONS OF THE  
VOTING RIGHTS ACT: LEGISLATIVE OPTIONS  
AFTER LULAC V. PERRY**

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**HEARING**

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION,  
CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

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JULY 13, 2006  
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**Serial No. J-109-98**

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**RENEWING THE TEMPORARY PROVISIONS OF  
THE VOTING RIGHTS ACT: LEGISLATIVE OP-  
TIONS AFTER LULAC V. PERRY**

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**THURSDAY, JULY 13, 2006**

U.S. SENATE, SUBCOMMITTEE ON THE CONSTITUTION,  
CIVIL RIGHTS AND PROPERTY RIGHTS,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 2:33 p.m., in room SD-226, Dirksen Senate Office Building, Hon. John Cornyn, presiding.

Present: Senators Cornyn, Kennedy, and Feingold.

**OPENING STATEMENT OF HON. EDWARD M. KENNEDY, A U.S.  
SENATOR FROM THE STATE OF MASSACHUSETTS**

Senator KENNEDY. [Presiding.] We will come to order. The Chairman and other members are expected here momentarily, and then there are going to be some votes that are coming up, so the Chairman will have to deal with that. But we will get started, and I would ask consent that my comments appear after the Chair, and I also have a statement by the Senator from Vermont, Senator Leahy, and I ask that that be made part of the record.

I hope that today will conclude our hearings on the reauthorization of the Voting Rights Act. We have built a strong record justifying the renewal of the Act's key expiring provisions—Section 5, Section 203, and the Federal observer provisions. Voting this bill out of Committee and moving it to the floor for consideration by the full Senate is essential. The importance of Act to minority voters and to our Nation's promise of democracy demands action, and I am hopeful that the full Senate can pass this bill before the August recess in time for the 41st anniversary of the signing of the Act, which we will celebrate on August 6th.

The Supreme Court's decision in *LULAC v. Perry* that the Texas Congressional redistricting plan discriminated against Latino voters in violation of Section 2 of the Act is strong evidence in favor of reauthorization. The Court found current discrimination against minority voters in a jurisdiction covered in its entirety under Section 5 of the Voting Rights Act. The decision is a vindication of minority voting rights and another indication that voting discrimination persists today in some parts of the country, including at the State level.

The Court made several significant findings. It found that polarized voting exists throughout the State. Anglo voters in Texas gen-

erally vote for different candidates than minority voters. We know that redistricting boundaries and altering election rules in such cases has been used to undermine the voting rights of minorities. And Section 5 provides a needed remedy for such practices.

The Court also found that the State has a long, well-documented history of discrimination against Hispanics and African-Americans in voter registration, voting, and otherwise participating in the electoral process. The 2003 redistricting in Texas was another chapter in that history. The State shifted 100,000 Latino voters from a district where they were on the verge of electing a candidate of their choice to another district in which Latinos already controlled election outcomes.

As Justice Kennedy states, "In essence, the State took away the Latinos' opportunity because Latinos were about to exercise it."

Justice Kennedy found evidence that Texas had intentionally diluted the voting strength of Latino voters because of their ethnic background and in violation of the Constitution. Such evidence of intentional discrimination is obviously very significant with respect to the constitutionality of extending Section 5 of the Act.

Even Justice Scalia said, "We long ago upheld the constitutionality of Section 5 as proper exercise of Congress's authority under Section 2 of the 15th Amendment to enforce the Amendment's prohibition on denial or abridgment of the right to vote."

As Justice Scalia emphasized, Section 5 applies only to jurisdictions with a history of official discrimination. In fact, the Texas redistricting plan should never have been before the Court. If the Attorney General listened to the advice of career attorneys in the Civil Rights Division, he would not have approved the Texas plan under Section 5.

As Justice Souter said, the Attorney General should have objected because the State failed to offset the elimination of a district in which African-American voters had demonstrated an ability to elect a candidate of their choice under the previous plan. That is why Chief Roberts was moved to say, "It is a sordid business, this divvying us up by race."

As long as State and local election officials continue to discriminate against minority voters, laws like Section 5 will be needed to protect minority voters.

We will hold up. We will have a moment or two recess here while Senator Cornyn arrives, and then we will hear from Senator Cornyn and the panel. We thank the witnesses for their patience. Most of them have some familiarity with this process. I would indicate to them that their testimony is very important and we will have a good opportunity to review it carefully here on the Committee.

[Recess 2:38 p.m. to 2:55 p.m.]

**STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM  
THE STATE OF TEXAS**

Senator CORNYN. We will reconvene. Welcome to each of you. I ask you indulgence as the Senate has four stacked votes, and so we will get started here. I will get started. I know Senator Kennedy was here and delivered his opening statement, but if you will

hang in there with us, we will get this done in the best form we possibly can.

On behalf of the Chairman, let me say welcome to this eighth and likely the last in a series of a number of hearings before the Senate Judiciary Committee on reauthorizing the temporary provisions of the Voting Rights Act, provisions that are scheduled to expire about 1 year from now, in the summer of 2007.

Few issues are as fundamental to our system of democracy and the promise of equal justice under law as are our voting rights. It is precisely for this reason that it is appropriate that we continue to engage in a thorough review of the Act and that we continue to work collectively to ensure that the Act is reauthorized with due consideration of the requirements of the Constitution and recent guidance from the U.S. Supreme Court.

As we continue to explore the many issues raised by reauthorization of the expiring provisions, I am concerned we may not be as clear as we need to be about what we are discussing. Many, I think, may be under the false impression that if Congress does not act, the Voting Rights Act will expire. Nothing could be farther from the truth. In fact, the Act's core provision, that is, Section 2, its prohibition on discrimination with respect to voting, applies nationwide and is permanent.

What concerns me further is that the current draft rewrites significant portions of the existing Voting Rights Act. Unfortunately, in my opinion, in a way that may well have the effect of further injecting partisan politics into the noble pursuit of guaranteeing voters access to the ballot box. This concern of mine and of numerous scholars was heightened by the Supreme Court's recent opinion in *League of United Latin American Citizens v. Perry*, the Texas redistricting case, a heavily anticipated decision handed down about 2 weeks ago. The Court upheld virtually all aspects of the Texas redistricting plan, requiring that a single district be redrawn, although the ripple effect is unknown at this point.

I believe the Court was right to uphold the bulk of that plan, because whatever one thinks of partisan gerrymandering, it has long been the case that legislatures will seek to maximize party interests when establishing districts for voting. And until we come up with a better objective system, partisan gerrymandering will always be a reality of redistricting. As one of my former colleagues told me, he said, "You can't take politics out of politics." And this is true whether it is a Democrat- or a Republican-led remapping.

But it is disturbing when an Act that was designed to ensure voters that voters have full access to the ballot box has become a vehicle for partisan maneuvering. That is why I fear that the current rewrite of the Voting Rights Act will do that, that we are continuing this, in the words of Chief Justice John Roberts, sordid business of divvying up people by race. Only now we are perpetuating it under the cloak of protecting voting rights. I believe we should take great caution in this exercise.

We have an esteemed group of scholars with us today, and I look forward to hearing from each of you about your opinions on the topics I have mentioned and the Voting Rights Act generally.

Roger Clegg is President and General Counsel of the Center for Equal Opportunity in Sterling, Virginia, and he has extensively researched and written on legal issues raised by our civil rights laws.

Next, Professor Sherrilyn Ifill, from the University of Maryland Law School in Baltimore. Professor Ifill has previously served as Assistant Counsel at the NAACP Legal Defense and Education Fund, where she litigated various Voting Rights Act cases.

Nina Perales, from the Mexican American Legal Defense and Educational Fund, is also with us today. Ms. Perales is the Southwest Regional Counsel for MALDEF in my hometown of San Antonio, Texas.

Michael Carvin is a partner with the law firm of Jones Day here in Washington, D.C. Mr. Carvin specializes in constitutional, appellate, civil rights, and civil litigation against the Federal Government. He has argued cases in the U.S. Supreme Court and virtually all Federal appeals courts.

Professor Joaquin Avila is an Assistant Professor of Law at Seattle University School of Law in Seattle, Washington. Professor Avila was previously Managing Director and head of Latin America for Lehman Brothers, where he developed and implemented strategic plans for the region.

Last, but certainly not least, we have Abigail Thernstrom, who is joining us for the second time. Ms. Thernstrom is the Vice Chair of the United States Commission on Civil Rights, and she has written extensively on race relations and voting rights issues. Ms. Thernstrom, thank you for returning to be with us again.

I would especially like to thank Chairman Specter, as well as Senator Brownback, Chairman of the Subcommittee on the Constitution, Civil Rights, and Property Rights, for scheduling this important hearing, and I am delighted to chair it today.

As I said a moment ago, this is going to be a little helter-skelter, but we will do the best we can and in a way that allows me to get back and cast votes on the stacked votes before us. But until then, Mr. Clegg, let's start with you, please. We will ask you to keep your opening statement to 5 minutes, and then we will proceed with questions. Thank you.

**STATEMENT OF ROGER CLEGG, PRESIDENT AND GENERAL COUNSEL, CENTER FOR EQUAL OPPORTUNITY, STERLING, VIRGINIA**

Mr. CLEGG. Thank you, Senator Cornyn. In my full written statement, I discuss at some length why I think Section 5 and Section 203 should not be reauthorized, indeed why I think doing so would be unconstitutional, and why the *Bossier Parish* decisions and *Georgia v. Ashcroft* should not be overturned if Section 5 is reauthorized. But in my oral statement this afternoon, I would like to focus specifically on the divergence between what the Voting Rights Act was supposed to be and what it has become, and that divergence is in many ways dramatized by the Supreme Court's recent decision in *LULAC v. Perry*.

Section 5 has diverged from its original purpose in several ways. The first way is that there really is no longer any rhyme or reason in which jurisdictions are covered and which ones are not. After several decades, we would expect to need to update the trigger

mechanism, looking at more recent elections or more recent records of voting violations.

Another way Section 5 has diverged from its original stated purpose is even more disturbing. It is not being used to stop racial gerrymandering. It is being used to require it. Sometimes that motivation is overtly racial. The Voting Rights Act is being used to foster segregation in voting districts, and it is being used to try to ensure something like racial proportionality in legislatures. But at least four of the Justices in *Perry* acknowledged that, while generally the reapportionment there was about politics, not race, what racial gerrymandering did take place was required by the Voting Rights Act.

It is also disturbing to see a voting rights statute twisted into a partisan political device, and this abuse is committed by both parties. For instance, in Texas, Republicans did not aim to dilute anyone's voting power because of race. They were focused on people's voting power because of party—not always a particularly noble focus but one that is as old as Elbridge Gerry at least. Still, the Democrats wanted to stop them, and so they tried, with some success, to use the Voting Rights Act to do it. Likewise, in *Georgia v. Ashcroft*, the Democrats were not trying to hurt black voters or help them, per se. They just wanted to try to win more seats for Democrats. But their efforts were challenged under the Voting Rights Act because it was the tool at hand.

Incidentally, the same kind of abuse can also happen in ways that do not involve gerrymandering but do involve other voting practices or procedures that are objected to, ostensibly because they are racially discriminatory, but really for partisan purposes. For instance, I suspect that absentee ballot procedures and voter identification and other anti-fraud laws are all challenged sometimes not because anyone really believes that they are intended to be racially discriminatory, but because one side thinks these rules will hurt their voter turnout and their disparate racial impact allows the Voting Rights Act to be invoked for, again, partisan political ends.

The good news, Mr. Chairman, is that in 2006 neither party wants to stop anyone from voting because of race. All either party cares about is winning. There is no candidate in either party who would not be thrilled with 100 percent black registration and turnout, so long as the candidate was also confident that those voters would vote for him.

The racial polarization that is often the centerpiece of Voting Rights Act litigation is an increasingly incoherent concept. Whites and blacks may frequently vote differently in some jurisdictions, but it is not about race or discrimination. It is just about differences in political opinion on issues like taxes and national defense.

But because African-Americans vote so overwhelmingly Democratic, any effects test in the voting area can be readily invoked for partisan purposes, sometimes by one part, sometimes by the other. For instance, for years Republicans have tried, sometimes successfully—although those days may be ending—to use an effects test to pack African-Americans into a relatively few districts, thus bleaching all the other surrounding districts white, with the end result that there are lots of Republican districts and just a few black ones, especially in jurisdictions like the South where the white vot-

ers tend to be conservative. Of course, conversely, Democrats in *Perry* argued that reapportionment aimed at helping Republicans was racially discriminatory. Well, what is to be done? The obvious answer is don't renew Section 5.

If Congress insists that it cannot go cold turkey, then at least it should not make Section 5 worse. The two *Bossier Parish* decisions have modestly limited its scope and its potential abuses. They should not be overturned. I would also put *Georgia v. Ashcroft* in this category. The current House bill not only overturns *Georgia v. Ashcroft* but replaces it with a provision that is muddy at best, will lead to years of more litigation, and will have results that its drafters never intended. I would add that the more this provision's meaning is clarified to ensure that it requires the creation of majority-minority districts, the more clearly unconstitutional it will be as well.

The case law that has grown up around Section 5 makes its meaning nearly incomprehensible already. Congress should not make matters worse by adding language, the meaning of which its own members cannot agree on.

I would also not extend Section 5 or Section 203 for another 25 years. The shorter the extension, the better, especially if Congress changes the statute in ways that might have unintended consequences. I would also try to put in place a better, more objective review mechanism, probably in the statute itself. Congress must undertake a serious, systematic comparison of voter registration and participation rates by race in covered versus non-covered jurisdictions, with an effort to determine the actual causes of any disparities and specifically whether those causes are discrimination, and if there are more limited and effective remedies for any discrimination than the preemption mechanism and an effects test. Above all, Senator Cornyn, Congress should not extend the law and then forget about it and its effects for another 25 years—and then scramble and try to figure out what to do about it in the heat of another election year.

Thank you very much.

[The prepared statement of Mr. Clegg appears as a submission for the record.]

Senator CORNYN. Thank you, Mr. Clegg.

Professor Ifill?

**STATEMENT OF SHERRILYN A. IFILL, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF MARYLAND SCHOOL OF LAW, BALTIMORE, MARYLAND**

Ms. IFILL. Thank you for giving me the opportunity to testify in support of the passage of this bill reauthorizing the Voting Rights Act.

I followed the deliberations on this matter in the House and in the Senate with some interest, and I commend both Houses for the deliberate and thorough way in which you have considered reauthorization of the Act.

As a former voting rights attorney and now an academic, I have tried to follow the arguments advanced by those who disagree with the continued need for the Act, like Mr. Clegg—arguments that I believe have been most capably countered by supporters of the Act

in the civil rights and academic communities who have appeared before you.

But I was particularly interested in appearing at this hearing because I confess to being somewhat intrigued by the name of the hearing: “Legislative Options after *LULAC v. Perry*.” I was intrigued because my reading of the Supreme Court’s decision in that case finds nothing that supports altering the existing framework of the draft bill for reauthorization of the Voting Rights Act. To the contrary, the Court’s analysis in *LULAC*, to my mind, strongly supports the bill. I say this for three reasons.

First, the Court upheld the district court’s finding that voting was racially polarized throughout the State of Texas. This finding and the Supreme Court’s recognition of it is significant. It reflects the reality that although this country has come a long way since the Act was passed in 1965, we still, as Congressman John Lewis stated to this Committee, have a great distance to go.

When I litigated voting rights cases in the 1980’s and early 1990’s in Texas, voting was racially polarized. Fifteen years later, this political reality continues to shape and to undermine the ability of minority voters to elect candidates of their choice.

Second, the Court in *LULAC*, in its detailed and local specific analysis of the way in which the dismantling of District 23 violated Section 2 of the Act, demonstrates why the protections of the Voting Rights Act are not limited merely to access to the ballot box, as some would have us believe. In 1965 and again in 1982, Congress explicitly designed the Act to address any means by which a jurisdiction might interfere with the ability of minority voters to participate in the political process and elect candidates of their choice. Rather than anticipate what those methods might be, Congress, and later the courts in furtherance of Congress’ goals, encouraged—and I am quoting—“a searching, practical evaluation of the local political reality and a functional view of the political process”—I am quoting from the Senate report accompanying the 1982 amendments of the Act—to determine whether a violation of Section 2 has occurred.

In *LULAC*, the Court rejected a simplistic numbers game whereby one Latino district, District 23, could simply be swapped for another, District 25. The Court recognized instead that District 23 was dismantled precisely to keep Latinos there from exercising their increasing power in that district. The Court described this action by the State of Texas as “bearing the mark of intentional discrimination.”

Third, with regard to Section 5, as you know, *LULAC v. Perry* was not a Section 5 case; thus, the Court’s opinion in *LULAC* offers this Committee no new analysis or insight into the appropriate standard for preclearance under Section 5, the scope of jurisdictions to be covered under Section 5, or the trigger formula for Section 5. In fact, the only pronouncements about Section 5 that I think are of importance for this Committee’s work on the reauthorization bill appear in the opinion of Justice Scalia, concurring in part and dissenting in part.

In that opinion, the three most conservative Justices on the Court joined with Justice Scalia in reaffirming the constitutionality of Section 5 as a proper exercise of Congress’s authority under Sec-

tion 2 of the 15th Amendment, a power that remains undiminished after *City of Boerne v. Flores*.

Finally, to the charge that the Voting Rights Act fosters segregation, there are myriad factors that have contributed to residential segregation in the United States. Some of them include a history of violence, socioeconomic disparities between blacks and whites, red-lining, and even choice. None of these phenomena were created by the Voting Rights Act, and I would commend certainly a number of studies, including Jim Loewen's "Sundown Towns," Sheryll Cashin's "The Failure of Integration," if one wants to look at the purposes and the causes of residential segregation.

The Voting Rights Act instead has encouraged some of the most integrated districts, election districts, that this country has seen in the South.

In conclusion, the Supreme Court's decision in *LULAC v. Perry*, to the extent that it bears on the deliberations of this Committee, reaffirms the importance of reauthorizing the Act, and I would be happy to take any further questions about the decision.

Thank you.

[The prepared statement of Ms. Ifill appears as a submission for the record.]

Senator CORNYN. Thank you very much.

Ms. Perales?

**STATEMENT OF NINA PERALES, SOUTHWEST REGIONAL COUNSEL, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, SAN ANTONIO, TEXAS**

Ms. PERALES. Thank you, Chairman Cornyn. Thank you for the opportunity to testify today regarding the Supreme Court decision in the Texas redistricting case and its implications for the reauthorization of the Voting Rights Act.

My name is Nina Perales. I am Southwest Regional Counsel for MALDEF, the Mexican American Legal Defense Fund. MALDEF successfully litigated the Voting Rights Act claim before the Court. I argued the appeal on behalf of the GI Forum before the Supreme Court on March 1, 2006.

The *LULAC v. Perry* decision is a resounding affirmation of the Voting Rights Act and its continued importance in protecting minority voting rights. The Supreme Court decision also helps us understand why we need the protections of the temporary provisions in the face of ongoing discrimination in Texas.

The Court found that Texas had violated the Voting Rights Act by diluting Latino voting strength in District 23. As mentioned by Professor Ifill, the Court found racially polarized voting throughout the State and characterized the racially polarized voting in District 23 as "severe."

For Texas, the State containing the second largest number of Latinos in the United States, this is the second time a State redistricting plan has been invalidated in this decade for violating Latino voting rights.

This decision, although characterized by many as having to do with partisanship, is not about Democrats and it is not about Republicans. Importantly, the record in this case demonstrated that Latinos in District 23 were flexible in their partisan affiliation and

had voted in some numbers for the incumbent prior to his losing support in the Latino community steadily over the decade leading up to the redistricting.

This Court in this decision was unable to determine a standard for partisan gerrymandering—unable or unwilling, and, thus, this case does not discuss how the Voting Rights Act might or might not be squeezed into a partisan agenda. It simply does not discuss it.

The Supreme Court, however, did affirm the rule that political maneuvering—and I believe the Supreme Court understands this can happen from either party—has its limits when it comes to taking away Latino opportunity to elect. This case has unusual and hopefully unique facts because it was a very bad situation for Latinos in District 23. Having grown into the majority, now comprising 55 percent of the registered voters, and having voted very cohesively over the last decade, more and more so against the incumbent, Latinos were divided by the State, pulled out of this district, just at the point at which they were going to unseat the disfavored candidate. The Supreme Court wrote that, Texas “took away the Latinos’ opportunity because Latinos were about to exercise it.”

The Court did not have any problem at all overruling the district court in its finding that District 23 was not an opportunity district. The Supreme Court found that it did offer the opportunity to elect. It was not a fuzzy or an amorphous concept, but quite clear, and clear enough for the Supreme Court to handle it and rule that it was an opportunity district based on a local appraisal of the facts there, including the turnout, the election performance, and the registration rates.

Finally, I want to mention that the Subcommittee can be reassured by the fact that eight Justices wrote specifically to say that Section 5 of the Voting Rights Act, which was—in fact, there was no Section 5 claim in this case and there could not have been because, of course, those issues are reserved to the Justice Department and the district court in Washington, D.C. But eight Justices still went out of their way to write that Section 5 is a compelling State interest and to uphold or to discuss the Court decisions previously upholding the constitutionality of Section 5, I think that that is—to the extent that *LULAC v. Perry* does speak to the temporary provisions, it is in a very positive and affirming way.

[The prepared statement of Ms. Perales appears as a submission for the record.]

Senator CORNYN. Thank you, Ms. Perales.

We are going to have to recess for the vote and return shortly, I hope.

[Recess 3:17 p.m. to 4:14 p.m.]

Senator CORNYN. We will reconvene the hearing. Again, my apologies. Simply unavoidable.

Mr. Carvin, we would be glad to hear your opening statement.

**STATEMENT OF MICHAEL A. CARVIN, PARTNER, JONES DAY,  
WASHINGTON, D.C.**

Mr. CARVIN. Thank you, Senator Cornyn. I have been involved in a number of voting rights—

Senator CORNYN. Mr. Carvin, is your red light on?

Mr. CARVIN. Can you hear me now?

Senator CORNYN. I can hear you now. Thank you.

Mr. CARVIN. Thank you. I was just going to say that I have filed a brief on behalf of the Texas Republican Party in the *LULAC* case.

To cut to the chase, I think the principal relevance of the *LULAC* case for the Section 5 reauthorization was the case's treatment of so-called influence districts. As you know, Senator, those are districts where minorities are not sufficiently large that they can constitute a majority in a district but they are, nonetheless, sizable enough that they can form a coalition with non-minority voters to elect their candidates of choice. And that issue came up in *LULAC* in the following way:

There was a Section 2 challenge to the failure to maintain or preserve old District 24 where the black population, citizen voting age population was roughly 26 percent, and it was argued that even though they were a minority of the district, they could elect their preferred candidate, who was the white Democratic incumbent, Martin Frost.

The Court, I should emphasize, did not resolve explicitly whether or not such claims are ever viable under Section 2, but it did reject the claim, as it was brought relative to District 24, and it did so with language that is in my statement, where at least Justice Kennedy indicated that acceptance of this kind of influence district theory would raise serious constitutional concerns about the Voting Rights Act.

That continued a long line of precedent in which all the lower Federal courts, save one, had rejected the continuous efforts of the Democratic Party in the 2000 redistricting cycle to have courts order or require these influence districts under Section 2 and Section 5 of the Voting Rights Act. Those have been uniformly rejected pursuant to the reasoning that the Federal judiciary is not empowered or required by the Voting Rights Act to engage in preferences for one party over another, even if that party is supported predominantly by minorities. In other words, it is an obvious fact that certainly in the African-American community and largely in the Latino community, the preferred candidate of choice is a Democrat. But the courts have rejected the notion that that somehow justifies creating districts where minorities can elect their preferred candidates of choice.

The mandate of Section 2 is not to prefer any party, regardless of its demographic composition. It is to ensure that minority voters have an equal opportunity to elect their candidates, no guarantees because of partisan preferences.

The relevance of that to the legislation the Committee is considering is that as that theory of partisan preferences and influence districts under Section 2 has been uniformly rejected, I am greatly concerned that the Committee and the Congress is about to revive it under Section 5. And the reason for that is that the language in the Senate and House bills prohibits as retrogressive any redistricting change that diminishes the ability of minority voters to elect their preferred candidates of choice. And as I indicated before, since the preferred candidate of choice is largely Democratic, you will literally have a Federal statute, passed, ironically, by a Republican Congress, which says you cannot diminish the ability to elect

Democrats in these covered jurisdictions. This would not just be a requirement that you preserve majority-minority districts because we all know that in the circumstances I previously described, minorities are able to elect their preferred candidates of choice, even if they are not a numerical majority in the district because they can form a coalition with like-minded Democratic voters who are non-minority.

We also know, of course, that preferred candidates of choice among the minority community can be either members of that ethnic group or non-minorities. For example, in the *LULAC* case, Representative Bonilla is a Latino, but as Ms. Perales indicated previously, he was not the Hispanic candidate of choice. You do not look at the ethnicity of the candidate. You look at the voting patterns of the particular ethnic group.

So *LULAC* confirms again that if you have a requirement in the Voting Rights Act that says you cannot diminish the ability to elect a preferred candidate of choice, what you have, in essence, done is prevent dismantling districts like the old District 24 in Texas because that would diminish the ability to elect the preferred candidate.

I will also briefly mention the override of the *Bossier Parish II* case, which is of particular relevance to me because I successfully argued that case in the Supreme Court, and the evil there is that it enables the Justice Department to find discriminatory purpose every time that the submitting jurisdiction does not maximize the number of minority opportunity districts. And after the *Georgia v. Ashcroft* override, that would not only mean maximizing the number of majority-minority districts, it would mean maximizing the number of the so-called influence districts, which, as you indicated in your opening statement, in my mind injects partisan consideration of favoritism into a statute that is supposed to ensure racial neutrality. And I think that would be a very troubling development, particularly 40 years after the enactment of the first version of Section 5.

Thank you.

[The prepared statement of Mr. Carvin appears as a submission for the record.]

Senator CORNYN. Thank you, Mr. Carvin.

Professor Avila, we would be glad to hear your opening statement.

**STATEMENT OF JOAQUIN G. AVILA, ASSISTANT PROFESSOR OF LAW, SEATTLE UNIVERSITY SCHOOL OF LAW, SEATTLE, WASHINGTON**

Mr. AVILA. Good afternoon, Senator. I would just like to add for the record that even though I would have liked to have been a strategic partner for the Lehman Brothers—I probably would have been better off financially—I have spent most of my time during the past 32-plus years doing nothing but voting rights litigation. And I am now transitioning myself into a teaching career.

I am here because I want to just simply state that voting discrimination still persists and it is very pervasive. As a result of my experiences during the past 30-plus years, in Texas from 1976 to 1986, when I was involved with the Mexican American Legal De-

fense and Educational Fund, I presented testimony before Congress back in 1981 when it was reauthorizing the 1982 Voting Rights Act Amendments. And in that testimony I presented a very extensive record of voting discrimination.

That experience continued when I started to open up my voting rights practice in California, and as a result of that voting rights practice, I have had substantial experience in terms of documenting racially polarized voting, Section 5 violations in Monterey County and in Kings County in California. And the impact of Section 5 has been very dramatic in California.

Just to give you one illustration, in Monterey County, California, the Board of Supervisors had submitted a plan for redistricting that had to be submitted for Section 5 preclearance. And as a result of Section 5, we were able to prevent the implementation of a plan that was going to divide and fragment a politically cohesive minority community. And if we did not have Section 5, then we would have had to have litigated under Section 2 of the Voting Rights Act. And as a result of a letter of objection that was issued by the Attorney General at that time, we were able to prevent the implementation of a plan that had a clear discriminatory effect.

It is not just the application of just some draconian law. This had a dramatic impact in Monterey County. It resulted in the election of the first Latino supervisor in over 100 years. That is what Section 5 did in Monterey County.

My experiences out there in California also demonstrated that there is a significant issue of noncompliance with Section 5. As a result of the noncompliance, jurisdictions simply refused to submit their voting changes for approval. And, in fact, I was involved in two Supreme Court cases, involving, again, Monterey County, where you had a series of judicial district consolidations that had occurred from 1968 to 1983 that had not even been submitted. It took two U.S. Supreme Court cases and 9 years of litigation in order for Monterey County and the State of California to comply.

Most recently, in additional litigation in Monterey County, the county, in fact, had not submitted for preclearance a series of consolidations of their voting precincts, and it took, again, litigation. Section 5 is very much needed. And, in fact, just on Cinco de Mayo of this year, we had a letter of objection that was issued by the Attorney General against the North Harris, Monterey County Community College District because there was a reduction in voting places. It went from 84 polling places to 12 polling places, and clearly this had a dramatic impact on voter participation in that community college district. And the Attorney General issued a letter of objection.

It is just not merely one of these de minimis voting changes. In that particular submission to the Department of Justice, it was consolidated down to 12 voting precincts from 84, and each of the newly consolidated voting precincts in the non-minority area, where you had the least number of Latinos, it was 6,500 voters. In the more heavily concentrated Latino voters in that district, you had 67,000 voters. That is a dramatic impact. That is why Section 5 is needed. And that is why it is needed for an additional 25 years.

We have not gotten to the point yet, from 1982 to the present, where we can definitely say that we have addressed and resolved all the issues of voting discrimination and racially polarized voting. That continues to this day. And the primary purpose of the Voting Rights Act is to address problems that started with the founding of this country related to issues of voting. And the purpose of the Voting Rights Act as stated in *State of South Carolina v. Katzenbach* was to banish the blight of voting discrimination once and for all. And that is what we ask you to do.

[The prepared statement of Mr. Avila appears as a submission for the record.]

Senator CORNYN. Thank you very much, Professor.  
Ms. Thernstrom?

**STATEMENT OF ABIGAIL THERNSTROM, SENIOR FELLOW, THE  
MANHATTAN INSTITUTE, AND VICE CHAIR, U.S. COMMISSION  
ON CIVIL RIGHTS, LEXINGTON, MASSACHUSETTS**

Ms. THERNSTROM. Thank you for the opportunity to testify this afternoon.

The Supreme Court's decision in *LULAC v. Perry* does indeed have important implications for the debate over the reauthorization of the temporary emergency provisions of the Voting Rights Act. The House bill explicitly protects the ability of minority citizens to elect their preferred candidates of choice. But who qualifies as a candidate of choice? And what does an opportunity district look like?

The *LULAC* appellants argued that Martin Frost was the candidate of choice for blacks, that his district was protected by the Voting Rights Act even though Frost is white, and his district, which was drawn for partisan reasons, was only 25 percent black. The Court rejected that argument, but would it have done so if, let's say, the black percentage was 10 points higher? There are no legal standards either in place or proposed to answer that question.

The problem of who counts as a minority representative runs through the infamous leaked Justice Department memo on preclearing the Texas plan. DOJ staff attorneys claimed that the white incumbent in District 29 was, in their words, "basically Hispanic;" therefore, that Democratic district was protected by the Voting Rights Act. District 25 as well was represented by a white Democrat deemed "responsive to minority interests." It, too, was a Voting Rights Act entitlement, Justice Department staff argued.

While *LULAC* appellants claimed that Mr. Frost counted as a black representative, the Hispanic incumbent Henry Bonilla, they suggested, was not truly Hispanic because he was a Republican. And the Court did agree that taking too many Hispanic Democrats out of the district had deprived minority voters of electoral opportunity, even though the district remained majority Hispanic. So a Hispanic incumbent in a majority Hispanic district is not really Hispanic, but a white Congressman is described as black by DOJ staff and appellants. Both political parties can play such definitional games to further their partisan interests, and the Sensenbrenner bill, with its dangerously imprecise language, encourages such gamesmanship.

Definitional games have long been integral to the Department of Justice enforcement process. Administration critics are charging bias in the enforcement of the preclearance provision—an amusing allegation given the fact that the Justice Department in the 1980’s and 1990’s used the Voting Rights Act to pursue an ideologically driven agenda in blatant conflict with Supreme Court interpretation of the statutory language.

Most pertinent to *LULAC*, in the 1990’s the Justice Department saw purposeful discrimination lurking in every districting plan that contained less than the maximum number of possible majority-minority districts. And, remember, in enforcing Section 5, mere suspicion is sufficient to deny preclearance.

This history is relevant to the House bill which would allow objections to electoral changes on suspicion of any discriminatory purpose. Overturning *Bossier Parish II*, the bill would reinstate the power of the Justice Department to play with charges of illegal purpose, undefined, in order to reject districting plans it does not like, positively inviting partisan mischief.

Moreover, such an open-ended definition of discriminatory purposes asks the Justice Department to settle broad questions of electoral equality that are inappropriate for a process of swift administrative review. Resolving such questions requires the specific detailed idiosyncratic knowledge of race and politics in a local jurisdiction that only a Federal district court can obtain in the course of a trial. Where discriminatory intent is suggested, plaintiffs can always bring a 14th Amendment suit. The statutory amendment is unnecessary.

Section 5’s proposed language cannot be administered like a highway bill. Enforcement depends on unacknowledged normative assumptions. The murky language of Section 2 protection against ill-defined discriminatory results already has courts immersed in what Justice Thomas, echoing Justice Frankfurter, has called “a hopeless project of weighing questions of political theory.” But at least the project is one in which judges, disciplined by the structure of trials and appeals are engaged. Not so with the administrative of Section 5. The opaque language of the proposed House bill will further empower Justice Department attorneys who make preclearance decisions behind closed doors, who have no need to explain their reasoning, and are almost inevitably driven by normative and partisan convictions, which may vary from one administration to the next.

America’s racial landscape has fundamentally changed in the last 40 years. The core provisions of the Voting Rights Act are permanent. Basic 15th Amendment rights are secure. The issue today is the reauthorization of the emergency provisions that were constitutionally radical and, thus, initially expected to last only 5 years. What precisely is needed 41 years later? Congress has had the time, could take the time to think about how to answer that question with great care. I realize it is not likely to do so. I still wish it would.

Thank you.

[The prepared statement of Ms. Thernstrom appears as a submission for the record.]

Senator CORNYN. Thank you very much. We will proceed to a round of questions.

Senator Feingold is here, the Ranking Member of the Subcommittee. I would be glad to defer to you for any opening statement you would like to make.

**STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR  
FROM THE STATE OF WISCONSIN**

Senator FEINGOLD. Thank you, Mr. Chairman. We have held several hearings on the Voting Rights Act, both in the full Committee and in this Subcommittee, and we have been fortunate to have several outstanding witnesses participate in this process. I think we have established a solid legislative record for this legislation.

That said, I am glad that this is the last hearing. It is time to move to the next stage of the legislative process and to bring this bill before the Committee so that it can continue on to the full Senate, where it is my hope that the Majority Leader will bring it up for a vote before the August recess.

The VRA expires in 2007. This law is too important to take up under a ticking clock of expiration. We need to complete the authorization process in this Congress this year. We have a bipartisan and bicameral consensus, and we should move forward.

I have to say that I am puzzled by comments by some Members of Congress and critics who continue to argue that certain provisions of the Voting Rights Act are no longer necessary because we are living in a different era and that "there is no longer racial bias" in certain areas with a history of discrimination in voting rights.

The Supreme Court in *LULAC v. Perry*, of course, found otherwise. The Court ruled that Texas did, in fact, violate Section 2 of the Voting Rights Act when it diluted the voting power of Latino voters in District 23. I do not want to take a whole lot of time talking about the decision because I want to get into the question part. But I just want to note that although the Court's decision gives us some indication of how the current Court might rule on future Voting Rights Act cases, it provides no justification for slowing down or holding up consideration of the Chairman's reauthorization bill.

Mr. Chairman, that is the only opening statement I want to make. Thank you.

Senator CORNYN. Thank you, Senator Feingold.

Mr. Clegg, let me start with you. During the course of the discussions and hearings on reauthorization of Section 5 and Section 203, the main expressed concern is that we not pass legislation which will be vulnerable to a constitutional challenge—in other words, be engaged in a futile act insofar as the Supreme Court in applying the constitutional standard to that legislation by which they would judge it.

Would you describe for us what you believe, if we were to reauthorize Section 5 in its current form as proposed, what the constitutional challenge would be and your assessment as to whether the Court would indeed uphold it or strike it down?

Mr. CLEGG. Sure, I would be delighted to. I appreciate the question because actually one of the things that I wanted to clarify, as I was listening to my colleagues' testimony here, is that I do not

think that the *Perry* decision tips the Court's hand on what the justices are likely to do if such a challenge is brought. In fact—

Senator CORNYN. Indeed, if I can interject there, *Perry* did not involve Section 5. It was a Section 2 case, right?

Mr. CLEGG. That is exactly right, and even more explicitly than that, Justice Scalia's opinion, which was joined by three other Justices, has a footnote that says, "No party here raises a constitutional challenge to Section 5 as applied in these cases, and I assume its application is consistent with the Constitution." So, he is not saying that it is Constitutional; he is just saying that, because it has not been challenged, he is not going to address that question.

As I explain in some detail in my written statement, I think that Section 5, if it is reauthorized, would be constitutionally vulnerable. I think it would be unconstitutional. I think the Court is likely to strike it down, and I think the Court should strike it down.

There are basically two ways in which Section 5 is constitutionally vulnerable. One is that it is extraordinarily intrusive in matters that are generally left to the States, and sometimes textually committed to the States. And in addition to that, it uses an effects test, which the Court has said goes beyond Congress's authority under the 14th Amendment and the 15th Amendment. The Court has said that you have to have disparate treatment in order for those amendments to be violated, and that if Congress goes beyond that and prohibits State actions that are not disparate treatment, it can do so only if it is congruent and proportional to stopping disparate treatment.

I do not think the record has been made for that here. I think that the problem is compounded by the fact that some States are covered and other States are not. And I do not think that the record that Congress has now supports that discrimination among the different States.

I think that what Congress would have to do in order to prevent a successful constitutional challenge is show that the covered jurisdictions have a much worse record than the non-covered jurisdictions when it comes to intentional racial discrimination in 2006; and that the use of a preclearance mechanism and an effects test is essential in order to prevent that intentional discrimination. And I do not think the record has been made to do that, and I do not think you can make that record.

Senator CORNYN. We will have a chance to ask more than one round, but let me, before I turn it over to Senator Feingold in 36 seconds here, ask Mr. Carvin: Do you agree with Mr. Clegg's analysis or do you have a different view?

Mr. CARVIN. No, and as always it was succinctly stated, and with the 26 seconds left, I will just add—

Senator CORNYN. Well, that does not apply to you. That applies to me.

[Laughter.]

Mr. CARVIN. All right. Look, Roger walked through the three factors that are very troublesome. It reverses all the normal principles of federalism. It singles out, apparently on an arbitrary basis, what the voting patterns were in 1968, some States to suffer these special burdens and others to be exempt, for a law that will extend out to 2032—so, literally, you know, 70-odd years past the time

that the formula used for triggering was existent. And, of course, the *City of Boerne* point, which is that you are exceeding the prohibitions in the 14th and 15th Amendments, all rendered constitutionally vulnerable.

The one additional point I would add is that I think that the provisions of the bill, Section 5 of the bill, which overturned *Georgia v. Ashcroft* as well as *Bossier Parish II*, make it even more constitutionally vulnerable because, after all, you are making the law more race conscious, for the reasons I have identified, more of a partisan preference, and it is very odd. And I do not think the Court will accept the notion that Georgia in 2006 or California in 2006 is subject to greater constraints on its redistricting and voting changes than was Mississippi in 1965. So it is very odd that 40 years into this process, in the face of all the tremendous gains that have been made in the political and electoral landscape, that Congress would actually be ratcheting up the burdens on the covered jurisdictions at this late date.

Senator CORNYN. Ms. Thernstrom?

Ms. THERNSTROM. Could I very quickly comment on that? There is an additional point here. The trigger for coverage rests on the inference of intentional discrimination from the combination of low voter turnout and the presence of a literacy test. That statistical trigger made sense in 1965. It does not make sense today. And, in fact, even in 1970, when the emergency provisions were, of course, reauthorized for the first time, there was no reason to assume intentional discrimination on the basis of low voter turnout and the literacy test in, for instance, Manhattan but not in Queens—two boroughs in New York.

Over the years, the coverage has become increasingly arbitrary.

Ms. IFILL. Might I be heard on this, Senator?

Senator CORNYN. Sure. I will come back to you, if you do not mind, because I hate to intrude on Senator Feingold's time. So let's turn over to him. We will come back for some more questions. Thank you.

Ms. IFILL. Thank you.

Senator FEINGOLD. Mr. Chairman, I have here 17 statements and letters in support of S. 2703 from a wide variety of organizations, companies, and prominent individuals. I ask that they be included in the record.

Senator CORNYN. Without objection.

Senator FEINGOLD. Mr. Chairman, I would ask Professor Ifill to say what she would like to say.

Ms. IFILL. Thank you. I wanted to comment on just a couple of the points that were made, to first of all comment on the concern that Section 5 reauthorization would be unconstitutional because it violates principles of federalism.

The Supreme Court has reviewed on several occasions this claim and this contention, and, in fact, in *LULAC v. Perry*, Justice Scalia, joined by the three most conservative members of the Court, repeats what the Supreme Court held years ago in *South Carolina v. Katzenbach*. And what he said in *LULAC v. Perry* in determining that compliance with Section 5 would constitute a compelling State interest that would justify race-conscious districting, "We long ago upheld the constitutionality of Section 5 as a proper exercise of

Congress's authority under Section 2 of the 15th Amendment to enforce that Amendment's prohibition on the denial or abridgment of the right to vote."

I read that sentence as making it quite clear that there is no new threat to the constitutionality of Section 5 based on the question of federalism and intrusion into State control.

Second, with regard to the use of the effects test and the requirement that when that test is used, it be done so in a way that is congruent and proportional—and as that relates to the question of the States that are covered and the trigger mechanism—it seems to me here that one has to read the Act as part of a whole. The Act requires that there are certain States that, based on the trigger, are covered by Section 5. But the Act also permits States and jurisdictions to bail out if they are able to prove that they no longer engage in discrimination. And it also provides opportunities for jurisdictions to be bailed in through the pocket trigger.

And if one reads the entire statute together, then what it looks like is a rational and workable way in which Congress can target the jurisdictions that have the longest and most egregious history of discrimination, a history that in many jurisdictions, as evidenced in *LULAC v. Perry*, is unbroken as it relates to racially polarized voting and discrimination in redistricting; and then provide mechanisms so that States or jurisdictions can be relieved of their obligations under Section 5, or States or jurisdictions where they should be covered by Section 5 can be required to engage in preclearance.

So if one reads it all together, it seems to me it provides a rational and workable scheme that Congress is well within its authority under Section 5 to create—to enforce its obligations under the 15th Amendment.

Senator FEINGOLD. Ms. Perales, Professor Ifill anticipated the question I was going to ask you. With all the hand-wringing we have heard about the possible constitutional problems of Section 5, including from Mr. Clegg just now, do you believe that it is an open question at this point in the minds of the Justices on the Supreme Court?

Ms. PERALES. No, it is absolutely not an open question. I would also like to address with respect to 203, which somehow floated into our discussion of this case, even though this case has nothing to do with Section 203, that there are still, of course, many hundreds of thousands of voters, even just in my State of Texas, who suffer from intentional discrimination as a result and who as a result do not have—did not have the opportunity to learn English—these are native-born citizens—and who need the bilingual provisions of the Voting Rights Act and for whom, of course, this is perfectly constitutional, and no serious scholar challenges the constitutionality of Section 203.

Senator FEINGOLD. Ms. Perales and Professor Ifill, Mr. Clegg stated in his written testimony that, "The Voting Rights Act has become an instrument for partisan gerrymandering." I happen to disagree with Mr. Clegg and was hoping you would please share your views on this characterization. Ms. Perales?

Ms. PERALES. I would like to address that. Thank you.

I know that there is concern about this, and I think some of it arises from confusion by observers about the *LULAC v. Perry* case.

There is confusion about which claims were raised by which appellants, and also which claims were upheld and which ones were not. So I would like to make clear, first of all, that there is nothing in *LULAC v. Perry*, for example, that creates confusion around the question of who is the preferred candidate of minority voters. This is, of course, very well established in the area of voting rights law. And in this particular case, the Supreme Court ruled that the incumbent in District 23 was not preferred by Latino voters because he only received 8 percent of the support from Latino voters in his district—not a close call, not a confusing question in the least.

Similarly, the Court had no problem concluding District 23 was an opportunity district. This is also very well established and not confusing in this case or in any other area.

I wanted to add that for Latinos, particularly in the Southwest, opportunity to elect often involves comprising the majority of the district, and so for that reason, the language in the current bill, now transitioning to the bill that you have before you, regarding opportunity to elect the preferred candidate is not language that expands the protection of the Voting Rights Act to influence district. It talks about opportunity to elect, not ability to chime in. And these are important words. They mean something. Opportunity to elect, as I mentioned before, for us often means comprising the majority or—in fact, it almost always means comprising the majority for us, particularly in Texas. It may also mean coalition, but it does not mean—and I am hereby referring to the three categories that were set out in *Georgia v. Ashcroft*—coalition, influence, and majority district.

It does not do what Mr. Carvin—disagreeing respectfully with my colleague, it does not do what he says it does. It is a limited fix to a decision that is, in our opinion, not correct.

Finally, with respect to *Bossier II* and the language in the bill, *Bossier II*, if limited by the language in the bill, would not unleash a frenzy of maximization in redistricting. It would only mean that actions taken with the purpose of racial discrimination would violate Section 5. Again, very limited, and thus, overall, I do not think that any of these measures nor the decision in *LULAC v. Perry* really does inject partisanship into the Voting Rights Act. And I say that because we did not litigate Democratic claims, we did not litigate Republican claims, and our claims were the only ones that were upheld.

Senator FEINGOLD. Professor Ifill?

Ms. IFILL. Senator, I have in the last year heard the Voting Rights Act blamed for partisan gerrymandering, residential segregation, people identifying themselves by race, and a whole list of other of society's ills, all of which existed prior to the enactment of the Voting Rights Act in 1965 in the United States and which continued to exist in the United States but are most certainly not caused by the Voting Rights Act.

Earlier, Mr. Carvin said that the Voting Rights Act has now injected race in such a way into a statute that was designed to assure racial neutrality, and respectfully, I disagree. Section 5 was not actually designed to assure racial neutrality. By requiring that jurisdictions submit any voting changes to the Department of Justice or to the D.C. District Court, Section 5 of the Act required ju-

risdictions to actually make an assessment, to look at race, to determine whether or not a plan that they were proposing would result in the diminution of voting strength, of minority voting strength.

It is important to remember that from the outset the Voting Rights Act was explicitly targeted at race. It recognized that the exclusion of racial minorities from full participation in the political process is one of the worst ills in a democratic society. And under Congress's enforcement power under the 15th Amendment, Congress was authorized to take drastic action to address that problem. So the Voting Rights Act is not a race-neutral act. It is a race-conscious act.

And then, finally, I would just note with regard to the issue of the districts that were subject to dispute in *LULAC v. Perry*, I find it quite curious and interesting that several of the districts that were in dispute—District 23 that was dismantled and later District 24—had, it seems to me, the kinds of characteristics that I have heard Ms. Thernstrom over the years and others say we would want in our political system. District 24 was an integrated district with a 50-percent Anglo population, a 25-percent African-American population, and I believe a 20-percent Latino population. The candidate of choice of black voters in that district was a white person—Martin Frost. I thought those were the kinds of outcomes that we wanted to see happen, that we wanted to move away from assuming that black voters had to support only black candidates and white voters only white candidates.

District 23, likewise, was a district in which Latino voters did not support the Latino incumbent. Once again, the voters were exercising their political choice not based on race, but based on the interests of their community. And yet those districts are not lauded and held up as the kind of goal that we sought with the Voting Rights Act. But instead those districts are called the result of partisan gerrymandering.

Senator FEINGOLD. Professor Avila, I am out of my time, but if you want to just quickly, if the Chairman would permit, make a comment.

Mr. AVILA. I just wanted very briefly to add that in terms of whether Section 5 is involved with partisanship, well over—there are about 1,100 letters of objection that have been issued by the U.S. Department of Justice under Section 5 and well over probably around 90 percent of all of those have involved nonpartisan city council races, have involved nonpartisan school district races, have involved nonpartisan special election district, nonpartisan county commissioners.

So Section 5 is not about partisanship. It is about providing political access to minorities.

Senator FEINGOLD. Mr. Chairman, thank you for the additional time.

Senator CORNYN. Sure.

I would like to get the reaction from each of you to this question. This bill is predicated on election returns in 1964, 1968, and 1972. My question is: Wouldn't it make better sense to determine what the coverage of Section 5 is to base them on elections most recent in time, 2000, 2004 Presidential elections? And I would like for you

as part of the question to note that African-American voter registration now in the areas covered by Section 5 exceeds that of the U.S. generally. And, finally, as part of the question, since 1995, the highest percentage of objections sustained to submissions by covered districts, the highest was less than one-half of 1 percent. That is from 1995 to the most current we have. For example, 2005, it was 3,811 submissions and only one objection sustained.

I would like to get your reaction, each of you, to both the triggers of those elections predicated on 1964, 1968, 1972, why it does not make more sense to trigger that with 2000 and 2004, and particularly get your explanation as to why you think that coverage under those jurisdictions that are covered by Section 5 where African-American voter registration exceeds that of the Nation generally and what this sort of ratio of objections to submissions, why that makes sense. Mr. Clegg?

Mr. CLEGG. I think you are exactly right. I think that it makes perfect sense in 2006 to re-evaluate where we are as a Nation in terms of discrimination in voting. I do not believe that there is no longer any discrimination in voting. I do not know anybody who believes that. Of course, there are still instances of racial discrimination in voting.

But the question is whether that kind of disparate treatment exists to a degree and in the kind of pattern that supports the approach that was written into this bill 41 years ago. And, therefore, I think Congress needs to look throughout the United States to see whether there is still disparate treatment and to what degree. One thing Congress can look at to determine that is voter registration patterns, but there may be other things that it needs to look at, too.

You also need to compare whatever evidence of discrimination you find in the covered jurisdictions—to the extent of discrimination that you find in non-covered jurisdictions if you are going to continue to single out some jurisdictions and not others.

And, finally, you need to ask whether the appropriate mechanism for fighting that disparate treatment is the preclearance mechanism because of the federalism problems that it raises, and whether it includes an effects test, because of the constitutional problems that an effects test raises and because of the fact that the use of the effects test has actually encouraged racial discrimination and racial gerrymandering.

Senator CORNYN. Professor Ifill?

Ms. IFILL. With regard to the trigger, Senator, I think what underlies that question is whether or not one regards the history of egregious discrimination in the jurisdictions that are covered by Section 5 to be relevant, to have continuing relevance to the question of monitoring under Section 5. And I think that most scholars and most litigators in the voting rights area would agree that that history is relevant.

The triggers that were found were used to reflect that history of discrimination. Registration can be a symptom of the problem, but registration itself is not necessarily the problem. And so Congress used these triggers as a way of identifying those jurisdictions that reflected through these symptoms that history of discrimination. But it certainly did not suggest that that is the only way and that

is the benchmark by which we determine that a jurisdiction has a problem with discrimination in voting. And that is why once again I suggest that it is important to look at the Act as a whole, to recognize that Congress has anticipated both a way in and a way out for jurisdictions that discriminate that are not covered by the preclearance formula and for jurisdictions that are covered by the preclearance formula but that can demonstrate that they do not engage in discrimination. And read as a whole, it seems to me there is nothing wrong with continuing to use the trigger formula that was based on that history of discrimination.

With regard to the second question about DOJ objections, I think that the number of objections, really, if you look at that in the abstract, fails to really account for the deterrent effect of Section 5 preclearance, and that is that many jurisdictions respond to the Department of Justice in a variety of ways. Sometimes jurisdictions withdraw the proposed change. In other instances, the Department of Justice asks for more information, and jurisdictions provide that additional information which can result in a change in the plan.

And so the whole process, the whole reality that one has to submit the plan for preclearance means that jurisdictions take care and, as I suggest, are required to look at their plans to determine whether or not they are retrogressive, and it is also true that the administration by the Justice Department in reviewing those plans very often results in a change in plans that are submitted or the withdrawal of plans. And without taking into account that information, I think you cannot really read very much from the fact that the number of objections themselves are small.

Senator CORNYN. Ms. Perales?

Ms. PERALES. Thank you. Just briefly, I will do the Southwest spin on this, which is that many of the Southwestern States were brought into coverage under Section 5 through the use of the trigger in 1972. That, of course, is perfectly appropriate, and, in fact, these jurisdictions still merit the supervision of Section 5 as evidenced by the continued discrimination found both by the Justice Department as well as the Court, for example, in Texas, where we have had both a DOJ objection statewide in this decade as well as the Supreme Court finding of discrimination in violation of the Voting Rights Act in this decade. This tells us that the initial trigger is still very useful and very viable.

Similarly, with respect to Arizona, Arizona has also had statewide objections this decade and in, I believe, the previous two decades with respect to statewide plans.

Finally, with respect to the number of submissions to the Justice Department and how many objections are made, there are still very important objections being made, and even this number of them is making a tremendous difference for minority voters. And as I mentioned, the objections in Texas, the objections in Arizona, which are just the statewide ones that I am mentioning, but also at the local level there are objections that are helping every day, every year helping minority voters participate on an equal footing with others.

As Professor Avila mentioned, we cannot discount the widespread noncompliance. There are many, many, many jurisdictions that are simply not submitting their changes and violate Section 5 when they implement them.

And, finally, I wanted to give an example of the deterrence effect of Section 5 in the city of Seguin, which is in between Austin, Houston, and San Antonio. The city of Seguin, when they found out that they had a majority of districts in their city council plan that were going to be Latino in the upcoming redistricting, they dismantled one of those districts so as not to have a Latino majority in the city council. This, of course, is nonpartisan elections.

When they submitted this plan to the Justice Department, the Justice Department expressed concerns, asked for more information. As a result, that plan was withdrawn and a better plan, one that actually reflected the Latino majority of the city and the five council districts was ultimately submitted. And so this is an example that I can think of from my experience where Section 5 worked exactly the way it should, even though there was not an objection interposed by the Justice Department.

Senator CORNYN. Before Mr. Carvin answers, let me just get a quick answer from Professor Ifill and Ms. Perales. If you think Section 5 serves a useful deterrent effect when it comes to discrimination against minority voting, do you support its extension beyond the covered jurisdictions?

Ms. IFILL. Well, I simply just do not think it would be possible for the Department of Justice to administer what you are referring to as a kind of nationwide coverage of Section 5. I think it would essentially be the death knell for Section 5. I think it would be impossible to—

Senator CORNYN. Do you think it is desirable if it were possible?

Ms. IFILL. I think it makes more sense, frankly, for Congress to utilize a program that is a workable program and one that is based on a history of discrimination in particular jurisdictions, and as Congress has done, to provide the opportunity to expand that coverage where appropriate and to remove that coverage where appropriate. It seems to me that makes the most sense rather than being overbroad. And, of course, being overbroad would naturally run one into a constitutional problem.

Senator CORNYN. Ms. Perales, do you agree, or do you have a different—

Ms. PERALES. Yes, I do agree. It is not appropriate to expand Section 5 coverage nationwide.

Senator CORNYN. Mr. Carvin?

Mr. CARVIN. Well, that touches on, of course, the fundamental dilemma here, which is nobody is denying that discrimination exists, but what the record makes fundamentally clear is that there is no rational way of suggesting that the covered jurisdictions have more ongoing official discrimination than the non-covered jurisdictions, whatever benchmark or analysis you use—voter turnout, election intimidation.

The House report is actually very interesting because I think if you look at it, you will see that the examples they come up with and the analysis they come up with of what people would consider real voting discrimination exists disproportionately, far disproportionately in the non-covered jurisdictions than it does in the covered jurisdictions.

So you have to ask yourself whether or not, to go back to the quote that has been bandied about here from Justice Scalia, wheth-

er or not there is some rationale of official discrimination which justifies this extraordinary disparate treatment. I cannot understand why Monterey County is viewed somehow in California worse than Arkansas or Oklahoma, and I do not think any rational person could suggest that the problems there are so different in kind that this extraordinarily differential treatment from the Federal Government is authorized.

There has been some discussion here of bail-out and bail-in provisions, but we all know that the bail-in provisions are virtually nonexistent, and the bail-out provisions cannot be used because if you have one statewide objection, it basically condemns all the subordinate political jurisdictions to being kept in. If it really is fair to look at circumstances as they exist in 2006 or 2020 or 2030, it would make a lot more sense not to have these relatively meaningless bail-out and bail-in provisions, but have a formula that is tied to some objective benchmark of minority opportunity and voter participation, all of which were proposed in the House and I think should be taken up by the Senate when it comes time to consider the bill.

Thank you.

Senator CORNYN. Professor Avila?

Mr. AVILA. Yes, I would like to just say I agree with Professor Ifill's comments with respect to the triggering concerns. I would just like to add with respect to the issue of the number of letters of objection to the number of submissions, as I indicated earlier, there is a substantial issue of noncompliance and it is just not me saying this. In 1968, the U.S. Civil Rights Commission indicated that there was a substantial issue of noncompliance. In 1970, when the Act was reauthorized, Congress again noted in testimony before Congress that there was a substantial issue of noncompliance.

In 1975, the same thing occurred. In 1978, you had a GAO report that documented the fact that there was a substantial issue of noncompliance. You had the Supreme Court in *Perkins v. Matthew* document that there was a substantial issue of noncompliance.

In 1982, you had Drew Days, who was the Assistant Attorney General for the Civil Rights Division, testifying before Congress that there was a substantial issue of noncompliance.

In 1999 and 1996, the Supreme Court in *Lopez v. Monterey County*, as I stated earlier, was dealing with judicial district consolidations. They had not been submitted from 1968, so the issue of noncompliance is very significant.

We have been doing some initial studies in various counties in California, and there are hundreds of annexations that have not been submitted for Section 5 preclearance. So that might in some part explain why we have this small number of letters of objection.

Senator CORNYN. Ms. Thernstrom?

Ms. THERNSTROM. Well, updating the trigger using simply 2004 turnout would just continue the arbitrary nature of the coverage, and it is arbitrary.

Look, in 1965, those who designed the Voting Rights Act knew precisely which jurisdictions needed to be covered, and they designed a statistical trigger to cover those jurisdictions; that is, they knew where you had a literacy test and low voter participation, the combination of black and white voter participation, under 50 per-

cent—they picked the 50-percent statistic very carefully in order to get the right jurisdictions. Where you had that combination of a literacy test and low voter participation, you knew that that low voter participation was an indication of the intentional fraudulent use of literacy tests to disenfranchise blacks.

There is no, there never was in interpreting this Act, an argument that low voter participation or participation under the 50-percent mark standing alone was an indication of intentional discrimination. And, indeed, the only reason, for instance, New York was covered in the 1970 reauthorization is because in that low turnout year, three boroughs in New York, but not the other two boroughs, fell just below the 50-percent turnout. So you had this arbitrary coverage.

The complaints today about electoral discrimination, the complaints in 2000 and 2004 involved—in 2000, Florida counties that were not covered by the Voting Rights Act; in 2004, States like Ohio, not covered by the Voting Rights Act. I was part of an instrumental team that commissioned studies for the American Enterprise Institute. They are on the AEI website, showing levels of voter participation in the South, showing how high they are, higher than in the North in many States.

You know, as Richard Hasen, a law professor who is for the reauthorization of Section 5, has said, “Bull Connor is dead.” And the racial landscape in America has changed. This bill does not reflect that. Updating the trigger in an arbitrary manner to 2004 turnout would not reflect that change either. The bill needs to come into conformity with racial reality more than four decades down the road. And four decades in civil rights time, you are talking about a revolution in racial attitudes in this country and the status of blacks, and Hispanics, who were, of course, not covered in 1965. But obviously the revolution has been particularly striking with respect to African Americans.

Now, in terms of bail-out possibilities, for the reasons that Mike Carvin just said, bail-out is a joke. And that is the reason why few jurisdictions have indeed bailed out. And as for the deterrent effect, look, yes, lots of States were forced, in order to get the Justice Department off their back in the 1990’s, to draw maps that had a maximum number of majority-minority districts that came as close to proportional racial and ethnic representation as possible. I did not think proportional racial and ethnic representation was a value that was built into the Voting Rights Act, but it was what the Justice Department was insisting on. So the deterrent effect, in effect, forced jurisdictions to do what the Voting Rights Act never should have forced them to do, which violates basic American values. If you want to see that story, it is spelled out very nicely by the Supreme Court in *Miller v. Johnson*. You have to look at the district court opinion as well as the Supreme Court opinion.

But it is a disgraceful story, and so I do not buy this whole argument about a deterrent effect, given the standards that the Justice Department has been using, which have nothing to do or not much to do with the actual statute.

Senator CORNYN. This has, I know, been a long afternoon for you. We are going to have to wrap it up now because we actually have a meeting of several members of the Judiciary Committee on this

subject at 5:15. I am going to have to leave. But we will leave the record open so that those members who were unable to come this afternoon—it has been a particularly hectic day and week. So that is the reason why—not for lack of interest—that people have not been here. We will leave the record open for 1 week for them to submit any additional questions in writing or submit any other materials for the record.

Without objection, I am going to put in the record a number of articles, editorials, and statements by scholars and journalists that raise questions about the reauthorization as drafted. In addition, there is a report of the U.S. Commission on Civil Rights which will also be made part of the record.

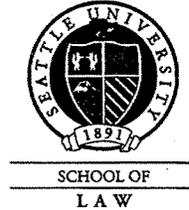
In conclusion, let me just thank each of you for being here and sharing with us your expertise and point of view. This is enormously important for all the reasons that we have discussed, and we are much better off for having your contribution.

Thank you very much.

[Whereupon, at 5:12 p.m., the Subcommittee was adjourned.]

[Questions and answers, submissions for the record and an appendix follow.]

QUESTIONS AND ANSWERS



August 18, 2006

United States Senator  
Arlen Specter, Chairman  
Committee on the Judiciary  
Washington, DC 20510-6275

Dear Senator Specter,

As requested in your July 24, 2006, correspondence I am responding to questions posed by members of the Committee on the Judiciary. Please note that the designation of Seattle University School of Law is for purposes of identification only and does not represent any institutional endorsement, approval, or agreement with any statements, views and arguments expressed in this letter.

Thanks in advance for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Joaquin G. Avila".

Joaquin G. Avila  
Assistant Professor of Law

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**Supplemental Written Testimony of Joaquin G. Avila**

**Assistant Professor of Law  
Seattle University, School of Law\***

**Before the Senate Committee on the Judiciary**

**Hearing on S. 2703,  
“Renewing the Temporary Provisions of the Voting Rights Act:  
Legislative Options after *LULAC v. Perry*”**

**July 13, 2006**

\* The designation of Seattle University School of Law is for purposes of identification only and does not represent any institutional endorsement, approval, or agreement with any statements, views and arguments expressed in this supplemental written testimony.

**Responses to Written Questions from Senator Cornyn:**

**1. What empirical data can you cite that indicates the ability of minorities in the covered jurisdictions to participate fully in the electoral process is substantially different from minorities outside the covered jurisdictions? Please be specific with respect to covered jurisdictions vs. non-covered jurisdictions.**

I did not receive Senator Cornyn's questions and the accompanying letter dated July 23, 2006 until July 25, 2006 – five days after the United States Senate passed the Voting Rights Act Reauthorization Act (VRARA) by a vote of 98 to 0. Senator Cornyn's Questions 1-8 are not germane to the topic of the hearing. The topic, as I understand it, focused on what impact, if any, the United States Supreme Court's decision in *LULAC v. Perry* striking down the Texas congressional redistricting plan for discriminating against Latino voters has on reauthorization. As I explain in my response to Question 9, there is little connection between the *LULAC* decision, which was decided under the permanent remedies of Section 2 of the Voting Rights Act, and the recently renewed remedies of Section 5. Furthermore, to the limited extent that the *LULAC* decision is relevant to Section 5, it strongly supports a twenty-five year reauthorization because of its finding of extensive voting discrimination against Latinos in Texas.

Furthermore, the tenor of Questions 1-8 implies that those questions were asked to inform the Senate vote on the VRARA. It is my understanding that these questions were asked and answered by several other witnesses well before the Senate's 98-0 vote in favor of the VRARA. I have reviewed the responses of Professor David Canon, Professor Drew S. Days III, Professor Pamela S. Karlan, and Theodore M. Shaw, among others, and agree with the substance of their responses to Senator Cornyn's questions.

It is also my understanding that Senator Cornyn did not offer any amendments during the Judiciary Committee's markup of S. 2703, the VRARA, and that he was one of the 98 Senators who voted unanimously to renew and restore the expiring provisions of the Voting Rights Act. Apparently, Senator Cornyn was satisfied both with the continuing need for the Voting Rights Act and the congruence and proportionality of the Act to remedy voting discrimination under *City of Boerne v. Flores*. I do not believe I can offer any additional substantive information that could further enhance Senator Cornyn's apparent support for the VRARA at the time of Senate enactment on July 20, 2006. Therefore, in lieu of providing written responses to Questions 1-8, I will rely upon and incorporate by reference the written responses provided prior to the Senate vote by the witnesses that I identified above.

2. Currently, the Voting Rights Act identifies those jurisdictions subject to additional oversight by looking at voter turnout in the presidential elections of 1964, 1968, and 1972. Re-authorization of the Act in its current form would preserve these dates as the “triggers.”

- a. Would you support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972? Why or why not?
- b. Would you support adding the Presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to section 2 litigation say, in the last 5 years, to this formula in order to pick up jurisdictions that have begun discriminating since the 1970s? Why or why not?

Please see my response to Question 1.

In *City of Boerne v. Flores*, the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the Fourteenth and Fifteenth Amendments. *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997). In striking down the Religious Freedom Restoration Act, the Court observed, “RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.”

3. Given this statement, would you support removing – at a minimum – the year 1964 from the coverage formula? Why or why not?

Please see my response to Question 1.

4. While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions – yet, for the period 1996 through 2005, the Department of Justice reviewed 54,090 Section 5 submissions and objected to 72, or 0.153 percent. What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only 1 objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?

Please see my response to Question 1.

5. In light of the lack of clear differentiation between covered jurisdictions and non-covered jurisdictions, would you support re-authorization for a term of 5 years instead of 25? Why or why not? 10 years? Why or why not?

Please see my response to Question 1.

6. Putting aside the constitutional questions with regard to overturning *Georgia v. Ashcroft* – I want to better understand some of the practical implications.

Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are “influence” districts, with relatively low numbers of minority voters, should be protected under the plan? Why or why not?

Please see my response to Question 1.

7. What do the changes to the Voting Rights Act proffered in the current re-written version mean? Specifically, Section 5 of the currently proposed re-write of the Act says the following:

(b) Any voting qualification, or prerequisite to voting, or standard, practice, or procedure, with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) the term ‘purpose’ in subsections (a) and (b) of this section shall include any discriminatory purpose.

Please tell the committee, in a few sentences, what you believe these phrases to mean.

Please see my response to Question 1.

8. Putting aside the constitutional questions with regard to overturning *Georgia v. Ashcroft and/or Bossier Parrish II* – I want to better understand some of the practical implications.

Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are “influence” districts, with relatively low numbers of minority voters, should be protected under a plan?

Please see my response to Question 1.

9. The Court in *LULAC v. Perry* indicates that for purposes of Section 2, the analysis should focus on a district in isolation. In other words, the Court said that Texas could not remedy a possible Section 2 violation of “dilution” by creating a new offsetting opportunity district because the analysis must be performed in “isolation.” This seems troubling. As Chief Justice Roberts pointed out:

*When the question is where a fixed number of majority-minority districts should be located, the analysis should never begin by asking whether a [] violation can be made out in any one district “in isolation.” In these circumstances, it is always possible to look at one area of minority population “in isolation” and see a “violation” of § 2...*

*For example, if a State drew three districts in a group, with 60% minority voting age population in the first two, and 40% in the third, the 40% can readily claim that their opportunities are being thwarted because they were not grouped with an additional 20% of minority voters from one of the other districts. But the remaining minority voters in the other districts would have precisely the same claim if minority voters were shifted from their districts to join the 40%.*

**If the analysis for Section 5 determination of “candidate of choice” are similarly decided on a district-by-district basis, how can it possibly work?**

For the reasons stated in my answer to Question 1, this question is not germane to the topic of the Hearing or to passage of the VRARA. As a preliminary matter, the Supreme Court’s decision only involved an interpretation of Section 2 of the Voting Rights Act,<sup>1</sup> not Section 5.<sup>2</sup> To the limited extent that the LULAC decision is relevant to Section 5, it strongly supports a twenty-five year reauthorization because of its finding of extensive voting discrimination against Latinos in Texas. Nevertheless, I will provide a brief response.

The question raised by Senator Cornyn highlights an issue that has already been addressed by the Supreme Court in *LULAC v. Perry*.<sup>3</sup> In assessing whether there is a violation of Section 2, the Court reaffirmed the long-standing analysis required in Section 2 cases, first established in *White v. Regester*,<sup>4</sup> affirmed by Congress in the 1982 reauthorization and amendments to the Voting Rights Act,<sup>5</sup> and reaffirmed by the Court in *Thornburg v. Gingles*.<sup>6</sup> This analysis requires an intense local appraisal that is focused on the impact of a given election district on a minority community’s voting strength. This local appraisal is necessary because the Supreme Court has repeatedly stated that a particular election system or redistricting plan cannot be presumed to have a discriminatory effect on minority voting strength. Rather, there must be evidence that the boundaries of a given election district either fragments or over-concentrates a particular politically cohesive minority community such that it is denied an equal opportunity to participate in the political process and elect a candidate of its choice. If the Section 2

<sup>1</sup> 42 U.S.C. § 1973.

<sup>2</sup> 42 U.S.C. § 1973c.

<sup>3</sup> \_\_\_ U.S. \_\_\_, 126 S.Ct. 2594 (2006).

<sup>4</sup> 412 U.S. 755 (1973).

<sup>5</sup> P.L. 97-205, 96 Stat. 131 (1982). See also S.Rep. 97-417, 97th Cong.2nd Sess. (1982) reprinted in 1982 U.S.C.C.A.N. 177.

<sup>6</sup> 478 U.S. 30 (1986).

challenge involves a discriminatory redistricting plan and the *Thornburg v. Gingles* conditions and the totality of circumstances evidentiary standards are met, then the redistricting plan must be redrawn to eliminate its discriminatory impact on the local minority community. This aforementioned analysis has been applied for nearly half a century and has not encountered any insurmountable barriers.

The hypothetical presented by Chief Justice Roberts is within the context of a Section 2 analysis. Even if a similar analysis is incorporated in the newly amended Section 5, Chief Justice Roberts' hypothetical does not create an insurmountable barrier that cannot be judicially adjudicated. First, to give full effect to Chief Justice Roberts' hypothetical, one has to assume that elections are characterized by racially polarized voting. Moreover, the levels of racially polarized voting would have to be identical in all three election districts. Practical experience suggests that completely identical levels of racially polarized voting are nearly impossible to duplicate. The most compelling reason is that elections are based upon candidates that are unique to a given election district. However, let's assume that the racially polarized voting analysis is based upon state propositions presented for voter approval that were the subject of an election in all three districts.

The next major assumption involves the totality of circumstances evidentiary standard. In order for this hypothetical to work all three election districts have to not only satisfy the same evidentiary factors but also would have to satisfy them to the same extent. For example, if there were racial appeals in one election district, then there must be the same type of racial appeals in all three election districts. Such a scenario would be nearly impossible to achieve. Quite simply, there is a tremendous variance regarding the presence of these evidentiary factors in each of these jurisdictions. In fact, this variability and the importance ascribed to each evidentiary factor were recognized by Congress as part of the political realities underpinning these types of challenges. Accordingly, Congress directed the federal court to avoid using these evidentiary factors as mechanical counting devices and to recognize that an evidentiary factor that is critical in denying minorities access to the political process in one jurisdiction may not play a similar critical role in another jurisdiction.<sup>7</sup> For all of these reasons, the hypothetical presented by Chief Justice Roberts is not anchored to the political realities existing in many communities.

However, even assuming that there are identical levels of racially polarized voting and that all three election districts have the same set of evidentiary factors specified in the totality of circumstances test, one also has to assume that the demographic characteristics of the three adjoining election districts are such that only two majority minority election

<sup>7</sup> See *supra* note 5, Senate Report 97-417, at 29, note 118 ("The Courts ordinarily have not used these factors, nor does the Committee intend them to be used, as a mechanical point counting device. The failure of plaintiff to establish any particular factor, is not rebuttal evidence of non-dilution. Rather, the provision requires the Court's overall judgment (*sic*), based on the totality of circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is, in the language of *Fortson v. Dorsey*, 379 U.S. 433 (1965)] and *Burns v. Richardson*, 384 U.S. 73 (1966)], minimized or canceled out." (internal quotation marks omitted)), 30, note 119 ("Section 2, as amended, adopts the functional view of political process, used in *White* [see *supra* note 4] rather than the formalistic view espoused by the plurality in *Mobile v. Bolden*, 446 U.S. 55 (1980).").

districts can be created and a third district must remain at 40% minority. Such an assumption as with the previous assumptions is not warranted. The hypothetical assumes an even distribution of minority communities and a similar degree of geographic compactness. There are very few, if any, areas in the United States where such a uniform minority population distribution and concentration exist.

Only after assuming that all of the aforementioned evidentiary factors are present, that identical levels of racially polarized voting exist and that the demographics of the three election districts result in only one particular configuration, can one begin to address the hypothetical presented by Chief Justice Roberts. In addressing this hypothetical one becomes immediately aware that all of these uncertainties and practical difficulties incorporated into the hypothetical suggest that the hypothetical assumes too much. When comparing the hypothetical to the real world, there are no such factual scenarios.

Nevertheless, for purposes of addressing this hypothetical, we will assume all of the above. When presented in such a posture, the question posed by Chief Justice Roberts thus becomes, which of the two districts shall be majority minority election districts? The question posed by Chief Justice Roberts does not become non-justiciable simply because there is a Hobson's choice (another assumption) that a federal district court must resolve. The appropriate procedure under our appellate review is to defer to the District Court unless there have been errors of law or factual findings that are clearly erroneous. In addressing the hypothetical the District Court would have to conduct an intense local appraisal to determine which of the two districts would become majority minority districts. The District Court could base its decision on a variety of considerations. Since Chief Justice Roberts based his hypothetical upon speculation, we can also speculate that such a consideration might be based upon a difference in anticipated growth rates for the minority community in each of the three election districts. There may be other considerations as well, such as levels of minority voter registration and turnout.

Once the District Court decided which of the two majority districts would be created, the Supreme Court would ultimately review the decision to determine if there was an error of law committed or if the factual findings were clearly erroneous. If either of these two standards was not met and the Supreme Court concluded that an impermissible factor was utilized, the case would be remanded to the District Court for further proceedings. This is the standard procedure for adjudicating cases in our federal court system. The hypothetical presented by Chief Justice Roberts is no different from other seemingly difficult issues presented for judicial adjudication. Such a conclusion becomes even more compelling when such judicial adjudication is conducted within the context of nearly half of century of precedent that has considered similar difficult issues.

10. In a 2002 article in the Berkeley La Raza Law Journal, you wrote:

*“Another major obstacle primarily affecting the Latino community is the prerequisite of citizenship as a voting requirement. This, of course, is a controversial topic.”*

Do you believe that the idea that only citizens should vote is “controversial?”

In a UCLA Chicano Studies Research Center brief that you authored, entitled “Political Apartheid in California: Consequences of Excluding a Growing Noncitizen Population,” you said:

*“Latino political empowerment has often been measured in terms of the increasing number of Latino elected officials or the elimination of discriminatory election structures. Today another critical gauge of Latino political empowerment merits a renewed focus: the issue of noncitizens and voting...”*

Again, is it your position that a requirement that one be an American citizen to vote is analogous to apartheid?

Although Senator Cornyn has taken my comments out of context, I want to thank him for raising the very important question of restrictions on the franchise.

Our Republic has always excluded large classes of people from civic engagement and political participation: African-Americans, Asians (particularly Chinese in the West), Alaska Natives and American Indians; Latinos; women; persons without land or property; non-Protestants (particularly Catholics and Jews); illiterate persons, including those who were victims of educational discrimination; new residents to communities, which included anyone (including citizens) who had lived in a community for sometimes as much as three years. For much of our Nation’s history, the number of persons who could not vote far exceeded the privileged few who could.<sup>8</sup>

Senator Cornyn’s own State of Texas has historically imposed some of the most discriminatory limitations on the franchise. Texas is home to The White Primary Cases, a series of four decisions between 1927 and 1953 in which the United States Supreme Court struck down increasingly insidious efforts to disenfranchise African-Americans.<sup>9</sup> Texas has fared little better in its treatment of Latinos. In the landmark decision of *White v. Regester*,<sup>10</sup> the United States Supreme Court described the intentional efforts by Texas to adopt mechanisms that when combined with extreme racial bloc voting by Anglos,

<sup>8</sup> See generally, Alexander Keyssar, *The Right to Vote, The Contested History of Democracy in the United States* (2004).

<sup>9</sup> *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

<sup>10</sup> See *supra* note 4.

denied Latinos an equal opportunity to elect their candidates of choice.<sup>11</sup> In 1975, Congress used the extensive discrimination against Latinos in Texas as the basis for extending Section 5 coverage to language minority citizens.<sup>12</sup>

Unfortunately, much of Texas's sad legacy of discrimination against over one-third of its citizens, African-Americans and Latinos, continues to this day.<sup>13</sup> Some of the strongest evidence for the recent twenty-five year renewal of the expiring provisions of the Voting Rights Act came from Texas. Since 1982, Texas has the second highest number of Section 5 objections interposed by the United States Department of Justice, including at least 107 objections, ten of which were for statewide voting changes.<sup>14</sup> A majority of all Section 5 objections to discriminatory voting changes in Texas have been since 1982, affecting nearly 30 percent of Texas's 254 counties, where 71.8 percent of the State's minority voting age population resides.<sup>15</sup> Texas also leads the nation in several categories of voting discrimination, including recent Section 5 violations and Section 2 challenges.<sup>16</sup> For example in 2004, Waller County was stopped from disenfranchising African-American students at Prairie View A&M who were trying to vote for two African-American students running for County office. In 2002, the City of Seguin tried to dismantle a Latino city council district and cancel the candidate-filing period to prevent Latino candidates from running in the district and winning a majority of seats. The Senate considered countless other recent examples prior to reauthorizing the Act late last month.

Limiting voting to citizens has been a more recent component of historical efforts to disenfranchise minorities. If anything, for much of our Nation's history, imposing citizenship requirements to vote was unaccepted nearly everywhere. At the time of the foundation of our Republic, "the concepts of citizenship and voting were not linked. Voting eligibility then depended primarily on property owning."<sup>17</sup> Every state allowed non-citizens to vote until 1814, when New Hampshire enacted the first citizenship

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<sup>11</sup> See *supra* note 4.

<sup>12</sup> See David H. Hunter, *The 1975 Voting Rights Act and Language Minorities*, 25 CATH. U. L. REV. 250, 254-57 (1976); S. REP. NO. 94-295, at 24-31, 37-39, reprinted in 1975 U.S.C.C.A.N. at 790-797, 804-06; 121 CONG. REC. H4709-4713, H4716-4718 (daily ed. June 2, 1975) (statement of Rep. Edwards); U.S. COMM'N ON CIVIL RTS., THE VOTING RIGHTS ACT: TEN YEARS AFTER 22-25, 57-59, 85-87, 97-99, 103-04, 108-111, 114-21, 123, 144, 160, 166, 220-30, 242-48, 251-54, 331-32 (1975).

<sup>13</sup> Census 2000, STF-3 and STF-4 data.

<sup>14</sup> NINA PERALES, LUIS FIGUEROA & CRISelda RIVAS, THE MINORITY VOTING EXPERIENCE IN TEXAS SINCE 1982: DEMONSTRATING THE IMPORTANCE OF REAUTHORIZATION OF THE VOTING RIGHTS ACT 3, 15-16 (2006).

<sup>15</sup> *Id.* at 3, 15.

<sup>16</sup> *Id.*

<sup>17</sup> Paul Kleppner, "Defining Citizenship: Immigration and the Struggle for Voting Rights in Antebellum America," in VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY 45 (Donald W. Rogers ed. 1992).

requirement.<sup>18</sup> As late as the Civil War, Georgia and South Carolina continued to permit non-citizens to vote.<sup>19</sup>

Non-Hispanic white men, who were the only elected officials at the time, tied citizenship to voting in earnest in the 1840s and 1850s as “part of a larger movement aimed at preserving native-stock culture and customs in the face of a floodtide of immigration from Europe, especially from Germany and Ireland.”<sup>20</sup> Efforts to suppress the vote of immigrants, particularly Irish Catholics, culminated in the growth of the Native American and Know Nothing Parties. The platform for both was very similar. Each party advocated a twenty-one year probationary period prior to naturalization, and limiting voting and public office holding to native-born citizens.<sup>21</sup> Although they failed to achieve their goals of limiting voting to native-born citizens, the efforts of these anti-immigrant parties bore fruit by the mid-nineteenth century by restricting voting to citizens.

In response to this new citizenship requirement for voting, nearly one hundred years after the Declaration of Independence, the federal government and states worked together to limit who was eligible to become a “citizen.” African-Americans were excluded until the ratification of the Fourteenth and Fifteenth Amendments in 1868 and 1870, respectively, although millions were denied the fruits of their citizenship until after the passage of the Voting Rights Act of 1965. Although women could be citizens, they were denied the franchise until ratification of the Nineteenth Amendment in 1920. American Indians were denied citizenship until the passage of the Indian Citizenship Act in 1924,<sup>22</sup> although many states, including Arizona, New Mexico, South Dakota, and Utah effectively disenfranchised them until the 1960s and the 1970s.<sup>23</sup> The racist exclusion of many so-called “undesirable” groups, especially Chinese, Filipinos, and Japanese, was not lifted until 1952, when Congress enacted the Walter-McCarran Act that “removed the bar to immigration and citizenship for races that had been denied those privileges prior to that time.”<sup>24</sup> In this context, it is evident that citizenship and naturalization requirements have routinely been used to achieve political apartheid for millions of Americans.

Unfortunately, even today we continue to see efforts to use our naturalization laws to deter the influx of “undesirables,” particularly Latinos.

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 46.

<sup>21</sup> *Id.* at 48-50.

<sup>22</sup> Act of June 2, 1924, ch. 233, 43 Stat. 253.

<sup>23</sup> See Jeanette Wolfley, “Native American Political Participation,” in *VOTING RIGHTS IN AMERICA: CONTINUING THE QUEST FOR FULL PARTICIPATION* 153, 157-63 (Karen McGill Arrington & William L. Taylor eds. 1992).

<sup>24</sup> Karen McGill Arrington, “The Struggle to Gain the Right to Vote: 1787-1965,” in *VOTING RIGHTS IN AMERICA* at 25, 34.

Senator Cornyn also inquires whether “the idea that only citizens should vote is ‘controversial.’” The Merriam-Webster dictionary defines a “controversy” as an issue that is “disputable” or “a discussion marked especially by the expression of opposing views.”<sup>25</sup> To answer the question therefore requires a determination of whether tying citizenship to voting is universally accepted. It clearly is not.

As I have detailed above, citizenship has not been accepted as a prerequisite to voting for much of our Nation’s history. It did not become a requirement until the federal and state governments decided to use it to suppress political participation by undesirable groups, including Latinos. Even today, citizenship is not a universal requirement within the United States. For example, six towns in Maryland, including Takoma Park, permit resident aliens to vote in local elections.<sup>26</sup> I have documented other examples in my articles cited by Senator Cornyn in his question.

Moreover, citizenship requirements for voting are clearly out of step with the emerging trend among the world’s other democracies. Today, some forty nations allow some form of resident alien voting. The trend accelerated in 1992, when members of the European Union “agreed that citizens who were living in other member nations could vote in municipal and European Parliament elections of the host country.”<sup>27</sup> As noted international law scholars T. Alexander Aleinikoff and Douglas Klumeyer observed in their book, *Citizenship Policies for an Age of Migration*: “Why should [a European Union] citizen who has just recently moved to another member state enjoy a right to vote in a local election while a third-country national who has lived there for years but does not yet qualify for naturalization is excluded from participating in his or her city?”<sup>28</sup> Indeed, since 2004, Austria, Belgium, and Rome have adopted laws permitting resident alien voting.<sup>29</sup> These trends suggest that restricting the franchise to citizens is far from an accepted notion, and therefore is indisputably “controversial” according to the dictionary definition.

In this day and age when we are sending resident aliens and their sons and daughters overseas to fight and die for their country, it is wrong to deny these Americans the right to vote. As tax-paying residents of their communities who contribute to our economy and have made and will continue to make the ultimate sacrifice for our Nation, they have already proven that they are “citizens” in everything but name.

Finally, as to the question of whether it is my “position that a requirement that one be an American citizen to vote is analogous to apartheid,” Senator Cornyn misconstrues the main point of the article. First, the article describes that due to laws enacted by States

<sup>25</sup> See <http://www.m-w.com/dictionary/controversy>.

<sup>26</sup> See David C. Earnest, “Noncitizen Voting Rights: A Survey of an Emerging Democratic Norm,” paper given at the 2003 annual convention of the American Political Science Association in Philadelphia (August 29, 2003), at 2 n.4.

<sup>27</sup> See <http://www.immigrantvoting.org/material/world.html>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

limiting the right to vote to citizens, there is an increasing number of adult non-citizens who are excluded from participating in the electoral process. This process is very important to local communities. This process results in the election of officials who enact ordinances and adopt policies. These ordinances and policies have a direct impact on the daily lives of Latina/o communities, both citizen and non-citizen. Both citizens and non-citizens are part of the social and economic fabric of local communities.

In addition, both citizens and non-citizens pay taxes and contribute to the economic well-being of local communities. Yet non-citizens are prevented from electing those individuals who will directly affect the well-being of their communities. In effect, there is taxation without representation and a denial of a non-citizen's right to petition their government for a redress of grievances. Accordingly, when there is a growing number of non-citizens contributing in so many ways to their local communities and are excluded from electoral participation, there will be an increase in the political alienation of these communities. Such political alienation will not contribute to the social cohesiveness that is essential for a smooth functioning and vibrant body politic. The absence of such cohesiveness should concern all of us.

Within this context, the reference to political apartheid is an appropriate description. As noted in my article, there are numerous communities where over half of the adult population is non-citizen. In some instances the percentage of adult non-citizens in California approaches 65% of the total adult population. A similar observation can be made with respect to Senator Cornyn's State of Texas. As the following table<sup>30</sup> illustrates, in Texas there are 147 cities that have a 10% or more adult non-citizen population, 42 cities that have a 20% or more adult non-citizen population, 17 cities that have a 30% or more adult non-citizen population, and 3 cities that have a 50% or more adult non-citizen population.

	Texas Municipality	%Non-Citizen 18 Years Old & Over
1	Cactus city, Moore County	63.7%
2	El Cenizo city, Webb County	51.3%
3	Presidio city, Presidio County	50.2%
4	Cockrell Hill city, Dallas County	46.3%
5	New Summerfield city, Cherokee County	45.9%
6	Hidalgo city, Hidalgo County	42.9%
7	Rio Bravo city, Webb County	42.1%
8	Progreso city, Hidalgo County	40.7%
9	Sullivan City city, Hidalgo County	40.6%
10	Roma city, Starr County	37.1%
11	South Houston city, Harris County	36.1%

<sup>30</sup> U.S. Census Bureau, American Factfinder, Data Sets, Summary File 4, Table GCT-P16, Citizenship Status for the Population 18 Years and Over: 2000.

	Texas Municipality	%Non-Citizen 18 Years Old & Over
12	La Joya city, Hidalgo County	34.6%
13	Alton city, Hidalgo County	33.5%
14	San Juan city, Hidalgo County	33.4%
15	Palmhurst city, Hidalgo County	31.7%
16	Mobile City city, Rockwall County	31.3%
17	Bovina city, Parmer County	30.2%
18	Galena Park city, Harris County	29.9%
19	Pharr city, Hidalgo County	29.8%
20	Palmview city, Hidalgo County	29.3%
21	Jacinto City city, Harris County	29.2%
22	Socorro city, El Paso County	28.3%
23	Brownsville city, Cameron County	26.8%
24	Penitas city, Hidalgo County	26.6%
25	Eagle Pass city, Maverick County	26.1%
26	Dell City city, Hudspeth County	25.1%
27	Laredo city, Webb County	24.8%
28	Irving city, Dallas County	24.3%
29	Arcola city, Fort Bend County	23.9%
30	Rio Grande City city, Starr County	23.8%
31	Houston city	22.9%
32	Port Isabel city, Cameron County	22.9%
33	Dallas city	22.7%
34	Alamo city, Hidalgo County	22.5%
35	Los Fresnos city, Cameron County	22.4%
36	Farmers Branch city, Dallas County	22.2%
37	McAllen city, Hidalgo County	21.9%
38	Donna city, Hidalgo County	21.8%
39	Mission city, Hidalgo County	21.2%
40	Conroe city, Montgomery County	20.8%
41	Mount Pleasant city, Titus County	20.6%
42	Richmond city, Fort Bend County	20.0%
43	Wilmer city, Dallas County	19.8%
44	Pasadena city, Harris County	19.7%
45	Webster city, Harris County	19.0%
46	Industry city, Austin County	19.0%
47	Del Rio city, Val Verde County	18.9%
48	Stafford city	18.7%
49	Edinburg city, Hidalgo County	18.4%

	Texas Municipality	%Non-Citizen 18 Years Old & Over
50	El Paso city, El Paso County	18.3%
51	North Cleveland city, Liberty County	18.3%
52	La Feria city, Cameron County	18.3%
53	Anna city, Collin County	18.2%
54	Palacios city, Matagorda County	17.9%
55	Perryton city, Ochiltree County	17.7%
56	Brookside Village city, Brazoria County	17.6%
57	Freeport city, Brazoria County	17.5%
58	Elgin city	17.3%
59	Garland city	17.3%
60	Big Lake city, Reagan County	17.1%
61	Edcouch city, Hidalgo County	17.1%
62	Hart city, Castro County	16.2%
63	Keene city, Johnson County	16.0%
64	Winfield city, Titus County	16.0%
65	Friona city, Parmer County	15.7%
66	Carrollton city	15.7%
67	Ennis city, Ellis County	15.5%
68	Clute city, Brazoria County	15.4%
69	Weslaco city, Hidalgo County	15.2%
70	San Benito city, Cameron County	14.9%
71	Kemah city, Galveston County	14.8%
72	Gruver city, Hansford County	14.8%
73	Rosenberg city, Fort Bend County	14.6%
74	Pittsburg city, Camp County	14.6%
75	Nixon city	14.4%
76	Brookshire city, Waller County	14.3%
77	Dumas city, Moore County	14.1%
78	Kermit city, Winkler County	14.0%
79	La Grulla city, Starr County	14.0%
80	Center city, Shelby County	13.8%
81	Richardson city	13.8%
82	Hempstead city, Waller County	13.8%
83	Austin city	13.8%
84	Grand Prairie city	13.8%
85	Brackettville city, Kinney County	13.8%
86	Waelder city, Gonzales County	13.8%
87	Fort Worth city	13.7%

	Texas Municipality	%Non-Citizen 18 Years Old & Over
88	Lyford city, Willacy County	13.7%
89	Morgan city, Bosque County	13.6%
90	Royse City city	13.6%
91	Baytown city	13.5%
92	Muleshoe city, Bailey County	13.5%
93	Turkey city, Hall County	13.5%
94	Dublin city, Erath County	13.5%
95	Ackerly city	13.5%
96	San Perlita city, Willacy County	13.4%
97	Mercedes city, Hidalgo County	13.1%
98	Bardwell city, Ellis County	13.1%
99	Elsa city, Hidalgo County	13.1%
100	Sunray city, Moore County	13.1%
101	Buffalo city, Leon County	13.0%
102	Bridgeport city, Wise County	13.0%
103	Jacksonville city, Cherokee County	13.0%
104	Balcones Heights city, Bexar County	12.9%
105	Corsicana city, Navarro County	12.9%
106	Humble city, Harris County	12.9%
107	Sansom Park city, Tarrant County	12.8%
108	Rio Hondo city, Cameron County	12.7%
109	Plano city	12.7%
110	Pecos city, Reeves County	12.7%
111	Arlington city, Tarrant County	12.5%
112	Harlingen city, Cameron County	12.3%
113	Hillsboro city, Hill County	12.3%
114	Beverly Hills city, McLennan County	12.2%
115	Eagle Lake city, Colorado County	12.1%
116	McKinney city, Collin County	12.1%
117	Katy city	12.1%
118	Hutchins city, Dallas County	12.0%
119	Rice city, Navarro County	11.9%
120	Willis city, Montgomery County	11.9%
121	Haltom City city, Tarrant County	11.8%
122	Crane city, Crane County	11.8%
123	Spearman city, Hansford County	11.7%
124	Horizon City city, El Paso County	11.5%
125	Kaufman city, Kaufman County	11.4%

	Texas Municipality	%Non-Citizen 18 Years Old & Over
126	Diboll city, Angelina County	11.4%
127	Decatur city, Wise County	11.3%
128	Cleveland city, Liberty County	11.3%
129	Giddings city, Lee County	11.2%
130	Uvalde city, Uvalde County	11.2%
131	Iraan city, Pecos County	11.2%
132	Sealy city, Austin County	11.2%
133	Uhland city	11.1%
134	Sugar Land city, Fort Bend County	11.0%
135	McGregor city	11.0%
136	Morton city, Cochran County	11.0%
137	Stratford city, Sherman County	10.8%
138	Hedwig Village city, Harris County	10.8%
139	Bryan city, Brazos County	10.6%
140	Lewisville city	10.5%
141	Eules city, Tarrant County	10.4%
142	Seagraves city, Gaines County	10.4%
143	Dickinson city, Galveston County	10.2%
144	Gunter city, Grayson County	10.2%
145	Marfa city, Presidio County	10.1%
146	Manor city, Travis County	10.1%
147	Athens city, Henderson County	10.1%

Continuing to exclude a community that is becoming a larger proportion of the adult population will produce a barrier between these two communities that can be described as political separatism. It also is inconsistent with efforts by many localities in the United States and a growing number of democracies around the world to ensure that all adult residents of their communities have a voice in their governments.

### Conclusion

In closing, I want to thank the Chairman for the opportunity to testify and to respond to these questions. As I explained in my response to Question 1, no post-enactment evidence can inform the Senate's vote on the VRARA, which occurred with the unanimous passage of S. 2703 on July 20, 2006.

I would commend the Senate Judiciary Committee to continue to exercise oversight over enforcement of the Voting Rights Act by the United States Department of Justice. In that vein, I am attaching two articles that show that the Committee must remain vigilant in ensuring that the Department addresses widespread non-compliance with the Act. The

first piece, an article I prepared entitled "*Report of Section 5 Non-Compliance: The Absence of Federal Enforcement*," identifies more than two hundred voting changes in Merced County, California, that have not been submitted for Section 5 approval. The second report, by the National Association of Latino Elected and Appointed Officials (NALEO), identifies several examples of voting discrimination and suggested ways to improve enforcement of the Act's renewed provisions.

**Senator John Cornyn**  
**Questions for Witnesses for Voting Rights Act Hearings**  
**July 13, 2006**

**Mr. Michael Carvin:**

1. What empirical data can you cite that indicates the ability of minorities in the covered jurisdictions to participate fully in the electoral process is substantially different from minorities outside the covered jurisdictions? Please be specific with respect to covered jurisdictions vs. non-covered jurisdictions.
2. Currently, the Voting Rights Act identifies those jurisdictions subject to additional oversight by looking at voter turnout in the presidential elections of 1964, 1968, and 1972. Re-authorization of the Act in its current form would preserve these dates as the “triggers.”
  - a. Would you support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972? Why or why not?
  - b. Would you support adding the Presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to section 2 litigation say, in the last 5 years, to this formula in order to pick up jurisdictions that have begun discriminating since the 1970s? Why or why not?

In *City of Boerne v. Flores*, the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the Fourteenth and Fifteenth Amendments. *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997). In striking down the Religious Freedom Restoration Act, the Court observed, “RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.”

3. Given this statement, would you support removing – at a minimum – the year 1964 from the coverage formula? Why or why not?
4. While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions – yet, for the period 1996 through 2005, the Department of Justice reviewed 54,090 Section 5 submissions and objected to 72, or 0.153 percent. What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only 1 objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?
5. In light of the lack of clear differentiation between covered jurisdictions and non-covered jurisdictions, would you support re-authorization for a term of 5 years instead of 25? Why or why not? 10 years? Why or why not?

6. Putting aside the constitutional questions with regard to overturning *Georgia v. Ashcroft* – I want to better understand some of the practical implications.

Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are “influence” districts, with relatively low numbers of minority voters, should be protected under the plan? Why or why not?

7. What do the changes to the Voting Rights Act proffered in the current re-written version mean? Specifically, Section 5 of the currently proposed re-write of the Act says the following:

(b) Any voting qualification, or prerequisite to voting, or standard, practice, or procedure, with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

- (c) the term ‘purpose’ in subsections (a) and (b) of this section shall include any discriminatory purpose.

Please tell the committee, in a few sentences, what you believe these phrases to mean.

8. Putting aside the constitutional questions with regard to overturning *Georgia v. Ashcroft* and/or *Bossier Parrish II* – I want to better understand some of the practical implications.

Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are “influence” districts, with relatively low numbers of minority voters, should be protected under a plan?

9. The Court in *LULAC v. Perry* indicates that for purposes of Section 2, the analysis should focus on a district in isolation. In other words, the Court said that Texas could not remedy a possible Section 2 violation of “dilution” by creating a new offsetting opportunity district because the analysis must be performed in “isolation.” This seems troubling. As Chief Justice Roberts pointed out:

*When the question is where a fixed number of majority-minority districts should be located, the analysis should never begin by asking whether a [ ] violation can be made out in any one district “in isolation.” In these circumstances, it is always possible to look at one area of minority population “in isolation” and see a “violation” of §2...*

*For example, if a State drew three districts in a group, with 60% minority voting age population in the first two, and 40% in the third, the 40% can readily claim*

*that their opportunities are being thwarted because they were not grouped with an additional 20% of minority voters from one of the other districts. But the remaining minority voters in the other districts would have precisely the same claim if minority voters were shifted from their districts to join the 40%.*

If the analysis for Section 5 determination of “candidate of choice” are similarly decided on a district-by-district basis, how can it possibly work?

10. If the re-written version of the Voting Rights Act is not adopted, and instead, we were to adopt something closer to a straight re-authorization, what would the result be?
11. I have a letter that I will insert into the record from the Secretary of State of Texas, Roger Williams, that details his concern that after the LULAC opinion, implementation of the Court’s determination that District 23 be re-drawn, coupled with many other federal law requirements, like HAVA, will make it next to impossible for Texas to comply in a timely fashion. He writes:

*In short, it is extremely cumbersome on the election officials in Texas to have to balance compliance with the wide array of federal election laws designed to ensure that every person has a timely, confidential and secure method of voting with the ever-evolving judicial interpretations of the Voting Rights Act.*

What concerns me is that we now seem to be poised to adopt significant revisions – that is adoption of “preferred candidate of choice” and “any discriminatory purpose” as standards – and we don’t have agreement on what they mean. At what point does the continued ebb and flow of our law under the Voting Rights Act put states in a place where they are simply unable to redistrict without running afoul of federal law – even as they undertake the process with the purest and best of intentions?

## Michael Carvin's Responses to Senator Cornyn's Questions

1. I do not have ready access to such data. I believe that the American Enterprise Institute and the Civil Rights Commission have analyzed this information.
2.
  - a) I would support updating the coverage formula in order to provide some arguable basis that the distinction between covered and non-covered jurisdictions reflects current realities, rather than completely anachronistic information.
  - b) I would support adding these triggers for the same reason identified in the prior answer.
3. I would support removing 1964 from the coverage formula because of the serious constitutional concerns it raises, as well as for the reason given in answer to 2a.
4. I believe the infinitesimal amount of objections is yet another reason why extending Section 5 to the currently covered jurisdictions is unwarranted and raises serious constitutional concerns.
5. In light of the serious constitutional questions, and the absence of empirical data suggesting distinctions between covered and non-covered jurisdictions, the shorter the re-authorization period the better.
6. Although the statutory language is ambiguous, I believe the legislative history in the Senate makes clear that influence districts are not protected under the new statute. I refer specifically to the Committee Report and the statements of various Senators on the floor.
7. I believe that the meaning of these ambiguous and unfamiliar terms are best described in the Senate legislative history, namely the Committee Report and the statements of various Senators on the floor.
8. Please see my answer to No. 6.
9. I agree with Chief Justice Roberts' concerns about analyzing districts in isolation, and I believe it would be unworkable if that analysis was extended to Section 5 determinations.
10. If Section 5 of the Voting Rights Act had been renewed without change, this would have eliminated some of the additional constitutional concerns raised by expanding its substantive standards so long after any identifiable systemic discrimination was being practiced in the covered jurisdictions.
11. It is already extraordinarily difficult for covered jurisdictions to comply with federal law and the ambiguities in the statute exacerbate that problem.

July 28, 2006

Mr. Barr Huefner  
Senate Judiciary Committee  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Mr. Huefner:

Enclosed please find my changes to the transcript of my recent testimony before the Committee, per Senator Specter's letter to me of July 24.

In another letter from Senator Specter also dated July 24, he enclosed additional questions from Senator Cornyn. In light of the fact that the President yesterday signed the Voting Rights Act extension into law, I assume that this matter is moot. I will say, however, that I agree with the tenor of Senator Cornyn's questions: That empirical data and other evidence justifying the extension was lacking; that, at a minimum, the coverage mechanism ought to have been updated and the extension should have been for a period of time shorter than 25 years; that the language in the bill addressing *Georgia v. Ashcroft* and the *Bossier Parish* decisions will have uncertain and unintended consequences; and that the Supreme Court's recent decision in *LULAC v. Perry* injects still more uncertainty into Section 5's likely future applications.

It is too bad that the Senate passed the extension bill that it did, but I am consoled by the fact that it is likely to be struck down by the courts as unconstitutional.

I appreciate the opportunity the Committee afforded me to discuss the concerns that the Center for Equal Opportunity had about this legislation.

Sincerely,

Roger Clegg  
President and General Counsel

Enclosure

**Sherrilyn Ifill, Associate Professor of Law  
University of Maryland Law School  
Written Responses to Senator Cornyn's Questions**

1. What empirical data can you cite that indicates the ability of minorities in the covered jurisdictions to participate fully in the electoral process is substantially different from minorities outside the covered jurisdictions? Please be specific with respect to covered jurisdictions vs. non-covered jurisdictions.

I did not receive the questions provided in your July 23, 2006 letter until July 31, 2006 -- four days after the Voting Rights Act renewal bill was signed by President Bush. Several of the questions are framed in terms that suggest that they were designed to explore some of the issues that would inform the Senate vote. As I understand it, your questions 1-6, and 8 were put to and answered by several witnesses prior to the Senate's 98-0 vote in favor of the renewal bill and thus prior to the President's signing. I have had the opportunity to review the responses of Drew Days, Pam Karlan, and Ted Shaw, among others, and believe that I agree with the substance of their responses to your questions and that no meaningful contribution to the relevant legislative record can be made at this post-enactment stage. Indeed, I presume that your satisfaction with the thorough testimony offered by witnesses and to the written responses provided in response to your queries, as well as to those of the other Senators, was manifested in your vote in favor of the bill. Accordingly, in lieu of providing written responses to questions 1-6, 8 here, I rest on those written responses that were provided prior to the Senate vote by the witnesses that I identified above. In addition, I believe that the answers I furnished at the hearing with regard to the significance of the number of Department of Justice objections under Section 5, are responsive to question 4.

2. Currently, the Voting Rights Act identifies those jurisdictions subject to additional oversight by looking at voter turnout in the Presidential elections of 1964, 1968, and

1972. Reauthorization of the Act in its current form would preserve those dates as the “triggers”.

- a) Would you support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972? Why or why not?
- b) Would you support adding the Presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to section 2 litigation say, in the last 5 years, to this formula in order to pick up jurisdictions that have begun discriminating since the 1970s? Why or why not?

Please see my response to Question 1.

3. In *City of Boerne v. Flores*, the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the 14th and 15th amendments. In striking down the Religious Freedom Restoration Act, the Court observed, “RFRA’s legislative record lacks examples of modern instance of generally applicable laws passed because of religious bigotry.”

Given this statement, would you support removing- at a minimum- the year 1964 from the coverage formula?

Please see my response to Question 1.

4. While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions- yet, for the period 1996 through 2005, the Department of Justice reviewed 54,090 Section 5 submissions and objected to 72, or .153 percent. What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only one objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?

Please see my response to Question 1, and also my live testimony at the hearing on July 13, 2006.

5. In light of the lack of clear differentiation between covered jurisdictions and non-covered jurisdictions, would you support re-authorization for a term of 5 years instead of 25? Why or why not? 10 years? Why or why not?

Please see my response to Question 1.

6. Putting aside the constitutional questions with regard to overturning *Georgia v. Ashcroft* – I want to better understand some of the practical implications.

Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are “influence” districts, with relatively low numbers of minority voters, should be protected under the plan? Why or why not?

Please see my response to Question 1.

7. What do the changes to the Voting Rights Act proffered in the current re-written version mean? Specifically, Section 5 of the currently proposed re-write of the Act says the following:

(b) Any voting qualification, or prerequisite to voting, or standard, practice, or procedure, with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) the term ‘purpose’ in subsections (a) and (b) of this section shall include any discriminatory purpose.

Please tell the committee, in a few sentences, what you believe these phrases to mean.

Although many of the issues raised in my response to Question 1 apply equally here in that post-enactment legislative history cannot have informed the vote, I provide the following brief written response because I am not aware that this specific question has been addressed by numerous witnesses. The “preferred candidate of choice” language was designed to clarify Congressional intent in light of the Supreme Court’s recent ruling in *Georgia v. Ashcroft*, which held that the presence of influence districts may factor into whether or not a redistricting plan can be deemed retrogressive. This new language in the bill will help ensure that under Section 5 jurisdictions are not permitted to dismantle districts that provide minority voters an opportunity to elect candidates of choice in favor

of districts in which minority voters “can play a substantial, if not decisive, role in the electoral process” -- more commonly referred to as influence districts.<sup>1</sup>

In addition, the “any discriminatory purpose” language contained in the bill further clarifies Congressional intent in light of the *Reno v. Bossier Parish School Board II* ruling which held that evidence of discriminatory purpose was not sufficient to sustain a Section 5 objection. In *United States v. Bossier Parish School Board*, 520 U.S. 471 (1998), the Supreme Court confirmed that *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), provides the framework for determining whether there was sufficient circumstantial evidence or direct evidence of invidious discriminatory purpose infecting the adoption of a particular voting change. The *Arlington Heights* framework requires the Justice Department and courts to determine whether the “the impact of the official action” “bears more heavily on one race than another,” the historical background of the jurisdiction's decision, the sequence of events leading to the challenged action, legislative history and departures from normal procedural sequences and contemporary statements by members of the decision making body.<sup>2</sup> The newly enacted bill will help ensure that Section 5 appropriately filters out changes enacted with discriminatory intent and not only those manifesting the more narrow retrogressive intent.

8. Putting aside the constitutional questions with regard to overturning *Georgia v. Ashcroft* and/or *Bossier Parrish II* – I want to better understand some of the practical implications.

Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are “influence” districts, with relatively low numbers of minority voters, should be protected under a plan?

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<sup>1</sup> *Georgia v. Ashcroft*, 539 U.S. 461, at 482 (2003).

<sup>2</sup> *Arlington Heights*, 429 U.S. at 266-68.

Please see my response to Question 1.

9. The Court in *LULAC v. Perry* indicates that for purposes of Section 2, the analysis should focus on a district in isolation. In other words, the Court said that Texas could not remedy a possible Section 2 violation of “dilution” by creating a new offsetting opportunity district because the analysis must be performed in “isolation.” This seems troubling. As Chief Justice Roberts pointed out:

*When the question is where a fixed number of majority-minority districts should be located, the analysis should never begin by asking whether a [ ] violation can be made out in any one district “in isolation.” In these circumstances, it is always possible to look at one area of minority population “in isolation” and see a “violation” of §2...*

*For example, if a State drew three districts in a group, with 60% minority voting age population in the first two, and 40% in the third, the 40% can readily claim that their opportunities are being thwarted because they were not grouped with an additional 20% of minority voters from one of the other districts. But the remaining minority voters in the other districts would have precisely the same claim if minority voters were shifted from their districts to join the 40%.*

If the analysis for Section 5 determination of “candidate of choice” are similarly decided on a district-by-district basis, how can it possibly work?

Although many of the issues raised in my response to Question 1 apply equally here in that post-enactment legislative history cannot have informed the vote, I provide the following brief written response because I am not aware that this specific question has been addressed by numerous witnesses. The Court’s recent ruling in *LULAC* helps clarify the governing standards for both proving and for remedying a violation of Section 2 of the Voting Rights Act, including the Section 2 prerequisite of compactness, the requirement which requires a showing, in the context of a redistricting challenge, that

minority voters are sufficiently compact and numerous such that a district can be created that would provide those voters with an opportunity to elect candidates of their choice. 126 S.Ct. 2594; *see also Johnson v. DeGrandy*, 512 U.S. 997 at 1008 (1994); *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). As outlined in Justice Kennedy’s controlling opinion, the three “*Gingles*” prerequisites must initially be met “[c]onsidering the district in isolation.” 126 S.Ct. 2594, 2616. Thereafter, however, Justice Kennedy recognized that a broader examination might lead to the conclusion that there could be no Section 2 violation under the circumstances.

The State of Texas argued that even though the *Gingles* prerequisites were met with respect to the challenged District 23 (because the District could have been drawn in an equally compact manner so as to including a sufficient numbers of Latinos of voting age to permit those voters to elect a candidate whom they preferred) there was no Section 2 violation because “it met its §2 obligations by creating new District 25 as an offsetting [Latino] opportunity district,” *id.* The Court rejected this argument because it found that District 25 under the State’s plan was not “compact” in the sense that had it not been drawn by the State, individuals in the area could have succeeded, in a different Section 2 case, in meeting the *Gingles* compactness prerequisite by proposing it. *Id.* at 23-29. Justice Kennedy’s opinion clarified that a “State [may] use one majority-minority district to compensate for the absence of another only when the racial group in each area had a §2 right and both could not be accommodated,” *id.* at 23.

It is evident from this approach that the Court did not limit the Section 2 analysis to a single district “in isolation.” Justice Kennedy’s opinion confirms this by stating that “the first *Gingles* condition requires the possibility of creating more than the existing

number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice.” *Id.* at 23, quoting *Johnson v. DeGrandy*, 512 U.S. 997, 1008 (1994). Further clarifying the compactness requirement, the *LULAC* Court also noted that this “inquiry should take into account ‘traditional districting principles such as maintaining communities of interest and traditional boundaries.’” *LULAC* (quoting *Vera*, 517 U.S. at 977, (plurality opinion)). Most importantly, the Court held that states cannot use one majority-minority district to compensate for the absence of another except in those instances when the racial group in each area had a Section 2 right and both could not be accommodated.

It is important, in interpreting the Court’s language, to bear in mind the well-established principle statement regarding the need to review Section 2 claims in isolation to mean that Section 2 addresses a different harm than that addressed in the Section 5 context. Section 2 goes beyond the bare protections provided in the Section 5 context by looking to see whether the voting strength of minority voters in a particular jurisdiction has been diluted. In that sense, the protections afforded by Section 2 are broader in scope. Section 2 violations do not require the kind of comparative analysis conducted in the Section 5 context by looking at electoral opportunities provided under an old and new plan. Rather, Section 2 violations are largely jurisdiction geographic area-specific and require an intensely localized examination of the factors outlined constituting in the *Gingles* preconditions, including the compactness requirement, in order to determine whether a meritorious claim has been presented. It also is clear, however, that the Court’s precedents have recognized that considerations of “substantial proportionality”

on a jurisdiction-wide basis may serve as a limitation on Section 2 claims. *See DeGrandy*, 512 U.S. 997, 1015-16 (1994).

The analysis conducted in the Section 5 context is entirely distinct from that conducted in the Section 2 context, although it. However, the analysis is comparable in that preclearance determinations also turn on require a very localized and focused analysis. However, unlike the Section 2 context, this analysis aims to determine the number of truly viable districts under the benchmark and proposed plans. Indeed, determining whether a particular district is viable as a minority-opportunity district calls on for an careful regression analysis of voting patterns to that help determine whether minority voters are able to elect their “candidates of choice.”

Thus, for the reasons outlined above, I believe that Section 2 and 5 are workable provisions that address different harms utilizing distinct forms of analysis.

10. The Supreme Court said that Henry Bonilla, a Hispanic Republican – a man that grew up in the barrios, a man who was the first in his family to attend college – could not represent Hispanics in his district – seemingly, simply because he is not a Democrat.

Similarly, you wrote the following in a July, 12 2005 editorial piece in the Baltimore Sun:

*“The nomination of Justice Thomas to the seat vacated by Justice Marshall reduced the idea of diversity to its most simplistic and cosmetic terms. One need not question Justice Thomas' race or his authenticity as a black justice to recognize that describing him as "representative" of blacks, when his views reflect those of only 10 percent of the black population, is cynical and crude.”*

What support by the minority population in an elected official’s district should be sufficient to indicate who can represent them?

Similarly, forgetting for a moment that Justice Thomas is not an elected official – and thus, is not “representative” of any constituency in particular... if 10% support is not enough support for Justice Thomas to represent the views of African-Americans, what is enough? Would 20% be enough? 40%?

As I have articulated in my scholarship over the past 13 years, the term “representation” is a dynamic one, capable of multiple meanings depending on the context. Even appointed officials can serve in a “representative” capacity, although not in precisely the direct manner that elected representatives do. For example, on our federal circuit courts of appeal, judges are selected from the states that comprise each appellate district. In the 4<sup>th</sup> Circuit for example, judges are selected from North Carolina, South Carolina, Maryland, Virginia and West Virginia. Ideally, each of those states should be “represented” on the 4<sup>th</sup> Circuit. This does not mean that judges on the 4<sup>th</sup> Circuit are expected to advance the interests of their home states in deciding cases. But without question, the experience and familiarity of judges from particular states with the practice of law, the political reality, and governing structures in their home states should inform the work of the entire 4<sup>th</sup> Circuit.

Justices on the Supreme Court and other appointed courts can and do serve a representative function – albeit a quite different one than legislators. Judges must be impartial decision makers. But adherence to impartiality does not mean that a judge has no representative function. I have described the boundaries of judicial representation in my article, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash. & Lee. L. Rev (2000) at pages 466-479, and I invite you to review that article for a more expansive articulation of my views in this regard.

With regard to the percentage of support needed to “represent” a community, it is an accepted pillar of our democracy that a candidate who receives the support of a majority (50% + 1) of the electorate becomes the representative of that jurisdiction. I know of no circumstance in which a leader who enjoys the support of only 10% of a relevant constituency has been regarded as the legitimate “representative” of that community. I use this same standard when thinking about whether an appointed official can be said to “represent” a particular constituency, recognizing of course that appointed officials – especially judges – are not pure or direct representatives in the same way as legislators or executives. In short, I ask, are the views and decisions of the “representative” reflective of those of the majority of the constituency to be represented?

I reject any notion that representation based on solely on shared racial background or characteristics is legitimate. Again, I elaborate on this in my article *Racial Diversity on the Bench*, cite above at pages 479-491. I fully acknowledge that shared racial background can be an important aspect of representation, but only if that shared background translates into common views, perspectives, values or goals between the putative representative and his constituents. For this reason, I argue that Justice Clarence Thomas is not “representative” of African Americans in the United States. He is African American, but his views as expressed in cases such as *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Thomas, J., dissenting), *M.L.B. v S.L.J.*, 519 U.S. 102, 129 (1996) (Thomas, J., dissenting), *Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas, J., concurring), *Hudson v. McMillan*, 503 U.S. 1, 28 (1992) (Thomas J., dissenting), to name just a few, demonstrate that he does not share the opinion, perspectives or goals of the vast majority of African Americans. The views he advances may represent those of African American

conservatives, but conservatives constitute only 10% of the adult African American population in the U.S.

Finally, I would emphasize that only the group that is to be represented can determine who represents them. Thus regardless of Henry Bonilla's background, if Mexican American voters in District 23 believed that he did not represent them, then he was not their representative. Here I would correct a premise of Question 10, above. The Supreme Court did not say the Henry Bonilla "could not represent Hispanics in his district." The Court said that Hispanics believed increasingly that Bonilla *did not* represent them. Mexican American voters demonstrated this belief by giving Bonilla a smaller and smaller percentage of their votes. Certainly Bonilla has the potential to represent the views, perspectives and goals of a majority of Mexican Americans in that District. But he cannot be regarded as the "representative" of Mexican American constituents simply by virtue of his being Mexican American, and from an impoverished background. That shared ethnic, cultural and social heritage must be combined with a common contemporary political agenda with Mexican American voters in that district, in order for Mr. Bonilla to be legitimately regarded as their representative.



# MALDEF

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Dear Senator Cornyn:

I appreciated the opportunity to deliver testimony before the sub-committee on the significance of the Supreme Court's decision in *LULAC v. Perry*, 126 S. Ct. 2594 (2006) prior to the vote to renew the Voting Rights Act of 1965.

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Your letter enclosing additional questions for witnesses at the hearing was sent to me on July 24, 2006, four days after the Senate voted to reauthorize the Voting Rights Act. As you know, President Bush signed the reauthorization bill into law on July 27, 2006.

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As I expressed during my oral presentation, although that decision does not bear directly on the provisions that Congress recently renewed, there are aspects of the decision that lend support to the renewal. Now that the bill has become law, I believe that it is most appropriate for me to rely upon the thorough testimony and responses that were provided to your questions by other voting rights litigators (including Ted Shaw, Pam Karlan, Armand Derfner, Laughlin MacDonald, Robert McDuff, and Anita Earls, among others) prior to the Senate's vote rather than attempting to expand the record, in ways that may be cumulative, at this date.

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**Senator John Cornyn**  
**Questions for Witnesses for Voting Rights Act Hearings**  
**July 13, 2006**

**Ms. Abigail Thernstrom:**

**Senator John Cornyn**  
**Questions for Witnesses for ALL Voting Rights Act Hearings**  
**May – June 2006**

1. *What empirical data can you cite that indicates the ability of minorities in the covered jurisdictions to participate fully in the electoral process is substantially different from minorities outside the covered jurisdictions? Please be specific with respect to covered jurisdictions vs. non-covered jurisdictions.*

Minorities in the covered jurisdictions participate in the electoral process at very high levels, clearly suggesting that their “ability” to do so should not be in doubt. The old barriers to participation are gone, of course—the barriers that made the Voting Rights Act so essential in 1965.

The high level of minority participation in the covered jurisdictions is clear in the Charles Bullock and Keith Gaddie studies that were commissioned by me and a former colleague. They are part of the record. Just to take one state as an example, while Georgia once had a terrible history of black disfranchisement, in the most recent presidential elections, black participation rates actually slightly exceeded those of whites. And if one compares Georgia to states outside the South, black registration is slightly higher and turnout is roughly the same. Georgia is not unique.

As the political theorist Michael Walzer once wrote, in a true democracy every citizen is “a potential participant, a potential politician.” Of course not every citizen will have equal power. It is not power itself but the “opportunities and occasions of power” that must be properly shared. The covered jurisdictions now clearly meet this test.

2. *Currently, the Voting Rights Act identifies those jurisdictions subject to additional oversight by looking at voter turnout in the presidential elections of 1964, 1968, and 1972. Re-authorization of the Act in its current form would preserve these dates as the “triggers.”*

- a. *Would you support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972? Why or why not?*

Updating the trigger is certainly better than leaving it as is. But it’s important to remember why the original trigger used the 1964 participation figures. In 1965, total registration and turnout below 50 percent of the voting-age population combined with the use of a literacy

test was clear circumstantial evidence that blacks were deliberately being kept from the polls. And without explicitly naming a single state, the trigger perfectly targeted the states and counties with egregious histories of Fifteenth Amendment violations.

Even in 1970, however, the use of the 50 percent cut-off, using political participation figures for 1968, no longer made sense. The trigger brought three New York City boroughs under coverage, for instance, although blacks had been freely voting in the state for a century and had been elected to public office for fifty years. Coverage of assorted counties in Wyoming, Arizona, California, and Massachusetts was equally arbitrary.

Updating the trigger didn't make sense in 1975, either. Remember, the use of a literacy test was an essential element in 1965; the low political participation figures were indisputable evidence that an illegitimate test was being used for nefarious purposes. But the states and counties that the turnout figures in 1972 brought under coverage had a literacy test only in the form of English-only ballots—which by no stretch of the imagination were equivalent to racist registrars asking applicants to read the Beijing Daily in the Jim Crow South.

Moreover, if ballots in English were a problem, the solution was simple: bilingual material. What justified imposing on Texas and other jurisdictions the burden of having to preclear all newly instituted methods of election (a category that included the *retention* of at-large voting in municipalities that decided they would benefit economically from an annexation)? The 1975 hearings did not provide evidence that these were jurisdictions that had been deliberately keeping Hispanics from the polls—that were deeply suspect and required extraordinary federal oversight, with the burden of proof on them to show an absence of wrongdoing every time they moved a polling place.

Resting coverage today on turnout in 2004 is preferable to the continuing and indefensible use of 1972 data, but levels of political participation by now are unrelated to deliberate efforts to disfranchise minority voters—and that relationship was the entire basis of the trigger's legitimacy in the 1965 act. Why not move on, and recognize that the problems with America's electoral procedures in 2006 are unrelated to those that made section 5 of the Voting Rights Act so necessary forty-one years ago.

*b. Would you support adding the Presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to section 2 litigation say, in the last 5 years, to this formula in order to pick up jurisdictions that have begun discriminating since the 1970s? Why or why not?*

I would not for the following reason: the legal standards that govern the enforcement of section 2 are a mess and hard to justify. As a consequence, jurisdictions that have been subject to section 2 litigation have not necessarily been engaged in discrimination.

Section 2 was supposed to be used only to attack those rare jurisdictions in which race dominated the political process, such that a racial census could be taken and the outcome of

an election would be known beforehand. (See the 1982 testimony of Armand Derfner, e.g.— a witness this year as well.) Such cases were supposed to be hard to win; in fact, plaintiffs prevail easily since all they have to show, as it turns out, is that the three “preconditions” outlined in the *Gingles* decision have been met. Whether the “totality of circumstances” indicates that minority voters have less opportunity than whites to participate politically and elect the representatives of their choice is a question that has disappeared along with the promises of Derfner and others. The difficult task of assessing equal electoral opportunity has been replaced by a crude formula that includes a definition of polarized voting that only Justice Brennan signed on to, and that makes no distinction between whites voting for partisan reasons and for reasons of racial animus.

In 1982, Senator Hatch warned that “future courts and future Justice Departments will look [at] proportional representation as the standard against which all electoral and voting practices [will be] assessed.” He was the one and only Senator who saw what was coming down the road with the passage of section 2, which has indeed become an instrument to insist on districting arrangements that promote (to the degree possible) minority officeholding in proportion to the minority population. Note: Not proportionate minority *representation*, but proportionate minority officeholding has become the right. And yet section 2 does not refer to “minority representatives of their choice, but just “representatives”; elected officials representing minority interests can come in all colors.

A case currently being litigated in Springfield, Massachusetts illustrates the problem with section 2 today. The issue is an at-large voting system, under which both blacks and Hispanics have been elected to public office. In fact, the percentage of blacks on the school committee has sometimes been disproportionately high relative to their population numbers in recent decades. If Puerto Rican turnout in the city were not quite so low, they too would likely do very well. Despite this record of electoral success, the plaintiffs want the court to order race-based single-member districts on the theory that minorities are entitled to their “fair share” of seats and would more likely be assured of proportionality on the school committee and the city council with ward voting. If the plaintiffs win, would this be a clear case in which a city had engaged in electoral discrimination and deserved to be under section 5 coverage? Are single-member districts the only form of organizing the electoral landscape that is compatible with democratic government?

In amending section 2, Congress unequivocally and wisely rejected the notion of group entitlement to even one legislative seat. Group membership was to count as a qualification for office only where blacks and other minority citizens could prove themselves distinctively excluded from the electoral process. But today true black and Hispanic political exclusion is hard to find, and thus I have a problem with a great many cases in which plaintiffs in section 2 suits have prevailed. If the provision had turned out as intended and had provided a remedy only where legislative seats seemed largely reserved for whites, then using section 2 litigation as a measure of the need for continuing coverage would make sense.

*In City of Boerne v. Flores, the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the Fourteenth and Fifteenth Amendments. City of Boerne v. Flores, 521 U.S. 507, 530 (1997). In striking down the Religious Freedom Restoration Act, the Court observed, "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."*

3. *Given this statement, would you support removing – at a minimum – the year 1964 from the coverage formula? Why or why not?*

See my answer above—in response to question 2. Registration and turnout as the basis of a trigger makes no sense. The connection between fraudulent literacy tests and low levels of political participation legitimized the original trigger. Literacy tests are gone, and political participation under the 50 percent mark is no longer a reliable indicator of electoral discrimination.

4. *While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions – yet, for the period 1996 through 2005, the Department of Justice reviewed 54,090 Section 5 submissions and objected to 72, or 0.153 percent. What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only 1 objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?*

You are perfectly right that supporters of reauthorization and amendment rely mainly on anecdotes, some quite old. I'm a social scientist; I want data.

The data to which you refer is indeed very telling. The report on "Voting Rights Enforcement & Reauthorization" recently released by the U.S. Commission on Civil Rights contains a great deal of data that tell the same story as the one above. As the report says, "during the last decade, objections have virtually disappeared, particularly with respect to change types that represent the bulk of the submitted changes."

Section 5 was supposed to sunset in 1970. It's an extraordinary emergency provision. The emergency was not permanent; indeed, it's over. Neither section 2 nor the Fourteenth Amendment have been repealed; plaintiffs retain plenty of power to attack electoral discrimination wherever they believe they have found it. Section 5 is no longer needed.

5. *In light of the lack of clear differentiation between covered jurisdictions and non-covered jurisdictions, would you support re-authorization for a term of 5 years instead of 25? Why or why not? 10 years? Why or why not?*

My views should be clear by now. I would prefer a short reauthorization to a longer one, but my real preference is to recognize the provision was supposed to last only five years and it's now more than four decades old. Time to wave goodbye.

6. *Putting aside the constitutional questions with regard to overturning Georgia v. Ashcroft – I want to better understand some of the practical implications.*

*Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are "influence" districts, with relatively low numbers of minority voters, should be protected under the plan? Why or why not?*

The new language in the bill that is described as overturning *Georgia v. Ashcroft* is so murky that it's hard to know precisely what the consequence of its adoption would be.

Let's begin with my view of the decision, however. The Supreme Court, starting with *Miller v. Johnson* in 1995, had expressed considerable concern about racially gerrymandered districts that rested on the "offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" In *Georgia v. Ashcroft*, the Court added another concern to that of racial stereotyping. Perhaps black votes were being "wasted" in what the ACLU approvingly referred to as "max-black" districts. That is, perhaps the goal should be to concentrate only as many blacks (or Hispanics) in a district as necessary to elect a minority representative, then to assign minority voters beyond that number to other districts.

Justice Sandra Day O'Connor's opinion for a majority of five was a classic study in just how lost courts can become when trying to sort out questions of racial fairness and political representation.

Georgia's state senate districting plan had lowered the percentage of black voters in some districts (although not below 50 percent), but increased the number of districts certain to elect white Democrats. This was an unusual legislative step, but Justice O'Connor explained the logic. "No party contests that a substantial majority of black voters in Georgia vote Democratic," she wrote, and thus any increase in the number of Democratic state senators--even if they were white--would boost minority representation. Correspondingly, the implication was, any decrease in the number of Republican legislators would be good for blacks.

In other words, white Democrats count as minority "representatives." It was a remarkable *legal* conclusion for the Court to reach.

Before *Georgia v. Ashcroft*, majority-black districts were sacrosanct; they couldn't be eliminated in a new map. That's still true. But the logic of O'Connor's opinion makes all existing Democratic districts that contain a significant number of blacks equally untouchable, since the assumption is that Democrats speak for the interests of blacks.

With *Georgia v. Ashcroft*, the Voting Rights Act became not just a charter for black enfranchisement and officeholding but also a statute to protect certain safe seats for white

Democrats. Never mind that Georgia is majority-Republican. With *Ashcroft*, Democratic districts in which blacks are an "influence" (the Court's term) appear to have become another permanent entitlement.

On the other hand, O'Connor's starting point was right. Minority "representation" is not so easy to define. Who counts as a "representative"? Blacks can clearly represent "white" interests; are we to argue that whites cannot represent "black" interests—assuming (erroneously) that interests are racially defined?

"The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine," she said. In calculating the level of "minority representation," there were factors to be weighed even beyond whether a white incumbent was "sympathetic to the interests of minority voters"—factors such as whether a white incumbent occupied a position of legislative power.

With *Ashcroft*, we have arrived at the equivalent of Justice Potter Stewart's famous definition of pornography: You know minority representation when you see it. O'Connor's opinion is a nightmare; it provides no coherent legal standards. Moreover, the decision hands to the Justice Department a task totally unsuited to the process of swift administrative preclearance—that of assessing the setting in which voting takes place and determining whether one plan is more racially "fair" (by some elusive but inevitably subjective definition) than another. Overturning it has the virtue that the old retrogression standard, which involved simply counting minority officeholders, would be revived. (Or so it seems; there are a number of law professors who are not so sure that it would do so.) But do members of Congress really want to sign on to the notion that only blacks can represent black voters, and thus we know the level of black representation by counting African Americans in public office?

In *Ashcroft*, within the majority of five, only Justice Clarence Thomas kept his wits about him. He concurred with the Court's bottom line--remanding the case for further consideration in light of the majority opinion. But he reiterated his belief that his colleagues had "immersed the federal courts in a hopeless project of weighing questions of political theory." Even worse, by segregating voters "into racially designated districts . . . [they had] collaborated in what may aptly be termed the racial 'balkaniz[ation]' of the Nation."

The solution is the politically difficult one that I have already urged: abandon preclearance. What's the argument against asking plaintiffs in these suits to rest their cases on either section 2 or the Fourteenth Amendment? Complicated questions of racial equality in the political arena demand, at the very least, what the Court once called "an intensely local appraisal" of the sort that only an actual trial affords.

And, by the way, overturning *Bossier Parish II* creates the same problem: the DOJ will have to sort through complicated issues of intentional discrimination in settings that do not resemble Mississippi in 1965—a process that no one should have much confidence in. Moreover, it should not be forgotten that the burden of proof under section 5 is on the jurisdiction to show an *absence* of discrimination—a burden that was appropriate 41 years ago, but can hardly be justified today.

7. *What do the changes to the Voting Rights Act proffered in the current re-written version mean? Specifically, Section 5 of the currently proposed re-write of the Act says the following:*

*(b) Any voting qualification, or prerequisite to voting, or standard, practice, or procedure, with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.*

This revision of section 5 just compounds the problem of already murky statutory language. Who are the “candidates of choice” for minority voters? How are they to be identified?

The language of that provision refers to “representatives of their choice,” plainly suggesting a definition of representation broader than that which would have been conveyed had the wording been, “*minority* representatives of their choice.” Did that mean that a white candidate could qualify? What about an unsuccessful black candidate who was nevertheless the first choice of minority voters? When Rep. John Lewis first got elected to Congress in 1986 he got only a minority of the black vote against Julian Bond in the Democratic primary and was forced into a runoff that he won by picking up substantial white support. He was thus not truly the “preferred candidate” for black voters in his first successful election.

In *Georgia v. Ashcroft* (2003) Justice O’Connor’s majority opinion rather wistfully noted: “The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine.” Indeed. And the task of discerning when minority voters lack that “ability” has defeated the Court itself.

The question has arisen in the section 2 context as well. The Supreme Court, in its most recent section 2 cases, *LULAC v. Perry*, dismissed the argument that Rep. Martin Frost, a white liberal, was entitled to his congressional seat as the candidate of choice for black voters. Redistricting has fragmented the district from which he had been elected. Blacks were only 25 percent of the district, and, while they had consistently voted for Frost, they had had no choice if they wanted to support a Democrat. There had been no contested Democratic primary in the previous two decades. It was a district designed to elect an Anglo. “The fact that African-Americans preferred Frost to some others does not...make him their candidate of choice,” the Court concluded.

Will the new section 5 language be read to incorporate that conclusion in a section 2 case? It’s impossible to predict.

*(c) The term ‘purpose’ in subsections (a) and (b) of this section shall include any discriminatory purpose.*

*Please tell the committee, in a few sentences, what you believe these phrases to mean.*

In Bossier Parish I, the district court (on remand) had failed to answer a question that, a bit mysteriously, had never been raised in the decades since *Beer v. United States* (1976) had been decided. Did the retrogression principle govern the interpretation of discriminatory “effect” alone, or was it equally applicable to assessments of discriminatory purpose? In enforcing section 5, were there one or two legal standards? Perhaps a districting plan could be suspected of racial animus, although its “effect” did not leave black voters worse off than they had been before. Should that plan be precleared?

On the surface, the question might seem a tad ridiculous. Could the Court really argue that intentionally discriminatory districting maps did not necessarily violate section 5? Yes. It could—and did in *Bossier Parish II* (2000). Section 5 had a limited aim: to make sure the enfranchisement promised by section 4 was not undermined by alternations in electoral procedure that robbed blacks of expected political power. The provision was not an all-purpose tool that could be used to remedy other forms of voting-related intentional discrimination. Such an all-purpose tool would have been totally inappropriate to the administrative preclearance process, which was one option under section 5.

Appellants would recast section 5’s phrase “does not have the purpose and will not have the effect of x” to read “does not have the purpose of y and will not have the effect of x,” Justice Scalia wrote for the Court. They “refuse to accept the limited meaning that we have said preclearance has in the vote-dilution context,” he went on. That limited meaning “does not represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilutive than what it replaces, and therefore cannot be stopped in advance under the extraordinary burden-shifting procedure of §5, but must be attacked through the normal means of a §2 action.”

In amending section 5 to overturn the *Bossier II* decision, Congress has (in Justice Scalia’s words) refused “to accept the limited meaning that [the Court has] said preclearance has in the vote-dilution context.” The Justice Department, in the preclearance process, will now re-acquire the liberty it abused in the 1980’s and 1990s—the freedom to label as discriminatory in intent any districting map that provides less than a maximum number of safe minority seats. It will thus return to regarding roughly proportional racial and ethnic representation as a right—in direct conflict with the entire history of the statute.

8. *Putting aside the constitutional questions with regard to overturning Georgia v. Ashcroft and/or Bossier Parrish II – I want to better understand some of the practical implications.*

*Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are “influence” districts, with relatively low numbers of minority voters, should be protected under a plan?*

I would assume not. One of the points of overturning *Ashcroft* was to eliminate that possibility.

9. *The Court in LULAC v. Perry indicates that for purposes of Section 2, the analysis should focus on a district in isolation. In other words, the Court said that Texas could not remedy a possible Section 2 violation of "dilution" by creating a new offsetting opportunity district because the analysis must be performed in "isolation." This seems troubling. As Chief Justice Roberts pointed out:*

*When the question is where a fixed number of majority-minority districts should be located, the analysis should never begin by asking whether a [ ] violation can be made out in any one district "in isolation." In these circumstances, it is always possible to look at one area of minority population "in isolation" and see a "violation" of §2...*

*For example, if a State drew three districts in a group, with 60% minority voting age population in the first two, and 40% in the third, the 40% can readily claim that their opportunities are being thwarted because they were not grouped with an additional 20% of minority voters from one of the other districts. But the remaining minority voters in the other districts would have precisely the same claim if minority voters were shifted from their districts to join the 40%.*

*If the analysis for Section 5 determination of "candidate of choice" are similarly decided on a district-by-district basis, how can it possibly work?*

It can't possibly work. The population shifts over time, increasing minority voters in some districts, decreasing them in others. The section 5 question (when the districting in question is state-wide) should be retrogression in the state as a whole. If the black population drops from 60 percent to 45 percent in a particular district, affecting the likelihood that a "candidate of choice" will be elected, that should not constitute "retrogression" if the potential for black electoral success increases elsewhere.

10. *If the re-written version of the Voting Rights Act is not adopted, and instead, we were to adopt something closer to a straight re-authorization, what would the result be?*

It would have been far preferable to pass straight re-authorization, although I would have objected to that as well. Section 5 was an emergency provision; the emergency of black disfranchisement is long over. The problems that arise today are not necessarily in section 5 jurisdictions; nor do they remotely resemble the obstacles that blacks faced in the Jim Crow South.

11. *I have a letter that I will insert into the record from the Secretary of State of Texas, Roger Williams, that details his concern that after the LULAC opinion, implementation of the Court's determination that District 23 be re-drawn, coupled with many other federal law requirements, like HAVA, will make it next to impossible for Texas to comply in a timely fashion. He writes:*

*In short, it is extremely cumbersome on the election officials in Texas to have to balance compliance with the wide array of federal election laws designed to ensure*

*that every person has a timely, confidential and secure method of voting with the ever-evolving judicial interpretations of the Voting Rights Act.*

*What concerns me is that we now seem to be poised to adopt significant revisions – that is adoption of “preferred candidate of choice” and “any discriminatory purpose” as standards – and we don’t have agreement on what they mean. At what point does the continued ebb and flow of our law under the Voting Rights Act put states in a place where they are simply unable to redistrict without running afoul of federal law – even as they undertake the process with the purest and best of intentions?*

No one can possibly know what electoral arrangements the courts and the Department of Justice will view as in compliance with the Voting Rights Act. There is still no consensus on the definition of “undiluted” votes. Are minority voters entitled to proportional representation; in *Bossier Parish I*, Justice Breyer in his dissent explicitly acknowledged the inevitability of proportionality as the benchmark in measuring the electoral power to which minorities are entitled. Likewise, in her concurrence in *Gingles v. Thornburg* (a section 2 case) Justice O’Connor charged the majority on the Court with having created “a right to usual, roughly proportional representation on the part of sizable, compact, cohesive minority groups. If,” she went on, “under a particular multimember or single-member district plan, qualified minority groups usually cannot elect the representatives they would be likely to elect under the most favorable single-member districting plan, then 2 is violated.”

There are numerous other unresolved questions: the proper definition of “racial bloc voting,” among them. The statute is a mess—in part because it has no clear theoretical foundation any more. In 1965 the theoretical assumptions underlying the act were perfectly clear; the statute was pure anti-discrimination legislation. But no longer.

## SUBMISSIONS FOR THE RECORD

## AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS



815 SIXTEENTH STREET, N.W.  
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PRESIDENT

RICHARD L. TRUMKA  
SECRETARY-TREASURER

LINDA CHAVEZ-THOMPSON  
EXECUTIVE VICE-PRESIDENT

**LEGISLATIVE ALERT!**

(202) 637-5090

May 10, 2006

Dear Senator:

I am writing on behalf of the AFL-CIO to urge you to co-sponsor the "Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006" (S. 2703). This legislation is critical to ensuring the continued protection of the Voting Rights Act (VRA), widely considered to be our nation's most effective civil rights law.

The VRA has enfranchised millions of racial, ethnic, and language minority citizens by eliminating discriminatory practices and removing other barriers to their political participation. In doing so, the VRA has empowered minority voters and helped to desegregate legislative bodies at all levels of government. However, 41 years after initial passage of the VRA, there is significant evidence that barriers to minority voter participation persist.

Ten oversight hearings held by the Subcommittee on the Constitution of the House Judiciary Committee during the 109<sup>th</sup> Congress considered the ongoing need for three key provisions of the VRA that are set to expire in August 2007. The evidence presented at those hearings demonstrated the continuing need for all three of these provisions: Section 5, which requires certain jurisdictions to obtain federal approval prior to making any changes that affect voting; Section 203, which requires certain jurisdictions to provide language assistance to citizens with limited English proficiency; and Sections 6 through 9, which authorize the federal government to send observers to monitor elections.

The evidence presented at the House oversight hearings revealed continuing and persistent discrimination in jurisdictions covered by Section 5 and Section 203 of the VRA. Jurisdictions covered by Section 5 continue to attempt to implement discriminatory electoral procedures on matters such as methods of election, annexations, and polling place changes, as well as redistricting. The hearings also demonstrated that citizens are often denied access to VRA-mandated language assistance and, as a result, the opportunity to cast an informed ballot. S. 2703 responds directly to evidence gathered by the subcommittee by renewing these key provisions for 25 years.

S.2703 also reauthorizes and reinstates the meaning of Section 5 originally intended by Congress, which the Supreme Court undermined in *Reno v. Bossier Parish II* and *Georgia v. Ashcroft*. The provision dealing with *Reno v. Bossier Parish II* restores the ability of the Attorney General, under Section 5 of the VRA, to block implementation of voting changes motivated by a discriminatory purpose. The provision dealing with *Georgia v. Ashcroft* clarifies that Section 5 is intended to protect the ability of minority citizens to elect candidates of their

choice. In order to provide minority-language citizens with equal access to voting, S. 2703 renews Section 203 using more frequently updated coverage determinations based on the American Community Survey Census data. S.2703 also keeps in place provisions for federal observers, and authorizes recovery of expert witness fees in lawsuits brought to enforce the VRA.

We urge you to co-sponsor and support prompt enactment of the Fannie Lou Hamer, Rosa Parks, Coretta Scott King Voting Rights Act Reauthorization and Amendment Act of 2006. Thank you for considering our views.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. Samuel', written over a faint circular stamp.

William Samuel, Director  
DEPARTMENT OF LEGISLATION



**The American Jewish Committee**  
Office of Government and International Affairs

1156 Fifteenth Street, N.W., Washington, D.C. 20005 www.ajc.org 202-785-4200 Fax 202-785-4115 E-mail [ogia@ajc.org](mailto:ogia@ajc.org)

**RE: VOTING RIGHTS ACT REAUTHORIZATION**

May 9, 2006

Dear Senator,

I write on behalf of the American Jewish Committee, the nation's oldest human relations organization with over 150,000 members and supporters represented by 33 regional chapters, to urge you to support S.2703, the "Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006" (VRAVA). This crucial legislation would reauthorize and restore the vitality of the most successful civil rights law ever enacted, the Voting Rights Act of 1965 (VRA).

The VRA protects fundamental civil rights and ensures that Americans have the right to participate in democratic elections. Passed in the wake of coordinated efforts to disenfranchise African-American populations, the VRA clarified and expanded upon the Constitution's Fifteenth Amendment, which guarantees every American the right to vote. The law proved remarkably successful in removing barriers that too often inhibit Americans from exercising their right to vote. Although many of the discriminatory practices that previously prevented minority populations from voting have been abolished, the VRA is still vitally important today when many Americans, particularly in urban centers, encounter obstacles as they seek to cast their votes.

Section 203 is among the key provisions of the VRA set to expire at the end of 2007. This provision requires certain communities with large populations of non-English or limited-English-proficient speakers to provide ballots and instructions in languages other than English. The reauthorization of this measure will ensure that these immigrant populations are afforded the same information and access in voting as their fellow Americans, regardless of national origin and linguistic skills. Section 5, also set to expire next year, requires jurisdictions with a history of discrimination in voting to obtain federal approval prior to making changes that would affect voter participation. This provision prevents voting practices with a discriminatory purpose or effect from being implemented.

Reauthorizing the expiring provisions in the Voting Rights Act will safeguard the right to vote in America for future generations. S.2703 appropriately addresses the essence of the VRA by renewing the temporary provisions for 25 years, as well as by clarifying the VRA's language in response to two recent U.S. Supreme Court decisions. The American Jewish Committee urges you to support the Voting Rights Act Reauthorization and Amendments Act of 2006.

Thank you for considering our views on this important matter.

Respectfully,

Richard T. Foltin

Legislative Director and Counsel



ADVANCING EQUALITY

May 4, 2006

**Co-Sponsor Voting Rights Reauthorization and Amendments Act of 2006 (S 2703)**

Dear Senator:

On behalf of the Asian American Justice Center, and our affiliates, the Asian American Institute, the Asian Law Caucus, and the Asian Pacific American Legal Center, we write to vigorously support and to urge you to co-sponsor S. 2703, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006. S. 2703 is critical to ensuring the continued protection of the right to vote for all Americans, including Asian Americans.

The Voting Rights Act (VRA) is our Nation's most successful civil rights law and has enjoyed strong bipartisan support. Congress enacted it in direct response to persistent and purposeful discrimination through literacy tests, poll taxes, intimidation, threats, and violence. The VRA has enfranchised millions of racial, ethnic, and language minority citizens by eliminating discriminatory practices and removing other barriers to their political participation. In the process, the VRA has made the promise of democracy a reality for Asian Americans.

Three key provisions of the VRA will expire next year, unless they are renewed. Section 5 prevents voting practices with a discriminatory purpose or effect from being implemented. Section 203 requires certain jurisdictions to provide language assistance to voters in areas with high concentrations of citizens who are limited-English proficient and illiterate. Sections 6-9 authorize the federal government to use observers in elections to monitor VRA compliance.

The House hearings highlighted that while progress has been made under the VRA, much work remains to be done. The hearings demonstrate that significant discrimination in voting is still pervasive in jurisdictions covered by the expiring provisions of the Act. In fact, the majority of all the Department of Justice's objections to discriminatory voting practices and procedures have occurred since 1982, when Section 5 was last reauthorized. Evidence of the hundreds of Section 5 objections and numerous successful voting cases have been brought during that period, provide further documentation of the persistence of discrimination in jurisdictions covered by the expiring provisions. Additionally, the record illustrates that thousands of United States citizens continue to face discrimination because of their language minority status and need VRA mandated language assistance to ensure that they can cast a meaningful ballot.

S. 2703 addresses this compelling record by renewing the VRA's temporary provisions for 25 years. The bill reauthorizes and restores Section 5 to the original congressional intent that has been undermined by the Supreme Court in *Reno v. Bossier Parish II* and *Georgia v. Ashcroft*. The *Bossier*

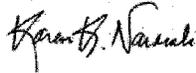
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AFFILIATES: Asian Pacific American Legal Center in Los Angeles • Asian Law Caucus in San Francisco • Asian American Institute in Chicago

fix prohibits implementation of any voting change motivated by a discriminatory purpose. The *Georgia* fix clarifies that Section 5 is intended to protect the ability of minority citizens to elect their candidates of choice. Section 203 is being renewed to continue to provide language minority citizens with equal access to voting without language barriers, using more frequent coverage determinations based on the American Community Survey Census data. The bill also keeps the federal observer provisions in place and authorizes recovery of expert witness fees in lawsuits brought to enforce the VRA.

The right to vote is the foundation of our democracy and the VRA provides the legal basis to protect this right for all Americans. We urge you to support this critical civil rights legislation by cosponsoring S. 2703. To co-sponsor S. 2703, please contact: Dimple Gupta, Chief Counsel for the Constitution in Senator Specter's office, at (202) 224-5225, [Dimple\\_Gupta@judiciary-rep.senate.gov](mailto:Dimple_Gupta@judiciary-rep.senate.gov); Kristine Lucius, Senior Counsel in Senator Leahy's office, at (202) 224-7703, [Kristine\\_Lucius@judiciary-dem.senate.gov](mailto:Kristine_Lucius@judiciary-dem.senate.gov); Charlotte Burrows, Counsel in Senator Kennedy's office at 202-224-4031, [charlotte\\_burrows@judiciary-dem.senate.gov](mailto:charlotte_burrows@judiciary-dem.senate.gov); or, Gaurav Laroia, Counsel in Senator Kennedy's office, at (202) 224-7878, [Gaurav\\_Laroia@judiciary-dem.senate.gov](mailto:Gaurav_Laroia@judiciary-dem.senate.gov). If you or your staff have any further questions, please feel free to contact Terry M. Ao, AAJC Senior Staff Attorney, at (202) 296-2300.

Sincerely,



Karen K. Narasaki  
President and Executive Director  
Asian American Justice Center

Stewart Kwoh  
President and Executive Director  
Asian Pacific American Legal Center

Tuyet Le  
Executive Director  
Asian American Institute

Gen Fujioka  
Interim Executive Director  
Asian Law Caucus



ADVANCING EQUALITY

Statement of  
**Karen K. Narasaki**  
 President and Executive Director, Asian American Justice Center

Before the  
 Subcommittee on the Constitution, Civil Rights and Property Rights  
 Committee on the Judiciary  
 United States Senate

Hearing on S. 2703,  
 "Continuing Need for Section 203's Provisions for Limited English Proficient Voters"  
 June 13, 2006

**Introductory Statement**

AAJC is supportive of S. 2703 and its renewal and restoration of the Voting Rights Act (VRA) of 1965. As our statement will demonstrate, the VRA has been instrumental to the Asian American community and our political participation. Our statement first reviews the historic and current discriminatory barriers faced by Asian Americans seeking to vote. The statement also outlines the educational inequities that still persist. A review of the impact the VRA has had on political participation, including the increase in Asian Americans as elected officials and the increase in voter registration and turnout, is also included. The statement will also explain why Section 5, Section 203, and the other provisions reauthorized by S. 2703 are critical to the continued political participation of the Asian American community.

**Organizational Background**

The Asian American Justice Center (AAJC), formerly known as the National Asian Pacific American Legal Consortium (NAPALC), is a national non-profit, non-partisan organization that works to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation.

AAJC has three affiliates: The Asian American Institute in Chicago; the Asian Law Caucus in San Francisco and; the Asian Pacific American Legal Center in Los Angeles, all of which have been engaged in working with their communities to ensure compliance with the Voting Rights Act. AAJC also has over 100 Community Partners serving their communities in 24 states and the District of Columbia.

Together with our Affiliates and our Community Partners, AAJC has been extensively involved in improving the current level of political and civic engagement among Asian American

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AFFILIATES: Asian Pacific American Legal Center in Los Angeles • Asian Law Caucus in San Francisco • Asian American Institute in Chicago

communities and increasing Asian American access to the voting process. One of our top priorities is the reauthorization of the VRA because of the incredible impact it has had on the Asian American community in addressing discriminatory barriers to meaningful voter participation.

To that end, AAJC is pleased to provide comments on S. 2703, the “Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.” AAJC commends the bipartisan, bicameral support shown by the Senate Judiciary Committee and House Judiciary Committee for renewing key expiring provisions of the VRA. AAJC would like to request that this written statement be formally entered into the hearing record.

### **History of Discrimination against Asian Americans in the United States**

Voting is the most important tool Americans have to influence government policies that affect every aspect of their lives – from taxes, to education, to health care. In short, voting is power.

Voting is also the foundation of our democracy, and the right to vote is a fundamental American right. However, large numbers of Americans have been denied the right to vote throughout our nation’s history. For example, until 1965, African Americans in the South were systematically and violently denied the right to vote.

During that same time, Asian American voters were also denied the opportunity to exercise the right to vote. Beginning in 1790, Asian Americans were considered “aliens ineligible for citizenship.”<sup>1</sup> In the late 1800s, Chinese Americans were expressly prohibited from naturalizing as citizens.<sup>2</sup> By 1924, this prohibition was extended to virtually all Asian immigrants (except Filipinos), denying them the right to vote.<sup>3</sup> By 1935, Filipinos were also restricted in their ability to vote.<sup>4</sup>

It was not until the last fifty years that the last of these restrictions ended, at long last giving all Asian Americans the right to vote.<sup>5</sup> However, even after all Asian Americans were finally granted the right to vote, they faced another obstacle to meaningful voter participation – language barriers. Citizens not fluent in English were often denied needed assistance at the polls.

To compound the language barrier problems at the polls, Asian Americans historically faced discrimination in education. Like most communities of color in the United States, Asian Americans experienced segregation in the classrooms. In Mississippi during the late 1920s, Martha Lum, a native-born Asian American, brought suit after being denied admission to the local white school in *Gong Lum v. Rice*.<sup>6</sup> Lum claimed that being rejected on account of her Chinese ancestry was discriminatory and unconstitutional. The Supreme Court upheld Mississippi’s right to school segregation, holding that under *Plessy v. Ferguson*, segregation was constitutional and that the federal courts should not interfere with a state’s right to regulate its school system as it sees fit.

<sup>1</sup> See, e.g., Naturalization Act of March 26, 1790, ch. 3, 1 Stat. 103 (1790) (repealed 1795).

<sup>2</sup> See, e.g., Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58-61 (repealed 1943) (prohibiting immigration of Chinese laborers).

<sup>3</sup> See, e.g., Immigration Act of 1917, ch. 29, 39 Stat. 874 (repealed 1952) (banning immigration from almost all countries in the Asia-Pacific region).

<sup>4</sup> Philippine Independence Act of 1934 (Tydings-McDuffie Act), ch. 84, 48 Stat. 456 (amended 1946) (imposing annual quota of fifty Filipino immigrants).

<sup>5</sup> Immigration and Nationality Act of 1965 (Hart-Celler Act), Pub. L. No. 89-236, 79 Stat. 911 (1965).

<sup>6</sup> *Gong Lum v. Rice*, 275 U.S. 78 (1927).



*Gong Lum v. Rice* did more than just validate segregation in Mississippi. Alabama,<sup>7</sup> the District of Columbia,<sup>8</sup> Florida,<sup>9</sup> Kansas,<sup>10</sup> Maryland,<sup>11</sup> Missouri,<sup>12</sup> North Carolina,<sup>13</sup> Oklahoma,<sup>14</sup> South Carolina,<sup>15</sup> Tennessee,<sup>16</sup> Texas,<sup>17</sup> and Virginia<sup>18</sup> all cited to *Gong Lum* as precedent in their own segregation cases.

In California, which has historically had a significant Asian American population, school segregation laws existed that specifically required students of Asian descent to attend schools separate from both white and black children. As early as 1860, the California School Law provided for separate schools for “Negroes, Mongolian[s], and Indians.”<sup>19</sup> In 1870, however, the state legislature provided only for separate schools for “all white children,” “children of African descent,” and “Indian children,” completely ignoring the Asian American population.<sup>20</sup> Several attempts were made to establish schools for children of Chinese descent in San Francisco during this period, but various obstacles prevented the establishment of an ongoing school system for Asian American students.<sup>21</sup>

Although the California Supreme Court upheld school segregation in the face of a challenge based on both the state and federal constitutions in 1874,<sup>22</sup> the court did hold that no child could be completely prevented from attending school on account of his or her race. This meant that Asian American schoolchildren, who had been ignored by the 1870 School Law, could attend public schools. In spite of the ruling, many local school boards enacted measures to prevent Asian American students from attending their neighborhood schools.

In 1885, the California Supreme Court held that because students of Asian descent were not specifically excluded from the public schools, school boards could not prohibit them from attending schools in their district.<sup>23</sup> The California legislature quickly responded to this ruling by passing a statute that stated that if a local school board established a school for “Mongolian” students, those students could not attend any other school.<sup>24</sup>

In 1902, Chinese American students specifically challenged segregation and Chinese-only schools, but the court upheld the separate but equal doctrine.<sup>25</sup> Japanese American students

<sup>7</sup> *Browder v. Gayle*, 142 F.Supp. 707 (M.D. Ala. 1956).

<sup>8</sup> *Carr v. Corning*, 182 F.2d 14 (D.C. Cir. 1950).

<sup>9</sup> *State ex rel. Hawkins v. Bd. of Control*, 60 So. 2d 162 (Fla. 1952).

<sup>10</sup> *Graham v. Bd. of Educ.*, 114 P.2d 313 (Kan. 1941).

<sup>11</sup> *Pearson v. Murray*, 182 A. 590 (Md. 1936).

<sup>12</sup> *State ex rel. Gaines v. Canada*, 113 S.W.2d 783 (Mo. 1937).

<sup>13</sup> *Epps v. Carmichael*, 93 F.Supp. 327 (M.D.N.C. 1950).

<sup>14</sup> *Sch. Dist. No. 7 v. Hunnicutt*, 51 F.2d 528 (E.D. Okla. 1931).

<sup>15</sup> *Briggs v. Elliott*, 98 F. Supp. 529 (E.D.S.C. 1951).

<sup>16</sup> *McSwain v. County Bd. of Educ.*, 104 F.Supp. 861 (E.D. Tenn. 1952).

<sup>17</sup> *Battle v. Wichita Falls Jr. Coll. Dist.*, 101 F.Supp. 82 (N.D. Tex. 1951).

<sup>18</sup> *Davis v. County Sch. Bd.*, 103 F.Supp. 337 (E.D. Va. 1952).

<sup>19</sup> Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 *Asian L.J.* 181, 190 (1998).

<sup>20</sup> *Id.* at 191.

<sup>21</sup> *See id.* at 190-91.

<sup>22</sup> *See Ward v. Flood*, 48 Cal. 36 (1874).

<sup>23</sup> *Tape v. Hurley*, 66 Cal. 473 (1885).

<sup>24</sup> *See Kuo, supra* note 19, at 198.

<sup>25</sup> *See Wong Him v. Callahan*, 119 F. 381 (N.D. Cal. 1902).

challenged segregation in *Aoki v. Dean* arguing that the School Law did not apply to Japanese Americans because they were not “Mongolian.” In 1907, as part of the “Gentleman’s Agreement” between the Roosevelt administration and the Japanese government that limited Japanese immigration, the *Aoki* case was dismissed.<sup>26</sup> Asian Americans did not see the repeal of all California’s school segregation statutes until 1947 when students of Mexican heritage who challenged California’s segregation system, with the cooperation of the Japanese American Citizens League, won in court.<sup>27</sup> It was not until 1954 that all Asian American students were freed from school segregation nationwide.<sup>28</sup>

Even with desegregated classrooms, Asian American students faced educational discrimination when schools failed to teach them English. It was not until 1974 that the Supreme Court’s decision in *Lau v. Nichols*<sup>29</sup> launched the modern bilingual education movement, finding that school districts could no longer ignore the plight of non-English speaking students and thus must have programs in place to address their special needs.

Prior to *Lau*, San Francisco’s school district faced rising numbers of non-English speaking and limited English proficient (LEP)<sup>30</sup> students. Despite underfunded attempts by the school district to provide English language assistance programs, most LEP students were required to attend regular, English-only classes for all academic areas.<sup>31</sup> For example, in 1970, only 37% of the 2,856 Chinese-speaking students in the San Francisco school district who needed special English language instructions received specialized assistance. Of the remaining students who did receive English language assistance, more than 59% did not receive such assistance on a full-time basis. Finally, there were enough bilingual Chinese-speaking teachers to teach only 9% of the total Chinese-speaking student population who needed special English language instructions.<sup>32</sup> These inadequacies caused difficulties and frustration among the LEP Chinese-speaking students, resulting in increased rates of truancy, delinquency, and drop-outs within an ethnic group that had previously been considered a “model minority.”

On March 25, 1970, Kinney Kinmon Lau and 12 non-English speaking Chinese American students, more than half of whom were American-born, filed a class action lawsuit on behalf of approximately 3,000 Chinese-speaking students who received no specialized English language assistance.<sup>33</sup> Plaintiffs claimed that the school district denied them the opportunity to obtain the education received by other students in the school district by failing to provide adequate English assistance and that this failure thus violated Title VI of the Civil Rights Act of 1964, which bans discrimination based “on the ground of race, color, or national origin,” in “any program or activity receiving federal financial assistance.”

<sup>26</sup> See Richard Delgado & Jean Stefancic, *Symposium: Race and the Law at the Turn of the Century: California’s Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. Rev. 1521, 1567 (2000).

<sup>27</sup> See *Mendez v. Westminster Sch. Dist.*, 161 F.2d 774 (9th Cir. 1947); see also, Toni Robinson & Greg Robinson, *Mendez v. Westminster: Asian-Latino Coalition Triumphant?*, 10 Asian L.J. 161 (2003).

<sup>28</sup> *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (1951).

<sup>29</sup> *Lau v. Nichols*, 414 U.S. 563 (1974).

<sup>30</sup> Limited-English proficiency is defined as the ability to speak English “less than very well.”

<sup>31</sup> See Wang, L. Ling Chi, *Lau v. Nichols: History of a Struggle for Equal and Quality Education*, in *Counterpoint: Perspectives on Asian America*, 240, 241 (Emma Gee ed. 1976).

<sup>32</sup> See *id.*; see also *Lau v. Nichols*, 483 F.2d 791, 792 (9th Cir. 1973).

<sup>33</sup> See Wang, *supra* note 31, at 240.

On January 21, 1974, the Supreme Court issued a unanimous opinion finding that the state had failed to provide equal treatment to the *Lau* plaintiffs. Because the state treated the students differently based on their language, the Court found that the state had discriminated against the students based on their national origin. The opinion stated that “there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.”<sup>34</sup> The Court found that the Chinese-speaking minority receive fewer benefits than the English-speaking majority, which denied them a meaningful opportunity to participate in the educational program, and noted that these were “all earmarks of the discrimination banned by the regulations.”<sup>35</sup>

The school segregation and lack of English instruction in the classrooms for Asian American students, coupled with disproportionate income levels and living conditions arising from past discrimination, resulted in high rates of illiteracy and low voting participation.

#### **Overview of the Voting Rights Act and Asian Americans**

The VRA was enacted in response to this long history of discrimination. The critical moment leading to the VRA’s passage occurred in March 1965. On a bridge outside Selma, Alabama, state troopers assaulted hundreds of people who were peacefully marching for voting rights for African Americans.

The VRA is designed to combat voting discrimination and to break down language barriers in order to ensure that Asian Americans and other Americans can vote. Asian Americans have long suffered discrimination at the polls, and still do today. Additionally, Asian American citizens still face language barriers when attempting to vote. Asian American citizens who speak some English but are not fluent can have difficulty understanding complex voting materials and procedures. By providing Asian American citizens with equal access to voting and helping to combat voting discrimination, the VRA gives Asian American citizens power to influence the policies that impact their community.

Since the enactment of the VRA over 40 years ago and the subsequent adoption of Section 203 in 1975, Asian Americans have made significant gains in electoral representation, although Asian American elected officials are still underrepresented in government. The VRA, and the language assistance provided by Section 203 in particular, has played a critical role in many of these gains.<sup>36</sup> Studies show a sharp rise in the number of Asian American elected officials in federal, state, and local offices. In 2004 the total number of elected officials was 346, up from 120 in 1978. Of the 346 total elected officials, 260 serve at the local level, up from 52 in 1978.<sup>37</sup> Approximately 75 Asian American officials serve at the state legislative level. These gains can be directly attributed to the VRA and particularly to the passage of Section 203. For example, the vast majority

<sup>34</sup> See *Lau v. Nichols*, 414 U.S. 563, 566 (1974).

<sup>35</sup> *Id.*

<sup>36</sup> States that contain at least one county required to provide voting assistance in one or more Asian languages pursuant to Section 203 include: Alaska, California, Hawaii, Illinois, New York, Texas, and Washington.

<sup>37</sup> Carol Hardy-Fanta, Christine Marie Sierra, Pei-te Lien, Dianne M. Pinderhughes, and Wartyna L. Davis, *Race, Gender and Descriptive Representation: An Exploratory View of Multicultural Elected Leadership in the United States*, September 4, 2005, at 4.

<sup>38</sup> *Id.* at 17.



of Asian American elected officials, 75%, were elected in jurisdictions covered by Section 203 of the VRA.<sup>38</sup> In the state legislatures, 65% of Asian Americans were elected from jurisdictions covered by the VRA.<sup>39</sup> In city councils, 79% of Asian Americans were elected from VRA-covered jurisdictions.<sup>40</sup> And among those serving on the school boards, 84% of Asian Americans were elected from covered jurisdictions.<sup>41</sup>

In California, the increase has been particularly dramatic. In 1990, California had no Asian American state legislators; it now has nine. Eight of the nine Asian American state legislators represent legislative districts located in counties that are covered under Section 203 for at least one Asian language.<sup>42</sup> Every county in California that is covered under Section 203 for an Asian language has at least one Asian American legislator.

Harris County, Texas provides another example of gains in electoral representation that are directly attributable to the 1992 amendment to Section 203. In July 2002, the Census Bureau determined that Harris County qualified for Section 203 coverage in Vietnamese (in addition to Spanish). In 2003, Harris County election officials violated Section 203 by failing to provide Vietnamese ballots on its electronic voting machines. Harris County attempted to remedy the problem by creating paper ballot templates in Vietnamese. However, the County did not make these templates widely available to voters and did not offer them to voters at all polling places.

Pressure by the Department of Justice (DOJ), AAJC, and our Community Partner, the Asian American Legal Center of Texas, resulted in a settlement agreement that addressed the County's violations. Specifically, the County agreed to (1) hire an individual to coordinate the County's Vietnamese language election program; (2) provide all voter registration and election information and materials, including the voting machine ballot, in Vietnamese, as well as English and Spanish; (3) establish a broad-based election advisory group to make recommendations and assist in election publicity, voter education, and other aspects of the language program; and (4) train poll officials in election procedures and applicable federal voting rights law. In the wake of these changes, Harris County elected its first Vietnamese state legislator, Hubert Vo, in November 2004 over an incumbent.<sup>43</sup>

Despite these significant gains, barriers precluding Asian Americans from electing candidates of their choice still exist. This progress is at risk of being subverted without the renewal of the VRA, including Section 203. There is still much work to do before Asian Americans can exercise their right to vote without encountering obstacles related to their lack of fluency in English and without encountering discrimination at the polls. To that end, AAJC believes S. 2703 will help ensure that Asian American voters will continue to have their voices heard and help more Asian Americans to vote.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 17-18.

<sup>41</sup> *Id.*

<sup>42</sup> These legislators are California State Assemblymembers: Judy Chu (Los Angeles), Carol Liu (Los Angeles), Ted Lieu (Los Angeles), Van Tran (Orange), Shirley Horton (San Diego), Wilma Chan (Alameda), Alberto Torrico (Alameda, Santa Clara), and Leland Yee (San Francisco, San Mateo).

<sup>43</sup> [http://www.civilrights.org/campaigns/vra/learn\\_more/detail.cfm?d=195](http://www.civilrights.org/campaigns/vra/learn_more/detail.cfm?d=195).



**Continuing Discrimination against Asian American Voters**

Although the VRA has done much to assist language minorities in exercising their right to vote, discrimination against Asian American voters and candidates persists, and the need for the protections provided by the VRA remains.

For example, on April 25, 2005, Trenton, New Jersey radio hosts denigrated Asian Americans by using racial slurs and speaking in mock Asian gibberish during an on-air radio show. The hosts demeaned a Korean American mayoral candidate and made various other derogatory remarks. One of the hosts, Craig Carton, made the following remarks:

Would you really vote for someone named Jun Choi [said in fast-paced, high-pitched, squeaky voice]? ... And here's the bottom line. ... no specific minority group or foreign group should ever dictate the outcome of an American election. I don't care if the Chinese population in Edison has quadrupled in the last year, Chinese, should never dictate the outcome of an election, Americans should... And it's offensive to me... not that I have anything against uh Asians... I really don't... I don't like the fact that they crowd the goddamn black jack tables in Atlantic City with their little chain smoking and little pocket protectors.<sup>44</sup>

Several days after the broadcast, the New Jersey/National Taskforce Against Hate Media and the New Jersey Coalition for Asian American Civil Rights reached an agreement with the radio station, which provided that the hosts would issue an on-air apology and the station would implement specific strategies to promote cultural awareness.<sup>45</sup> Jun Choi eventually won the election.

The discriminatory attitudes expressed by the hosts in Trenton are by no means unique. In 2005 in Washington State, a citizen named Martin Ringhofer challenged the right to vote of more than one thousand people with “foreign-sounding” names. Mr. Ringhofer targeted voters with names that “have no basis in the English language” and “appear to be from outside the United States” while eliminating from his challenge voters with names “that clearly sounded American-born, like John Smith, or Powell.”<sup>46</sup> Mr. Ringhofer primarily targeted Asian and Hispanic voters.<sup>47</sup> In one of the counties in which Mr. Ringhofer initiated his challenge, the county auditor declined to process the challenge and contacted the DOJ about the challenge due to its apparent violation of state and federal law.<sup>48</sup>

Through poll monitoring efforts, several organizations have documented evidence of discrimination by poll workers at polling sites throughout the country. Under the Access to Democracy Project, AAJC and its affiliates monitored polls during the November 2004 election and found significant evidence of poll worker reluctance to implement Section 203 properly, as well as outright hostility towards Asian American voters. For example, one election judge in Cook County, Illinois, commented that a voter whom he was unable to understand should “learn to speak

<sup>44</sup> <http://www.asianmediawatch.net/jerseyguys/>.

<sup>45</sup> *Id.*

<sup>46</sup> See also Jim Camden, *Man Says Votes from Illegal Immigrants*, March 31, 2005,

<http://www.spokesmanreview.com/local/story.asp?ID=61944>.

<sup>47</sup> *Id.*

<sup>48</sup> Letter dated April 5, 2005 from Franklin County Auditor to Martin Ringhofer.

English.” Similarly, in a precinct in Cook County, with a very high concentration of Chinese American voters, there was only one Chinese ballot booth and no sign indicating that the booth was for Chinese speakers. When asked about this concern, the election judge replied, “They don’t need them anyway. They just use a piece of paper and punch numbers. They don’t read the names anyway, so it doesn’t matter.”

During the 2004 election, “Election Protection” coalition members monitored polls by documenting calls from voters across the United States complaining of discriminatory practices at the polls. For example, in Orange County, California, an Asian American voter was unnecessarily required to show proof of identification and address even though she was not a first time voter and had voted in the precinct previously. This also occurred in Bergen County, New Jersey.<sup>49</sup>

Similarly, in Boulder, Colorado, a poll worker made racist comments to an Asian American voter. The poll worker then told her she was not on the list of registered voters and turned her away after the voter had waited in line for over an hour. The voter watched as others completed provisional ballots, and she asked if she could do so as well, only to be told her circumstances were different. The voter continued to watch as another Asian American woman was also turned away. After the voter left the polling place, she called the Election Protection hotline and discovered that she indeed was properly registered to vote at that location. She returned and eventually was allowed to vote.<sup>50</sup>

Other examples of discriminatory behavior at the polls included:

- In West Palm Beach, Florida, an election poll worker told a voter that the city was not handling Hispanic, Black or Asian voters at that particular polling place.<sup>51</sup>
- In Union County, New Jersey, White challengers were seen going inside the voting booth with minority voters.<sup>52</sup>
- In Jackson Heights, Queens, one poll worker said, “You Oriental guys are taking too long to vote.” Other poll workers commented that there were too many language assistance materials on the tables, saying, “If they (Asian American voters) need it, they can ask for it.” At another site in Queens, when a poll worker was asked about the availability of translated materials, he replied, “What, are we in China? It’s ridiculous.”<sup>53</sup>
- In Koreatown, New York during the 2004 general elections, a precinct inspector gave certain Asian American voters time limits and sent at least one Asian American voter to the back of the line.<sup>54</sup>

<sup>49</sup> *Election Incident Reporting System: 1-866-Our-Vote*, <https://voteprotect.org/index.php?display=EIRMapNation&tab=ED04>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Asian American Legal Defense & Education Fund, *Asian American Access to Democracy in the 2004 Election: Local Compliance with the Voting Rights Act and Help America Vote Act (HAVA) in NY, NJ, MA, RI, MI, PA, VA*, August 2005.

<sup>54</sup> Tr. 11/8/05 (App.), at 1433 (Written Testimony of Eunsook Lee, Sept. 25, 2005 (“Lee Written Testimony”).

More generally, despite claims of certain opponents who assert that Asian Americans no longer suffer from discrimination in American society and hold Asian Americans up as the “model minority” who have already succeeded in American society, the reality is that Asian Americans still suffer from discrimination. Scholars have debunked this “model minority” myth.<sup>55</sup> This myth rests on stereotypes of Asian Americans as being more racially and culturally inclined to be hard-working and industrious than other minorities.<sup>56</sup> As evidenced by the substantial body of scholarly literature on this topic, the “model minority” myth is empirically false and ignores current discrimination against Asian Americans.

Contrary to the claims of the proponents of the myth, Asian Americans’ socioeconomic status reflects the lingering effects of a long history of racial discrimination. Indeed, a higher percentage of Asian Americans than Caucasian Americans live in poverty.<sup>57</sup> Eleven Asian American groups have poverty rates above average, including Chinese, Koreans, Vietnamese, and Pakistanis.<sup>58</sup> Hmong and Cambodians have poverty rates higher than any of the major racial and ethnic groups in the U.S., both 29% or higher compared to 12% for the U.S.<sup>59</sup> Asian Americans have per capita incomes below that of the U.S. population overall.<sup>60</sup> Filipinos, Koreans, and Vietnamese are among the sixteen Asian American and Pacific Islander groups that have per capita incomes below that of the U.S. overall. Hmong, Cambodians, and Laotians have per capita incomes below \$12,000, which is below that of any of the major racial or ethnic groups.<sup>61</sup> Further, discriminatory employment barriers resulting from the stereotype of Asian Americans as unassertive “grinds” who lack leadership skills have hindered Asian Americans’ ability to advance to management positions.<sup>62</sup> Asian Americans experience such “glass ceiling” barriers in many

<sup>55</sup> See, e.g., Frank H. Wu, *Yellow: Race in America Beyond Black and White* 39-59 (Basic Books 2002) (discussing the empirical and other flaws in this myth); Deborah Woo, *Glass Ceilings and Asian Americans: The New Face of Workplace Barriers* 34-38 (Altamira Press 2000).

<sup>56</sup> See Wu, *Yellow*, *supra* note 55, at 45-47, 62-63 (discussing how the myth emerged with a 1966 article contrasting Japanese Americans and African Americans based on cultural differences); Woo, *Glass Ceilings*, *supra* note 55, at 24, 33-38 (criticizing explanations of socioeconomic disparities between Asian Americans and other races based on cultural differences such as Confucianism); see also Wu, *Yellow*, *supra* note 55, at 49, 74-77 (describing “model minority” myth as a form of stereotyping).

<sup>57</sup> Asian American Justice Center, *A Community of Contrasts: Asian Americans and Pacific Islanders in the United States Demographic Profile* 10 (2006).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 9. Per capita income is the income available per individual in a population, rather than for an entire household. Because Asian American households are larger on average, per capita income is a better measure of a group’s overall well-being.

<sup>61</sup> *Id.*

<sup>62</sup> See Woo, *Glass Ceilings*, *supra* note 55, at 120 (discussing cultural stereotypes regarding Asian Americans’ general leadership abilities); Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 *Stan. L. Rev.* 855, 894 (1995) (noting the negative stereotype that Asian Americans have poor leadership and interpersonal skills). Indeed, according to one study, of all racial groups, Asian Americans “face the worst chance of being advanced into management positions.” See LEAP Asian American Pub. Policy Inst. & U.C.L.A. Asian American Studies Ctr., *The State of Asian Pacific America* 215-216 (1993). According to the Equal Employment Opportunity Commission (“EEOC”), a disparity exists for Asian Americans between the extent to which they occupy professional positions that require a college degree and the extent to which they hold management positions with responsibilities of supervision and policy setting. See EEOC, *Job Patterns for Minorities and Women in Private Industry* (1998), <http://www.eeoc.gov/stats/jobpat/1998/tables-1.html> (last visited June 28, 2006) (noting EEOC data showing that 29 percent of Asian American employees are professionals, but only 7.4 percent fill management positions).

occupational contexts, including the corporate sector,<sup>63</sup> the federal government,<sup>64</sup> science and engineering,<sup>65</sup> academia,<sup>66</sup> and the federal judiciary.<sup>67</sup> Asian Americans also suffer significant discrimination in the area of government contracting.<sup>68</sup>

The “model minority” myth ignores the continuing existence of discrimination and prejudice against Asian Americans in contemporary American society. In 2001, a comprehensive survey revealed that 71 percent of respondents held either decisively negative or partially negative attitudes towards Asian Americans.<sup>69</sup> Racial representations and stereotyping of Asian Americans, particularly in well-publicized instances where individuals in power or the mass media express such attitudes,<sup>70</sup> reflect and reinforce an image of Asian Americans as “different,” “foreign,” and the “enemy,” thus stigmatizing Asian Americans, heightening racial tension, and instigating

<sup>63</sup> Asian Americans comprised less than 0.3 percent of senior executives in the United States in 1990. See Korn/Ferry International, *Executive Profile: A Decade of Change in Corporate Leadership* 23 (1990). Today, Asian Americans comprise less than one percent of the board directorships of Fortune 500 companies. See White House Initiative on Asian Americans and Pacific Islanders, *A People Looking Forward, Action for Access and Partnership in the 21st Century* 60-61 (2001) (“*A People Looking Forward*”).

<sup>64</sup> According to EEOC data, Asian Americans are under-represented in supervisory positions in 23 out of 25 federal departments or agencies (of those departments or agencies reporting this information) and constitute just 1.6 percent of the federal workforce’s top managers and highest salaried employees. See *A People Looking Forward*, *supra* note 62, at 104-05; Asian Americans and Pacific Islanders Joint Task Force, *AAPI Federal Employment and Glass Ceiling Issues* 11 (2001).

<sup>65</sup> Asian Americans are less likely than other minority groups to be in management positions in science and engineering fields. See National Science Foundation, *Women, Minorities, and Persons with Disabilities in Science and Engineering* (1998), <http://www.nsf.gov/statistics/nsf99338/pdfstart.htm> (last visited June 12, 2006).

<sup>66</sup> Among minorities, Asian Americans occupy the smallest number (under one percent) of top administrative positions at two- and four-year academic institutions combined. See Woo, *Glass Ceilings*, *supra* note 55, at 118-19. Asian Americans also have been under-represented in professional school faculties. For example, as of 1993, over 70 percent of American law schools had never hired an Asian American faculty member. See Pat K. Chew, *Asian Americans in the Legal Academy: An Empirical and Narrative Profile*, 3 *Asian L.J.* 7, 33 (1996).

<sup>67</sup> Of almost 1,600 active judges in the federal judiciary, only 0.9 percent are Asian American. See Edward M. Chen, Speech Presented at the California Law Review Dinner (April 11, 2002) (unpublished).

<sup>68</sup> See Notice: Proposed Reforms to Affirmative Action in Federal Procurement, *Appendix - The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26042, 26050-63 (May 23, 1996) (citing congressional hearings since 1980 regarding discrimination against minority-owned business enterprises, and stating that Congress found that “11 percent of Asian business owners had experienced known instances of discrimination in the form of higher quotes from suppliers” and that Asian American-owned businesses receive, on average, only 60 cents of each dollar “of state and local expenditures that those firms would be expected to receive, based on their availability”); Theodore Hsien Wang, *Swallowing Bitterness: The Impact of the California Civil Rights Initiative on Asian Pacific Americans*, *Ann. Surv. Am. L.* 463, 469 (1995) (stating that numerous studies conducted by local governments in California concluded that Asian American businesses face significant discrimination in competition for government contracts).

<sup>69</sup> See Committee of 100, *American Attitudes Toward Chinese Americans and Asians* 56 (2001). The study further found that, of those respondents holding decisively negative views, 34 percent said they would be upset if a significant number of Asian Americans moved into their neighborhood and 57 percent believed that increased Asian American population is bad for America. See *American Attitudes*, at 46, 50. Twenty three percent of respondents said that they would be “uncomfortable” if an Asian American were elected president. *Id.* at 40.

<sup>70</sup> For example, during the trial of O.J. Simpson in the mid-1990s, Senator Alfonse D’Amato, using a crudely exaggerated Japanese accent on a radio talk show, mocked the handling of the case by Judge Lance Ito, a third generation Japanese American who speaks English without an accent. See Cynthia Kwei Yung Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 *Hastings Women’s L.J.* 165, 175 (1995). Other incidents of such stereotyping in connection with the Simpson trial included racist epithets that appeared on national radio programs. See *id.* at 176.

discrimination.<sup>71</sup> Such negative racial representation and stereotyping also can incite violence directed against Asian Americans.<sup>72</sup> Thousands of incidents of anti-Asian American violence have been documented over the last decade, including physical harassment, assault, attempted murder, and murder.<sup>73</sup>

Finally, educational discrimination against Asian Americans still exists. This educational discrimination impacts the ability of Asian Americans to achieve high levels of education. While some Asian American children are doing well in education, there is a significant number who are not.<sup>74</sup> This in turn depresses the ability of Asian Americans to participate in the electoral process.<sup>75</sup> The impact of these low rates of educational attainment on electoral participation is exacerbated by the language barriers faced by Asian Americans. More than a third of the Asian American

<sup>71</sup> See Lee, *Beyond Black and White*, *supra* note 70, at 181. Spencer K. Turnbull, *Wen Ho Lee and the Consequences of Enduring Asian American Stereotypes*, 7 *Asian Pac. Am. L.J.* 72, 74-75 (2001); Terri Yuh-lin Chen, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 *Asian L.J.* 69, 72, 74-75 (2000) (“Hate Violence”); Jerry Kang, *Racial Violence Against Asian Americans*, 106 *Harv. L. Rev.* 1926, 1930-1932 (1993). See also *American Attitudes*, *supra* note 68, at 8. In the survey discussed above, 32 percent of the respondents said they believed that Chinese Americans are more loyal to China than to the United States, and 46 percent of those surveyed said they believed that “Chinese Americans passing on information to the Chinese government is a problem.” See *American Attitudes*, *supra* note 68, at 18, 26. Such racial attitudes toward Japanese Americans underlay the federal government’s internment of approximately 120,000 of these citizens during World War II. See *Korematsu v. United States*, 323 U.S. 214 (1944); see also *Adarand Contractors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (recognizing that the internment of Japanese Americans upheld in *Korematsu* was “illegitimate” and citing Congressional finding that this internment was “carried out without adequate security reasons . . . and [was] motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership” (quoting Pub. L. 100-383, § 2(a), 102 Stat. 903-904)).

<sup>72</sup> See Chen, *Hate Violence*, 7 *Asian L.J.* at 74-76.

<sup>73</sup> See National Asian Pacific American Legal Consortium 2000 *Audit of Violence Against Asian Pacific Americans 9* (2001). Moreover, the myth that Asian Americans uniformly are economically prosperous encourages criminals to target Asian Americans. See Jerry Kang, *Racial Violence Against Asian Americans*, 106 *Harv. L. Rev.* 1926, 1929-30 (1993). The implied inferiority of other minority races that is inherent in the myth’s depiction of Asian Americans as a success story also creates or intensifies resentment and scapegoating impulses, especially in competitive circumstances (e.g., school) or in times of economic downturn. See *id.* at 1934-36 (explaining that publicity about supposed successes of Asian Americans implies to other minority groups “that, but for their incompetence or indolence, they too would be succeeding in America,” thus fueling resentment against Asian Americans); Wu, *Yellow: Race in America Beyond Black and White*, *supra* note 55, at 70-73 (explaining how myth of Asian American prosperity instigated racial tension in Detroit during the recession in 1982 and in Los Angeles during the 1992 riots following acquittal of the defendants accused of beating Rodney King).

<sup>74</sup> While Asian American adults age 25 years and older are more likely than Whites to have graduated college, they are also more likely to have not graduated from high school. Four Southeast Asian groups – Vietnamese, Cambodians, Laotians, and Hmong – have educational levels far below average, some among the lowest in the nation. Census data shows that over 25% of Cambodians, 45% of Hmong, and 23% of Laotians have had no formal schooling, compared to 1% of the overall population. Similarly, Census data shows that only 9% of Cambodians, 7% of Hmong, and 8% of Laotians obtain at least a bachelor’s degree, compared to 24% of the overall U.S. population. Additionally, nearly half or more of Hmong, Cambodian, and Laotian adults and over a third of Vietnamese have not completed high school. About one out of five Chinese adults have not finished high school. Less than ten percent of Cambodian, Laotian, and Hmong adults have completed college and only 20% of Vietnamese, the fifth largest Asian American group in the U.S., has a college degree. Asian American Justice Center, *A Community of Contrasts: Asian Americans and Pacific Islanders in the United States Demographic Profile 7* (2006). The data cited are taken from U.S. Census 2000, Summary Files 1 through 4. Figures are for the inclusive Asian American (but not Pacific Islander) population (single race and multi-race combined).

<sup>75</sup> In its 1982 report supporting reenactment of the temporary provisions of the Voting Rights Act, the Senate found, based on Supreme Court jurisprudence, that educational disparities are causally linked with depressed levels of political participation.

population, nearly four million people, is considered LEP.<sup>76</sup> A majority of six Asian American groups are LEP: Vietnamese, Hmong, Cambodian, Laotian, Bangladeshi, and Taiwanese.<sup>77</sup> More than one out of three Koreans, Chinese, Thai, Indonesians, and Malaysians and more than a fifth of Filipinos, Japanese, Asian Indians, and Pakistanis are LEP, or not fluent in English.<sup>78</sup>

More than 1.2 million Asian American children between ages 5 and 17 are language minorities. More than one out of five Asian American children ages 17 years and younger are considered limited English proficient. The effects of LEP are experienced differently across sub-ethnic lines. A majority of Hmong children and a third or more of Bangladeshi, Cambodian, and Vietnamese children are LEP. A fifth or more of Pakistani, Korean, Malaysian, and Chinese children are LEP.<sup>79</sup> In order for these children to become fluent in English so that they can participate in society, including voting, they need to have adequate, if not better, English language instruction while in school.

Unfortunately, Asian American children are not receiving the English instruction they need. The supply of qualified bilingual educators is not enough to meet the demand of Asian American LEP students. For example, in 1997, California only had 72 certified bilingual Vietnamese teachers for 47,663 Vietnamese-speaking students (ratio = 1:662), 28 certified bilingual Hmong teachers for 31,165 Hmong-speaking students (ratio = 1:1,113), and 5 certified bilingual Khmer teachers for 20,645 Khmer-speaking students (ratio = 1:4,129). In 1986, a successful class action was brought on behalf of 6,800 Asian American English Language Learner (ELL) students.<sup>80</sup> One of the plaintiffs was a Cambodian refugee enrolled in English-only English as a Second Language (ESL) courses who was placed in a class for mentally handicapped students after failing to make progress for three years. The 1986 consent decree required the school district to review all placements of ELL Asian American students, including assessment and communication in their native language, revisions to ESL curriculum, recruitment and training of ELL instructors fluent in Asian languages, and all communications with parents in their native languages. Students are not being properly served as mandated under *Lau v. Nichols*, and we find Asian American children growing up to become Asian American adults who are not fluent in English.

Asian American immigrants understand that learning English is a path to better earnings and opportunities. Basic adult ESL classes offered generally assist new Americans to become functionally fluent. Because little, if anything, is being offered for those seeking to become more than functionally fluent, many new citizens are not able to learn English to the level where they comfortably understand complex voting materials.

Many Asian American adults who want to learn English find that it can be difficult to do so through no fault of their own. As Dr. James Tucker testified during the House Judiciary Subcommittee on the Constitution legislative hearing, educational discrimination is compounded by

<sup>76</sup> Asian American Justice Center, *A Community of Contrasts: Asian Americans and Pacific Islanders in the United States Demographic Profile* 11 (2006).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Y.S. v. Sch. Dist. of Philadelphia*, Case No. 85-6924 (E.D. Pa. 1986) (noting consent decree continued by stipulation in 2001).



the absence of sufficient adult ESL programs.<sup>81</sup> Some of the examples he noted of places with significant and/or growing populations of Asian Americans are:<sup>82</sup>

- In Boston, the average waiting time is 6-9 months. Some adults have to wait as long as 2-3 years.
- In Las Vegas, the largest ESL provider reports that the average waiting time for adult ESL classes ranges from one to four months.
- In the metropolitan New York City region, the need for adult ESL courses is estimated to be one million. Less than half (41,347) of the adults were able to enroll with over one hundred providers in 2005 due to inadequate numbers of classes. Most adult ESL programs no longer keep waiting lists because of the extreme demand, using lottery systems instead. The lottery system turns away at least three out of every four adults interested in taking an adult ESL class. In 2001, a survey of the few providers who still maintained waiting lists found that there were 12,000 adults on the lists, with an average waiting time of at least six months.

As these figures show, there are simply not enough available classes to meet the high demand of many Asian Americans for instruction in English language acquisition. As a result, many Asian American citizens are not receiving the educational opportunities they need in order to fully learn the English language and thus are being marginalized in the voting process due to the complicated voting materials and procedures involved.

AAJC commends the Senate's leadership in recognizing the continuing discrimination faced by minority voters, including Asian Americans, and for reauthorizing and restoring the VRA, including Sections 5 and 203, for 25 more years as a congruent and proportional exercise of its powers.

#### Section 5

AAJC is supportive of S. 2703's renewal for 25 years and restoration of Section 5 of the VRA. We commend the Senate's leadership for restoring the strength of Section 5 by addressing two Supreme Court decisions that have significantly narrowed Section 5's effectiveness. S. 2703 rejects the Court's holding in *Bossier II* by clarifying that a voting rule change motivated by any discriminatory purpose cannot be precleared. S. 2703 also partly rejects the Court's decision in *Georgia v. Ashcroft*, by restoring the pre-*Georgia v. Ashcroft* standard to protect the minority community's ability to elect their preferred candidates of choice. The renewal and restoration of Section 5 is important to the Asian American community.

Section 5 applies to numerous voting changes in covered jurisdictions, including redistricting, annexation of other territories or political subdivisions, and polling place changes, which can have an immense impact on local politics in particular and on Asian American

<sup>81</sup> See A Bill to Reauthorize and Amend the Voting Rights Act of 1965: Part II of 16 (May 4, 2006): Legislative Hearing on H.R. 9, Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Congress (testimony of Dr. James Thomas Tucker).

<sup>82</sup> *Id.*

communities' ability to participate in the process. In jurisdictions that are covered by both Sections 5 and 203, Section 5 complements the enforcement of Section 203. Jurisdictions that are covered by both Sections 5 and 203 must obtain preclearance from the Justice Department before implementing any change in a language assistance program. For example, when the New York City Board of Elections refused to provide fully translated machine ballots, the Justice Department, acting pursuant to Section 5, compelled the Board to comply with Section 203 by providing machine ballots with all names transliterated into Chinese.<sup>83</sup>

As the Asian American community continues to grow and move, Section 5 will become increasingly relevant to Asian Americans. Asian Americans are one of the fastest growing populations in America.<sup>84</sup> Large numbers of Asian Americans continue to live in California, New York, and Hawaii.<sup>85</sup> However, Asian Americans are simultaneously moving to different areas of the United States, including the South. Georgia and North Carolina are among the three fastest growing Asian American populations.<sup>86</sup> In fact, five of the states covered in their entirety and another four states covered partially by Section 5 are among the top 20 states with the fastest growing Asian American populations. The remaining covered states all experienced a growth in their Asian American populations.<sup>87</sup>

With this demographic shift, we are seeing the continued need for Section 5 coverage to help combat voting discrimination against Asian Americans in Section 5 covered jurisdictions. For example, Bayou La Batre, Alabama, is a fishing village of about 2,750 residents, about one-third of whom are Asian Americans. In the 2004 primary elections, an Asian American candidate ran for City Council. In a concerted effort to intimidate supporters of this candidate, supporters of a white incumbent challenged Asian American voters at the polls. The challenges, which are permitted under state law, included complaints that the voters were not U.S. citizens or city residents, or that they had felony convictions. The challenged voters had to complete a paper ballot and have that ballot vouched for by a registered voter. The DOJ investigated the allegations and found them to be racially motivated. As a result, the challengers were prohibited from interfering in the general election, and ultimately the town, for the first time, elected an Asian American to the City Council.<sup>88</sup>

Section 5 is also important to the Asian American community because of the distinct and unique voice of the community, which sometimes favors different candidates than White voters.<sup>89</sup> There have been several examples of differences in voting patterns between Asian American and White voters:

- The 2003 gubernatorial election in Louisiana suggests that racial issues remain salient in Section 5 covered jurisdictions. Pre-election polls in the weeks prior to the

<sup>83</sup> Editorial, *Minority Rights in the Voting Booth*, New York Times, Aug. 19, 1994, <http://select.nytimes.com/search/restricted/article?res=F60910FB3D5DOC7A8DDDA10894DC494D81>.

<sup>84</sup> <http://www.census.gov/Press-Release/www/releases/archives/race/001839.html>.

<sup>85</sup> [http://www.advancingequality.org/files/census\\_handbook.pdf](http://www.advancingequality.org/files/census_handbook.pdf) - Summary - p. i.

<sup>86</sup> [http://www.advancingequality.org/files/census\\_handbook.pdf](http://www.advancingequality.org/files/census_handbook.pdf) - Table 9 - p. 10.

<sup>87</sup> *Id.*

<sup>88</sup> DeWayne Wickham, *Why Renew Voting Rights Act? Alabama Town Provides Answer*, USA Today, Feb. 22, 2006, 13A available at [http://www.usatoday.com/news/opinion/editorials/2006-02-22-forum-voting-act\\_x.htm](http://www.usatoday.com/news/opinion/editorials/2006-02-22-forum-voting-act_x.htm).

<sup>89</sup> In many cases, the major opponents to Asian American candidates are white voters. Christian Collet, *Bloc Voting, Polarization and the Panethnic Hypothesis: The Case of Little Saigon*, 67 J.Pol. 3 (Aug. 2005).



November runoff showed now-Representative Bobby Jindal, an Indian American Republican supported by George W. Bush and Governor Mike Foster, with a comfortable lead over Caucasian Democratic Lt. Gov. Kathleen Blanco. But on Election Day, Jindal lost to Blanco by the margin of 52% to 48%. Analysis done on the race showed that a significant number of those who voted for David Duke, the former leader of the Ku Klux Klan, swung their support away from the non-white Republican, Jindal, to the white Democrat, Blanco.<sup>90</sup>

- During the 1998 U.S. Congressional 39<sup>th</sup> District race in California, Cecy Groom (a Filipino American Democrat) ran against Ed Royce. While almost 57% of Asian Americans voted for Groom, over 61% of White voters supported Royce.<sup>91</sup>
- During the 1998 race for California State Assembly District 60, in which Bob Pacheco ran against Ben Wong, 61% of Asian Americans voted for Wong, but only 23% of White voters did so.<sup>92</sup>
- During the 1998 race for California State Assembly District 68, in which Ken Maddox ran against Mike Matsuda, 68% of Asian American Pacific Islanders voted for Matsuda; most White voters supported Maddox (56%).<sup>93</sup>
- In a study of Vietnamese American voting patterns in Westminster, California<sup>94</sup>, the author found that in every election examined since 1998, racially polarized voting was evident, with Vietnamese American voters giving their support to Vietnamese and other Asian American candidates and white voters backing as an opposing bloc their white opponents.<sup>95</sup>
  - During the highly contested 2000 Westminster City Council race, eight candidates, including three Asian Americans, ran for two seats. Despite overwhelming support from Asian American voters, the Asian American candidates lost to White candidates who were opposed by the Asian American community.<sup>96</sup> This was the case despite the fact that one of the Asian Americans spent more than the top vote-getter.<sup>97</sup>
  - During the 1998 Westminster mayoral race, five candidates ran for the position of Westminster Mayor, including a Vietnamese American, Chuyen Nguyen. While Asian American voters surveyed overwhelmingly supported

<sup>90</sup> Richard Skinner and Philip A. Klinkner, *Black, White, Brown and Cajun: The Racial Dynamics of the 2003 Louisiana Gubernatorial Election*, Forum: Vol. 2: No. 1, Article 3 (2004).

<sup>91</sup> Asian Pacific American Legal Center ("APALC"), November 1998 Southern California Voter Survey Report ("Voter Survey Report") (1999), [http://www.apalc.org/Nov\\_1998\\_Voter\\_Survey.pdf](http://www.apalc.org/Nov_1998_Voter_Survey.pdf).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Westminster, California is home to the largest Vietnamese community outside of Vietnam.

<sup>95</sup> Christian Collet, *Bloc Voting, Polarization and the Panethnic Hypothesis: The Case of Little Saigon*, 67 J.Pol. 3 (Aug. 2005).

<sup>96</sup> See APALC, Voter Survey Report, *supra* note 90.

<sup>97</sup> Christian Collet, *Bloc Voting, Polarization and the Panethnic Hypothesis: The Case of Little Saigon*, 67 J.Pol. 3 (Aug. 2005).

him, White voters tended to support Joy Neugebauer and eventual winner Frank Fry.

- During the 1998 Westminster City Council race, a republican Vietnamese American ran for reelection against six white opponents and one other Asian American candidate. Mayor Frank Fry, a fellow Republican, unleashed mail urging “voters to reject Tony ‘Little Saigon’ Lam” in the non-partisan race. While he eventually retained his seat as an incumbent of six years, Lam had to spend almost four times as much as the other incumbent who retained her seat and who happened to be white.<sup>98</sup>

Even in elections where no Asian American candidate is involved, Asian American voters still tend to vote differently than White voters. According to a Los Angeles Times election 2004 exit poll, 34% of Asian American voters voted for Bush, whereas 64% voted for Kerry. White voters, on the other hand, voted 57% for Bush and 42% for Kerry.<sup>99</sup> A November 2002 Southern California Voter Survey found that, in the 2002 gubernatorial vote, 61% of Asian Americans voted for Gray Davis, while only 38% of White voters voted for him.<sup>100</sup> According to a November 2000 Los Angeles Times exit poll, Asian American voters voted 62% for Gore and 37% for Bush. White voters, on the other hand, voted 43% for Gore and 54% for Bush.<sup>101</sup>

Asian American voters also vote differently than White voters on ballot initiatives that directly impact the Asian American community.<sup>102</sup> For example, 53% of Asian American voters voted against Proposition 187, a 1994 initiative in California to ban undocumented immigrants from public social services, non-emergency health care, and public education. By contrast, 63% of White voters voted for the initiative. Similarly, 61% of Asian American voters voted against California's Proposition 209, a 1996 initiative that bans affirmative action in the state; by contrast, 63% of White voters voted for the initiative.

### Section 203

AAJC commends the Senate's leadership for extending the language assistance provision, Section 203 of the VRA, another 25 years in S. 2703. AAJC also commends the Senate's leadership for recognizing that the previous method of Section 203 determinations based upon data from the decennial census long form cannot keep pace with the ever-growing and changing population and have provided for determinations to be made based upon the annual American Community Survey on a five-year basis. Because the growth rate and the migration rate show that today's society is increasingly mobile, determinations made every five years will help to ensure that jurisdictions that need coverage continue to be covered and that jurisdictions that no longer need to be covered because they no longer have a sizeable language minority population with limited English proficiency will not be required to provide language assistance.

<sup>98</sup> Christian Collet, *Bloc Voting, Polarization and the Panethnic Hypothesis: The Case of Little Saigon*, 67 J.Pol. 3 (Aug. 2005).

<sup>99</sup> L.A. Times 2004 Exit Poll, <http://www.pollingreport.com/2004.htm>.

<sup>100</sup> Asian Pacific American Legal Center, Data on Asian Pacific Islander Voters from the November 2002 Southern California Voter Survey, Nov. 7, 2002, [http://www.apalc.org/2002\\_voter\\_survey.pdf](http://www.apalc.org/2002_voter_survey.pdf).

<sup>101</sup> L.A. Times 2000 Exit Poll, <http://www.pollingreport.com/2000.htm>.

<sup>102</sup> L.A. Times exit polls.

Section 203 has been critical to the participation of Asian American voters. Despite the positive impact of the Voting Rights Act in general and Section 203 in particular, language minorities still face significant discrimination at the polls when attempting to exercise their right to vote. Discrimination at the polls can manifest in different ways, including hostile and unwelcoming environments at the polls and an outright denial of the right to vote. These barriers in addition to educational discrimination result in extremely depressed voter participation. According to the Census Bureau, in the November 2004 Presidential Election, Latino voting-age U.S. citizens had a registration rate of 57.9 percent and Asian American voting-age U.S. citizens had a registration rate of only 52.5 percent, compared to 75.1 percent of all non-Hispanic white voting-age U.S. citizens.<sup>103</sup> Section 203 remains necessary to remedy the problem of discrimination against Asian Americans at the polls and to increase their voter participation.

Section 203 is needed to help language minorities overcome another major barrier: The inability to speak or read English very well. This is the single greatest hurdle that many language minorities must overcome in exercising their right to vote. Although many language minorities were born in this country or came here at a very young age, some have trouble speaking English fluently, often because they received a substandard education and were not taught English in school, while other language minorities immigrated to this country and have not had adequate opportunities to learn English.

Because the United States encourages civic engagement, certain persons are exempt from English literacy requirements when applying for citizenship, such as the elderly who have resided in the United States for a lengthy period of time<sup>104</sup>, the physically or developmentally disabled, and certain Hmong veterans who helped to save American lives during the Vietnam War and came to the United States as refugees.<sup>105</sup> These citizens are in particular need of language assistance while voting. For example, Asian American seniors age 65 years and older have the highest rates of LEP among the major racial and ethnic groups.<sup>106</sup> A majority of Asian American seniors (58%) are LEP, including Filipino, Koreans, and Chinese.<sup>107</sup> Five Asian American groups have senior populations that are more than 80% LEP, including Vietnamese, Hmong, Cambodians, Laotians, and Bangladeshi.<sup>108</sup>

Overall, 40% of Asian Americans nationwide over the age of 18 have limited English proficiency, and 77% speak a language other than English in their homes. For certain Asian American groups, these numbers are well above the national averages. For example, 67% Vietnamese Americans over the age of 18 have limited English proficiency. For Laotians,

<sup>103</sup> U.S. Census Bureau, Table 4a, Reported Voting and Registration of the Total Voting-Age Population by Sex, Race and Hispanic Origin: November 2004.

<sup>104</sup> This exemption recognizes the fact that language acquisition is more difficult for the elderly and has potentially a large impact. According to the Department of Homeland Security records, more than 2.25 million of naturalized citizens between 1986 and 2004 were age 50 or over and thus old enough to qualify for the exemption. Ana Henderson, English Language Naturalization Requirements and the Bilingual Assistance Provisions of the Voting Rights Act (2006) (on file with the author).

<sup>105</sup> Up to 45,000 Hmong veterans who fought with special guerrilla units or irregular forces in Laos and their spouses were admitted as refugees and were eligible to be exempt. *Id.*

<sup>106</sup> Asian American Justice Center, *A Community of Contrasts: Asian Americans and Pacific Islanders in the United States Demographic Profile 11* (2006).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*



Cambodians, and Hmongs over the age of 18, over 60% have limited English proficiency.<sup>109</sup> Coupled with the lack of ESL programs, which Congress itself documented during the 1992 reauthorization of Section 203, language minorities are effectively precluded from learning English.

The Section 203 formula triggering coverage is a very rigorous one. It does not presume that all minority voters need assistance, but considers literacy rates as well as self assessed language ability. In previous censuses, the Census Bureau asked about English ability in its long form census questionnaire.<sup>110</sup> It determined that respondents tend to overestimate their ability so only those who respond that they speak English “very” well are deemed to be truly proficient.<sup>111</sup> Once the Census Bureau determines the population size of LEP citizen voting-age population for a single covered language, the Bureau then takes into account whether the illiteracy rate of that group is higher than the national average.<sup>112</sup> In other words, the only persons who are counted for purposes of Section 203 determinations are those that are not fluent in English, of a single language group, citizen, voting-age AND have less than a 5<sup>th</sup> grade education.<sup>113</sup> Because voting materials are written at a level that is high school or above, citizens whose illiteracy rate, i.e. the failure to complete the 5th primary grade, is greater than that of the nation are in particular need of assistance and Section 203 is narrowly tailored to capture those citizens in need.<sup>114</sup>

Section 203 has proven effective in achieving its objective. According to Attorney General Alberto Gonzales, Section 203 is a necessary remedy to address disparities in voter registration and turnout among covered groups. When properly implemented, both Asian American voter registration and voter participation has increased significantly in covered jurisdictions. The DOJ has undertaken the most extensive enforcement of the language assistance provisions in the history of the Voting Rights Act and they have evidence that their enforcement and compliance efforts are working. For example, in San Diego County, voter registration among Hispanics and Filipinos rose by over 20 percent after one of DOJ’s lawsuits was filed. During that same period, Vietnamese

<sup>109</sup> *Id.*

<sup>110</sup> The long form census questionnaire has been replaced by the annual American Community Survey, which asks many of the same questions as the long form census questionnaire. S. 2703 renews Section 203 and keys Section 203 determinations to the new American Community Survey. The same concerns that exist regarding self-responses with regards to English proficiency for the long form census questionnaire also apply to the American Community Survey.

<sup>111</sup> Limited-English proficient for the purposes of Section 203 of the Voting Rights Act is defined as the inability “to speak or understand English adequately enough to participate in the electoral process.” See generally 42 U.S.C. § 1973aa-1a(b)(3)(B). The Director of the Census determines limited English proficiency based upon information included on the long form of the decennial census. The long form, however, is only received by approximately 17 percent of the total population. Those few who do receive the long form and speak a language other than English at home are asked to evaluate their own English proficiency. The form requests that they respond to a question inquiring how well they speak English by checking one of the four answers provided – “very well,” “well,” “not well,” or “not at all.” The Census Bureau has determined that most respondents over-estimate their English proficiency and therefore, those who answer other than “very well” are deemed LEP. See H.R. Rep. No. 102-655 at 8, reprinted in 1992 U.S.C.C.A.N. 772.

<sup>112</sup> Illiteracy is defined for these purposes as “receiving less than a fifth grade education.”

<sup>113</sup> As a result, only 16 jurisdictions in seven states are covered for any Asian language. Those jurisdictions account for more than half of the nation’s Asian American population.

<sup>114</sup> Ana Henderson, English Language Naturalization Requirements and the Bilingual Assistance Provisions of the Voting Rights Act (2006) (showing that the levels of English literacy necessary to pass naturalization tests, or possessed by many native-born citizens, are far below the level necessary to fully understand election materials) (on file with the author). Analysis of voter materials, including voter registration and ballot measures, from all 50 states reveals that they are consistently written at high grade levels and use complex English, e.g., contain longer sentences and words as well as complicated vocabulary and grammar.

registrations increased by 40 percent. And in Harris County, Texas, the turnout among Vietnamese eligible voters doubled following the DOJ's efforts in that county in 2004.<sup>115</sup> That same year, Harris County elected the first Vietnamese American to the Texas state legislature after the county began fully complying with Section 203. Also, in 2004, over 10,000 Vietnamese American voters registered in Orange County, which helped to lead to the election of the first Vietnamese American to California's state legislature.

#### Costs of Language Assistance

In a May 1997 study on the costs of Section 203, the General Accounting Office (GAO) surveyed all 422 jurisdictions and all 28 states covered by Section 203. For the respondents that provided cost data, the average cost for written assistance was only 14% of total costs, and the average cost of oral assistance was only 6.5% of total costs.

Notably, some officials responding to the GAO survey stated that they have provided assistance for so long that it is just part of their process, and they do not track costs separately. Some jurisdictions even demonstrated that it is possible to provide oral assistance at no or minimal cost. The GAO reported that other jurisdictions even provided assistance to groups for whom they were not required to offer assistance.

Research from Dr. James Tucker confirms the GAO findings. Dr. Tucker's research found, among other things, that over a majority of jurisdictions incurred no additional costs for either oral or written language assistance.<sup>116</sup> This research also concluded that, after controlling for factors such as population size and classification of costs, the average percentage of total election costs attributable to language assistance is 2.9% for oral assistance and 7.6% for written assistance. As Dr. Tucker noted in his testimony during the House Judiciary Subcommittee on the Constitution oversight hearing on Section 203, these averages are nearly equal to or below the original costs reported by GAO based on the 1984 elections and relied upon by Congress to extend Section 203 in 1992.

Opponents of the Voting Rights Act and Section 203 in particular continue to argue that providing language assistance to voters with limited English proficiency is prohibitively costly. The evidence presented in the GAO study and the recent research conducted by Dr. Tucker rebuts this contention. According to these reports, costs were minimal in most cases and certainly manageable.

#### Constitutionality of Section 203

Section 203 is constitutional. The text of Section 203 states that, in enacting this provision, Congress relied on its enforcement powers under the Fourteenth and Fifteenth Amendments to the

<sup>115</sup> Alberto R. Gonzales, U.S. Attorney General, Prepared Remarks at the Anniversary of the Voting Rights Act, Lyndon B. Johnson Presidential Library Austin, Texas (Aug. 2, 2005).

<sup>116</sup> Dr. Tucker's testimony noted that nearly 60% of reporting jurisdictions (91 of 154) reported incurring no additional costs for providing oral language assistance, and that nearly 55% of reporting jurisdictions (78 of 144) reported incurring no additional costs for providing written language assistance.

United States Constitution.<sup>117</sup> Legislation that relies on Congress's enforcement powers under the Fourteenth and Fifteenth Amendments must be intended to address the type of discrimination proscribed by those Amendments. Where Congress addresses such harms, Congress has very broad legislative powers.

Congress's power under these Amendments, though, is not limitless. For legislation to remain within constitutional limits, the United States Supreme Court recently stated that the test is whether the legislation is "congruent" with and "proportional" to the improper discrimination that the statute addresses.<sup>118</sup> In *City of Boerne*, the Supreme Court identified three steps for determining whether a statute meets the "congruence and proportionality" standard: (1) identifying the constitutional protection at issue (discrimination); (2) reviewing the record to determine whether Congress responds to a widespread pattern of discrimination (congruence); and (3) determining whether Congress's response is reasonably proportional to the harm addressed (proportionality).

(I) First Prong: Identifying Discrimination Addressed By the Legislation

In the case of Section 203, we need to look no further than the language of the statute itself, which states that "citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them resulting in high illiteracy and low voting participation."<sup>119</sup>

The legislative history of Section 203 confirms this. In enacting Section 203, the Senate acted in response to racial discrimination in the voting process and education (and in other "facet[s] of life") that result in the disenfranchisement of language minorities.<sup>120</sup> In its 1982 report supporting reenactment of the temporary provisions of the Voting Rights Act, the Senate found, based on Supreme Court jurisprudence, that educational disparities are causally linked with depressed levels of political participation. Courts have recognized this linkage as well.<sup>121</sup>

(ii) Second Prong: Congruence

After identifying the discrimination addressed by the legislation, the Court then looks at whether Congress, in enacting the statute, is in fact responding to the stated discrimination or is acting pursuant to some other motivation.<sup>122</sup> To evaluate Congress's intent, the Court looks to the legislative record, which must "identif[y] a history and pattern" of violations of the constitutional right at issue.<sup>123</sup>

<sup>117</sup> See 42 U.S.C. § 1973aa-1a(a) ("Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.").

<sup>118</sup> *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997).

<sup>119</sup> 42 U.S.C. § 1973aa-1a(a).

<sup>120</sup> S. Rep. No. 94-295, as reprinted in 1975 U.S.C.C.A.N. 774, 791-96 (July 22, 1975) ("1975 Senate Report").

<sup>121</sup> See, e.g., *White v. Regester*, 412 U.S. 755, 767-69 (1973) (citing both history of discrimination against minorities and educational and other socio-economic disparities between minorities and whites as factors in concluding that electoral systems violated the Fourteenth Amendment); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139, 143-46 (5th Cir. 1977) (en banc) (inferring causal relationship between socio-economic disparities and depressed levels of political participation).

<sup>122</sup> *City of Boerne*, 521 U.S. at 531.

<sup>123</sup> *Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001).

The 1975 Senate Report supporting the enactment of Section 203, and the 1992 House and Senate reports supporting the most recent extension of Section 203 explicitly state and set forth findings that prove the purpose of the statute was to address racial discrimination resulting in the disenfranchisement of language minorities.<sup>124</sup> The 1992 House Report supporting the 15-year extension of Section 203 states that the extension “is statutory acknowledgement of the continuing existence of the discrimination that led to the enactment of S[ection] 203.”<sup>125</sup> The House found that educational disparities for certain language minority groups persisted and that these disparities had a direct and negative impact on those groups’ ability to participate in the electoral process. The 1992 Senate Report reached the same conclusions.<sup>126</sup>

The 1975 Senate Report sets forth the many ways in which racial discrimination against language minorities results in disenfranchisement:<sup>127</sup>

- “Extensive” testimony showed “inadequate numbers of minority registration personnel, uncooperative registrars, and the disproportionate effect of purging laws on non-english [sic] speaking citizens because of language barriers.”
- Some jurisdictions did not implement their otherwise liberal local election laws in a systematic way.
- Local officials would “frighten, discourage, frustrate, [and] otherwise inhibit language minority citizens from voting,” including intimidation at the polls.
- Other barriers at election polls included failure to locate voters’ names on precinct lists; location of polls at places where minority voters felt unwelcome or uncomfortable, or which were inconvenient to them; inadequate voting facilities; and underrepresentation of minority persons as poll workers.
- Lack of proper and equal educational opportunities result in high illiteracy rates and large numbers of language minorities who are not sufficiently fluent in English to be able to vote.

In addition, that Report makes clear that Congress’s purpose in enacting Section 203 was not primarily to remedy educational discrimination, but rather to remedy “the kind of voting discrimination against language minorities disclosed by the record” as set forth above.

The 1992 House Report contains numerous findings that show Congress’s concern in renewing Section 203 was to address the inequality of access to the political process that results from, *inter alia*, educational disparities, which is mirrored by the findings in the 1992 Senate Report. The 1992 House Report reiterated the conclusion of the 1975 report that “the denial of the right to vote is ‘directly related to the unequal educational opportunities afforded . . . [to language

<sup>124</sup> S. Rep. No. 94-295.

<sup>125</sup> H.R. Rep. 102-655, as reprinted in 1992 U.S.C.C.A.N. 766, 766 (July 8, 1992) (“1992 House Report”).

<sup>126</sup> S. Rep. 102-315, 1992 WL 163390, at 4-10 (July 2, 1992) (“1992 Senate Report”).

<sup>127</sup> S. Rep. No. 94-295, as reprinted in 1975 U.S.C.C.A.N. 774, 790-96.

minorities], resulting in high illiteracy and low voting participation.”<sup>128</sup> The Report found the following evidence of the educational inequalities that lead to the denial of the right to vote:<sup>129</sup>

- LEP groups receive poorer education than the general public.
- Significant funding shortages in local school systems result in the unavailability of ESL classes for LEP students.
- Even fewer ESL classes are available for voters who are no longer in school.
- Deficiencies in educational opportunities to learn English pose a particular problem for the elderly (who have the right to vote).
- De facto segregation for LEP groups remains a pervasive problem in many state and local school systems.
- The United States Commission on Civil Rights recently had determined that “[t]he education of Asian American immigrant children in our public schools is beset with serious problems. Schools face critical shortages of bilingual and [ESL] teachers and counselors for most Asian immigrant groups. Racial tensions are festering in schools, and little is being done about them. Many Asian American students are leaving our schools with below-average English proficiency.”

The record currently before the Senate, as well as the testimony presented here, demonstrates that the same discriminatory problems identified both in 1975 and 1992 by Congress that Section 203 was intended to redress still exists today.

(iii) Third Prong: Proportionality

The Court finally compares the legislation at issue with the documented record of constitutional violations to determine whether the legislation is “so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”<sup>130</sup> In evaluating proportionality, the Court has not enunciated any required factors to be examined. For example, the Court has not required that the legislation be “narrowly tailored” to remedying the identified discrimination. Instead, the latitude granted to Congress depends on the egregiousness and pervasiveness of the constitutional violations.

Section 203 is sufficiently proportional to the discrimination it seeks to address. The 1992 House and Senate had ample evidence to support the proposition that Section 203 is proportional to the very real problem of educational and voting discrimination. The 1992 House Report and the 1992 Senate Report both found that the remedial provisions of Section 203 had done much to cure these inequities. Specifically, statistics showed that, for the covered language minorities, “[Section] 203 has served as a catalyst for increased voter participation.”<sup>131</sup> Although there are no federal requirements that polling data be kept on the Asian American language minorities, then-recent exit

<sup>128</sup> H.R. Rep. 102-655, as reprinted in 1992 U.S.C.C.A.N. 766, 769.

<sup>129</sup> *Id.* at 767-70.

<sup>130</sup> *Tenn. v. Lane*, 541 U.S. 509, 533 (2004).

<sup>131</sup> H.R. Rep. 102-655, as reprinted in 1992 U.S.C.C.A.N. 766, 770.

polls conducted in Los Angeles and New York indicated that upwards of 80% of Asian American voters felt that language assistance materials would be “helpful” and likely would increase their participation in the electoral process.<sup>132</sup> The Report also noted that, in the decade preceding the renewal effort, continued voter discrimination was further evidenced by the fact that three of the four covered language minorities had brought many successful civil actions seeking to enforce the provisions of Section 203.<sup>133</sup>

More recent testimony indicates that Southern California exit polls revealed that the percentage of voters more likely to vote if they receive language assistance has increased from 43% in 1998 to 54% in 2000.<sup>134</sup> In the November 2004 general election, over one-third of Asian American voters used language assistance.<sup>135</sup> Moreover, between December 1999 and August 2005, the percentage of voters in Los Angeles County overall who requested language assistance increased by 38%, and Asian American voter registration in California increased by 61% from the November 1998 election to the November 2004 election, with a 98% increase in turnout from Asian American voters.<sup>136</sup> Testimony during the House hearings also noted that almost one-third of responders in an exit poll of Asian American voters in 2004’s presidential election stated that they needed some form of language assistance in order to vote, and that the greatest beneficiaries of language assistance (46%) were first-time voters.<sup>137</sup> Finally, since 2001, the current Administration filed more language assistance cases under sections 4 and 203 than in the entire previous 26 years, with each and every case being successfully resolved with comprehensive relief for affected voters. The lawsuits filed in 2004 alone provided comprehensive language assistance programs to more citizens than all previous sections 203 and 4(f)(4) suits combined and include the first lawsuits ever filed under section 203 to protect Filipino and Vietnamese voters.<sup>138</sup>

The Congressional record developed thus far, and the evidence presented in this testimony, already has substantial evidence demonstrating that Section 203 is proportional. The evidence shows that language assistance has been successful in increasing voter participation and minority representation and that language assistance still is needed because discrimination against Asian Americans continues to occur.

#### **Observer & Examiner program**

AAJC agrees with S. 2703’s elimination of federal examiners since examiners have not been appointed to jurisdictions certified for coverage in over twenty years. AAJC also supports the renewal of the observer coverage.

<sup>132</sup> *Id.* at 771.

<sup>133</sup> *Id.* at 772.

<sup>134</sup> *The Voting Rights Act: Section 203 – Bilingual Election Requirements, Part I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1352 (Kwoh Letter at 7).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1353-1354 (Kwoh Letter at 8-9).

<sup>137</sup> *The Voting Rights Act: Section 203 – Bilingual Election Requirements, Part I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1352 (Fung Written Testimony at 3).

<sup>138</sup> See A Bill to Reauthorize and Amend the Voting Rights Act of 1965: Part II of 16 (May 4, 2006): Legislative Hearing on H.R. 9, Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Congress (testimony of Rena J. Comisac).

### Expert Witness Fees and Expenses

AAJC commends leadership for authorizing the prevailing party to also recover expert costs as part of the attorney fees in voting rights cases. Because it is virtually impossible to prove a VRA violation without expending thousands of dollars for expert witness testimony, recoverable expert witness fees affirm Congress' intent of assuring access to the courts by victims of voting discrimination.

### Strengthening S. 2703 and the Reauthorization of the Voting Rights Act

#### *Lowering the Numerical Trigger for Section 203*

AAJC recommends that the Subcommittee consider strengthening Section 203 by lowering the numerical threshold for coverage from 10,000 in S. 2703. A lower numerical threshold will also decrease the potential that the ACS, which will replace the decennial long form census, will undercount language minorities. Unlike the decennial census long-form survey, the ACS will not be conducted in any Asian languages. Because 36% of the Asian American population has limited English proficiency, an English and Spanish-only ACS will likely result in an undercount of Asian American language minorities. Additionally, ACS forms are sent to only a small sample of the population, which means that few language minorities receive the form. This may result in the ACS collecting insufficient sample sizes for proper statistical analysis, further increasing the probability that the ACS will undercount Asian American language minorities. Thus, the likelihood of an undercount justifies lowering Section 203's numerical threshold from 10,000.

For example, lowering the threshold to 7,500 would trigger coverage for several Southeast Asian American communities.<sup>139</sup> The current 10,000 numerical benchmark has largely left out this significant portion of the Asian American community – the Southeast Asian American community, which largely consists of Americans from Cambodia, Laos and Vietnam.<sup>140</sup> Their characteristics include high levels of limited English proficiency and low levels of educational attainment, as well as low voter turnout.<sup>141</sup>

For the Southeast Asian American community, educational attainment remains low, especially for the Cambodian, Laotian, and Hmong communities.<sup>142</sup> Census data show that over 25% of Cambodians, 45% of Hmong, and 23% of Laotians have had no formal schooling, compared to 1% of the overall population. Similarly, Census data shows that only 9% of

<sup>139</sup> Nine additional Asian American populations in California, Illinois, New York, and Washington would currently be covered under Section 203 for Asian language assistance if a 7,500 threshold had been in effect when the 2002 determinations were made. All but one of those populations resides in counties that are already mandated to provide voting assistance in one or more Asian languages. Another six populations would have been covered for Spanish language assistance in Illinois, New Jersey, Ohio, Texas, Virginia and Wisconsin. Although several of these populations will have reached the 10,000 threshold by 2010, several other populations will not have reached the 10,000 threshold and will not be covered after the next coverage determinations are made – unless the threshold is lowered to 7,500.

<sup>140</sup> Vietnamese Americans are covered by Section 203 in a few jurisdictions, but other Southeast Asian American language minority groups have not been covered thus far.

<sup>141</sup> These communities clearly fall within the group of citizens Congress intended to protect and empower under Section 203 of the Voting Rights Act.

<sup>142</sup> The data cited below are taken from U.S. Census 2000, Summary Files 1 through 4. Figures are for the inclusive Asian American (but not Pacific Islander) population (single race and multi-race combined).

Cambodians, 7% of Hmong, and 8% of Laotians obtain at least a bachelor's degree, compared to 24% of the overall U.S. population. The impact of these low rates of educational attainment on electoral participation is exacerbated by the fact that 53% of Cambodian households, 58% of Hmong households, and 52% of Laotian households are LEP.<sup>143</sup>

Three more Southeast Asian American communities would have been covered in the 2002 coverage determinations based on the 2000 census data if the threshold had been 7,500 then, including the Cambodian American population in Los Angeles County. Section 203 coverage of this population alone would allow 17% of the nation's total Cambodian American population to benefit from language assistance. Contrarily, if the threshold remains at 10,000 when the next coverage determinations are made in 2012, zero percent of the nation's Cambodian American population will benefit from language assistance. A lower threshold of 7,500 will also trigger coverage for two more Southeast Asian American communities that were not at 7,500 after the 2000 census, but will likely be after the 2010 census and ACS.

Section 203 currently covers several cities traditionally known for their significant Asian American populations, including Los Angeles, California's Bay Area region, New York, Chicago, and Seattle. Section 203 coverage has also been triggered in cities with emerging Asian American populations, including Houston and San Diego. However, without a lower threshold, Section 203 will likely to continue to omit from its coverage other emerging Asian American populations in places such as Boston and Dallas. It is important for Congress to consider strengthening Section 203 so that it protects Asian American voters in these emerging population areas. A lower threshold would result in minimal additional costs.

*Deployment of Federal Observers to Section 203 Jurisdictions Where Discrimination Is Documented*

AAJC recommends that the Subcommittee consider whether the Attorney General should be able to deploy federal observers to Section 203 jurisdictions where discrimination or interference with the right to vote in connection with upcoming or recent elections has been documented under the Federal Observer program. As Barry Weinberg, Former Deputy Chief and Acting Chief of the Voting Section at DOJ, testified to at a hearing by the House Judiciary Subcommittee on the Constitution, the need for federal observers to document discriminatory treatment of racial and language minority voters in the polls has not waned. Mr. Weinberg further testified that minority language voters suffer additional discriminatory treatment when people who speak only English are assigned as polling place workers in areas populated by language minority voters. This fact is supported by years of community monitoring done by NGOs, including AAJC and its affiliates, which document complaints of widespread discrimination against language minorities across this country, such as:

- Challenges against Asian American voters at the polls alleging voters were not U.S. citizens or city residents, or that they had felony convictions because they looked "foreign" where voters were pulled from voting lines and forced to show passports or citizenship papers before they could vote.

<sup>143</sup> Asian American Justice Center, *A Community of Contrasts: Asian Americans and Pacific Islanders in the United States Demographic Profile 11* (2006).



- Poll workers treating Asian American voters with limited English proficiency disrespectfully, refusing to allow them to use an assistor of choice, and improperly influencing, coercing, and ignoring their ballot choices.
- Poll workers being hostile or out rightly racist to Asian American voters and language assistance, refusing to allow them to vote or refusing to provide language assistance as mandated by law.

While federal observers have been sent to areas to monitor elections on behalf of language minority citizens, it has mostly been as a result of court orders because the Attorney General can only certify jurisdictions that are covered by Section 5. The only recourse DOJ has to monitor elections on behalf of language minorities is to send attorney monitors. Federal observers have special access to polling places under the authority of the Voting Rights Act even where access to DOJ attorney monitors is otherwise barred by state laws. It is precisely inside the polling site that language minority voters experience discrimination by poll workers or even other voters, who degrade them, use racial slurs when speaking to them, challenge their right to vote, or refuse to assist them – simply because they believe the Asian American voter looks “foreign”.

If federal observers were allowed into Section 203-covered jurisdictions, they would be able to document these discriminatory and intimidating incidents. As Mr. Weinberg testified, these facts are crucial and irreplaceable in the enforcement of the Voting Rights Act.

Finally, providing the Attorney General the authority to dispatch federal observers where incidents of discrimination and intimidation have been reported in Section 203-covered jurisdictions would not result in mandatory increases in the cost of the federal observer program. This modification would not mandate that the Attorney General deploy federal observers to every Section 203 covered jurisdiction. Rather, federal observers would only be deployed to jurisdictions where there has been evidence of voting discrimination, providing the Attorney General with another tool to combat voting discrimination. While the DOJ has been able to enforce the language minority provisions of the Voting Rights Act without federal observers in Section 203 jurisdictions, one wonders how much more – both qualitatively and quantitatively – could be achieved if the Attorney General deployed federal observers to Section 203 jurisdictions where discrimination has been documented.

### **Conclusion**

On behalf of AAJC, I want to thank the Committee for the opportunity to provide a written statement on S. 2703 and its importance to the Asian American community. As this Committee knows, these provisions are essential to ensure meaningful and fair representation as well as equal voting rights for all Americans. The VRA helps remedy the continued discrimination experienced by Asian American voters. Because the expiring provisions are targeted to those areas with the most need, they are congruent and proportional to the discrimination experienced by minority voters. We are honored to be able to share our thoughts on the bill with the Committee. In particular, we are pleased to offer our support of S. 2703. I look forward to working with you to ensure its reauthorization by the end of this year.



Testimony  
*United States Senate Committee on the Judiciary*  
**TIME CHANGE--Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after  
 LULAC v. Perry**  
 July 13, 2006

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VOTING RIGHTS IN CALIFORNIA  
 1982-2006  
 A REPORT OF RENEWTHEVRA.ORG  
 PREPARED BY  
 JOAQUIN G. AVILA, EUGENE LEE, AND TERRY M. AO  
 MAY 2006

VOTING RIGHTS IN CALIFORNIA, 1982-2006  
 JOAQUIN G. AVILA<sup>1</sup>, EUGENE LEE<sup>2</sup>, AND TERRY M. AO<sup>3</sup>  
 INTRODUCTION TO THE VOTING RIGHTS ACT

The purpose of this report is to assess whether discrimination against minority voters and minority voting strength exists in California. In assessing whether such discrimination exists, the report will chronicle the efforts of minority communities in California to secure access to the political process utilizing the Voting Rights Act of 1965 ("VRA") from 1982, the year the VRA was reauthorized and amended, to the present. This chronicle indicates that two important provisions of the VRA have played a pivotal role in assisting racial and ethnic minority communities, as well as language minority groups, to secure greater access to the political process and, in some instances, to increase minority electoral representation - Section 5 and Section 203. However, the continued effectiveness of these provisions is in jeopardy since both

In addition, the results of this study support the conclusion that voting discrimination is still a persistent hallmark of California electoral politics that has prevented minority communities from completely achieving an equal opportunity to participate in the political process and elect candidates of their choice despite electoral gains by minority communities. of these provisions are due to expire in 2007.

In California, this voting discrimination often occurs within the context of racially polarized voting. When a Section 5-covered jurisdiction seeks to implement a voting change and elections are characterized by racially polarized voting, the potential for a discriminatory impact on minority voting strength is enhanced. Accordingly the U.S. Attorney General has objected to the implementation of changes in voting practices and procedures ranging from redistricting plans, a conversion from election districts to an at-large method of election, and annexations. Without Section 5 coverage, these voting changes in California would have been implemented, resulting in a discriminatory effect on minority voting strength.

Voting discrimination has also occurred when governmental jurisdictions subject to the minority language provisions of the VRA fail to comply with the corresponding language assistance provisions. This discrimination is often manifested in actions by election officials at polling sites that have adversely impacted the ability of limited-English proficiency voters to cast an effective and meaningful vote. The extent of this non-compliance is well documented and evidenced by the filing of numerous actions by the Attorney General against the cities of Azusa, Paramount, Rosemead, and the counties of Ventura, San Diego, San Benito, Alameda, and San Francisco.

These special provisions of the VRA continue to be effective tools in combating voting discrimination in California. The experiences in this state have demonstrated the continued need for the Section 5 preclearance and the Section 203 language assistance provisions. Without these special provisions, minorities will have insurmountable difficulties in challenging the adoption of voting changes that discriminate against minority strength. Moreover, without federal legislation to require political jurisdictions to provide language assistance during the election process, limited-English proficiency eligible voters and registered voters will be effectively excluded from the body politic. For these reasons, Congress should reauthorize and amend these provisions so that minority communities in California can continue their efforts to “banish the blight of racial discrimination in voting’ once and for all.”

This report is divided into several sections. The first section will provide a brief overview of the VRA focusing on key provisions that are due to expire in 2007. The second section will discuss the efforts of minority communities to utilize Section 5 to prevent the implementation of voting changes that discriminate against minority voting strength. The third section will focus on the language assistance provisions that permit limited-English proficiency voters to effectively participate in the political process. The fourth section will document the presence of racially polarized voting as demonstrated in cases and expert reports. Finally, the report’s conclusion will focus on the continued necessity for federal intervention to protect the rights of racial and ethnic minorities that still have yet to receive the full benefits of the Fifteenth Amendment to the U.S. Constitution, which provided in 1870 that states can no longer engage in voting discrimination on the basis of color, race, or previous condition of servitude.

#### I. Overview of the VRA

Faced with the continued recalcitrance of states and local governments in the South to eliminate obstacles that prevented African Americans from voting, Congress enacted the VRA in 1965. The 1965 VRA targeted states and local governmental entities in the South. This targeting was accomplished through a triggering formula that focused on voter registration or voter turnout levels in states and local governments that utilized tests or devices, such as literacy tests, as a prerequisite for voter registration. These tests or devices prevented African Americans from registering to vote. Accordingly, the use of these tests or devices were suspended in these covered jurisdictions for a five-year period. As noted previously, another important provision, Section 5, sought to prevent the implementation of any change affecting the right to vote unless federal approval was secured from the U.S. Attorney General in an administrative proceeding or in a judicial action from the U.S. District Court for the District of Columbia. The most significant feature of Section 5 related to the burden placed upon the covered jurisdiction submitting the proposed voting change. The covered jurisdiction had the burden of demonstrating that the proposed voting change did not have a discriminatory effect on minority voting strength and that the change was not adopted pursuant to a discriminatory purpose.

The 1965 VRA was subsequently amended. To further extend the temporary provisions of the VRA, Congress modified the applicable triggering formula found in Section 4. In 1970, Congress extended the regional ban on tests or devices to the nation. In addition, Congress extended the Section 5 preclearance requirement, as well as the national ban on tests or devices, for another five years. In 1975, Congress made the ban on tests or devices a permanent feature of the VRA and extended the Section 5 preclearance requirement for an additional seven years. Most significantly, Congress recognized that voting discrimination was not limited only to African Americans, but applied to other racial and ethnic groups as well. Specifically, Congress found “that voting discrimination against

citizens of language minorities is pervasive and national in scope.” Accordingly Congress expanded the definition of a test or device to include English-only elections in those jurisdictions where more than five percent of the eligible voters were members of an applicable language minority group. Thus, if a jurisdiction met the requirements relating to either having less than a 50 percent voter registration rate or less than a 50 percent voter turnout rate; and having English-only elections in a state, county, or jurisdiction that conducted voter registration; and more than 5 percent of the eligible voters were members of an applicable language group, the jurisdiction was subject to the Section 5 preclearance requirements. This expanded definition subjected the states of Arizona and Texas, states having large Latina/o populations, to Section 5 review.

The 1975 amendments also expanded the rights of limited-English proficiency eligible voters and voters to participate in the political process. Language assistance during elections was mandated in those jurisdictions subject to Section 5 meeting certain criteria, and were also mandated in those jurisdictions subject to the newly enacted Section 203 of the VRA. Under the 1975 VRA amendments, a jurisdiction could simultaneously be subject to the language assistance provisions of Section 5 and Section 203. In California, there were more counties subject to the language assistance provisions of Section 203 than to the provisions of Section 5.

After the passage of the 1975 amendments, a plurality of the U.S. Supreme Court in a 1980 case held that invalidating an at-large method of election on the basis of violating the Fourteenth and Fifteenth Amendments or Section 2 of the VRA required proof of a discriminatory intent. In response, Congress amended Section 2 to eliminate the requirement of a discriminatory intent. The newly amended Section 2 required proof only of a discriminatory effect on minority voting strength. The Senate Report accompanying the 1982 VRA amendments further defined the standard. According to the Senate Report, Section 2 was violated when it was demonstrated that under the totality of circumstances, minority voters did not have an equal opportunity to participate in the political process and elect candidates of their choice. The Supreme Court further refined Section 2 in a case involving a challenge to multimember and single-member legislative districts in North Carolina.

With respect to Section 5, Congress extended the preclearance requirement for a 25-year period until 2007. In addition, Congress established a new mechanism to create an incentive for covered jurisdictions to comply with Section 5 of the VRA. In creating this incentive, Congress provided for an expanded “bail-out” mechanism that permitted Section 5 covered jurisdictions to be exempt from Section 5 preclearance upon meeting certain criteria. Recently, eleven jurisdictions in Virginia have been removed from Section 5 coverage via the bailout procedures. As to Section 203, the language assistance provisions were extended for a ten year period until 1992.

In 1992, Congress extended the language assistance provisions to 2007. As a result of these amendments, the triggering formula was modified. Under the formula, a jurisdiction is subject to the language assistance provisions if the following criteria are met: 1) of the total number of eligible voters, more than five percent or 10,000 must consist of members of a single language minority group; 2) the members of this single language minority group must be limited-English proficient; 3) for those political jurisdictions that contain all or part of an Indian reservation, more than five percent of the total number of eligible voters within the Indian reservation must be eligible voters of a single language minority group who are of limited-English proficiency; and 4) “the illiteracy rate of the citizens in the language minority as a group [must be] higher than the national illiteracy rate.”

As further described in this report, the language assistance provisions have been instrumental in providing citizens who are not proficient in English with an opportunity to register to vote and to vote in elections, but only if there is effective compliance. Without effective compliance, in some

instances, Asian-American and other language minority voters have been prevented from casting a ballot simply because of a misunderstanding or the failure of polling place officials to provide assistance. In other instances, racial hostility served to discourage Asian-American and other language minority voters who are limited-English proficient from voting. Indeed, effective compliance with and enforcement of these language assistance provisions provides physical access to the electoral process to persons who are of limited-English proficiency.

In a similar manner, the Section 5 preclearance requirement serves to provide access to the political process by preventing the implementation of potentially discriminatory voting changes. Moreover, the deterrent effect of the law cannot be underestimated; legislators or local officials who are aware that they will be expected to show that a new law or practice satisfies the Section 5 standards are far less likely to propose voting changes that would be prohibited in order to avoid unnecessary additional costs, disruption, or litigation.

The next section of this report will provide documentation of specific examples demonstrating the use of Section 203 and Section 5 by minority communities to eliminate obstacles and barriers that prevented them from effective participation in the political process. These examples demonstrate that covered jurisdictions will continue to adopt new voting changes that have the potential for a discriminatory effect on minority voting strength. In addition, this documentation will provide examples of Section 5 covered jurisdictions simply ignoring the submission requirement. Such ongoing non-compliance presents a clear justification for extending the preclearance requirement for another period of time to permit full Section 5 compliance. Finally, the litigation involving Section 203 compliance provides clear evidence that many covered jurisdictions are resisting the efforts to fully integrate limited-English proficiency speakers into the body politic.

## II. Section 5 – An Effective Deterrent Against Voting Discrimination in California

The U.S. Attorney General has issued six letters of objection in California, four of which were issued after 1982. A review of these four letters of objections demonstrates that Section 5 has served as an important tool to eliminate discriminatory voting changes. The impact on local communities has been dramatic and historic. These experiences show that Section 5 is the most effective tool available to minority communities in California to prevent the implementation of potentially discriminatory voting changes. Unfortunately, these experiences are also evidence of the failure of effective Section 5 compliance and enforcement. In many instances, the covered jurisdiction simply does not submit the voting change to the Attorney General for Section 5 administrative approval and does not file an action in the U.S. District Court for the District of Columbia for judicial preclearance. On these grounds alone Section 5 should be extended to permit minority communities to reap the benefits of full compliance with the preclearance requirement.

### A. The Impact of Section 5 Has Been Dramatic and Historic

As a result of Section 5 enforcement, the first Latino was elected to the Monterey County Board of Supervisors in more than a hundred years. The U.S. Attorney General issued a letter of objection to a county supervisor redistricting plan that served as the catalyst for the adoption of a new redistricting plan. The implementation of the new non-discriminatory redistricting plan resulted in a historic election that provided the Latina/o community in Monterey County with a Latino county supervisor for the first time in over a hundred years.

A review of the circumstances surrounding the issuance of this letter of objection highlights the importance of having federal oversight of the election process in California, especially in areas where there are significant Latina/o communities. The 1990 Census showed that Latinas/os constituted 33.6

percent of Monterey County's population. At the time of the 1991 county supervisor redistricting process, there had not been a single Latina/o serving on the board of supervisors since 1893. After the completion of the county supervisor redistricting process, the plan was submitted for Section 5 review. Shortly thereafter Latinas/os filed an action based upon Section 5 and Section 2 of the Voting Rights Act of 1965. Since the redistricting plan had not received Section 5 preclearance, the plaintiffs argued that the court should enjoin the implementation of the plan in the upcoming 1992 elections. Alternatively, if the redistricting plan received Section 5 approval, the plan violated the Section 2 rights of Latinas/os by fragmenting a politically cohesive minority community.

This Monterey County litigation was not a typical suit. After the lawsuit was filed, the U.S. Attorney General requested additional information from the county. This request prompted the county to seek a settlement with the Latina/o plaintiffs. A settlement was reached that avoided the fragmentation of the Latina/o community. However, as a result of a referendum petition, voter approval of the county ordinance incorporating the redistricting plan was necessary. The referendum was successful in invalidating the county ordinance. Thereafter, the county was permitted another opportunity to adopt a new redistricting plan. The county was given until February 26, 1993, to secure the adoption of a redistricting plan and Section 5 approval. The new plan was adopted and submitted to the U.S. Attorney General for Section 5 approval. After receiving comments from the Latina/o community, the Attorney General issued a letter of objection.

The Attorney General concluded that Monterey County had not met its Section 5 burden. Although the new redistricting plan incorporated two supervisor districts each with a majority of Latina/o population, non-white Latinas/os comprised a plurality of the eligible voter population in each of the districts. Such an eligible voter population distribution was accomplished by fragmenting politically cohesive Latina/o voting communities in the city of Salinas and the northern part of the county. As noted by the Attorney General:

Your submission fails to disclose a sufficient justification for rejection of available alternative plans with total population deviations below ten percent that would have avoided unnecessary Hispanic population fragmentation while keeping intact the identified black and Asian communities of interest in Seaside and Marina. The proposed redistricting plan appears deliberately to sacrifice federal redistricting requirements, including a fair recognition of Hispanic voting strength, in order to advance the political interests of the non-minority residents of northern Monterey County. After the issuance of the letter of objection, the district court implemented the plaintiffs' plan in a special 1993 election. As the result of the letter of objection and the implementation of the court-ordered redistricting plan, a Latino was elected to the Board of Supervisors for the first time in over a hundred years. This historic event would not have occurred without Section 5 oversight.

Another example of Section 5's positive impact on a minority community involved a letter of objection issued against Merced County. In 1990, Latinas/os constituted 32.6 percent of the county's population. After the publication of the 1990 Census, the Board of Supervisors initiated a redistricting process. The Board of Supervisors, as a result of presentations relating to the county's demographics, was aware of the substantial growth in the county's Latina/o community in the 1980s. The Board of Supervisors disregarded this information, as well as rejected a redistricting plan developed by its demographer that created a supervisor district consisting of a majority of Latinas/os. The Attorney General objected to the proposed redistricting plan. The proposed plan fragmented the Latina/o community in the city of Merced. In addition, the plan did not place a city that was predominantly Latina/o into a supervisor district containing a significant portion of the county's Latina/o population. The submitted redistricting did not have a single supervisor district that contained a majority Latina/o population. After the letter of objection was issued, the county submitted for Section 5 approval a redistricting plan that avoided the fragmentation of the Latina/o community in the city of Merced and

included significant Latina/o communities within a majority Latina/o supervisor district. The new plan was approved and resulted in the election of a Latina supervisor.

Both of these examples illustrate the concrete results achieved by the enforcement of Section 5. Since there are only 58 counties in California, securing the right of a minority community to have equal access to the political process and to elect a candidate of its choice to a county board of supervisors is a significant accomplishment. In the case of Monterey County, it took a hundred years and a federal statute to make the rights protected by the Fifteenth Amendment a reality. There can be no question that if Merced and Monterey counties had not been subject to Section 5 review, the counties would have implemented the objectionable redistricting plans. After all, the counties formally adopted the redistricting plans that were ultimately invalidated by the Section 5 preclearance proceeding. If there had been no Section 5 oversight, the only recourse would have been to file an action pursuant to Section 2 of the Voting Rights Act of 1965. As previously noted, the Monterey County litigation included a Section 2 claim. However, the difficulties associated with Section 2 litigation, as discussed below, occurred after the case was filed. These difficulties with Section 2 would have for all practical purposes foreclosed any remedial action, due to the significant evidentiary burdens imposed upon minority plaintiffs and the substantial costs associated with these types of lawsuits. Section 2 litigation to challenge these county redistricting plans would not have been feasible.

#### B. Section 2 Litigation Cannot Serve as a Substitute for Section 5 Preclearance

The experience with Section 5 enforcement in California demonstrates the stark contrast between the protections offered by both Section 2 and Section 5. It has been suggested that by strengthening the protections provided by Section 2, there may be no need for Section 5 preclearance. However, the experiences in California demonstrate that Section 2 cannot serve as a substitute for Section 5 preclearance. Under Section 5, the advantages of "time and inertia" are shifted "from the perpetrators of the evil [of voting discrimination] to its victims." An administrative process of 60 days, where the burden of proof is upon the submitting jurisdiction, is substituted for a judicial process, where the burden of proof is upon the minority plaintiffs. Such a difference will often dictate whether an election feature or change will survive a legal challenge.

Section 2, on the other hand, presents the minority community with more formidable obstacles in successfully dismantling a method of election that has a discriminatory effect on minority voting strength. A short history is necessary to assess the limitations of litigation based upon Section 2 in California when compared to the Section 5 preclearance process.

Latinas/os in California have relied upon the federal courts to protect their voting rights and offset the lack of access to the political process caused by racially polarized voting. Initially litigants relied upon a constitutional standard. In 1973, the U.S. Supreme Court held for the first time in *White v. Regester* that at-large or multimember districts violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The *White* decision invalidated at-large or multimember legislative districts in Bexar County, Texas, on the grounds that these districts diluted the voting strength of Mexican Americans in the San Antonio greater metropolitan area. After the *White* decision, at-large election challenges at the local governmental level were instituted across the Southwest. In California, the first at-large election challenge based upon the Fourteenth Amendment was filed against the city of San Fernando. The action was unsuccessful and resulted in establishing difficult evidentiary standards for minority communities seeking to demonstrate that at-large methods of election were unconstitutional. As a result of the district court's *Aranda* decision, there were no at-large election challenges filed in California during the late 1970s.

The constitutional standard was made more difficult when the Supreme Court in *City of Mobile v. Bolden* ruled that litigants had to demonstrate a discriminatory intent in either the enactment of an at-large election system or its maintenance in order to prove that a given at-large election system was unconstitutional. As a result of the *City of Mobile* decision, many at-large election challenges across the country were dismissed. The impact of this decision prompted Congress to amend Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and eliminate the necessity of proving a discriminatory intent pursuant to a constitutional standard. Instead, Section 2 was amended to incorporate a discriminatory effects standard as the basis for successfully challenging at-large methods of election that diluted minority voting strength.

After Section 2 was amended, Latinas/os filed the first case in California against the city of Watsonville. In *Gomez v. City of Watsonville*, the local Latina/o community had been unsuccessful in securing the election of its Latina/o preferred candidates to the city council. This lack of success was due to the city's use of an at-large method of election within the context of racially polarized voting patterns that diluted the voting strength of the Latina/o community. The case was ultimately successful on appeal to the U.S. Court of Appeals for the Ninth Circuit. In California, the *Gomez* decision served to renew efforts at the community level to eliminate discriminatory at-large methods of elections. After the success of the city of Watsonville case, at large election challenges were filed in other parts of California.

However, this period of Section 2 enforcement in California was short-lived. Two major unsuccessful at-large election challenges served to discourage any further litigation by private parties. These two cases involved challenges to the at-large method of election in the El Centro School District and the city of Santa Maria. These cases consumed substantial resources and in the case of the Santa Maria litigation, a final decision was not rendered until ten years after the case had been filed. Perhaps the most chilling aspect of these losses were the efforts by the defendants to collect on their Bill of Costs filed pursuant to 28 U.S.C. § 1920. In the El Centro School District litigation, the ultimate Bill of Costs was pared down to \$ 19,462.01. The district court denied the plaintiffs request to retax the costs and did provide for a ten-day stay to permit the plaintiffs to seek a stay before the U.S. Court of Appeals for the Ninth Circuit. The school district successfully applied pressure on the plaintiffs to dismiss their appeal in exchange for the school district to withdraw their Bill of Costs. A similar litigation strategy was pursued in the Santa Maria litigation.

As a result of the El Centro and Santa Maria litigation experiences, since 1992, no private litigants have filed at-large election challenges under the federal Voting Rights Act of 1965.

The absence of private litigants is significant, since as the following table demonstrates, the private bar has been largely responsible for enforcement of minority voting rights.

Voting Cases Commenced in United States District Courts

Year U.S. Cases -Plaintiff U.S. Cases -Defendant Private

Cases Totals

1977 15 9 179 203

1978 11 5 123 139

1979 13 7 125 145

1980 6 7 147 160

1981 8 9 135 152

1982 4 11 155 170

1983 1 6 168 175

1984 10 9 240 259

1985 17 5 259 281

16 Voting Cases Commenced in United States District Courts Year U.S. Cases - Plaintiff U.S. Cases - Defendant Private Cases Totals

1986 12 4 178 194  
 1987 12 7 195 214  
 1988 11 9 327 347  
 1989 11 5 167 183  
 1990 10 6 114 130  
 1991 10 7 180 197  
 1992 9 12 473 494  
 1993 14 11 188 213  
 1994 13 13 207 233  
 1995 9 11 215 235  
 1996 8 9 168 185  
 1997 2 10 129 141  
 1998 2 7 99 108  
 1999 6 3 93 102  
 2000 16 10 141 167  
 2001 10 16 163 189  
 2002 6 15 181 202  
 2003 3 5 139 147  
 2004 12 9 152 173  
 Totals 261 237 5,040 5,538

Due to the difficulties associated with filing at-large election challenges under the federal Voting Rights Act of 1965, an effort was pursued to create a state voting rights act in California. The state act was designed to permit the filing of legal actions in state court against at-large methods of election without having to demonstrate the costly and difficult evidentiary standards required under the federal VRA. This effort was successful. In 2002, the California State Voting Rights Act became law. Although the California State Voting Rights Act is a significant improvement over Section 2, it only applies to at-large elections and does not apply to other methods of elections, such as redistrictings, and other voting changes. Moreover, the state Act was declared to be unconstitutional by a Superior Court.

To summarize, Section 2 has been ineffective in eliminating discriminatory at-large methods of elections in California. As discussed above, Section 2 cases consume a significant amount of financial resources. In addition, the evidentiary burdens established by federal courts to prove a Section 2 are often insurmountable. Given these experiences with Section 2 litigation, there can be no dispute that in California, Section 5 provides a more effective tool to challenge the adoption of potentially discriminatory voting changes. Two examples will illustrate this point.

As the result of the 1975 amendments to the Voting Rights Act of 1965, the city of Hanford in Kings County became subject to the Section 5 preclearance requirement. Subsequently, after an extended delay, the city of Hanford submitted a series of annexations for Section 5 preclearance. The U.S. Attorney General issued a letter of objection. The Attorney General concluded that the city of Hanford had not met its burden of demonstrating that the proposed annexations did not have a discriminatory effect on minority voting strength. After an unsuccessful effort to seek a withdrawal of the letter of objection and an accompanying Section 5 lawsuit, the city agreed to implement a district-based method of election. This districting plan ultimately resulted in the election of one Latina and

one Latino to the City Council in a city containing a significant Latina/o population. If the protections afforded by Section 5 had been unavailable, then the only recourse would have been to file an at-large election challenge pursuant to Section 2. Given the results in the El Centro and Santa Maria litigation, the prospect of a successful outcome would have been highly unlikely.

In Monterey County, election officials decided to reduce the number of polling places for the special gubernatorial recall election held on October 7, 2003. According to county officials, the number of polling places utilized in the November 2002 general election was reduced from 190 to 86 for the special recall election. The Department of Justice ultimately approved the voting precinct consolidations only after Monterey County withdrew from Section 5 consideration five precinct and polling place consolidations. Absent Section 5 coverage there would not have been a withdrawal of these particular polling place consolidations. The only alternative would have been to file a Section 2 case and seek a preliminary injunction enjoining the consolidation of these polling places. Given the shortened time periods involved between the setting of the special election and the actual date of the election, presenting a Section 2 case with all of the required expert-intensive evidence relating to a history of voting discrimination, racially polarized voting, and racial appeals, among other factors, would not have been possible. With respect to the Monterey County polling place consolidations, there was no realistic opportunity to even utilize Section 2.

Based upon these case studies, Section 2 cannot be viewed as a substitute for Section 5 protection. The difficulties presented by a Section 2 case with its extensive use of expert testimony and with the burden on minority plaintiffs to demonstrate that a method of election or voting change results in a denial of an equal opportunity to elect a candidate of their choice is outweighed by a Section 5 administrative proceeding where the burden of proof is reversed.

Even if Section 2 cases were feasible, the shifting of the burden of proof to the covered jurisdiction in a Section 5 proceeding is far superior to having to expend substantial time and resources to meet the evidentiary burden imposed by Section 2.

#### C. Without Section 5 Coverage Jurisdictions Will Revert to Discriminatory Methods of Election

Any doubt as to whether covered jurisdictions would revert to discriminatory methods of election if Section 5 preclearance were no longer required was laid to rest with the attempted conversion from a district election system to an at-large method of election for the Chualar Union Elementary School District in Monterey County. The Department of Justice issued a letter of objection which prevented this conversion from occurring. The school district at one time had elected its board members pursuant to an at-large method of election. In 1995, when the Latina/o board membership consisted of a majority of the board, the method of election was changed to a district-based election system. After a period of time, however, a dispute arose between the Latina/o board members and members of the white community. As a result of this dispute, members of the white community sought to change the method of election by circulating a petition that would ultimately result in the conversion back to an at-large method of election. In evaluating the proposed voting change, the Department of Justice found that the cover letter accompanying the petition to change the method of election contained language that was expressed in a tone that "raises the implication that the petition drive and resulting change was motivated, at least in part, by a discriminatory animus." Moreover the letter of objection stated that under the previous at-large method of election, the Latina/o board members were susceptible to recall petitions, whereas under the district based election system, Latina/o board members had not been subject to recall elections. In Chualar, the absence of the protective features of Section 5 would have resulted in a reversion to the former discriminatory at-large method of election.

#### D. Section 5 Serves as a Deterrent to the Enactment of Voting Changes that Have the Potential to Discriminate Against Minority Voting Strength

In California, Section 5 has served as a deterrent to the adoption of potentially discriminatory voting changes. A recent example serves to illustrate this deterrence. As noted previously, in Monterey County, county officials withdrew from consideration a series of voting precinct consolidations only after the U.S. Attorney General voiced concerns regarding problems related to minority voter access to the county's polling places. The county intended to reduce the number of its polling places by close to one half. Such a dramatic reduction in a county that has 3,322 square miles would have clearly made it difficult for minorities to travel to their local polling site and cast their ballot. However, upon receiving the Attorney General's concerns, Monterey County withdrew the objectionable precinct consolidations from Section 5 review.

Since no letter of objection was issued, there was no readily available public document serving as a record of this event. Only because the withdrawal occurred within the context of Section 5 litigation, can this instance of deterrence be documented. Apart from this deterrent effect, Section 5 enforcement has produced gains in minority electoral representation as a result of increased community involvement in campaigns, even when a questionable voting change has received Section 5 approval. Given these beneficial effects, the record for reauthorizing and amending Section 5 becomes more compelling.

There is also an additional reason for continuing Section 5 coverage in the four California counties: non-compliance. Not all of the political entities located within the four counties have complied with the Section 5 preclearance requirement. As discussed in the next section of this Report, the issue of non-compliance has resurfaced repeatedly during the VRA's 41-year history. On this basis alone, Section 5 should be reauthorized.

#### E. Section 5 Should Not Be Permitted to Expire in the Face of Continuing Instances of Non-Compliance

One could simply conclude that four letters of objection since 1982 in the four counties covered under Section 5 in California indicates that Section 5 is not needed. However, such a conclusion would be unwarranted for two reasons. First, as discussed above, the letters of objection have served to discourage governmental entities from adopting plans which discriminated against Latina/o voting strength. Second, the conclusion assumes that there has been compliance with the Section 5 preclearance requirement. Such an assumption is unwarranted.

There is a significant problem relating to the enforcement of the Section 5. To achieve the purpose of eliminating voting discrimination, the VRA relies upon the voluntary compliance of Section 5-covered jurisdictions with the submission requirements. Based upon a long series of cases culminating in *Lopez I*, Section 5-covered jurisdictions are under a legal mandate to submit their voting changes prior to implementation in any elections. In reality, many Section 5-covered jurisdictions are delinquent in the timely submission of their voting changes. But for litigation, some jurisdictions would not have submitted any voting changes.

This sordid record of non-compliance is documented in letters of objection and litigation. For example, in the *Lopez* litigation, the Supreme Court referred to voting changes, adopted by California and implemented by Monterey County in the late 1960s, which as of 1999 had still not received the necessary Section 5 preclearance. Also, in litigation involving a special election to recall Governor Gray Davis, Monterey County disclosed that voting precinct consolidations had not been submitted since the mid 1990s. This record of non-compliance has been cited numerous times by the United

States Commission on Civil Rights, by congressmen and witnesses in testimony when the Act was reauthorized in 1970, 1975, and 1982, by the Government Accounting Office, and by Supreme Court precedent. Finally, as a result of independent reviews of voting changes in selected jurisdictions, the record demonstrates that non-compliance is still a significant problem. For example, in Merced County, California, there are special election districts that have not submitted their annexations for Section 5 approval.

Despite this record of non-compliance, there were efforts underway to either amend the VRA "bailout" provisions to facilitate the process of securing an exemption from Section 5 review, or to explore the feasibility of securing a "bailout" from Section 5 compliance. As previously noted, under the "bailout" provisions, covered jurisdictions can institute an action in the U.S. District Court for the District of Columbia seeking a judicial declaration that the covered jurisdictions are no longer subject to Section 5 preclearance. Before such a declaratory judgment can issue the covered jurisdiction must meet several requirements. For a ten year period prior to the filing of the declaratory judgment action, the covered jurisdiction must demonstrate, among other requirements, that all changes affecting voting have been submitted for Section 5 preclearance prior to implementation in the electoral process, that the covered jurisdiction or its political subunits must not have been the subject of a letter of objection or the denial of a declaratory judgment pursuant to Section 5, that no judgments or consent decrees have been entered in any litigation affecting the right to vote, and that the covered jurisdiction should "have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process . . . ."

Three of California's Section 5-covered jurisdictions, Monterey, Merced, and Kings counties, have sought to amend the bailout provisions or seek changes in the triggering formulas that determine Section 5 coverage in order to facilitate an exemption from this federal preclearance. Their efforts to seek a legislative amendment is not surprising, since none of the three counties could qualify for a bailout under the statute's current criteria. Merced County would have difficulty demonstrating that there are no discriminatory methods of elections within the county that deny minorities with equal access to the political process. For example, the city of Los Banos has a total population of 25,869, based upon the 2000 Census, of which 13,048 or 50.4 percent are Latina/o. The at-large method of election is implemented to select members to the City Council. Despite this large concentration of Latinas/os within the city there is not a single Latina/o serving on the City Council. Such an absence clearly suggests that the at-large method of election utilized by the city of Los Banos may have a dilutive effect on Latina/o voting strength and thus would impede efforts of Merced County to seek a Section 5 bailout. In addition, based upon an on-site study of annexations for special election districts by one of the authors, there appeared to be many annexations that had not been submitted for Section 5 approval. This factor, if true, would also prevent Merced County from successfully securing a Section 5 bailout.

The remaining two counties also would not be successful in securing a Section 5 bailout. In Kings County, the recent settlement involving the Hanford Joint Union High School District which resulted in the abandonment of the at-large method of election and the implementation of district elections would also prevent Kings County from bailing out from Section 5 coverage. In Monterey County, the recent letter of objection issued against the Chualar Union Elementary School District on March 29, 2002, would result in the same outcome.

This effort by Monterey, Kings, and Merced counties to secure legislative amendments to facilitate a Section 5 bailout further reinforces the need to have Section 5 coverage in California. These efforts demonstrate that these counties and their political subunits would have no hesitation in reverting back to redistricting plans or methods of elections that had a discriminatory effect on minority voting strength.

In summary, based upon this review of Section 5 letters of objections and non-compliance efforts, there continues to be a need for Section 5 preclearance. At a minimum, efforts should be undertaken to insure that jurisdictions have fully complied with Section 5. In California, Section 5 has been very effective in preventing the implementation of discriminatory voting changes and has discouraged jurisdictions from reverting back to previous election methods that denied Latinas/os with access to the political process.

### III. The Language Assistance Provisions Provide Limited English Proficiency Eligible Voters and Voters with an Effective Opportunity to Participate in the Political Process

#### A. Language Assistance Provisions – Sections 203 and 4(F)(4)

As previously noted, the language assistance provisions of the VRA, Sections 203 and 4(f)(4), were enacted in 1975 and reauthorized in 1982 because Congress found that discrimination against language minorities limited the ability of limited-English proficient (LEP) members of those communities to participate effectively in the electoral process. The language assistance provisions require language assistance for language minority communities in certain jurisdictions during the election process and apply to four language minority groups: American Indians, Asian Americans, Alaskan Natives, and persons of Spanish heritage. Congress has continually found that these covered groups have faced and continue to face significant voting discrimination due to “unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation.” Other language groups have not been included because Congress did not find evidence that shows they experienced similar sustained difficulties in voting. By providing language assistance, Congress intended to break down the language barriers that effectively prevented limited-English speaking citizens from exercising their constitutional right to vote.

The adoption of these language assistance provisions are derived from a very basic principle: an eligible voter should not be penalized for his or her lack of English proficiency, especially when this inability to understand the English language reflects the failure of educational institutions to insure that its young students, as well as, adult students, meet a certain minimal level of English proficiency. The congressional testimony in support of the language assistance provisions has documented the need for the implementation and the continued need for these provisions.

The language assistance provisions require that any election materials provided in English must also be provided in the language of the covered minority group. Election information includes registration or voting notices, forms, instructions, ballots, and any other materials or information relating to the electoral process. Where the language of a covered minority group has no written form, the state or locality is only required to provide oral instructions, information, and assistance.

In 1992, after determining that the type of discrimination previously encountered by covered language minority populations still existed and that the need for language assistance continued, Congress passed the Voting Rights Language Assistance Amendments, which reauthorized the language assistance provisions until August 2007. In addition to reauthorization, Congress determined that an expanded formula for determining coverage was necessary.

The pre-1992 formula required coverage only if an Asian, Native American, Alaskan Native or Latina/o language minority community had LEP voting age citizens equal to five percent of the jurisdiction's citizen voting-age population. This resulted in dense urban jurisdictions with large LEP voting populations not being covered while jurisdictions with smaller populations were being covered, and required an excessively large LEP language minority citizen voting-age population for urban jurisdictions to meet the five percent threshold. For example, the number of LEP voting age citizens from a single language minority community needed to meet the five percent threshold in 1990

for Los Angeles County was 443,158, as compared to Napa County, which required only 5,538 to meet the threshold. Similarly, San Francisco County would have also had to reach a much higher threshold than Napa County at 36,198. Congress determined that a 10,000 person benchmark served as an appropriate threshold that would solve that problem. The numerical benchmark has been extremely important to Asian Americans because 97 percent of Asian Americans live in densely populated urban areas.

A community of one of these language minority groups will qualify for language assistance under Section 203 of the Act if more than five percent or 10,000 of the voting-age citizens in a jurisdiction belong to a single language minority community and have limited-English proficiency; and the illiteracy rate of voting-age citizens in the language minority group is higher than the national illiteracy rate. A community of one of these language minority groups will qualify for language assistance under Section 4(f)(4) if (i) more than five percent of the voting-age citizens in a jurisdiction belong to a single language minority community, (ii) registration and election materials were provided only in English on November 1, 1972, and (iii) fewer than 50 percent of the voting-age citizens in such jurisdiction were registered to vote or voted in the 1972 presidential election. Jurisdictions covered under Section 4(f)(4) are covered under Section 5. Currently, Sections 203 and 4(f)(4) apply in California. Presently there are 25 counties in California subject to Section 203 that are required to provide an election process in a language other than English. Of the Section 5-covered jurisdictions, there are only three counties subject to the language assistance requirements.

#### B. Continuing Need

Language minority voters face discrimination on the basis of their limited-English proficiency. Even though language minority voters are citizens and have the legal right to vote, poll workers and other election officials single them out as persons who should not be voting because they are not completely fluent or literate in English. This discrimination creates barriers to voting. Most obviously, discrimination can result in outright denials of the right to vote. Discrimination also creates an unwelcoming atmosphere in poll sites that serves as a deterrent to language minority voters exercising their right to vote. Section 203 addresses both of these barriers in a manner that is more fully described in the section of this report addressing discrimination against language minority voters.

Language minority voters face another barrier to voting – language. Because of their limited-English proficiency, language is the largest barrier that language minority voters face in becoming full participants in our democracy. Some language minority voters, even though they were born in the United States or came to the United States at an early age, are limited-English proficient because they attended substandard schools that did not afford them an adequate chance to learn English. Other language minority voters are limited-English proficient because they immigrated to this country and have lacked adequate opportunities to fully learn English. In either case, Section 203 language assistance lowers the single largest hurdle that these voters face in the voting process.

Many Asian American and Latina/o voters in California have high rates of limited-English proficiency, which means they are unable to speak or understand English adequately enough to participate in the electoral process. For many language minority voters in California, the language barrier would be insurmountable without the language assistance that they receive pursuant to Section 203. California voters must contend with extremely complicated ballots. For example, the ballot used in the October 2003 gubernatorial recall election listed 135 candidates. The ballot used in the November 2004 general election contained a total of 16 statewide ballot propositions, and the ballot used in the November 2005 statewide special election contained ballot propositions addressing such

arcane topics as redistricting reform, prescription drug discounts and electricity regulation. Many voters who speak English as their first language have difficulty understanding these types of ballots. For language minority voters, the language barrier doubles or triples this difficulty.

Voter information guides are also full of complexity. These guides contain not only the text of proposed laws, but also analyses by the state legislative analyst, arguments for and against proposed laws, and rebuttal arguments. Adding to the complexity is the length of these guides. The voter information guide used in the November 2005 statewide special election is more than 75 pages long. For voters who do not read English at a high level, reading these types of guides would take weeks. In short, language minority voters need Section 203 to help them climb the language hurdle. Several indicators show that this need is particularly compelling for voters in California.

#### 1. Demographic Indicators of Need

Disaggregated Census 2000 data show that the language minority population in California does indeed have a high rate of limited-English proficiency. Disaggregated Census 2000 data also show that a significant portion of the Asian-American population, including significant portions of specific Asian-American ethnic groups, and the Latina/o population in California live in what are referred to as "linguistically isolated households." A household is considered linguistically isolated if all members of the household 14 years and older are limited- English proficient. Voters who live in linguistically isolated households are in particular need of language assistance because they do not have family members who can assist them in the voting process even if they wanted the assistance.

The Asian-American population in California is nearly 40 percent limited-English proficient, and over one-quarter of Asian American households are linguistically isolated. A number of Asian-American groups are majority or near-majority limited-English proficient, including Vietnamese at 62 percent, Korean at 52 percent, and Chinese at 48 percent. These groups also have high rates of linguistic isolation, with 44 percent of Vietnamese American households isolated, 41 percent of Korean American households isolated, and 34 percent of Chinese American households isolated. The Latina/o population in California is 43 percent limited-English proficient, and 26 percent of Latina/o households are linguistically isolated.

The table below provides additional data on rates of limited-English proficiency and linguistic isolation for various racial and ethnic groups in California:

California – LEP and LIH Rates

Group Percentage of Population That Is Limited-English Proficient (LEP) Percentage of Households That Are Linguistically Isolated (LIH)

California	20%	10%
White	3%	2%
Latina/o	43%	26%
American Indian/Alaska Native	16%	8%
Asian overall	39%	26%
Vietnamese	62%	44%
Cambodian	56%	32%
Korean	52%	41%
Chinese	48%	34%
Filipino	23%	11%
Japanese	22%	18%

#### 2. Requests for Language Assistance

Another indication that language minority voters are in need of language assistance is the number of

voters who request language assistance. According to data gathered by the Los Angeles County Registrar of Voters, the total number of voters in Los Angeles County requesting language assistance increased by 38 percent from December 1999 to August 2005. This increase reflects increased outreach by Los Angeles County and illustrates language minority voters' reliance on language assistance. The following table shows these increases for specific language minority groups:

Los Angeles County – Voter Requests for Language Assistance  
 Language Percentage Increase in Number of Voter Requests for Language Assistance  
 From December 1999 to August 2005

Chinese	49%
Japanese	25%
Korean	26%
Tagalog	63%
Vietnamese	40%
Spanish	37%

These data indicate that because of voter outreach and education by Los Angeles County and community advocates, many limited-English proficient Asian Americans and Latina/o voters are using the language assistance provided under Section 203. The data also indicate that as the number of requests for language assistance increases, language minority voters have a continuing need for Section 203 assistance.

### 3. Exit Poll Indicators of Need

During major elections, APALC conducts large-scale exit polls at poll sites throughout Southern California. These poll results show that the limited-English proficiency rate of APIA voters mirrors the limited-English proficiency rate of the general APIA population. For example, in November 2004, 40 percent of APIA voters surveyed in APALC's exit poll indicated that they are limited-English proficient. The following table shows similar exit poll data for other elections:

Southern California Exit Poll Data – LEP Rates  
 Election Percentage of APIA Voters Who Are Limited-English Proficient

November 2004	* 40%
November 2002	32%
November 2000	46%
March 2000	47%
November 1998	35%

\* Represents preliminary findings. Subject to adjustment based on statistical weighting.

In addition to illustrating that language minority voters have a need for language assistance, these exit poll results show that many APIA and Latina/o voters in Los Angeles and Orange counties would benefit from language assistance during the voting process. For example, in November 2000, 54 percent of APIA voters and 46 percent of Latina/o voters indicated that they would be more likely to vote if they received language assistance. The following table provides similar data for other elections:

Southern California Exit Poll Data – More Likely to Vote If Assistance Received  
 Election Percentage of APIA  
 Voters More Likely to Vote If Assistance Received Percentage of Latina/o

Voters More Likely to  
Vote If Assistance Received  
November 2000 54% 46%  
March 2000 53% 42%  
November 1998 43% 38%

In APALC's most recent exit poll, data from the November 2004 general election indicate that over one-third of APIA voters used language assistance to cast their vote. Several APIA groups had particularly high rates of using language assistance, including 37 percent of Chinese-American voters, 48 percent of Korean-American voters and 52 percent of Vietnamese-American voters.

#### C. Unequal Educational Opportunities for Language Minorities

Congress enacted Section 203 after concluding that English-only elections and voting practices effectively denied the right to vote to a substantial segment of the nation's language minority population. Congress made findings that language minorities suffer from unequal educational opportunities, high illiteracy, and low voting participation. Language minorities still face unequal educational opportunities, and the continuing existence of these inequalities constitutes a sufficient basis for Congress to renew Section 203 for an additional 25 years.

##### 1. Demographic Indicators of Unequal Educational Opportunities

Current demographic data indicate that educational inequalities still exist. Using high school completion as a measure, disaggregated Census 2000 data show that Asian Americans and Latinas/os have lower rates of educational attainment than white Americans. In California, 19 percent of Asian Americans have less than a high school degree, compared with 10 percent of the white population. These differences are even more dramatic when looking at specific Asian American ethnic groups. For example, 36 percent of Vietnamese Americans have less than a high school degree. Latinas/os have even lower rates of educational attainment, with 53 percent having less than a high school degree. The following table shows rates of high school non-completion in California:

#### California – High School Non-Completion Group Percentage of Population With Less Than a High School Degree

California 23%  
White 10%  
Latina/o 53%  
Asian overall 19%  
Hmong 66%  
Laotian 58%  
Cambodian 56%  
Vietnamese 36%  
Chinese 22%  
Filipino 12%  
Korean 12%

These low rates of high school completion are a contributing factor to continuing high rates of limited-English proficiency among Asian American and Latina/o children, defined as children age 17 years and younger. According to disaggregated Census 2000 data, over one-fifth of Asian American

children in California are limited-English proficient. In the majority of counties covered by Section 203 for an Asian-American language minority group, these rates are higher. For example, 30 percent of Asian American children in San Francisco County and 24 percent of Asian American children in Los Angeles County are limited-English proficient. Almost one-third of Latina/o children in California are limited-English proficient. Los Angeles, Orange, and San Diego are the three counties in California with the largest numbers of limited-English proficient voting-age citizens covered under Section 203 for persons of Spanish heritage. Over 30 percent of Latina/o children in these counties are limited-English proficient.

## 2. Other Indicators of Unequal Educational Opportunities

There are other indications that language minorities suffer from unequal educational opportunities in California. K-12 students in California designated as “English learners” suffer from a number of educational inequities. English learners are students who speak a language other than English at home and who are not proficient in English. Students who speak a language other than English at home must take a test to assess their level of English proficiency. Students who are considered not proficient in English are classified as English learners, and most are placed into English language development programs.

According to a recent 2005 study, there are more than 1.6 million English learners in California, representing over one-fourth of California’s elementary and secondary students. Over 90 percent of these students are from language minority groups specified in Section 203 (Latinas/os comprise 85 percent of English learners, and APIAs make up 9 percent of English learners). Contrary to common perception, approximately 85 percent of California’s English learners are born in the United States.

## 3. Achievement Gap for English Learners

According to a 2003 study of English learners in California schools, the academic achievement of English learners lags significantly behind the achievement levels of English-only students. The study finds that the achievement gap puts English learners further and further behind English-only students as the students progress through school grades. For example, in grade 5, current and former English learners read at the same level as English-only students who are between grades 3 and 4, a gap of approximately 1.5 years. By grade 11, current and former English learners read at the same level as English-only students who are between grades 6 and 7, a gap of approximately 4.5 years.

The study also found that English learners have significantly lower rates of passing the California High School Exit Exam, a standards-based test that all students in California must pass in order to graduate from high school. In the graduating class of 2004, only 19 percent of English learners had passed the test after two attempts, compared with 48 percent of all students. The study attributes this achievement gap to a number of educational inequalities that English learners face. The study finds that English learners face seven categories of unequal educational opportunities:

a) California lacks a sufficient number of appropriately trained teachers to teach English learners.

English learners are more likely than any other students to be taught by teachers who are not fully credentialed. The study notes that 14 percent of teachers statewide were not fully credentialed in 2001-2002. In contrast, 25 percent of teachers of English learners were not fully certified. The study also finds that as the concentration of English learners in a

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**Report on Section 5  
Non-Compliance:  
The Absence of Federal Enforcement**

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Section 5 is the cornerstone of the 1965 Voting Rights Act.<sup>1</sup> Section 5 has been directly responsible for preventing the implementation of at least 1,027 voting changes from June 19, 1968, to June 25, 2004, that had the potential for discriminating against minority voting strength.<sup>2</sup> The Section 5 mechanism established by Congress to secure this protection was and continues to be based primarily on a system of voluntary compliance. Covered jurisdictions are subject to a statutory command to submit for federal approval any voting changes that are adopted within certain time periods.<sup>3</sup> Thus, the failure to submit such voting changes is particularly detrimental to the successful enforcement of a statute that to a large degree is dependent upon voluntary compliance.<sup>4</sup>

There may be a perception that after 40 years, full compliance with the Section 5 submission requirements has been achieved. In testimony before Congress, the Assistant Attorney General for the Civil Rights Division in referring to the low number of objections stated, “This tiny objection rate reflects the overwhelming – indeed, near universal – compliance

<sup>1</sup> 42 U.S.C. § 1973, *et seq.* (Section 5 – 42 U.S.C. § 1973c). See Joaquin G. Avila, *The Washington 2004, Gubernatorial Election Crisis: The Necessity of Restoring Public Confidence in the Electoral Process*, 29 Seattle L. Rev. 313, 329 (2006).

<sup>2</sup> Avila, *supra* note 1, at 330. Under Section 5 covered jurisdictions must submit their voting changes for administrative or judicial approval before implementation in any election. This approval is referred to as preclearance. See 28 C.F.R. § 51.2 (“Preclearance is used to refer to the obtaining of the declaratory judgment described in section 5, to the failure of the Attorney General to interpose an objection pursuant to section 5, or the withdrawal of an objection by the Attorney General pursuant to § 51.48(b).”). A covered jurisdiction has to submit a voting change either to the United States Attorney General for administrative preclearance or to the United States District Court for the District of Columbia for judicial preclearance. The burden is on the covered jurisdiction to demonstrate that the proposed voting change does not result in a retrogression of minority voting strength and was not adopted pursuant to an intent to retrogress minority voting strength. *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997); *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000). When the administrative process is utilized, the failure of the jurisdiction to meet its Section 5 burden results in a letter of objection issued by the Assistant Attorney General for the United States Department of Justice Civil Rights Division. 28 C.F.R. §§ 51.44 & 51.52(c). These letters of objection prevent the jurisdiction from implementing the proposed voting change. 28 C.F.R. § 51.10 (“It is unlawful to enforce a change affecting voting without preclearance under Section 5.”). See also *Lopez v. Monterey County (I)*, 519 U.S. 9, 20 (“No new voting practice is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance.”) (1996). During the time period from June 19, 1968, to June 25, 2004, the Attorney General issued 1,027 letters of objection.

<sup>3</sup> The relevant time periods are established by Section 5. 42 U.S.C. § 1973c. For Merced County, California, which is the subject of this Report, the operative date is November 1, 1972. 28 C.F.R. Part 51, Appendix. Accordingly, Merced County must submit for Section 5 preclearance any voting change enacted or administered since November 1, 1972.

<sup>4</sup> The United States Supreme Court noted the importance of this voluntary compliance since the United States Attorney General did not have sufficient resources to secure full compliance with the Section 5 submission requirements:

“Section 5 was enacted in large part because of the acknowledged and anticipated inability of the Justice Department – given limited resources – to investigate independently all changes with respect to voting enacted by States and subdivisions covered by the Act. . . . For that reason, § 5 places the burden on the affected polities to submit all changes for prior approval.”

*Perkins v. Matthews*, 400 U.S. 379, 391, n. 10 (1971).

with the Voting Rights Act by covered jurisdictions.”<sup>5</sup> Unfortunately, the reality is far from universal Section 5 compliance. A recent review of voting changes enacted by local governmental entities, such as cities, water districts, and other special election districts in Merced County, California, reveals that there are a minimum of 226 annexations, formations, detachments and consolidations that have not been submitted for Section 5 preclearance.<sup>6</sup> Such a large number in only one county out of the 841 local government entities<sup>7</sup> subject to Section 5 preclearance suggests that there is a larger problem relating to non-compliance with the Section 5 submission requirements. Clearly the results of this study demonstrate the absence of any “universal” compliance with the Section 5 submission procedures.

This Report is divided into three parts. The first part will present the results of the study conducted in Merced County, California, to determine the extent of compliance with the Section 5 preclearance requirement. Since there have been no declaratory judgment actions filed seeking Section 5 judicial preclearance for any voting changes in Merced County,<sup>8</sup> the study focused on compliance with the Section 5 administrative preclearance process. This focus necessarily involves an examination of whether applicable voting changes have been submitted to the United States Attorney General for Section 5 approval. The second part will demonstrate that such non-compliance with the Section 5 submission requirements is a problem that has persisted since the Voting Rights Act was first adopted in 1965. The third part will argue that current United States Supreme Court precedent supports the proposition that when the goal of a federal statute has not been achieved and the statute is due to expire, the statute should be extended until the problem sought to be addressed by the federal statute has been resolved. Such a proposition assumes greater validity when the statute seeks to both protect and advance that most fundamental of all

<sup>5</sup> *Modern Enforcement of the Voting Rights Act before the Sen. Comm. on the Judiciary*, 109th Cong., 2nd Sess. (Hearing Date May 10, 2006) (Statement of Wan J. Kim, Assistant Attorney General, Civil Rights Division, United States Department of Justice) (last visited June 12, 2006).

[http://judiciary.senate.gov/testimony.cfm?id=1885&wit\\_id=5329](http://judiciary.senate.gov/testimony.cfm?id=1885&wit_id=5329).

<sup>6</sup> These changes (annexations – adding property, formations – incorporating new governmental entity, detachments or deannexations – subtracting property, consolidations – joining of two or more governmental entities) are considered voting changes because they have the potential of affecting the number of voters within a given jurisdiction. See 28 C.F.R. § 51.13(e). During the time period from 1965 to 2005, the Attorney General reviewed for Section 5 purposes: 88,923 annexations, 4,055 incorporations, and 1,252 consolidations.

[http://www.usdoj.gov/crt/voting/sec\\_5/changes.htm](http://www.usdoj.gov/crt/voting/sec_5/changes.htm) (last visited June 23, 2006).

<sup>7</sup> This figure is derived from the U.S. Department of Justice, Civil Rights Division, Voting Section website. According to the website the following local governments are located in the listed states: Alabama (67 counties), Alaska (16 Boroughs), Arizona (15 counties), Georgia (159 counties), Louisiana (64 parishes), Mississippi (82 counties), South Carolina (46 counties), Texas (254 counties), Virginia (33 counties – takes into account counties that have successfully sought exemption from Section 5 through the bailout procedures of Section 4 – 42 U.S.C. § 1973b(a)); 38 independent cities – takes into account independent cities that have successfully sought exemption from Section 5 through the bailout procedures of Section 4 – 42 U.S.C. § 1973(b)(a)), California (4 counties), Florida (5 counties), New York (3 counties), North Carolina (40 counties), South Dakota (3 counties), Michigan (2 townships), New Hampshire (1 township, 8 towns, and 1 other). [http://www.usdoj.gov/crt/voting/sec\\_5/covered.htm](http://www.usdoj.gov/crt/voting/sec_5/covered.htm) (last visited June 23, 2006). For a listing of counties for the affected states see <http://www.naco.org/> (last visited June 23, 2006).

<sup>8</sup> A review of the Voting Section’s website and the author’s review of declaratory judgment actions filed pursuant to Section 5 by covered jurisdictions do not reveal any such judicial preclearance actions. <http://www.usdoj.gov/crt/voting/overview.htm#vra> (last visited June 23, 2006).

rights – the right to vote.<sup>9</sup> The goal of Section 5 is to further the purposes of the Fifteenth Amendment<sup>10</sup> to the United States Constitution and to “ ‘banish the blight of racial discrimination in voting’ once and for all.”<sup>11</sup> Section 5 seeks to accomplish this goal by requiring covered jurisdictions to submit their voting changes for Section 5 review. If there is a failure by covered jurisdictions to submit such changes, then the goal of the federal statute has not been achieved and the purpose of the statute has been frustrated. Under these circumstances, reauthorization of Section 5 is appropriate to permit additional time to achieve complete compliance with a federal mandate that touches upon the most fundamental of all rights.

### I. Merced County, California – A Model of Section 5 Non-Compliance

Merced County is located in the central valley of California, south of Sacramento, the State’s capitol. According to the 2000 Census, there are a total 210,554 persons, of which 95,466 or 45.3% are Latina/o.<sup>12</sup> The County is governed by a five person board of supervisors.<sup>13</sup> Currently, there is one Latino serving as a county supervisor.<sup>14</sup> The empowerment of the Latina/o community in Merced County to participate in the political process and elect candidates of its choice was greatly facilitated by the issuance of a letter of objection by the Attorney General pursuant to Section 5. The letter prevented the implementation of a county supervisor redistricting plan that fragmented a politically cohesive Latina/o voting community.<sup>15</sup> The issuance of this letter of objection alone demonstrates the continued necessity for Section 5 review. However, there is a more significant reason for subjecting Merced County for continued Section 5 oversight: non-compliance with the Section 5 submission requirements by local governments.

The Section 5 preclearance requirements apply to all local governmental entities that conduct elections in a covered jurisdiction.<sup>16</sup> Moreover the importance of securing Section 5 compliance by local governmental entities is underscored by the Section 4 bailout provisions. A covered jurisdiction cannot secure a declaratory judgment from the United States District Court for the District of Columbia exempting the covered jurisdiction from Section 5 coverage unless

<sup>9</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights.”).

<sup>10</sup> U.S. Const. amend XV (“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.”).

<sup>11</sup> *McCain v. Lybrand*, 465 U.S. 236, 244 (1984), citing, *State of South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

<sup>12</sup> U.S. Bureau of the Census, Data Set: Census 2000 Summary File 1, Fact Sheet for Merced County, California. [http://factfinder.census.gov/servlet/SAFFacts?\\_event=Search&geo\\_id=&geoContext=&street=&county=Merced+County&cityTown=Merced+County&state=04000US06&zip=&lang=en&sse=on&pctxt=fph&pgsl=010](http://factfinder.census.gov/servlet/SAFFacts?_event=Search&geo_id=&geoContext=&street=&county=Merced+County&cityTown=Merced+County&state=04000US06&zip=&lang=en&sse=on&pctxt=fph&pgsl=010) (last visited June 23, 2006). African Americans constitute 8,064 or 3.8 of the county’s population; American Indian and Alaska Native constitute 2,510 or 1.2 % of the county’s population; Asians constitute 14,321 or 6.8% of the county’s population; Native Hawaiian and Pacific Islanders constitute 396 or 0.2% of the county’s population. *Id.*

<sup>13</sup> The Merced County Board of Supervisors is the governing board for Monterey County. See Cal. Gov. Code §§ 23005, 25000, 25207.

<sup>14</sup> Merced County website. <http://web.co.merced.ca.us/bos/index.html> (last visited June 23, 2006).

<sup>15</sup> U.S. Attorney General, Letter of Objection, April 3, 1992.

<sup>16</sup> 28 C.F.R. § 51.6 (“All political subunits within a covered jurisdiction (e.g., counties, cities, school districts) are subject to the requirement of section 5.”).

for a ten year period, all governmental entities have complied with the Section 5 submission requirements.<sup>17</sup> The statute specifically requires securing approval of the voting change prior to its implementation in an election.<sup>18</sup> Based upon these statutory requirements, there is a major violation of Section 5 in Merced County since there are 226 annexations, formations, detachments, and consolidations that have not been submitted for Section 5 review.<sup>19</sup>

A review of governmental records demonstrates that there is a substantial non-compliance with the Section 5 submission requirements.<sup>20</sup> This study was conducted on-site over the month of June 2006. The following two tables summarize the findings of this study.

<b>Table 1</b>					
<b>Merced County, California – Section 5 Non-Compliance</b>					
Type of Political Jurisdiction	Number of Political Jurisdictions	Type and Number of Voting Changes: Annexations	Type and Number of Voting Changes: Formations	Type and Number of Voting Changes: Detachments	Type and Number of Voting Changes: Consolidations
Cities	5	100			
Water Districts	16	80			
Water Districts	6		6		
Other Districts	2	2			
Water Districts	5			37	
Other Districts	1				1
<b>Totals</b>	<b>35</b>	<b>182</b>	<b>6</b>	<b>37</b>	<b>1</b>

<b>Table 2</b>	
<b>Summary of Voting Changes Merced County, California</b>	
Annexations	182
Formations	6
Detachments	37
Consolidations	1
<b>Total Number of Voting Changes Not Submitted for Section 5 Review</b>	<b>226</b>

<sup>17</sup> 42 U.S.C. § 1973b(a)(1)(D) (“A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action – (D) such State or political subdivision and all governmental units within its territory have complied with section 1973c [Section 5] of this title, including compliance with the requirement that no change covered by section 1973c of this title has been enforced without preclearance under section 1973c of this title . . .”).

<sup>18</sup> *Id.*

<sup>19</sup> Accordingly, under the present bailout provision of the Voting Rights Act, Merced County would not be able to successfully bailout from Section 5.

<sup>20</sup> The records providing the information regarding these voting changes were checked against a list provided by the Voting Section that listed Section 5 submissions from Merced County. Governmental entities were not included in the final tabulation for which no information could be secured to ascertain whether board members to the entity’s governing board were elected.

The tables show some remarkable figures. There have been at least 182 annexations for cities, water districts and other districts that have not been submitted for Section 5 review. Similarly, there have been 37 detachments for water districts that have also evaded Section 5 review. As the two tables plainly demonstrate, the total number of voting changes that have not been submitted for Section 5 review is 226. These voting changes span from 1972 to 2006. With the exception of one year – 1999 – in every year from 1972 to 2006, Section 5 non-compliance instances occurred.<sup>21</sup> The number of non-compliance instances, 226, represents at best a minimum figure since the study did not include all governmental entities within Merced County. Moreover, not all voting changes subject to Section 5 were reviewed due to time restraints and resources. Finally, the governmental entities excluded from this study because of the inability to ascertain whether their governing board members are elected may, in fact, elect their board members. Consequently, the results of this preliminary study should be considered as a minimum threshold for assessing this substantial Section 5 violation.

Unfortunately the experience of Section 5 non-compliance is not unique to Merced County. Since the Voting Rights Act was first enacted in 1965, non-compliance with the Section 5 submission requirements has always been a major problem. The next section of this Report will describe this history.

## **II. There is a Well Documented History of Non-Compliance with the Section 5 Submission Requirements**

The issue of non-compliance is significant. As stated previously the purpose of the Voting Rights Act is to “rid the country of racial discrimination in voting.”<sup>22</sup> However, if covered jurisdictions simply evade the law, the congressional purpose underlying the passage of the Voting Rights Act is frustrated.

Due to this significance, the issue of non-compliance has repeatedly been raised by the United States Commission on Civil Rights and Congress throughout the history of the Voting Rights Act. Just three years after the enactment of the Voting Rights Act of 1965, the United States Commission on Civil Rights issued a report documenting the absence of Section 5 compliance and enforcement. The Commission recommended that the Attorney General “... should promptly and fully enforce Section 5 ....” The Commission further recognized that continued non-compliance with Section 5 would encourage political subdivisions to ignore the Act:

“Failure to enforce the flat prohibition of Section 5 in the face of repeated violations – most notably in Mississippi – is bound to encourage the enactment and enforcement of additional measures having the purpose or effect of diluting or inhibiting the

<sup>21</sup> See Appendix A. From 1972 to 1979, 61 non-compliance instances occurred; from 1980 to 1989, 63 non-compliance instances occurred; from 1990-1999, 67 non-compliances occurred; and, from 2000-June of 2006, 35 non-compliance instances occurred.

<sup>22</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

Negro vote or making more difficult for Negroes to run for office. Swift and comprehensive enforcement of Section 5 is required to make it clear that such stratagems cannot succeed.”<sup>23</sup>

Despite this recommendation for more increased Section 5 enforcement by the United States Attorney General, covered jurisdictions continued in their efforts to ignore the explicit command of Section 5. During congressional hearings for the first extension of the Voting Rights Act in 1969, Representative William M. McCulloch, noted the impact of continued non-compliance on progress toward fulfilling the goals of the original Act:

“Section 5 was intended to prevent the use of most of these devices. But apparently the States rarely obeyed the mandate of that section, and the Federal Government was too timid in its enforcement. I hope that the case of *Allen v. State Board of Elections* [393 U.S. 544 (1969)], decided by the Supreme Court on March 3, 1969, is the portent of change. But in the meantime the march to political equality has been slowed.”<sup>24</sup>

The United States Supreme Court in *Perkins v. Matthews*<sup>25</sup> in a decision issued after the Act was extended in 1970 also recognized that covered jurisdictions were not complying with the Section 5 preclearance provisions. The Court reviewed a table of submissions prepared by the Attorney General which demonstrated “... that only South Carolina has complied rigorously with § 5.” The Court reviewed a series of voting changes enacted in Georgia which were not submitted for Section 5 review and commented that Mississippi, Alabama, Louisiana, and Virginia, for a two year period only submitted 33 voting changes. After reviewing this table, the Court stated: “The only conclusion to be drawn from this unfortunate record is that only one State is regularly complying with § 5’s requirement.”<sup>26</sup>

Non-compliance with Section 5 persisted. In 1975, the United States Commission on Civil Rights stated: “Non-compliance with the Voting Rights Act through failure to submit changes remains a problem in enforcement of the act.”<sup>27</sup> In its recommendations, the Commission again urged stricter enforcement of Section 5. The focus of the recommendation

<sup>23</sup> U.S. Comm’n on Civil Rights, Political Participation, A study of the participation by Negroes in the electoral and political processes in 10 Southern States since passage of the Voting Rights Act of 1965, at 184 (1968).

<sup>24</sup> *Voting Rights Act Extension: Hearings on H.R. 4249, H.R. 5538, and Similar Proposals, to Extend the Voting Rights Act of 1965 with Respect to the Discriminatory Use of Tests and Devices Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91<sup>st</sup> Cong. 4* (statement of William McCulloch, Member, House Comm. on the Judiciary), 18 (statement of Howard A. Glickstein, General Counsel and Acting Staff Director, U.S. Comm’n on Civil Rights: “Despite the requirements of section 5, the State of Mississippi made no submission to the Attorney General, and the new laws were enforced.”) (1969). See also *Amendments to the Voting Rights Act of 1965: Hearings on S. 818, S. 2456, S. 2507, and Title IV of S. 2029, Bills to Amend the Voting Rights Act of 1965 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91<sup>st</sup> Cong. 51–53* (statement of Frankie Freeman, Member, U.S. Comm’n on Civil Rights – Commissioner Freeman acknowledged that most states complied with Section 5, but did recognize that there were instances of non-compliance which could be addressed through litigation by the United States Attorney General) (1969).

<sup>25</sup> *Supra* note 4.

<sup>26</sup> *Id.*, 400 U.S. at 393, n. 11.

<sup>27</sup> U.S. Comm’n on Civil Rights, *The Voting Rights Act: Ten Years After*, at 28 (January 1975).

was a request to Congress to enact civil penalties and damages against election officials who refused to comply with federal law:

“The effectiveness of section 5 preclearance has been limited by the failure of covered jurisdictions to submit all changes in their electoral laws and procedures for review and by the absence of direct procedures to enforce compliance with the preclearance requirement.

An enforcement provision that would assess personal damages against officials who implement unsubmitted changes, without reimbursement from public funds, would foster timely submission of changes. Damages in such cases should be awarded to those who institute proceedings against such officials.”<sup>28</sup>

Continued non-compliance with Section 5 resulted in a Government Accounting Office report highly critical of the Department of Justice’s lack of administrative procedures to insure that all covered jurisdictions were submitting their voting changes for federal approval. The Report concluded that Section 5 compliance efforts have been limited.<sup>29</sup> The Report noted that the Department of Justice did not systematically identify and secure the submission of voting changes enacted by covered jurisdictions. The Department’s efforts were at best “sporadic” and fell “far short of formal systematic procedures to make sure that changes affecting voting are submitted.”<sup>30</sup> In addition, the Report was critical of the Department’s limited efforts to periodically remind covered jurisdictions of their continuing obligations to submit voting changes for Section 5 preclearance.<sup>31</sup>

The GAO report did not result in any improvements. In 1982, when renewal of the Act was under congressional consideration, former Assistant Attorney General for the Civil Rights Division, Drew S. Days III, testified that many covered jurisdictions were not in Section 5 compliance. As stated by Mr. Days, the Department of Justice did not have the resources to survey covered jurisdictions to determine whether any voting changes had not been submitted for Section 5 approval:

“One must also acknowledge, in assessing the Act’s effectiveness, that covered jurisdictions have made literally hundreds of changes that have never met the preclearance requirement of Section 5. I do not think it extravagant to conclude

<sup>28</sup> *Id.*, at 346–47.

<sup>29</sup> *GAO Report on the Voting Rights Act: Hearings on GAO Report on the Voting Rights Act Before the House Subcommittee on Civil and Constitutional Rights, of the Committee on the Judiciary, 95<sup>th</sup> Cong. 84 (1978).*

<sup>30</sup> *Id.*, at 85–86.

<sup>31</sup> *Id.*, at 87. In the meantime, private plaintiffs continued in their efforts to enforce the Section 5 preclearance provisions. See, e.g., *Trinidad v. Koebig*, 638 F.2d 846 (5<sup>th</sup> Cir. 1981) (Section 5 enforcement action against the City of Seguin, Texas, holding that a court-adopted redistricting plan was subject to Section 5 preclearance requirements); *Gomez v. Galloway*, 428 F.Supp. 358 (S.D.Tex. 1977) (Section 5 enforcement action against the City of Beeville, Texas); *Escamilla v. Staveley*, Civ. Act. No. DR-78-CA-23 (W.D.Tex. 1978) (Section 5 enforcement action against the Terrell County Commissioners’ Court, Texas).

that many of those changes probably worked to the serious disadvantage of minority voters. I am proud of the performance of the Civil Rights Division in enforcing the Voting Rights Act during my tenure. But I will not sit before you today and assert that even during what I think was a period of vigorous enforcement of the Act that the Department was able to ensure that every, or indeed most, electoral changes by covered jurisdictions were subjected to the Section 5 process. There was neither time nor adequate resources to canvas systematically changes since 1965 that had not been precleared, to obtain compliance with such procedures or even, in a few cases, to ascertain whether submitting jurisdictions had complied with objections to proposed changes. It was not uncommon for us to find out about changes made several years earlier from a submission made by a covered jurisdiction seeking preclearance of a more recent enactment.”<sup>32</sup>

In the Senate Report accompanying passage of the 1982 Amendments to the Voting Rights Act of 1965, the Senate Committee on the Judiciary also acknowledged that covered jurisdictions were not submitting voting changes for Section 5 preclearance. The Committee stated:

“Non-compliance generally has taken two forms. First, there has been continued widespread failure to submit proposed changes in election law for Section 5 review before attempting to implement the change. ...

The Subcommittee on the Constitution received testimony detailing the extent of non-compliance with the Act by covered jurisdictions. A representative of the Southern Regional Council testified that his organization’s research showed that ‘ ‘since 1965 in six Southern states as many as 750 state enactments affecting voting have been passed by state legislatures and have not been submitted for review under section 5.’ ’<sup>33</sup>

And so the Section 5 violations continue in California. Since 1982, there has been major Section 5 litigation involving the failure of Monterey County to secure approval of a series of judicial district consolidations dating back from 1968. Over the course of nine years and two U.S. Supreme Court decisions the consolidation ordinances were finally submitted for Section 5 approval.<sup>34</sup> Moreover, a recent Section 5 enforcement action filed against Monterey County in 2003, revealed that voting precinct consolidations from 1996 to 2002 had not been submitted for

<sup>32</sup> *Extension of the Voting Rights Act: Hearings on Extension of the Voting Rights Act Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97<sup>th</sup> Cong. 2117 (statement of Drew Days, former Assistant Attorney General, Civil Rights Division, U.S. Department of Justice) (1982).

<sup>33</sup> S. Rep. No. 97-417, at 12 (footnote omitted) (1982), reprinted in 1982 U.S.C.C.A.N. 177, 190. See also U.S. Comm’n on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* (September, 1981), at 70–75 (chronicling extent of failure to submit voting changes for Section 5 preclearance).

<sup>34</sup> *Lopez (I)*, supra note 2; *Lopez v. Monterey County (II)*, 525 U.S. 266 (1999).

Section 5 preclearance.<sup>35</sup> Finally the present study of Merced County Section 5 non-compliance serves to document the continuing disregard of an explicit federal mandate of submitting voting changes for Section 5 approval prior to implementation in local elections.

In summary, the legislative history of the various amendments to the Act, Supreme Court precedent, oversight review by the United States Commission on Civil Rights and the Government Accounting Office, recent Section 5 cases, along with the current status of Section 5 non-compliance in Merced County, all indicate that such non-compliance by Section 5 covered jurisdictions continues to be a persistent problem. Such continued and blatant regard of the Section 5 submission requirements provides an important basis for reauthorization of the Section 5 preclearance provisions.

### **III. Since the Purpose of the Section 5 Preclearance Provision Has Not Been Achieved Section 5 Should be Reauthorized Until There Has Been Full Compliance.**

Given the extensive historical and current record of Section 5 non-compliance, Congress should focus on whether the objectives of Congress in enacting Section 5 have been reached. The primary objective in enacting Section 5 was to prevent the implementation of voting changes enacted after certain dates unless these changes first secured federal approval. However, given the history of non-compliance with the Section 5 requirements and contemporary evidence of continued non-compliance, the congressional goal of ridding the country of voting discrimination has been frustrated. Thus, a statute enacted by Congress, whose express purpose was to impose federal review of voting changes in order to avoid the implementation of any discriminatory changes, cannot be permitted to simply expire when there is evidence that Section 5 covered states and political subdivisions have not complied with the statute's preclearance requirements. A statute which has been described as the most effective civil rights statute ever enacted by Congress and which implicates the most fundamental of all rights, the right to vote, cannot be relegated to history when there is evidence of continued non-compliance.

The extraordinary remedy of Section 5 preclearance was imposed as a response to the ingenious and persistent efforts to avoid the political integration of racial and ethnic minorities into the body politic. Congress recognized the serious cost to federalism that Section 5 exacted and for this reason the statute was to be a temporary measure. However, an explicit understanding formed the basis for this intrusion into state electoral affairs: covered jurisdictions would comply with federal law and submit all applicable voting changes for federal review. Upon completing review of these voting changes, there would be no necessity for this federal oversight. However, as suggested by the evidence presented in this Report, covered states and political subdivisions have not fulfilled their obligation to follow federal law. Given this suggestion of non-compliance and given the temporary nature of Section 5, there is even greater reason to assess whether the congressional goal of eliminating voting discrimination by requiring review of all applicable voting changes has been achieved.

Such an inquiry is certainly suggested by the United States Supreme Court decision in *Grutter v. Bollinger* where the Court sustained a law school's admissions policy that factored in

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<sup>35</sup> *Salazar v. Monterey County, California*, Civil Action No. C-03-03584 JF (Three Judge Court) (Complaint filed August 1, 2003) (N.D.Cal.).

race as part of the student selection process.<sup>36</sup> In evaluating the use of race in the admissions process the Court emphasized the temporal nature of remedies that were designed to eliminate ongoing racial and ethnic disparities in law school student enrollments. As stated by the Court:

We are mindful, however, that “[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.” Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all “race-conscious programs must have reasonable durational limits.” In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”<sup>37</sup>

In *Grutter* the Court permitted the use of an admissions policy that factored in the criteria of race as long as the program was limited by the goal of racial and ethnic diversity. The admissions policy was to be in place on a temporary basis to avoid violating the use of race in contravention of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Court explicitly recognized that such an admissions policy had to be narrowly tailored to achieve a compelling state interest. A critical component of this analysis was the Court’s emphasis on the diversity goal sought to be achieved. The goal justified the extraordinary remedy of using race in an admissions selection process. Since the goal was deemed achievable by the Court over a fixed period of time, the challenged admissions program survived constitutional scrutiny because the program was limited in duration and would be subject to periodic reviews to determine if the goal of the program was achieved.

Although in the reauthorization of Section 5 there is no race-based remedy directly implicated, the analysis in *Grutter* can be directly applied to assess whether Section 5 should be reauthorized. The goal in *Grutter* was the achievement of racial and ethnic diversity. Similarly Congress should assess in the reauthorization legislative efforts whether the goal of Section 5 to “banish the blight of racial discrimination in voting’ once and for all”<sup>38</sup> has been achieved. If the goal of Section 5 has not achieved, then Section 5 oversight should be continued. An important component in any such assessment is whether there has been “near universal” compliance with the requirements of Section 5. Section 5 mandates that all voting changes in

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<sup>36</sup> 539 U.S. 306 (2003).

<sup>37</sup> *Id.*, at 341-342 (case and brief citations omitted).

<sup>38</sup> *Supra* note 11.

covered jurisdictions should be submitted for federal review. The purpose of this review is to determine whether proposed voting changes have the potential to discriminate against racial and ethnic minority voting strength. If there is evidence presented to Congress that there are Section 5 covered jurisdictions that have not submitted their voting changes for Section 5 review, then Congress can only conclude that the goal of Section 5 has not been achieved and should be reauthorized to permit covered jurisdictions to comply with the submission requirements.

This Report presents ample evidence of non-compliance with the Section 5 submission requirements in one county in California. The study of Section 5 compliance in Merced County presents compelling evidence of a pattern, that can be characterized at best historical neglect and at worst a blatant disregard, of the explicit mandates of a federal statute initially adopted to protect the voting rights of racial and ethnic minorities. The number of known violations in Merced County is not insignificant – 226. This showing should place the burden on covered jurisdictions to demonstrate complete compliance with the Section 5 submission requirements for all governmental entities located within the covered jurisdiction.<sup>39</sup> Absent such a showing by covered jurisdictions, Congress should conclude that the protective features of Section 5 oversight are still needed since the basic statutory requirements have not been met. Accordingly, Congress should reauthorize Section 5 for another period of time to permit the Attorney General to enforce Section 5 and to permit covered jurisdictions to submit their voting changes for Section 5 approval.

### Conclusion

At this historic juncture Congress is assessing whether to extend for another period of time the most effective civil rights legislation ever enacted. The continued need for such protection is amply supported by the extensive documentation provided thus far in support of Section 5 reauthorization. As part of this assessment Congress should at a minimum determine whether there has been “near universal” compliance with the Section 5 submission requirements. The importance of this compliance is underscored by the bailout requirement that a covered jurisdiction for a ten year period must demonstrate that all governmental entities located within the covered jurisdiction are in full compliance with the Section 5 submission requirements. Given the importance of Section 5 compliance in the development of the bailout provisions in 1982, this Congress should also give the factor of Section 5 compliance significant weight in determining whether the Act should be reauthorized. The evidence presented in this Report regarding the presence of 226 voting changes in Merced County that have not been submitted for Section 5 approval clearly provides the necessary weight to tip the scales in support of Section 5 reauthorization.

Section 5 continues to be a necessary tool to combat voting discrimination. The elimination of such discrimination is indispensable to maintaining the vibrancy and cohesiveness of the body politic. Without such a tool, the commands and protections envisioned by the Fifteenth Amendment become an illusory goal and ultimately affect the continued viability of

<sup>39</sup> The shifting of this burden is consistent with the Section 5 burden imposed on covered jurisdictions to demonstrate the absence of a discriminatory purpose in the adoption of a proposed voting change and to demonstrate that the proposed voting change does not have a discriminatory effect on minority voting strength. *See supra* note 2.

our republican form of government. As noted by Circuit Judge John R. Brown: “For no state, and no nation, can survive if, professing democratic rule of the governed, it flagrantly denies the voting right through racial or class discrimination.”<sup>40</sup> Those words spoken over forty years ago still continue to ring with a clarity that resonates with the current Section 5 reauthorization efforts. Moreover in assessing whether to reauthorize Section 5, Congress should recall the basic reasons expressed by Attorney General Nicholas Katzenbach in his testimony before Congress in 1965 to justify the enactment of Section 5:

Mr. Katzenbach: The justification for that [Section 5 review] is simply this: Our experience in the areas that would be covered by this bill has been such as to indicate frequently on the part of State legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States. I refer, for example, to the new voter qualifications that have been put into the statutes of Louisiana, Mississippi, and Alabama following the enactment of the 1964 act which made things more difficult for people to vote and which were put in, I believe – and we have established in one case and I believe we will establish in other cases – for no other purpose than to perpetuate racial discrimination.

The same thing was true, as the Chairman may recall, in Louisiana at the time of the initial school desegregation, where the legislature passed I don’t know how many laws in the shortest period of time. Every time the judge issued a decree, the legislature, which was sitting in special session, passed a law to frustrate that decree.<sup>41</sup>

The concern expressed by the Attorney General focused on the adoption of new voting changes that would frustrate the implementation of court decrees or that would serve to discriminate against racial and ethnic minority voters. In response to the observation that this statement was true then and no longer true now, an examination of the vast record submitted in this present Section 5 reauthorization should demonstrate that such a concern continues to be valid today. For example, the Chualar Union Elementary School District in Monterey County sought to revert from a district election system to an at-large method of elections. The Attorney General in objecting to the proposed voting change found that such a change would serve to discriminate against the Latina/o community who sought to maintain their presence on the school board.<sup>42</sup> Clearly the concerns expressed by Attorney General Katzenbach in 1965 are relevant today.

<sup>40</sup> *United States v. State of Mississippi*, 229 F.Supp. 925, 974 (dissenting opinion) (5th Cir. 1964).

<sup>41</sup> *Voting Rights, Hearings on H.R. 6400 and other proposals to enforce the 15th Amendment to the Constitution of the United States Before the H. Subcomm. No. 5 of the Comm. on the Judiciary*, 89th Cong., 1st Sess. 60 (March 18, 1965) (Statement of Nicholas deB. Katzenbach, Attorney General of the United States).

<sup>42</sup> See e.g., U.S. Attorney General, Letter of Objection, March 29, 2002 (Chualar Union Elementary School District – Monterey County, California).

As noted in the letter of objection issued against the Chualar Union Elementary School District, federal oversight continues to be necessary to guarantee that Section 5 covered jurisdictions will not revert to old practices that result in voting discrimination. And, most importantly, federal oversight is indispensable in places such as Merced County that not only have a history of non-compliance with the Section 5 submission requirements, but that continue to this day to disregard their legal obligation to follow federal law. Accordingly, the unlawful actions of jurisdictions within Merced County provide a compelling reason for continuing the Section 5 federal oversight. Quite simply, the job is not done.

## Appendix A

## Merced County Section 5 Non-Compliance, By Year

Year	Number of Annexations, Formations, Detachments & Consolidation
1972	3
1973	9
1974	10
1975	10
1976	7
1977	8
1978	8
1979	6
1980	2
1981	3
1982	6
1983	4
1984	4
1985	6
1986	10
1987	9
1988	8
1989	11
1990	22
1991	4
1992	7
1993	5
1994	3
1995	5
1996	13
1997	4
1998	4
1999	0
2000	3
2001	2
2002	1
2003	9
2004	10
2005	8
2006	2
<b>TOTAL</b>	<b>226</b>

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TESTIMONY OF

MICHAEL A. CARVIN

BEFORE THE

SENATE JUDICIARY COMMITTEE

REGARDING THE

REAUTHORIZATION OF THE VOTING RIGHTS ACT

July 13, 2006

## STATEMENT OF MICHAEL A. CARVIN

Good afternoon, Mr. Chairman and members of the Committee. Thank you for the opportunity to testify concerning the Supreme Court's recent decision in *LULAC v. Perry*, and its potential effect on legislation to renew Section 5 of the Voting Rights Act. I have been involved in a substantial number of redistricting and voting rights cases, and filed a brief on behalf of the Texas Republican Party in *LULAC*.

I will focus my comments on *LULAC*'s resolution of the Section 2 challenge to the so-called "dismantling" of old District 24, previously represented by Democratic incumbent Martin Frost. Texas' District 24 had a black citizen voting age population of 25.7% and thus the question was whether the failure to create or maintain such an "influence" or "coalition" district stated a viable cause of action under Section 2. More specifically, the plaintiffs' claim was that, although African-Americans were not a possible majority in the district, they could form a winning "coalition" with Anglo voters to elect their preferred candidate, and therefore the district could not be altered.

The Supreme Court, as it has done in the past, reserved the question of whether a minority constituting less than a potential majority could ever state a claim under Section 2. Three Justices, in an opinion authored by Justice Kennedy, found that, even assuming that "it is possible to state a § 2 claim for a racial group that makes up less than 50% of the population," the challenge to District 24 failed because African-American voters had not shown that they could constitute "a sufficiently large minority to elect their candidate of choice with the assistance of [non-minority] cross-over votes." *LULAC*, Slip Op. at 37-38. (Two Justices, Justices Scalia and Thomas, rejected the claim because, as they had previously opined, Section 2

does not provide minority voters with any basis for challenging redistricting plans that are not motivated by discriminatory purpose. Justice Scalia, concurring, Slip Op. at 2.)

In this regard, the Kennedy plurality noted that the district court had found that “African-Americans could not elect their candidate of choice in the [Democratic] primary” and that, in fact, “Anglo Democrats control this district.” Slip Op. at 38. The Court determined that the district court’s findings were not clearly erroneous because they were supported by substantial testimony and, indeed, even by the minority voters’ own expert’s testimony. *Id.* at 38-39. Accordingly, given that the plaintiffs could not establish that African-Americans could elect their candidate of choice, even in a coalition with non-minority voters, it did not definitively reach the question of whether such “influence” or “coalition” districts are required under Section 2.

The Kennedy plurality opinion nevertheless casts serious doubt on the viability of such claims under Section 2. Specifically, it found that while such influence districts are “relevant to the § 5 analysis” under *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the “lack of such districts *cannot establish* a § 2 violation.” Slip Op. at 40 (emphasis added). Indeed, the Court noted that, “[i]f § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.” *Id.*

Thus, in my opinion, the *LULAC* decision, although not definitive, foreshadows the Supreme Court’s future explicit rejection of influence or coalition district claims under Section 2. Indeed, virtually every lower federal court has rejected such claims and, in my view, acceptance of these claims would be contrary to the plain language and explicit purpose of the Voting Rights Act. Simply put, the “influence” district theory seeks to convert the Voting Rights Act’s mandate of *equal opportunity for minority voters* into a statutory mandate for *partisan*

*preferences*. Throughout the 2000 redistricting cycle (and, to a lesser extent, the 1990's), Democratic partisans brought numerous challenges across the country arguing that, because African-Americans and most Hispanic groups tend to vote Democratic, the Voting Rights Act requires legislatures to draw districts that maximize the electoral fortunes of the Democratic party. Thus, it was argued, even in districts where minorities cannot constitute a majority, influence districts had to be created, so that minorities could elect their "representatives of choice." Fortunately, virtually every lower court rejected this theory as a transparent effort to conscript the federal judiciary into rearranging districts that tend to favor Democrats, including white Democrats. As numerous courts noted, the federal judiciary is not required or permitted to arrange districts "to make the congressional races competitive for [D]emocratic candidates" because the "Voting Rights Act does not guarantee that nominees of the Democratic party will be elected, even if black voters are likely to favor that party's candidates." *Smith v. Clark*, 189 F. Supp. 2d 529, 537 (S.D. Miss. 2002) (three-judge court); *Baird v. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992); *see also Hall v. Virginia*, 385 F.3d 421, 430-32 & n.13 (4th Cir. 2004), *cert. denied*, 544 U.S. 421 (2005); *Nixon v. Kent County*, 76 F.3d 1386, 1392 (6th Cir. 1996); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 643-44 (D.S.C. 2002) (three-judge court).

The *LULAC* decision is therefore relevant to the Section 5 reauthorization legislation currently being considered by Congress. This is because S.2703, like its House counterpart, H.R.9, would clearly require the partisan "influence" districts that have been soundly rejected under Section 2. Specifically, Section 5(b) of the bill would prohibit any redistricting change with the "effect of diminishing the ability [of minority voters] to elect their preferred candidates of choice." As noted, Democrats are almost always minorities' preferred candidates of choice

and, therefore, a federal statute would prohibit diminishing the ability to elect Democratic candidates, whether they are minority or non-minority.

Needless to say, minorities have the ability to elect their preferred candidates in districts where they do not constitute a majority, so long as they can form a winning coalition with like-minded non-minority voters. This undisputed reality was confirmed in *Georgia v. Ashcroft* itself, which stated that there are “communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having *no need to be a majority within a single district in order to elect candidates of their choice.*” 539 U.S. at 481. Accordingly, it is quite clear that Section 5(b) of the bill would not only prohibit elimination of majority-minority districts, but also those “influence” districts where minorities are able to coalesce with non-minority voters to elect their preferred candidates. Indeed, the House Committee Report for H.R.9 confirms that the bill requires preservation of influence or coalition districts, as well as majority-minority districts. Page 71 of the Report unequivocally says that, “[v]oting changes that leave a minority group less able to elect a preferred candidate of choice, either directly *or when coalesced with other voters*, cannot be precleared under Section 5.”

Moreover, contrary to what some apparently believe, this provision would prohibit altering not only districts where minorities and non-minorities come together to elect minority Democratic candidates, but also where the coalition elects non-minority Democratic candidates. Obviously, non-minority candidates can be the preferred candidates of minority voters. Again, the legislative history in the House confirms this truism. *See, e.g.*, House Report at 70 (“minority voters [must be able to] elect their preferred candidates, *including* candidates of their own race”).

The *LULAC* opinion also further supports the conclusion that the candidate of choice inquiry does not turn on the race of the candidate, but whether the candidate, regardless of race or ethnicity, is preferred by minority voters. Thus, for example, Representative Bonilla, a Latino Republican, was not the Hispanic voters' candidate of choice, even though they were of the same ethnicity. Similarly, in its discussion of whether African-American voters in District 24 had a sufficient presence to elect their preferred candidate, the opinion by Justice Kennedy nowhere hinted that Anglo Democrats, such as Representative Frost, could not be the minorities' candidate of choice. Rather, it simply made the point that there was not sufficient evidence to show that African-Americans had sufficient numbers in the district to elect candidates of choice of all races, including an African-American Democrat, if they so chose. And even this seemingly incontrovertible point, based on the express findings of a district court which had to be upheld unless clearly erroneous, was not accepted by four Justices. *See* Opinion of Justice Stevens; Opinion of Justice Souter. In this regard, it is also important to realize that a submitting political jurisdiction has the burden of proof under Section 5, while the burden under Section 2 is on the minority voters challenging the redistricting plan. That being so, it would be the state or local government's burden to demonstrate that the non-minority Democrat elected in the influence district is *not* the minorities' candidate of choice. This will be difficult, if not impossible, in districts, like District 24, where minority candidates have rarely, if ever, run and/or have achieved mixed success.

Further, unlike the Section 2 statute at issue in *LULAC*, the bill prevents "diminishing the ability" to elect candidates of choice, so it clearly reaches and protects districts where minorities did not have a demonstrable pre-existing power to elect the candidate of choice under the old plan. If minorities had a 40% chance of electing their candidate in the old influence district and

the new plan reduces that potential to 20%, then the ability to elect has been “diminished” by the plan. Indeed, Justice Stevens noted in *LULAC* that whether minorities “control” a district “is not relevant in evaluating whether [the redistricting plan] is retrogressive under § 5,” although it is relevant under Section 2. Opinion of Justice Stevens, Slip Op. at 35 n.15. Since old District 24 “was a strong influence district for black voters,” the redistricting plan was retrogressive because it caused retrogression “by dismantling . . . District 24.” *Id.* The Section 2 inquiry, in contrast, was whether minorities controlled or would usually win under the proposed alternative influence district. In addition, many *minority* Democratic representatives are elected in districts where members of their race are a clear minority. That being so, it will often be easy to show that minorities have some ability to elect even a minority candidate of choice and, as a consequence, that the district cannot be altered under the standards set forth in S.2703.

In short, while the apparent impetus behind this language was to overturn *Georgia v. Ashcroft*, this section plainly does far more than that. *Georgia v. Ashcroft*, to be sure, provided states greater latitude to undo prior majority-minority districts. But the bill takes away not only this discretion with respect to majority-minority districts, but with respect to *all* districts where minority-preferred candidates can be elected. Since all agree that such candidates can be elected in majority white districts, these “influence” districts cannot be altered under the plain language of S.2703.

S.2703 contains another unfortunate change which would require not only *preservation* of existing influence districts, but *creation* of new ones that never before existed. Specifically, Section 5(c) overturns *Bossier Parish II*, 528 U.S. 320 (2000)—a case I argued successfully before the Supreme Court—by restoring the Justice Department’s ability to deny Section 5 preclearance even where there is *no diminution* in minority voting strength, if the Department

discerns a so-called “discriminatory purpose.” It is well documented, however, that the Justice Department routinely finds discriminatory purpose every time the submitting authority fails to create the maximum number of minority opportunity districts. *See, e.g., Miller v. Johnson*, 515 U.S. 900 (1995). For example, in the 1980’s and (particularly) the 1990’s, the Department found “discriminatory purpose” solely because the submitted plan did not create the maximum number of majority-minority districts, leading to the sort of racial gerrymanders struck down in *Shaw v. Reno*, 509 U.S. 630 (1993). Particularly because the bill treats coalition districts as “protected” minority districts, the Department can and will now similarly require states to create the maximum number of these “coalition” or “influence” districts. The way this will occur is by having a Democratic-leaning or civil rights group simply propose a plan which adds a certain number of “influence” districts, and the Justice Department will deem the rejection of such additions as being motivated by “discriminatory purpose.”

As this reflects, an inherent problem in enforcing Section 5 in a neutral manner is that, in the vast majority of cases, Section 5 preclearance decisions are made by the Justice Department’s Voting Rights Section, pursuant to decisions that are unreviewable in court. It is therefore especially risky to provide this Section with a statutory mandate that broadly expands their current powers. For example, the career attorneys in the Justice Department unanimously recommended a denial of preclearance in Texas because of the treatment of District 24, even in the face of the same evidence relied on by the district court and Justice Kennedy’s opinion.

Consequently, even if I am wrong about how courts might interpret the language in the bill, there is little question that the Justice Department will take its typically aggressive approach, especially since they have sought to require the preservation of such influence districts even under existing law. If this bill becomes law, the career bureaucracy of the Voting Rights Section

will have specific authorization to override the neutral decisions of state legislatures, and there can be little doubt as to how that new power will be exercised.

Thank you. I would be happy to answer any questions.

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TESTIMONY OF

ROGER CLEGG,

PRESIDENT AND GENERAL COUNSEL,

CENTER FOR EQUAL OPPORTUNITY

BEFORE THE

SENATE JUDICIARY COMMITTEE

REGARDING THE

REAUTHORIZATION OF THE VOTING RIGHTS ACT

July 13, 2006

**Introduction**

Thank you, Mr. Chairman, for the opportunity to testify this afternoon before the Committee.

My name is Roger Clegg, and I am president and general counsel of the Center for Equal Opportunity, a nonprofit research and educational organization that is based in Sterling, Virginia. Our chairman is Linda Chavez, and our focus is on public policy issues that involve race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. I should also note that I was a deputy in the U.S. Department of Justice's Civil Rights Division for four years, from 1987 to 1991.

The House bill about which I have been asked to testify this afternoon--which, among other things, reauthorizes the Section 5 and Section 203 provisions of the Voting Rights Act-- is bad policy from beginning to end, and unconstitutional in many different ways to boot. The provisions to which I object are: (1) the reauthorization of Section 5; (2) the overruling of the Supreme Court's *Bossier Parish* decisions; (3) the overruling of the Supreme Court's *Georgia v. Ashcroft* decision; and (4) the reauthorization of Section 203. (I would also note that, in the bill's section 3, there is a racial classification--page 8, line 24--that will have to withstand strict scrutiny if it is to be upheld as constitutional.)

Let me begin by quoting something to you:

And today, in the American South, in--in 1965, there was less than a hundred elected black officials. Today, there are several thousand. The Voting Rights Act of 1965 has literally transformed not just southern politics, but American politics. ...

Well, I think during the past 25 years, you have seen a maturity on the part of the electorate and on the part of many candidates. I think many voters, white and black voters, in metro Atlanta and elsewhere in Georgia, have been able to see black candidates get out and campaign and work hard for all voters. ...

So there has been a transformation. It's a different state, it's a different political climate, it's a different political environment. It's a different world that we live in, really. ...

The state is not the same state it was. It's not the same state that it was in 1965 or in 1975, or even in 1980 or 1990. We have changed. We've come a great distance. ... [I]t's not just in Georgia, but in the American South, I think people are preparing to lay down the burden of race.

That's not me. That's John Lewis, in a sworn deposition in the *Georgia v.*

*Ashcroft* litigation.

Justice O'Connor found that testimony credible. Let me read you how she concluded her opinion for the Supreme Court in that case:

The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race. ... As Congressman Lewis stated: "I think that's what the [civil rights] struggle was all about, to create what I like to call a truly interracial democracy in the South. In the movement, we would call it creating the beloved community, an all-inclusive community, where we would be able to forget about race and color and see people as people, as human beings, just as citizens." ... While courts and the Department of Justice should be vigilant in ensuring that States neither reduce the effective exercise of the electoral franchise nor discriminate against minority voters, the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life.

But the bill that you are considering today will ignore what John Lewis said about the changes in the South, and it would explicitly overturn Justice O'Connor's decision in *Georgia v. Ashcroft*.

It would also ignore the warning that Justice Scalia gave in *Bossier Parish*, about the limits of Congress's authority.

And, at a time when we are struggling with the issue of immigration, and where the one thing that everyone ought to be able to agree on is that we need to focus more attention on how to make sure that those coming to our country can become integrated

into our society, that we strengthen the social glue holding that society together, and that all of us be able at least to communicate with one another, this bill would tell immigrants --hey, if you can't speak English, no problem, Congress will even force local governments to print ballots in foreign languages.

This bill is bad for those immigrants, because it says that you can be a full participant in American democracy without knowing English, which is a lie. This bill is bad for everyone, because it perpetuates the racial gerrymandering and racial segregation that is now an inextricable by-product of the Section 5 preclearance process. In fact, it makes that process worse by overturning the *Bossier Parish* and *Georgia v. Ashcroft* decisions.

All of this is bad policy, and it is also unconstitutional. Sometimes the bill exceeds Congress's authority because it has no plausible record basis in enforcing the law against racial discrimination in voting, and sometimes it violates principles of federalism, and sometimes it actually turns the Constitution on its head and tries to guarantee racial gerrymandering and racial segregation.

I am not happy to say this, Mr. Chairman, but I believe I must: What I am afraid has happened is that Democratic Representatives are afraid in this area to do anything that might offend some minority incumbents and some of their minority constituents; their Republican counterparts are afraid to be called racist by various demagogues and interest groups; and both parties, especially Republicans, are politically happy with segregated districts and uncompetitive contests.

I hope that there will be enough Representatives and Senators, or a President, out there who take seriously enough their oaths to the Constitution; who are willing to stand

up to those who will call anyone a racist who stands in the way of their liberal agenda; and who will not let short-sighted political calculations tempt them from constitutional principle and the principle of nondiscrimination and nonsegregation.

***The Reauthorization of Section 5***

*The Two Basic Issues Raised by Section 5*

Section 5 requires certain jurisdictions--called "covered jurisdictions"--to "preclear" changes in, to quote the statute itself, "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" with the U.S. Department of Justice or the U.S. District Court for the District of Columbia. This includes anything from a relatively minor change (like moving a voting booth from an elementary school to the high school across the street) to an undoubtedly major change (like redrawing a state's congressional districts). The change cannot be precleared unless it is determined that it--to quote the new bill's language--"neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color."

Section 5 raises constitutional issues for two reasons, and I think that these two reasons together are likely to create judicial concerns greater than their sum alone. First, there are federalism concerns insofar as it requires states (and state instrumentalities, like cities and counties) to get advance federal approval in areas traditionally--and, often, textually, by the language of the Constitution itself--committed to state discretion. These federalism concerns are potentially heightened by the fact that some states are covered and others are not, especially if there is no compelling factual justification for the distinction. Second, since the federal government can bar a proposed change that has a

racially disproportionate “effect” but not a racially discriminatory “purpose,” Congress potentially exceeds its enforcement authority under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment, since those two amendments ban state disparate *treatment* on the basis of race but not mere disparate *impact* on that basis.

Congress may have been confident that it was acting within its authority when it first passed the Voting Rights Act in 1965, but both the facts and the law have changed over the past 40 years.

*The Shifting Factual and Legal Landscapes*

As to the facts, few would dispute that a great deal of progress has been made over the last 40 years in eliminating the scourge of state-sponsored racial discrimination, particularly in the South (which is where most of the covered jurisdictions are). No one would deny that there is still additional progress to be made against racial discrimination generally, and in voting, too, but the facts are not there to justify singling out the jurisdictions delineated under Section 5 for the extraordinarily intrusive requirements of that section. (Worse, as I read the bill, it makes Section 5 permanent--there is no longer even a 25-year expiration date.)

Congress has heard testimony from Professor Ronald Keith Gaddie and from my colleague Edward Blum. And it has before it the exhaustive, and unrebutted, studies published by the American Enterprise Institute. All this makes quite clear that (a) there is no crisis in voting rights in 2006 compared to what there was in 1965, and (b) there is no appreciable difference in the voting rights enjoyed in covered jurisdictions versus noncovered jurisdictions. Why are Texas and Arizona covered, and not New Mexico,

Oklahoma, and Arkansas? Why some counties in Florida and North Carolina, and not others? Why some boroughs in New York City, and not others?

I have gone through the House record, and thought I would share with you some of my thoughts about it. Regarding it, I would make four points.

First, I am struck by how one-sided it is. For instance, in the 170 pages of hearings on *Georgia v. Ashcroft*, I don't think that there is a single submission that defends Justice O'Connor's opinion. I don't think there was a single panel where more than one of the witnesses opposed reauthorization. I don't recall a single government official who testified or submitted a statement against reauthorization of Section 5.

Second, it seems to me that the evidence that the House did produce is almost all scattered and anecdotal rather than systematic and statistical. What's more, much of it is not even about purposeful discrimination, which is what you need to be able to cite. A Justice Department preclearance denial based on effect--even of a proposed at-large system, which seems almost as reviled now as literacy tests--does not help the bill, nor does a study of post-1982 Section 2 litigation (since such litigation typically asserts only a disproportionate "result").

Third, very little if any of the evidence compares covered jurisdictions to noncovered jurisdictions, and what comparisons there are undermine the bill. For example, one of the few discussions that compares, even implicitly, covered and noncovered jurisdictions--the statement by Charles D. Walton of the National Commission on the Voting Rights Act--concludes that "discrimination in voting and in election processes in the northeastern states is a significant problem" and that there would be "a great benefit to having more of the country covered by the pre-clearance provisions

of Section 5”; likewise, a law review article by Laughlin McDonald of the ACLU’s Voting Rights Project is entitled “The Need to Expand the Coverage of Section 5 of the Voting Rights Act in Indian Country,” and would do so “throughout the West”; the July 20, 2005, letter that Rep. William Lacy Clay submitted to the National Commission on the Voting Rights Act complained mostly about Florida and Missouri (as did Jonah Goldman); the statement of attorney Stephen Laudig complained about Indiana; Rep. Gwen Moore complained about Milwaukee; Alice Tregay complained about Chicago; Ihsan Ali Alkhatib complained about Detroit; Marlon Primes complained about Ohio; in general, the National Commission on the Voting Rights Act held hearings all over the country, and all over the country it found problems--sometimes in covered jurisdictions, but often not.

Fourth, there is very little if any discussion of why the extraordinary preclearance mechanism--and the use of an effects test--is the only, let alone the best, means to address the intentional discrimination that does arise.

In sum, the record reads like an attempt--and not a particularly skillful one--to justify after the fact a decision that had already been made.

Let’s just go through each of the nine “Findings” of the House bill: “(1)” admits the “[s]ignificant progress” that has been made; “(2)” asserts that “vestiges of discrimination ... demonstrated by second generation barriers” still exist, but if these undefined “vestiges” and “barriers” are not purposeful, then they do not help the bill; “(3)” cites “racially polarized voting,” but this alone is no evidence of a denial of voting rights, and certainly not unless the reason for the polarization is race rather than simply legitimate differences of political opinion, and is belied by the AEI studies anyway; “(4)”

cites enforcement activities of the Department of Justice, but fails to mention that--based on the House's own record (see June 14, 2005, Statement of Joseph D. Rich before the National Commission on the Voting Rights Act)--more than 99 percent of proposed changes are precleared (the percentage of objections since 1995 is less than 0.2 percent, according to the Justice Department, see Serial No. 109-79, p. 2596); and, of course, this finding tells us nothing about the critical questions of whether the actions at issue were purposefully discriminatory and whether covered jurisdictions have more voting rights violations than noncovered ones; "(5)" cites evidence on the continued need for observer coverage in covered jurisdictions (but, again, no comparison is made with noncovered jurisdictions, and this observer provision is uncontroversial anyway); "(6)" criticizes the Supreme Court's *Bossier Parish II* and *Georgia v. Ashcroft* decisions, but without giving any legal or factual specifics (indeed, the Court's decisions were consistent with the intent of Section 5, and overturning them, in any event, would raise constitutional problems; I've also noted the failure of the record to include any pro-*Georgia v. Ashcroft* views); "(7)" again asserts, but again without defining, the existence of "vestiges of discrimination"; "(8)" is essentially the same as Finding (4); and "(9)" is a broad and, as we have now seen, unsubstantiated conclusion.

As to the law, during the time since the Voting Rights Act was first enacted in 1965, the Supreme Court has made clear that the Fourteenth Amendment bans only disparate treatment, not state actions that have only a disparate impact and were undertaken without regard to race. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977) ("Our decision last Term in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that official action

will not be held unconstitutional solely because it results in a racially disproportionate impact.”). A plurality of the Court has drawn the same distinction for the Fifteenth Amendment. *City of Mobile v. Bolden*, 446 U.S. 55, 62-65 (1980) (plurality opinion) (“[The Fifteenth] Amendment prohibits only purposefully discriminatory denial or abridgment by government of freedom to vote ‘on account of race, color, or previous condition of servitude.’”) (quoting the Fifteenth Amendment).

The Supreme Court has also ruled even more recently that Congress can use its enforcement authority under the Fourteenth Amendment to ban actions with only a disparate impact only if those bans have a “congruence and proportionality” to the end of ensuring no disparate treatment. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). It is likely that this limitation applies also to the Fifteenth Amendment; there is no reason to think that Congress’s enforcement authority would be different under the Fourteenth Amendment than under the Fifteenth, when the two were ratified within 19 months of each other, have nearly identical enforcement clauses, were both prompted by a desire to protect the rights of just-freed slaves, and indeed have both been used to ensure our citizens’ voting rights.

Finally, the Supreme Court has, in any number of recent decisions, stressed its commitment to principles of federalism and to ensuring the division of powers between the federal government and state governments. *See, e.g., Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). It has also stressed what is obvious from the text of the Constitution: “The Constitution creates a Federal Government of enumerated powers.” *United States v. Lopez*, 514 U.S. 549, 552 (1995).

*The Unconstitutionality of Reauthorizing Section 5*

Putting all this together, it is very likely that the courts will look hard at a law that requires states and state instrumentalities to ask permission of the federal government before taking action in areas that are traditionally, even textually, committed to state discretion under the Constitution, and to meet a much more difficult standard for legality than is found in the Constitution itself.

It is true that in the leading case *City of Boerne v. Flores*, the Court explicitly distinguished the actions Congress had taken under the Voting Rights Act. On the other hand, however, in doing so it stressed Congress's careful findings and rifle-shot provisions. **521 U.S. at 532-33.** If Congress were to reauthorize Section 5 without ensuring its congruence and proportionality to the end of banning disparate treatment on the basis of race in voting--which is exactly what the bill we are discussing today would do--the language in *Flores* could as easily be cited against the new statute's constitutionality as in its favor. Likewise, the Court's decision in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003)--upholding Congress's abrogation of state immunity under the federal Family and Medical Leave Act--also stressed Congress's factual findings and the challenged statute's limited scope.

One frequently noted byproduct of the use of the effects test--under both Section 5 and Section 2--has been racial gerrymandering. It is ironic that the Voting Rights Act should be used to encourage the segregation of voting, but it has. In the closing pages of his opinion for the Court in *Miller v. Johnson*, 515 U.S. 900 (1995), Justice Kennedy noted the constitutional problems raised for the statute if it is interpreted to require such gerrymandering. (The Supreme Court has likewise, in the employment context, noted the

danger of effects tests leading to more, rather than less, disparate treatment. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652-53 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 992-94 & n.2 (1988) (plurality opinion); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J. concurring in judgment).) This byproduct of racial gerrymandering obviously raises a policy problem of the Voting Rights Act, in addition to the constitutional one.

Congress does not have before it evidence on which it can base a conclusion that the preclearance approach and the “effects” test are necessary to ensure that the right to vote is not “denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude,” to quote the Fifteenth Amendment. To the contrary, the evidence--especially the AEI studies, cited above--points in the opposite direction. Without these findings, a reauthorized Section 5 does not pass the tests of constitutionality the Supreme Court has set out.

The problems that remain are national in scope, and to focus on only particular jurisdictions makes no policy sense and aggravates federalism concerns. If the problems remain regional or remain only in even more widely scattered jurisdictions, then applying the statute’s preclearance provisions where they are no longer justified also aggravates federalism concerns. The test in the statute that determines whether a statute is covered or not is, after all, based on data that are three decades old.

Section 5 has had other bad side effects. The segregated districts it has created have contributed to a lack of competitiveness in elections; more extreme and fewer swing districts; the insulation of Republican officeholders from minority voters and issues of particular interest to their communities (to the detriment of both the officeholders and the

communities); and, conversely, the insulation of minority officeholders from white voters, making it harder for those officeholders to run for statewide or other larger-jurisdiction positions.

Section 5 of the Voting Rights Act is no longer fashioned to do the best job it can to guarantee the right to vote, and no longer does so in a way that consistent with the principle of federalism--which, after all, is also a bulwark against government abridgment of our rights as citizens.

#### ***Overturning the Bossier Parish Decisions***

The Voting Rights Act's two most prominent provisions are Section 2, 42 U.S.C. 1973, and Section 5, 42 U.S.C. 1973c. Section 2 applies nationwide, and bans any racially discriminatory "voting qualification or prerequisite to voting or standard, practice, or procedure." Discrimination is defined in terms of a controversial "results" test. It is controversial because it defines discrimination differently than it is defined in the Constitution itself, and because it inevitably drives jurisdictions to do exactly what the Constitution itself proscribes, namely act with an eye on race and ethnicity.

Section 5, on the other hand--and as I've already discussed--is not nationwide in scope. Rather, it requires certain jurisdictions--called "covered jurisdictions"--to "preclear" voting changes.

In two decisions over the past decade, the Supreme Court explained how Section 2 and Section 5 fit together. In *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997) (*Bossier Parish I*), and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier Parish II*), the Supreme Court held that, because Section 5 is aimed at changes

in voting practices undertaken in order to evade the Fifteenth Amendment, it is violated only if the changes at issue are retrogressive in “purpose” or “effect.” Thus, it is not permissible to refuse to preclear a changed practice or procedure simply because it may contain a violation of Section 2 (*Bossier Parish I*) or may reflect a discriminatory purpose (*Bossier Parish II*); the change must also be retrogressive.

The *Bossier Parish* decisions were rightly decided. As Justice O’Connor wrote for the Court in *Bossier Parish I*, “we have consistently understood these sections [i.e., Sections 2 and 5] to combat different evils and, accordingly, to impose very different duties upon the States.” As I read it, however, Section 5 of the new bill would overturn both decisions; Section 5’s new subsection (b) takes care of *Bossier Parish I*, and its new subsection (c) takes care of *Bossier Parish II*. (I see in Finding (6) that only *Bossier Parish II* is criticized, but even if you intend to overrule only it, in doing so you are also in effect overruling *Bossier Parish I*, because the bureaucrats at the Justice Department will be able to say that the failure to correct a Section 2 problem--and to maximize the political advantage of a protected racial group--is evidence of discriminatory purpose.)

In my view, this is bad policy and unconstitutional. I’m sure that some will argue, for instance, What’s wrong with the Justice Department holding up a change if it contains a potential Section 2 violation? But the problem is that, in truth, we don’t know whether there is a Section 2 violation or not. Generally, we would have just one side’s opinion about that, without a trial or a formal hearing or anything of the sort. As the Supreme Court recognized in *Bossier Parish II*, Section 5 contains “extraordinary burden-shifting procedures.” And, while Section 5 is normally aimed at a simple determination of backsliding vel non, determining a Section 2 or purpose violation requires a difficult legal

appraisal and, factually, weighing the “totality of the circumstances”--something much better left to conventional litigation. See generally Abigail M. Thernstrom, *Whose Votes Count?: Affirmative Action and Minority Voting Rights* (1987).

Indeed, as a practical matter, the government’s opinion is likely to be that of a low-level bureaucrat. And it is one thing to give that person, whoever he or she is, the authority to hold up a change; it is something else to give that person the effective authority to order changes where none were being made. It can no longer be claimed that all the Department is trying to do is thwart changes designed to keep one step ahead of the enforcement of the law. Now, moreover, all that person at the Department will have to point to is some statement in a voluminous record that, taken out of context, shows bad purpose; indeed, not even that is necessary if the preclearance involves a practice (like voter ID) that someone at the Department believes has inherently a bad purpose.

This shift further jeopardizes the statute’s constitutionality. In his opinion for the Court in *Bossier Parish II*, Justice Scalia wrote: “Such a reading would also exacerbate the ‘substantial’ federalism costs that the preclearance procedure already exacts, *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999), perhaps to the extent of raising concerns about Section 5’s constitutionality, see *Miller [v. Johnson]*, 515 U.S. 900,] 926-927 [(1995)].”

These problems are further exacerbated by the fact that, because Section 2 uses a constitutionally problematic “results” test, the Justice Department would be able to refuse to preclear, for instance, a redistricting plan that it felt had not been redrawn to contain “enough” minority-majority districts--even though the submitted plan contained no fewer such districts than it had in the past. The Department could likewise claim that the failure

to “improve” voting lines demonstrates discriminatory “purpose”--and, once again, gerrymandered districts (of either the majority-minority or influence/coalition variety) would be ordered even though there had been no retrogression. This fear is hardly an unfounded one, since the Court itself has noted the Department’s record in the past of coercing this sort of gerrymandering. *Miller v. Johnson*, 515 U.S. 900 (1995).

Finally, let me note another unhappy side-effect of overturning the *Bossier Parish* decisions. If the Justice Department refused to preclear a change that actually diminished discrimination but not by enough to make the Department happy--because it didn’t diminish it *enough*--the result would be to leave in place the *more* discriminatory status quo. It would be better and fairer to everyone to approve the change (improving matters) and then also bring a separate lawsuit under Section 2 (which, if successful, might improve matters still further). See *Bossier Parish II*, 528 U.S. at 335-336.

#### ***Overturning Georgia v. Ashcroft***

The bill we are discussing today also adds a final subsection to Section 5, stating that the focus of the law now would be just on whether a new provision protects citizens’ ability “to elect their preferred candidates of choice.” The purpose of this new subsection is to overturn Justice O’Connor’s opinion in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). Justice O’Connor wrote in that opinion that compliance with Section 5 had to be based on “the totality of the circumstances,” not just on “the comparative ability of a minority group to elect a candidate of its choice.” She relied in part on the testimony of Rep. John Lewis (D-Ga.).

The new bill rejects that broad approach, because it insufficiently guarantees the creation of majority-minority districts. The purpose of the provision is to demand the use of racial classifications that the Supreme Court has ruled will always trigger strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993). Worse, the bill demands the segregation of voting districts *uber alles*, as the sine qua non for Section 5 preclearance of redistricting. In doing so, as I noted above, it also rejects the penultimate paragraph in Justice O'Connor's opinion for the Supreme Court in *Georgia v. Ashcroft*:

The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race. Cf. *Johnson v. De Grandy*, 512 U. S., at 1020; *Shaw v. Reno*, 509 U. S., at 657. As Congressman Lewis stated: "I think that's what the [civil rights] struggle was all about, to create what I like to call a truly interracial democracy in the South. In the movement, we would call it creating the beloved community, an all-inclusive community, where we would be able to forget about race and color and see people as people, as human beings, just as citizens." Pl. Exh. 21, at 14. While courts and the Department of Justice should be vigilant in ensuring that States neither reduce the effective exercise of the electoral franchise nor discriminate against minority voters, the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life. See *Shaw v. Reno*, *supra*, at 657.

In addition, I would note that there is a good chance that the courts will interpret what the bill actually says as freezing into place not only majority-minority districts, but also influence or coalition districts. The latter will include districts, that is, in which a racial minority may make up a very small percentage of the voting population (for instance, Rep. Martin Frost's district that was at issue in the Texas redistricting case just decided by the Supreme Court). After all, an influence or coalition district can be said to ensure that the voters in question are able "to elect their preferred candidates of choice," and parts of Justice O'Connor's opinion in *Georgia v. Ashcroft* supports that

interpretation (see, e.g., 539 U.S. at 480: “In order to maximize the electoral success of a minority group, a State may choose to create a certain number of ‘safe’ districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. Alternatively, a State may choose to create a greater number of districts in which it is likely--although perhaps not quite as likely as under the benchmark plan--that minority voters will be able to elect candidates of their choice.”) (citations omitted); see also her quotation from *Johnson v. De Grandy*, two paragraphs later).

### ***Reauthorizing Section 203***

Finally, let me turn to the reauthorization for 25 years of the foreign-language ballot provisions of the Voting Rights Act, 42 U.S.C. 1973aa-1a, commonly referred to as Section 203, which is accomplished by Section 7 of the new bill. My discussion below is drawn from Linda Chavez’s testimony before this subcommittee last fall; she is the chairman of the Center for Equal Opportunity. Similar points were also made for the subcommittee’s record by K.C. McAlpin of ProEnglish and Jim Boulet, Jr., of English First.

Section 203 requires certain jurisdictions to provide all election-related materials, as well as the ballots themselves, in foreign languages. The jurisdictions are those where more than 5 percent of the voting-age citizens are members of a particular language minority, and where the illiteracy rate of such persons is higher than the national illiteracy rate. The language minority groups are limited to American Indians, Asian Americans, Alaskan Natives, and those “of Spanish heritage.” Where the language of the

minority group is oral or unwritten, then oral voting assistance is required in that language.

There are basically three policy problems with Section 203 that I would like to discuss today. First, it encourages the balkanization of our country. Second, it facilitates voter fraud. And, third, it wastes the taxpayers' money. In addition to these policy problems, in my view Section 203 is unconstitutional because, although Congress asserts it has enacted this law pursuant to its enforcement authority under the Fourteenth and Fifteenth Amendments, in fact this statute actually exceeds that authority.

*Section 203 Balkanizes Our Country*

America is a multiethnic, multiracial nation. It always has been, and this is a source of national pride and strength. But our motto is *E pluribus unum*--out of many, one--and this means that, while we come from all over the globe, we are also united as Americans.

This unity means that we hold certain things in common. We celebrate the same democratic values, for instance, share the American dream of success through hard work, cherish our many freedoms, and champion political equality. Our common bonds must also include an ability to communicate with one another. Our political order and our economic health demand it.

Accordingly, the government should be encouraging our citizens to be fluent in English, which, as a practical matter, is our national language. And, in any event, the government certainly should not discourage people from mastering English, and should not send any signals that mastering English is unimportant. Doing so does recent immigrants no favor, since true participation in American democracy requires knowing

English. *See Jose Enrique Idler, En Ingles, Por Favor, National Review Online, March 8, 2006, available at <http://www.nationalreview.com/comment/idler200603080757.asp>.*

Inevitably, however, that is what the federal government does when it demands that ballots be printed in foreign languages. It also devalues citizenship for those who have mastered English as part of the naturalization process. As Boston University president John Silber noted in his 1996 congressional testimony, bilingual ballots “impose an unacceptable cost by degrading the very concept of the citizen to that of someone lost in a country whose public discourse is incomprehensible to him.” **Quoted in John J. Miller, *The Unmaking of Americans: How Multiculturalism Has Undermined America’s Assimilation Ethic* (1998), page 133.**

*Section 203 Facilitates Voter Fraud*

Most Americans are baffled by the foreign-language ballot law. They know that, with few exceptions, only citizens can vote. And they know that, again with only few exceptions, only those who speak English can become citizens. So why is it necessary to have ballots printed in foreign languages?

It’s a good question, and there really is no persuasive answer to it. As a practical matter, there are very few citizens who need non-English ballots.

There are, however, a great many noncitizens who can use non-English ballots. And the problem of noncitizens voting is a real one. The Justice Department has brought numerous criminal prosecutions regarding noncitizen voting in Florida, as documented in a recent official report. **Criminal Division, Public Integrity Section, U.S. Department of Justice, *Election Fraud Prosecution and Convictions, Ballot Access & Voting***

*Integrity Initiative, October 2002 - September 2005.* This problem was mentioned years ago by Linda Chavez (*Out of the Barrio*, page 133), and has been extensively reported on in the press. See Ishikawa Scott, "Illegal Voters," *Honolulu Advertiser*, Sept. 9, 2000; Dayton Kevin, "City Steps Up Search for Illegal Voters," *Honolulu Advertiser*, Sept. 9, 2000; Audrey Hudson, "Ineligible Voters May Have Cast a Number of Florida Ballots," *Washington Times*, Nov. 29, 2000 ("A sizable number of Florida votes may have been cast by ineligible felons, illegal immigrants and noncitizens, according to election observers. ...This would not be the first time votes by illegal immigrants became an issue after Election Day. Former Republican Rep. Robert K. Dornan of California was defeated by Democrat Loretta Sanchez by 984 votes in the 1996 election. State officials found that at least 300 votes were cast illegally by noncitizens."); "14 Illegal Aliens Reportedly Voted," KSL NewsRadio 1160, Aug. 8, 2005; Associated Press, Untitled (first sentence: "Maricopa County Attorney Andrew Thomas has charged 10 legal residents who are not U.S. citizens with fraudulently registering to vote, and more residents are being investigated, he said."), Aug. 12, 2005; Joe Stinebaker, "Loophole Lets Foreigners Illegally Vote," *Houston Chronicle*, Jan. 17, 2005; Lisa Riley Roche & Deborah Bulkeley, "Senators Target License Abuses," *Desert Morning News*, Feb. 10, 2005; Teresa Borden, "Scheme To Get Noncitizens on Rolls Alleged," *Atlanta Journal-Constitution*, Oct. 28, 2004; Associated Press, "Harris County Cracking Down on Voting by Non-U.S. Citizens," *Houston Chronicle*, Jan. 16, 2005; John Fund's Political Diary, *Wall Street Journal*, Oct. 23, 2000 (voter fraud a growing problem since "47 states don't require any proof of U.S. residence for enrollment"); Doug Bandow, "Lopez Losing,"

*American Spectator*, Oct. 28, 2005 (Nativo Lopez’s Hermandad Mexicana Nacional “registered 364 non-citizens to vote in the 1996 congressional race in which Democrat Loretta Sanchez defeated incumbent Republican Bob Dornan”).

*Section 203 Wastes Government Resources*

As I just noted, there are few citizens who need ballots and other election materials printed for them in languages other than English. The requirement that, nonetheless, such materials must be printed is therefore wasteful.

On the one hand, the cost of printing the additional materials is high. It is a classic, and substantial, unfunded mandate. For example, Los Angeles County had to spend over \$1.1 million in 1996 to provide Spanish, Chinese, Vietnamese, Japanese, and Filipino assistance. **General Accounting Office, *Bilingual Voting Assistance: Assistance Provided and Costs* (May 1997), pages 20-21.** Six years later, in 2002, it had to spend \$3.3 million. **Associated Press, “30 States Have Bilingual Ballots,” Sept. 25, 2002.** There are 296 counties in 30 states now that are required to have such materials, and the number is growing rapidly. See **“English Is Broken Here,” *Policy Review*, Sept-Oct. 1996.** Frequently the cost of multilingual voter assistance is more than half of a jurisdiction’s total election costs. **GAO May 1997, pages 20-21.** If corners are cut, the likelihood of translation errors increases. (Indeed, the inevitability of some translation errors, no matter how much is spent, is another argument for why all voters need to master English. See *The Unmaking of Americans*, page 133; Amy Taxin, **“O.C.’s Foreign-Language Ballots Might Be Lost in Translation: Phrasing Is Found To Differ by County, Leading to Multiple Interpretations and Possibly Confusion for Some Voters,” *Orange County Register*, Nov. 3, 2005; “Sample S.J. Ballot Contains**

**Error: Spanish Translation Doesn't Make Sense,"** *Stockton Record*, Feb. 27, 2003;  
**Jim Boulet, "Bilingual Chaos,"** *National Review Online*, Dec. 19, 2000; **English First  
 Foundation Issue Brief, *Bilingual Ballots: Election Fairness or Fraud?* (1997),  
 available at <http://www.englishfirst.org/ballots/efbb.htm>.)**

On the other hand, the use made of the additional materials is low. According to a 1986 General Accounting Office study, nearly half of the jurisdictions that provided estimates said *no one*--not a single person--used oral minority-language assistance, and more than half likewise said *no one* used their written minority-language assistance. Covered jurisdictions said that generally language assistance "was not needed" by a 10-1 margin, and an even larger majority said that providing assistance was either "very costly or a waste of money." **General Accounting Office, *Bilingual Voting Assistance: Costs of and Use During the November 1984 General Election*, Sept. 1986, pages 25, 32, 39.** According to Yuba County, California's registrar of voters: "In my 16 years on this job, I have received only one request for Spanish literature from any of my constituents." Yet in 1996 the county had to spend \$30,000 on such materials for primary and general elections. ***The Unmaking of Americans*, page 134.**

What's more, to quote again from John J. Miller's excellent book, *The Unmaking of Americans: How Multiculturalism Has Undermined America's Assimilation Ethic* (1998), pages 242-243: Getting rid of foreign-language ballots "does not mean that immigrant voters who still have difficulty communicating in English would not be without recourse. There is a long tradition in the United States of ethnic newspapers--often printed in languages other than English--providing political guidance to readers in the form of sample ballots and visual aids that explain how to vote. It would surely

continue.” I should add that Mr. Miller concluded that “Congress should amend the Voting Rights Act to stop the Department of Justice from coercing local communities to print election materials in foreign languages.”

In sum, as a simple matter of dollars and cents, foreign-language ballots are just not worth it. The money would be much better spent on improving election equipment and combating voter fraud.

*Section 203 Is Unconstitutional*

Finally, Mr. Chairman, I would suggest that Section 203 raises serious constitutional problems, and, if it is reenacted, should be struck down as unconstitutional.

As I noted above, the Supreme Court has made clear that only purposeful discrimination--actually treating people differently on the basis of race or ethnicity--violates the Fourteenth and Fifteenth Amendments. See *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1976); *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The Court has ruled even more recently that Congress can use its enforcement authority to ban actions that have only a disparate impact only if those bans have a “congruence and proportionality” to the end of ensuring no disparate treatment. *City of Boerne v. Flores*, 521 U.S. 507 (1997); see also *United States v. Lopez*, 514 U.S. 549 (1995). This limitation is likely to be even stricter when the federal statute in question involves areas usually considered a matter of state authority. See, e.g., *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

Now, it seems to me very unlikely that the practice of printing ballots in English and not in foreign languages would be a violation of the Fourteenth or Fifteenth

Amendments—that is, it is very unlikely that this practice could be shown to be rooted in a desire to deny people the right to vote because of race or ethnicity. See *Out of the Barrio*, page 46; see also Abigail Thernstrom, *Whose Votes Count?: Affirmative Action and Minority Voting Rights* (1987), pages 40, 57. Rather, it has perfectly legitimate roots: To avoid facilitating fraud, to discourage balkanization, and to conserve scarce state and local resources. Accordingly, Congress cannot assert that, in order to prevent discrimination in voting, it has authority to tell state and local officials that they must print ballots in foreign languages.

The rather garbled text of Section 203, however, apparently says that Congress was concerned not with discrimination in voting per se, but with educational disparities. That is, the poorer education that, say, Latinos receive is what makes foreign-language ballots necessary. Of course, if these disparities are not rooted in discrimination, then there remains a problem with Congress asserting its power under Section 5 of the Fourteenth Amendment or Section 2 of the Fifteenth Amendment to require bilingual ballots. But let us assume that Congress did have in mind unequal educational opportunities rooted in educational discrimination, presumably by the states.

Even here, I think there are insurmountable problems. There is, in short, a lack of congruence and proportionality between the asserted discrimination in education and the foreign-language ballot mandate in Section 203. Are all the language minorities covered by Section 203 subjected to government discrimination in education--and, if not, then why are all of them covered? Are there language minorities that are subject to government discrimination that are not covered by Section 203--and, if so, then why aren't they covered? How often does education discrimination result in an individual not

becoming fluent enough in English to cast a ballot? Isn't it much more likely that this lack of fluency has some other cause (like recent immigration, most obviously, or growing up in an environment where English is not spoken enough)? Finally, is it a congruent and proportional response to education discrimination to force states to make ballots available in foreign languages? How likely is Section 203 to result in the elimination of education discrimination? Does this "remedy" justify Congress's overruling of the legitimate reasons that states have for printing ballots in English and not in foreign languages?

Congress has not and cannot answer these questions satisfactorily.

Does anyone really believe that the reason for Section 203 has anything to do with remedying state discrimination in education? Of course not. As Linda Chavez discussed in *Out of the Barrio*, the Voting Rights Act of 1965 was motivated by a desire to stop discrimination; the later expansion of the Voting Rights Act at the behest of Latino special interest groups was simply about identity politics. There was little factual record established even to show that Hispanics were being systematically denied the right to vote. This disenfranchisement would have been particularly difficult to demonstrate in light of the number of Hispanics who had previously been elected to office, which included Governors, U.S. Senators, Members of the House of Representatives, as well as numerous state legislators and local officials, many of these officials serving in jurisdictions that would soon be subject to the special provisions of the Voting Rights Act. **See also Thernstrom, chapter 3.** There is no credible way to equate the discrimination that African Americans in the South suffered to the situation of Latinos, who had voted--and been elected to office--in great numbers for decades. That was true

when Section 203 was first enacted, and it is even more true now, which is what matters for purposes of reauthorization. The reason for the bilingual ballot provision is not and never has been about discrimination--it is about identity politics.

***Conclusion and Discussion of LULAC v. Perry***

In my conclusion, I would like to focus specifically on the divergence between what the Voting Rights Act was supposed to be and what it has become. That divergence is in many ways dramatized by the Supreme Court's recent decision in *LULAC v. Perry* (June 28, 2006).

The purpose of the VRA was to stop racial discrimination in voting. In some jurisdictions prior to 1965, specifically in the Deep South, there was no question that African Americans, in particular, were disenfranchised. So Section 2 of the VRA prohibited that, and Section 5 of the VRA fashioned an ingenious and effective mechanism to stop this discrimination. Many states had been quite devious in avoiding federal law enforcement by constantly changing the methods through which disenfranchisement was accomplished, and so Section 5 said that *any* change related to voting procedures had to be precleared by the federal government. This was intended to catch, among other things, racial gerrymandering that was designed to prevent African Americans from electing their candidates of choice.

The VRA has diverged from this original purpose in two ways. The first way is that there really is no longer any rhyme or reason in which jurisdictions are covered and which ones aren't. Let's face it: We all know that. After several decades, we would expect to need to update the trigger mechanism--looking at more recent elections or more recent records of voting violations. But we all also know that this would result in many

jurisdictions no longer being covered, and perhaps adding to the VRA's coverage mechanism a number of new jurisdictions, and it is hard to say which would be more politically unpopular.

The other way the VRA has diverged from its original stated purpose is even more disturbing. It is not being used to stop racial gerrymandering; it is being used to require it.

Sometimes that motivation is overtly racial. There is no doubt in my mind that the Voting Rights Act is being used to foster segregation in voting districts, and is being used to try to ensure something like racial proportionality in legislatures. But at least four of the justices in *Perry* acknowledged that, while generally the reapportionment there was about politics, not race, what racial gerrymandering did take place was required by the VRA. It is disturbing to see a civil-rights statute twisted into a partisan-political device, and this abuse is committed by both parties.

For instance, in Texas, Republicans were not seeking to dilute anyone's voting power because of *race*; they were focused on people's voting power because of *party*--not always a particularly noble focus, but one that is as old as Elbridge Gerry, at least--but the Democrats wanted to stop them and so they tried, with some success, to use the Voting Rights Act to do it. Likewise, in *Georgia v. Ashcroft*, the Democrats weren't trying to hurt black voters or help them, per se; they just wanted to try to win more seats for Democrats. But their efforts were challenged under the Voting Rights Act because it was the tool at hand.

Incidentally, the same kind of abuse can also happen in ways that don't involve gerrymandering, but do involve other voting practices or procedures that are objected to,

ostensibly because they are racially discriminatory, but really because for partisan purposes. For instance, I suspect that absentee-ballot procedures, limitations on felons voting, and voter-identification and other antifraud laws are all challenged sometimes, not because anyone really believes that they are intended to be racially discriminatory, but because one side thinks these rules will hurt their voter turnout, and their disparate racial impact allows the VRA to be invoked for, again, a partisan political end.

The good news is that, in 2006, neither party wants to stop anyone from voting because of race; all either party cares about is winning. There is no candidate in either party who would not be thrilled with 100 percent black registration and turnout, so long as the candidate was also confident that those voters would vote for him or her.

The “racial polarization” that is often the centerpiece of VRA litigation is an increasingly incoherent concept. Whites and blacks may frequently vote differently in some jurisdictions, but it is not about race or discrimination--it is just about differences in political opinion on issues like taxes and national defense.

But because African Americans vote so overwhelmingly Democratic, any effects test in the voting area can be readily invoked for partisan purposes--sometimes by one party, sometimes by the other. For instance, for years Republicans have tried--sometimes successfully, although those days may be ending--to use an effects test to pack African Americans into a relatively few districts, thus bleaching all the other, surrounding districts white, with the end result that there are lots of Republican districts and just a few black ones, especially in jurisdictions (like the South) where the white voters tend to be conservative. Conversely, Democrats can argue that restrictions on felon voting (which disproportionately affects blacks) violates the Voting Rights Act; they are also likely to

argue that “wasting” black votes by overpacking minority-majority districts violates the Voting Rights Act; in *Perry*, they argued that reapportionment aimed at helping Republicans was racially discriminatory. And even without an effects test in Section 5, the peremptory power that it gives the Executive Branch allows it to object if it thinks the discriminatory effect is good evidence of discriminatory intent.

As I have already discussed, the intrusiveness of Section 5 into traditionally state functions, its use of a constitutionally ultra-vires effects test, and its now-established track record in pushing jurisdictions toward racial segregation and gerrymandering in redistricting--all combine to make Section 5 unconstitutional.

Well, what is to be done? The obvious answer is, don't renew Section 5. The case law is too bad and the temptations to abuse it are too great. At the same time, there is overwhelming evidence that it has outlived its (originally noble) purpose.

If Congress insists that it cannot go cold turkey, then at least it should not make Section 5 worse. The two *Bossier Parish* decisions have modestly limited its scope and its potential abuses; they should not be overturned. *Georgia v. Ashcroft* also belongs in this category. The current House bill not only overturns *Georgia v. Ashcroft*, but replaces it with a provision that is muddy at best, will lead to years of more litigation, and probably will have results that its drafters never intended. I would add that, the more this provision's meaning is clarified to ensure that it requires the creation of majority-minority districts, the more clearly unconstitutional it will be as well. The case law that has grown up around Section 5 makes its meaning nearly incomprehensible already; Congress should not make matters worse by adding language, the meaning of which its own members cannot agree on.

I would also not extend Section 5--or Section 203--for another 25 years. The shorter the extension, the better--especially if Congress changes the statute in ways that might have unintended consequences. I would also try to put in place a better, more objective review mechanism, probably in the statute itself. Congress must undertake a serious, systematic comparison of voter registration and participation rates by race in covered versus noncovered jurisdictions, with an effort to determine the actual causes of any racial disparities, and specifically whether those causes are discrimination--and if there are more limited and effective remedies for any discrimination than the preemption mechanism and an effects test. It should undertake the same sort of covered-versus-noncovered comparison to see in which jurisdictions actual violations of the Fifteenth Amendment of any kind are occurring. Above all, Congress should not extend the law and then forget about it and its effects for another 25 years, and then scramble and try to figure out what to do about it in the heat of another election year.

But, really, by far the best course is to declare victory and let Section 5 and Section 203 lapse. Let me conclude, Mr. Chairman, by quoting Chief Justice Roberts in the *Perry* case: "It is a sordid business, this divvying us up by race." As a matter of public policy and constitutional law, Section 5 and Section 203 should not be reauthorized; in any event, the Supreme Court's *Bossier Parish* and *Georgia v. Ashcroft* decisions should not be overturned.

Thank you very much, Mr. Chairman, for the opportunity to present this testimony today.

## **Bloc Voting, Polarization and the Panethnic Hypothesis: The Case of Little Saigon**

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**ABSTRACT**

The extensive literature on racial bloc voting (RBV) and minority representation has given little attention to Asian Americans. This paper contributes by examining the behavior of Vietnamese Americans living in the Little Saigon enclave in Orange County, California. Matching surname-coded voter registration records and precinct level returns for state and municipal elections between 1998 and 2002, I find evidence of bloc voting and polarization in every race where a Vietnamese American candidate is pitted against a White candidate. Further, I find evidence of panethnic behavior: Vietnamese Americans consistently rank candidates of different Asian ethnicities as their candidates of choice. Coming in light of recent evidence suggesting that polarized voting is declining in some parts of the United States, the findings have theoretical and instrumental implications for Asian American politics and the study of race and ethnicity.

IN 1975, the first major wave of Southeast Asian refugees came to America after the fall of Saigon and the end of the Vietnam War. Most were scattered to remote corners of the United States under a dispersal policy employed by Congress and the Gerald R. Ford Administration, but several processed at Camp Pendleton, a Marine Corps Station in northern San Diego County, California, found sponsors and settled about 65 kilometers north in a suburban area around the cities of Westminster, Garden Grove and Santa Ana. Following the Boat People exodus in the late 1970s and early 1980s and considerable secondary migration, this fledgling community evolved into the largest of several "Little Saigons" around the United States. Of the 1.2 million persons of at least partial Vietnamese descent counted nationwide in the 2000 Census, 1 of every 12 live in this central Orange County area and 1 in 5 live within driving distance in nearby areas throughout South Orange, Los Angeles, Riverside and San Diego counties. In just under 30 years, Little Saigon has thus become one of the few metropolitan communities in the mainland United States where an Asian American population is both large enough and sufficiently concentrated to have a potential impact on local and regional politics.

In this paper, I explore the impact of this rapidly growing enclave with specific regard to racial bloc voting (RBV). Insofar as the literature in this area has focused largely on the African American experience in the South (e.g., Davidson and Grofman 1994; Bullock and Dunn 1999; Grofman, Handley and Lublin 2001), this study seeks to expand understanding of this phenomenon to a population new to politics in the United States. The results have both theoretical and instrumental implications for Asian American politics and the study of race and ethnicity in the United States.

This paper proceeds in four parts. In the first section, I give an overview of racial bloc voting (RBV) that segues into a review of empirical literature concerning ethnicity and political behavior, particularly as it has evolved in the study of Asian Americans. From this, I move to a descriptive analysis of the Vietnamese American community: its movement into American politics and the factors that would presumably make it a cohesive political entity. This sets the stage for the bloc voting analysis, which is performed using established methods (Goodman 1953; King 1997; Grofman and Migalski 1988). I conclude with a discussion of the results and the implications.

#### **Bloc Voting, Asian Americans and the Panethnic Hypothesis**

In *Thornburg v. Gingles*, the Supreme Court established a three-prong test for claims of vote dilution under Section 2 of the Voting Rights Act. Writing for the majority, Justice Brennan said the minority group in question must be 1) “sufficiently large and geographically compact to constitute a majority in a single-member district”; 2) “politically cohesive” and; 3) be defeated consistently by a “white majority [who votes] sufficiently as a bloc” against it. In assessing the latter two prongs, the Court established RBV – and a quantitative method used to measure it (ecological regression) – as “the undisputed and unchallenged center” of minority representation (Issacharoff 1992: 1851).<sup>1</sup> Though lower courts have attempted to modify *Gingles* definitions<sup>2</sup>, and the backlash in *Shaw v. Reno* and other cases resulted in what Bullock and Dunn (1999) refer to as “the demise of racial redistricting”, substantiation of RBV and polarization remains “the critical legal question” in most voting rights cases (Pildes 2002: 1519).

As *Gingles* opened the floodgates for Section 2 challenges by other groups, Asian Americans were, for the most part, forced to play secondary roles in coalition suits.<sup>3</sup>

Facing limitations under *Gingles* formulae because “the population is small in size, geographically dispersed and politically fragmented” (Lien 2001: 111), Asian Americans after 1990 redistricting were content to create “influence” districts in mainland areas of metropolitan population concentration in New York and California (Aoki 2002), but it was not until after the 2000 round, with further population gains manifest in the Census, that some candidates, such as Leland Yee in California’s 12<sup>th</sup> Assembly District, were able to break through. In congressional and high-profile mayoral elections, however, the number of successful Asian Americans has remained stagnant (Takeda 2001).

Considering the legal significance of bloc voting – and its central importance to the empowerment strategies of many Asian American activists – it is somewhat surprising that RBV analysis has not played a more prominent role in the literature. To date, questions central to Asian American political participation have been addressed almost exclusively through qualitative techniques or the secondary analysis of individual-level data. Rarely have scholars examined Asian ethnic, or panethnic, voting behavior at the aggregate-level.

As a result, our understanding of the diverse Asian American voter remains limited. The best evidence, coming from Lien’s (2001) exhaustive review of available survey data, suggests that while some “common-fate” attitudinal measures suggest “an ability to forge a common sense of identity”, “the nature of a bloc vote for Asians ... should be considered as situationally defined and politically constructed” (196). In other words, Asian Americans *may* coalesce at the polls *if* the issue, the candidate and/or the electoral environment are conducive to panethnic mobilization. The problem is two-fold: a) there are few examples of such behavior based on reliable data sets; and b) when

the diverse construct of “Asian America” reveals unity, rarely does it extend beyond a single election and manifest over time. When aggregated and placed in the context of other groups, Asian Americans often appear as “the median voter...a genuine swing group” (Cain and Cho 2001: 148). When disaggregated, as Lien has found, the behavior of individual Asian ethnicities can vary considerably. Even then, such findings are vulnerable, given what she describes as data that are “scanty at best and limited in the number of respondents, geographic coverage and the questions asked” (2001: 237).

In one of the few papers that employs RBV analysis to understand Asian American voting behavior, Tam (1995) argues about the danger of such aggregation and resists the characterization of Asian Americans as “a monolithic voting bloc”. Using the 1986 precinct level vote for March Fong Eu, the popular Chinese American Secretary of State of California, as one of her dependent variables, she uses maximum likelihood estimation to examine the incidence of bloc voting among Chinese, Japanese and Korean American in three counties in the San Francisco Bay Area. The results reveal unified support among all three for Eu – but only once party is accounted for (Eu was a Democrat; her panethnic support came primarily from Asian Democrats). When a non-partisan English-only initiative (Proposition 63) is substituted as the dependent variable, variation emerges: Korean and Chinese Americans voted as a bloc (98 and 72 percent, respectively) “no”, but Japanese Americans (66 percent) voted “yes”.

No attempt was made to compare these results with other racial groups – and examine potential Asian/White polarization – as Tam’s primary objective was a test of what might be referred to as the *panethnic hypothesis*: namely the question of whether Americans of East and Southeast Asian ethnicity a) perceive themselves as being part of

a panethnic collectivity; b) have an identifiable set of group interests that transcend individual ethnicity but are otherwise distinctive from other racial groups; and c) act politically on the basis of those interests. While evidence of Black/White polarization has virtually driven the study of minority voting since *Gingles*, Asian/White polarization has rarely been hypothesized or empirically tested. One explanation may be practicality (i.e., a limited number of appropriate cases), but the lack of attention could be attributable to: 1) the success of Asian American candidates in areas where non-Asian populations predominate (hence implying substantial crossover support for Asian American candidates) (Takeda 2001); 2) empirical findings that have generally shown Asian American voters, when aggregated, to be close to Whites on many issues (Uhlener, Cain and Kiewiet 1989; Cain and Cho 2001). Lien, whose work has been instrumental in showing the complex ethnic contours of Asian American participation, nonetheless concludes: “in contemporary electoral politics, racial bridges are easier to build between Asians and Whites based on interpersonal friendship, shared partisanship, ideology and, provisionally, candidate choice” (168). Put another way, Asian/White polarization may be absent in the literature for the simple reason that scholars employing the limited survey data (which aggregates Asians) available would not have expected to find it.

Justice Brennan argued in *Gingles* for “an intensely local appraisal...to measure whether polarized voting impairs a minority group’s ability to elect candidates of their choice”. In the next section, I undertake such an examination of Little Saigon which, as a case study, provides a compelling contemporary opportunity for testing the presence of Asian bloc voting as well as Asian/White polarization.

**The Case of Little Saigon**

In little more than a quarter century, Little Saigon has emerged from a sparse collection of small businesses immersed in a predominantly White bedroom community to become home to the largest concentration of Vietnamese living anywhere in the world outside of Vietnam. Though the Hispanic population in the area is numerically significant, much of the concentrated political energies of Hispanics have been in neighboring Santa Ana, leaving the competition for power in Westminster and Garden Grove to established Whites and newly-arrived Vietnamese Americans.

***Residential Concentration and Population Growth***

The two-city area into which Little Saigon extends has undergone significant change since 1980. The cities of Westminster and Garden Grove at the taking of the 1980 Census were more than 80 percent White and constituted fewer than 200,000 residents combined. Fewer than 5,000 Vietnamese lived in these two cities at that time.

One sees a much different community twenty years later. Westminster saw the proportion of White residents in the 2000 Census decline to less than half of the population while the Vietnamese population emerged as the city's second largest group at 32 percent. A similar trend is evident in Garden Grove; Vietnamese now constitute 22 percent of the overall population.

***Reaction to the Burgeoning Refugee Community***

Concomitant with Little Saigon's emergence have been periodic manifestations of White resentment. Discrimination toward Vietnamese has been characterized as "less overt" (Ngin 1990: 46), but many episodes are familiar: the defacing of signs, slurs from elected officials, anti-immigrant petitions and racially-motivated murders (Reyes 1989).

While such events have provoked outrage, political activism among Vietnamese Americans in the immediate post-war years was often channeled inward: namely as intense expressions of anti-communism directed at the homeland. Seeing politics in the United States as a virtual extension of the war against the North Vietnamese, refugee activists began in the early 1980s to stage frequent demonstrations, as well as engage in more subversive activities designed to undermine the communist regime.

#### *Movement into American Politics*

A series of events in the mid 1990s – the establishment of diplomatic ties between the U.S. and Vietnam and the emergence of the first Vietnamese American campaigns for public office – served as forces of cohesion for the young community. A comparatively high rate of citizenship (Lien 2001: Table 5.4) combined with grassroots efforts to help the number of registered voters increase over the decade. In 1992, Vietnamese Americans were 7 percent of all registered voters in the Little Saigon area. By 2002, this had grown to 28 percent. In Westminster and Garden Grove, Vietnamese Americans currently occupy a share of the registered voter population that is comparable to their share of the population.

Surveys have found Vietnamese Americans to be the most politically conservative of Asian American groups (Uhlener, Cain and Kiewiet 1989; Lien 2001: Table 5.7). Yet, when aggregate party registration figures are examined, Vietnamese Americans are revealed to be increasingly independent. In 1992, nearly two-thirds of Vietnamese American voters in Little Saigon were registered GOP – and many activists remain visible Republicans in an area that, with the exception of the Latino community, is Republican overall. As the major parties became more competitive over the decade, the

GOP share of the Vietnamese electorate declined to a level roughly equal with the Democrats. Importantly, the number of independent voters doubled; between 1992 and 2002, Decline-to-State (DTS) and minor party registration grew from 15 to 31 percent.

### ***Candidate Emergence***

The incidence of any candidate of Asian ethnicity was scarce prior to the early 1990s. As the electorate has grown, more – primarily Vietnamese American – have emerged. Between 1992 and 2002, a total of 11 different Asian American candidates ran in 21 races in the Little Saigon area, ranging from city council to mayor to state legislature (**Table 1**). They have won nine times, a success rate of 42 percent. The six Vietnamese Americans who ran between 1998 and 2002, as well as two major candidates of other Asian ethnicity (Korean and Japanese American) who ran during that period, will be the focus of the analysis, yielding a total of eight different elections for examination. In every case, the major opponents to the Asian American candidates are White.

### **Analysis of Vietnamese American Bloc Voting**

To examine the incidence of RBV, I employ three standard methods used by scholars and accepted by the courts: 1) descriptive analysis of “homogeneous” precincts; 2) visual interpretation of scatter and tomographic plots<sup>4</sup>; and 3) estimates derived from Goodman’s (1953) standard linear model and King’s (1997) EI model, which is designed to address potentially fallacious constancy assumptions about unknown precinct-level parameters inherent in Goodman’s approach (as well as corrections by Duncan and Davis (1953) for “out of bounds” estimates generated through Goodman’s model). In situations where multiple candidates ran at-large races for multiple seats, I also perform a

ranking analysis for each candidate and his challengers, based on the dual equation method advocated by Grofman and Migalski (1988).

***Model Specification***

Adapting the commonly-used variables in RBV analysis to our purposes here, let:

- $C_v$  = the Vietnamese American candidate ( $C_a$  will refer to other Asian candidates);
- $N_i$  = the total number of votes cast (in given precinct  $i$ );
- $Pvc_v$  = the proportion of *all votes cast* going to the Vietnamese American candidate;
- $X_v$  = the proportion of *all registered voters* that is Vietnamese American;
- $X_h$  = the proportion of *all registered voters* that is Hispanic;
- $X_w$  = the proportion of *all registered voters* that is White (for our purposes,  $X_w = [1 - (X_v + X_h)]$ );
- $Pvvc_{vi}$  = the proportion of the vote given to the Vietnamese American candidate by *Vietnamese American voters*;
- $Pwvc_{vi}$  = the proportion given to the Vietnamese American candidate by *White voters*;
- $Phvc_{vi}$  = the proportion given to the Vietnamese American candidate by *Hispanic voters*;

As  $Pvc_v$ ,  $X_v$ ,  $X_w$  and  $X_h$  will be the known quantities in our dataset;  $Pvvc_v$  and  $Pwvc_v$  are the quantities of interest.  $Phvc_v$  would be included in races where a significant Hispanic candidate ran.

The linear model is expressed as  $Pvc_v = Pvvc_v(X_v) + (Pwvc_v)(X_w) + Phvc_v(X_h)$ .

So, using the standard equation,  $y = mx + b + \epsilon$ , when we regress  $Pvc_v$  on  $X_v$  we obtain estimates for  $Pvvc_v$ , where  $Pvvc_v = (m + b)$ . We obtain a separate value for  $Pwvc_v$  by subsequently performing an additional run of  $Pvc_v$  on  $X_w$ , which will yield the respective slope and intercept. Similarly,  $Pvc_v$  is regressed on  $X_h$  yielding an estimate of  $Phvc_v$ .

To apply this to the at-large, multiseat situation in which many of the Vietnamese American candidates ran, I follow the method of Grofman and Migalski (1988) and

repeat the process above to determine  $Pvvc_v$  and  $Pwvc_v$ , not only for  $C_v$ , but for each of his challengers  $C_1...C_n$ . This allows us to determine the rank ordered preferences by each group for each candidate, thus yielding a comprehensive portrait of whether polarized voting has occurred and which candidates are indeed the “candidates of choice”.

King (1997) adopts a different notation than that which I have outlined above, where the key variable  $Pvc_v$  is represented as  $T$  (in his model, the dependent variable is not the vote, but turnout) and  $Pwvc_v$  is written as  $\beta_w$ ,  $Phvc_v$  as  $\beta_h$  and  $Pvvc_v$  as  $\beta_b$ , which we will modify in our Vietnamese case to be  $\beta_v$ .  $X$  remains essentially the same. In his notation (1997:264), the basic linear model would thus be represented as  $T = \beta_v X_v + \beta_w X_w + \beta_h X_h$  and then truncated to a trivariate distribution of  $\beta_v$ ,  $\beta_w$  and  $\beta_h$  to account for the possibility under the standard linear model that the values of each will yield an “impossible” result outside the bounds of 0 and 1. To apply the model in a 2X3 scenario, King recommends a three-step process (which is followed here) whereby  $\beta_v$ ,  $\beta_w$  and  $\beta_h$  are determined by collapsing each into a series of 2X2 tables (eq. 15.2, 15.3 and 15.4 in King 1997: 265-6).<sup>5</sup>

### ***Data Sources***

The data employed in these analyses are derived from aggregate election returns and complete voter registration rolls provided by the Registrar of Voters in the County of Orange, California for the closest available period registration closing date (usually twenty-nine days) preceding the general elections of 1998 through 2002. The ethnicity of each registered voter was coded as either Vietnamese or Hispanic by combining surname lists and place of birth information that is included as part of the voter record. In other words, if the voter had either a Vietnamese surname or reported Vietnam as their place of

birth (or had a Hispanic surname or reported a Latin American country as their place of birth), they were coded as Vietnamese (or Hispanic). Surname lists provided by Lauderdale and Kestenbaum (2000) and the Census Bureau (Word and Perkins 1996) were supplemented by a Vietnamese surname text (Nguyen 1998) and case-by-case quality control analysis of the data for potential variants and typographical errors.<sup>6</sup>

### ***Case-by-Case Analysis***

The analysis is divided into two sections: first, races where one or more Vietnamese American candidates were present (Cases 1-6); second, races featuring candidates of an Asian ethnicity other than Vietnamese (Cases 7-8). In all cases, the Asian American candidates' major opponents are White; in seven of the eight, the races are non-partisan. With two exceptions, the Vietnamese American candidates were Republicans facing White opponents who were also Republican.<sup>7</sup> Case 7 features a Japanese American Democrat running in a partisan race against a White Republican. Only two among the 45 candidates involved were Hispanic; both had a minor impact.<sup>8</sup>

I describe below the relevant factors in each case, including the candidates involved, expenditures by the leading candidates and any known event that might have intensified the racial dynamics of the campaign. This is followed by a graphic analysis of scatterplots and tomographic plots, and then a summary statistical analysis that includes the homogeneous precincts, Goodman, King and Grofman and Migalski estimates.

### ***Vietnamese American Races***

- **Case 1: 1998 Westminster City Council:** Six years after becoming the first Vietnamese American to hold an elective office, Republican Tony Lam ran for reelection. He faced seven opponents. Six were White, one of whom an

incumbent (Margie Rice). Lam's other opponent was Duoc Tan Nguyen. Though he was a fellow Republican, Mayor Frank Fry unleashed mail urging "voters to reject Tony 'Little Saigon' Lam" (Pasco 1998) in the non-partisan race. Lam finished second and retained his seat. Rice, also a Republican, finished first and spent just a fraction of what Lam doled out (\$8,245 compared to Lam's \$63,522).

- **Case 2: 1998 Mayor of Westminster.** In 1998, Chuyen Nguyen mounted the first campaign by an Asian American for mayor of Westminster. He ran against four others, all of whom were White and one of whom, Fry, was the incumbent. Although Nguyen nearly matched Fry in terms of dollars spent on the race (\$18,446 compared to Fry's \$18,652), he finished fourth.
- **Case 3: 2000 Westminster City Council.** Three Vietnamese Americans – Andy Quach, Phuoc Bui and repeat candidate Duoc Tan Nguyen – were pitted against three White challengers for two available seats. Despite spending more than top vote-getter Kermit Marsh (\$23,807 to \$23,297), Quach, a Republican, finished fourth, while Bui and Nguyen finished fifth and sixth, respectively. The three White candidates (all Republicans) finished first, second and third.
- **Case 4: 2000 Garden Grove City Council.** This race saw a single Vietnamese American candidate, Van Tran, a longtime Republican activist, running against eight challengers. Mark Rosen, a Democrat, was the lone incumbent. Tran finished first; Rosen was second. Tran was easily the top spender, pouring \$97,309 into his campaign compared to Rosen's \$71,507.
- **Case 5: 2002 Westminster City Council.** Following Lam's retirement, Quach was his anointed successor. Quach spent twice as much as his nearest rival,

Russell Paris (\$51,964 compared to \$25,660), and was the top vote-getter. Paris, a Republican like Quach, finished second and won the other available seat.

- **Case 6: 2002 Garden Grove Unified School District (GGUSD) Board of Trustees.** The lone minority candidate running against three Whites, independent Lan Nguyen attempted in this race to become the first Vietnamese American to sit on a school board. Nguyen dramatically outspent his nearest opponent Terry Cantrell, \$57,988 to \$7,989, but won the second seat by only 99 votes. Incumbent Bob Harden, who ran as a Republican ticket with Cantrell, was the top vote-getter.

*Graphic Analysis*

The scatterplots and tomographic plots for each of the six races are shown in **Figures 1a-6b**. In each of the scatterplots, the vote for the Vietnamese American candidate (or combined vote in races where multiple Vietnamese candidates ran) is plotted against the percentage of Vietnamese American registration in the precinct. In the tomographic plots, we see something different: estimates of  $\beta_v$  and  $\beta_w$  using the King EI model. The concentric circles in each represent the area where  $\beta_v$  and  $\beta_w$  are likely to converge, based on 90 and 95 percent confidence levels, respectively.

Examining the scatterplots first, it is apparent that in each case the Vietnamese vote lines up in the expected positive linear fashion with the level of Vietnamese registration in the district. It is also apparent that the goodness of fit increases after 1998. Comparing each race, we find that the adjusted r-squared is .72 and .79 in the two 1998 races (Cases 1-2; **Figures 1a and 2a**), but ranges from .83 (Case 6; **Figure 6a**) to .89 (Case 4; **Figure 4a**) thereafter.

The tomographic plots provide the next step of analysis, by giving us a visual indication of whether polarization may exist through the plotting of the likely area of convergence of  $\beta_v$  (x-axis) and  $\beta_w$  (y-axis). To simplify, if the concentric circles should appear in the lower right portion of the two-dimensional plot, it indicates a high estimate of  $\beta_v$  and low estimate of  $\beta_w$ —thus, polarized voting by the two respective groups.

Each plot suggests consistent polarization. An extreme case would appear to be the 1998 Westminster mayoral election (Case 2; **Figure 2b**), where the estimated area of likely convergence is, in fact, below the x-axis, indicating a very low potential value for  $\beta_w$ . **Figure 6b** indicates that the Garden Grove Unified School District race in 2002 (Case 6) is also highly polarized.

*Summary Analysis of Derived Voting Estimates*

In **Table 2**, the results for the four types of analysis employed are summarized: homogeneous precincts, Goodman and King estimates for the Vietnamese and White bloc vote in each of the six races are presented, with the standard errors for the latter appearing in parentheses. In the right columns of the table are the ranking estimates yielded by Grofman and Migalski's recommendation for multicandidate races. For comparative purposes, the table also presents in the left columns some important descriptive information: the number of available seats and number of candidates in each race; the values for Vietnamese American registration in the electoral unit ( $X_v$ ) and; the proportion of vote (or combined vote) given to the Vietnamese American candidate (or candidates) ( $P_{vc_v}$ ).

As suggested by the graphic analysis, bloc support by Vietnamese American voters for Vietnamese American candidates is substantial. The analysis of the most

homogeneously Vietnamese and White precincts in each race yields a wide range of potential values for the Vietnamese (46 to 81 percent) and White vote (9-21 percent), respectively. When the Goodman and King models are run, there are only small differences: the Goodman model finds the Vietnamese vote to range from 64 to 70 percent (mean=67 percent) in each of the six cases, while the King model estimates are between 60 and 68 percent (mean=64 percent). Polarization is evident. White support for any Vietnamese American candidate never exceeds 18 percent in any of the races as estimated by Goodman or King model, and the mean across all races is 11 to 13 percent. In some cases, as the graphic analysis indicated, the White vote is in the low single digits.

Even more indicative is the ranking analysis. In every case, the Vietnamese American electorate ranked the Vietnamese American candidate first. In no case, did the White electorate rank any Vietnamese candidate high enough to win – and in five out six instances, ranked the Vietnamese American last. Four Vietnamese American candidates eventually won, but none would have prevailed had the electorate been completely White.

#### *Asian American (non-Vietnamese) Races*

- **Case 7: 1998 California State Assembly District 68, General Election.**

Michael Matsuda emerged as the Democratic candidate against Republican Garden Grove councilmember and police officer Kenneth Maddox. In the campaign, in which he was outspent (\$216,354 to \$121,282), Matsuda predicated his strategy on bloc support in the Little Saigon community. In the end, however, Maddox prevailed with 41,236 votes compared to Matsuda's 35,654.

- **Case 8: 2002 Garden Grove City Council.** Businessman Joseph Pak, a registered Democrat, faced five opponents, four of whom were White, one of

whom was a minor Hispanic candidate. Although he spent \$40,000 more than his nearest opponent, Mark Leyes, and received endorsements from Tran, Quach and Lan Nguyen, Pak finished third in the race. Incumbents William Dalton and Leyes, both Republicans, finished first and second, respectively.

#### *Graphic Analysis*

At first glance, the races appear somewhat different. In **Figure 7a**, we see that Matsuda's goal of mobilizing Vietnamese American voters may have had modest results. The linear model generates a weak, although positive, slope ( $m=.19$ ,  $t=4.79$ ,  $p<.001$ ) but fitness is weak overall (adj.  $R^2=.09$ ,  $p<.001$ ). In Pak's race, the scatterplot (**Figure 8a**) shows a better linear fit to the data (adj.  $R^2=.62$ ,  $p<.001$ ). In neither tomographic plot, however, do we see indications of polarization at levels comparable to those witnessed in the races involving Vietnamese American candidates.

#### *Summary Analysis of Derived Voting Estimates*

**Table 3** confirms the graphic interpretations. In the Assembly race, there is evidence of bloc support at a level comparable to other Vietnamese American candidates (64-65 percent). However, as the Democratic candidate in a higher-profile, partisan two-candidate race, Matsuda gained 40 percent of the White vote. Pak's council race shows greater polarization. The table shows both as the candidates of choice for Vietnamese voters and the least preferred choices for White voters.

#### **Conclusions**

Though some regions of the United States have shown a decline in polarized voting (Pildes 2002), the evidence presented here suggests the phenomenon remains relevant, particularly for an immigrant group taking initial political strides. In every case

examined since 1998, Vietnamese American voters gave Vietnamese American candidates bloc support<sup>9</sup> and ranked them as their candidates of choice. And in every one of those cases, White voters backed, as an opposing bloc, their White opponents.

While “the empirical base for pan-Asian voting [has often been] based more on voting potential, rather than actual voting history” (Ancheta 1998: 144), we find concrete evidence of such behavior in Little Saigon. Vietnamese American voters supported both Japanese American and Korean American candidates and gave support to the former at a level comparable to that which they gave to candidates of the same ethnicity. Young, newly-arrived and newly-registered, Vietnamese Americans reveal panethnic tendencies in their voting behavior, giving tangible (and for coalition advocates, promising) evidence that interethnic coalitions between Asians are possible at the polls.

Underscoring the Asian/White division and the importance of race and ethnicity in Little Saigon politics is the consistent polarization that appears regardless of partisan context. In Cases 1, 3 and 5, we saw polarization (and in Case 1, racially-tinged negative campaigning) although the major Vietnamese and White candidates were of the same (Republican) party. In Case 4, we saw polarization in conservative Garden Grove although the only major Republican candidate was Vietnamese and the only major White candidate was a Democrat. In Cases 7 and 8, we saw Vietnamese voters prefer Asian American Democrats to White Republicans who, presumably, would be closer to them on hot-button community issues pertaining to anti-communism.

In contemporary American politics, racism can often be, to use the words of Claire Kim (1999), coded. Although the community has enjoyed occasional self-determined success under the at-large electoral structures in place (and may enjoy more

as the population grows), each Vietnamese American victory – many of which have been narrowly won – has carried a significant price. As **Figure 9** demonstrates, a White challenger in the City of Westminster who has spent \$25,000 has received roughly 11 percentage points more of the vote for the investment than the Vietnamese candidate who has spent the same amount [P<sub>1</sub>-P<sub>2</sub>]. It is not until a Vietnamese candidate has spent close to \$40,000 that he or she can expect to meet the minimum threshold necessary to capture a council seat, as indicated by line *C* (P<sub>3</sub>). To win the mayoralty (*M*), or to run against a White incumbent is nearly an impossible challenge [P<sub>4</sub>-P<sub>5</sub>], as the latter can capture 30 to 40 percent of the vote by spending \$10,000 or less – a level that would barely allow the Vietnamese candidate to break into double digits. For the aspiring community leader, access to power is a slow, uphill climb that starts at the bottom – and does not maximize until he or she has spent what is, at the local level, an investment that goes far beyond what any White candidate – incumbent or challenger – has ever spent on a city race (P<sub>5</sub>).

The findings have theoretical and methodological implications for Asian American politics and the study of race and ethnicity. First, they suggest that ethnic loyalty and pan-ethnic action are not mutually undermining, but can work compatibly – particularly in contexts where an emergent Asian minority is pitted in direct competition with an established White majority. Second, they show how panethnic coalition building is facilitated by the presence of a numerically larger ethnic group who has developed political infrastructure (ethnic media, fundraising networks, incumbency) within the community. Third, they suggest reconsideration of the notion that “racial bridges are easier to build between Asians and Whites” – a conclusion usually predicated on the secondary analysis of individual-level data. The survey approach, as noted above, has

indicated less social distance between Asians and Whites when racial issues or statewide propositions are the dependent variable. However, when aggregate outcomes (even in an Asian American community most would consider to be very conservative) are substituted as the dependent variables, different conclusions emerge about Asian American panethnicity and Asian/White relations. Future research would benefit from more aggregate-level analysis and “intense local appraisals” to reconcile these differences.

Instrumentally, the findings give weight to advocates who have long sought more influence for Asian Americans in the redistricting process and cases that will meet *Gingles* standards. A rapidly growing and cohesive community of voters and aspiring candidates, Little Saigon is a symbolic counterpunch to the myth that Asian Americans are politically indifferent, amorphous and divided. Voters in Little Saigon may be nominally independent and, on some homeland related issues, ideologically conservative. But like African Americans and Latinos, they vote regularly as a bloc in order to protect the interests of their community against White majorities inclined to defeat them.

One may be pressed to argue that the Vietnamese American community has been systematically denied political access in a way comparable to the lengthy struggle of African Americans in the South. But the evidence in Little Saigon reveals a “stacked deck” that is disturbingly similar, making it apparent that equality in the American democratic process, nearly four decades after the Voting Rights Act, has yet to be attained. Particularly for immigrant groups seeking representation for the first time, race and ethnicity matter – and polarization remains a significant factor affecting political life.

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## TABLES

Table 1: Asian American Candidacies in Little Saigon Area, 1992-2002

Year	Candidate	Ethnic	Seat	Race/Ethnic of Opponent(s)	Result	Selected for Analysis <sup>a</sup>
1992	Henry Le	V	Santa Ana CC	W, H	Lost	
	Ho Chung	K	Garden Grove CC	W, W, W, W, W, W, W, W, W, H, T	Won	
	Jimmy Tong Nguyen	V	Westminster CC	W, W, W, W, V	Lost	
	Tony Lam	V	Westminster CC	W, W, W, W, V	Won	
1994	Ho Chung	K	Mayor, Garden Grove	W	Lost	
	Tony Lam	V	Westminster CC	W, W	Won	
1996	Ho Chung	K	Garden Grove CC	W, W, W, W, W, W, W	Won	
1998	S. Tom Oh	K	Garden Grove CC	W, W, W, W, W	Lost	
	Michael Matsuda	J	State Assembly District 68, Democratic Primary	W	Won (unopposed)	
	Ho Chung	K	State Assembly District 68, Republican Primary	W	Lost	
	Michael Matsuda	J	State Assembly District 68, General	W	Lost	*
	Tony Lam	V	Westminster CC	W, W, W, W, W, W, V	Won	*
	Duoc Tan Nguyen	V	Westminster CC	W, W, W, W, W, W, V	Lost	*
	Chung Nguyen	V	Mayor, Westminster	W, W, W, W	Lost	*
2000	Andy Quach	V	Westminster CC	W, W, W, V, V	Lost	*
	Phuoc Bui	V	Westminster CC	W, W, W, V, V	Lost	*
	Duoc Tan Nguyen	V	Westminster CC	W, W, W, V, V	Lost	*
	Van Tran	V	Garden Grove CC	W, W, W, W, W, W, W, H	Won	*
2002	Andy Quach	V	Westminster CC	W, W, W	Won	*
	Lan Nguyen	V	Garden Grove Unified Sch. Dist.	W, W, W	Won	*
	Joseph Pak	K	Garden Grove CC	W, W, W, W, H	Lost	*
				<i>Tot. won-lost</i>	<b>9-12</b>	<b>(42.8%)</b>

Sources: Statement of Votes, County of Orange; city clerks of Garden Grove and Westminster.

Legend: H=Hispanic, J=Japanese; K=Korean; T=Turkish; V=Vietnamese; W=White

<sup>a</sup> Elections were omitted from analysis if no precincts within the given constituency were 50 percent or more Vietnamese American. It was not until 1998 that any Little Saigon precinct was at least majority Vietnamese American, necessitating concentration on races that have occurred since that time. At least three other Vietnamese Americans mounted minor campaigns in Orange County during this period, but since all were outside of the Little Saigon area they have been omitted.

**Table 2:**  
**Homogeneous Precinct and Bloc Voting Estimates --**  
**Vietnamese American Candidate Races**

Homogeneous Precincts Analysis														Bloc Voting Estimates						
Pvc <sub>v</sub> ln...														Goodman		King		Grofman and Migalski		
Case	Race	Seats/cands	X <sub>v</sub>	Pvc <sub>v</sub>	Max X <sub>vt</sub>	Max X <sub>wt</sub>	Pvvc <sub>v</sub> (ε)	Pwvc <sub>v</sub> (ε)	β <sub>v</sub> (ε)	β <sub>w</sub> (ε)	Viet Rank of C <sub>v</sub>	White Rank of C <sub>v</sub>	Final							
1*	1998 Westminster CC	2/8	.20	.42	.51	.21	.65 (.04)	.14 (.02)	.60 (.03)	.15 (.01)	1,2	5,8	2,6							
2	1998 Westminster Mayor	1/5	.20	.18	.46	.09	.66 (.04)	.01 (.02)	.64 (.02)	.05 (.02)	1	5	3							
3*	2000 Westminster CC	2/6	.28	.31	.49	.15	.67 (.02)	.12 (.01)	.67 (.01)	.13 (.01)	1,3,4	4,5,6	4,5,6							
4	2000 Garden Grove CC	2/9	.21	.27	.49	.13	.69 (.02)	.17 (.00)	.68 (.01)	.17 (.00)	1	3	1							
5	2002 Westminster CC	2/4	.33	.35	.61	.19	.64 (.02)	.16 (.01)	.60 (.01)	.18 (.01)	1	4	1							
6	2002 Garden Grove Unified	2/4	.27	.30	.81	.10	.70 (.02)	.04 (.01)	.65 (.01)	.07 (.01)	1	4	2							
<i>Mean</i>					.56	.15	.67	.11	.64	.13										
<i>Wins</i>							4/9													
If electorate is only Vietnamese							7/9													
If electorate is only White							0/9													

Sources: Author analysis of records provided by Statement of Votes, County of Orange and city clerks of Garden Grove and Westminster and ethnic coded registration records. All races are non-partisan and at-large. Notes: X<sub>v</sub> = Percentage of Vietnamese Americans registered to vote in given election unit Pvc<sub>v</sub> = Percentage of total votes cast going to Vietnamese American candidate. Standard error (ε) in parenthesis. Precincts where fewer than 25 votes were cast were dropped from the analysis. \* indicates case where vote from multiple Vietnamese candidates was combined.

**Table 3:**  
**Homogeneous Precinct and Bloc Voting Estimates --**  
**Asian American (non-Vietnamese) Candidate Races**

						Homogeneous Precincts Analysis		Bloc Voting Estimates						
						Pvc <sub>ij</sub> in...		Goodman		King		Grofman and Migalski		
Case	Race	Seats/Cands	X <sub>v</sub>	Pvc <sub>v</sub>	Max X <sub>vj</sub>	Max X <sub>vnl</sub>	Ppvc <sub>v</sub> (ε)	Pwvc <sub>v</sub> (ε)	β <sub>v</sub> (ε)	β <sub>w</sub> (ε)	Viet Rank of C <sub>v</sub>	White Rank of C <sub>v</sub>	Final	
7	1998 Assembly District 68, General	1/2	.11	.48	.55	.36	.64 (.04)	.40 (.01)	.65 (.02)	.40 (.01)	1	2	2	
8	2002 Garden Grove CC	5	.25	.24	.45	.17	.40 (.02)	.13 (.01)	.39 (.01)	.12 (.01)	1	3	3	

Sources: Author analysis of records provided by Statement of Votes, County of Orange, City Clerk of Garden Grove and ethnic coded voter registration files. Case 7 is partisan; Case 8 is non-partisan and at-large. Notes: X<sub>v</sub> = Percentage of Vietnamese Americans registered to vote in given election unit. Pvc<sub>v</sub> = Percentage of total votes cast going to Asian American candidate. Standard error (ε) in parenthesis. Precincts where fewer than 25 votes were cast were dropped from the analysis.

FIGURES

Figure 1a  
Case 1: Combined Lam and D.T. Nguyen – 1998 Westminster City Council (n=49)  
(Linear model: adj.  $R^2=.72$ ,  $p<.001$ )

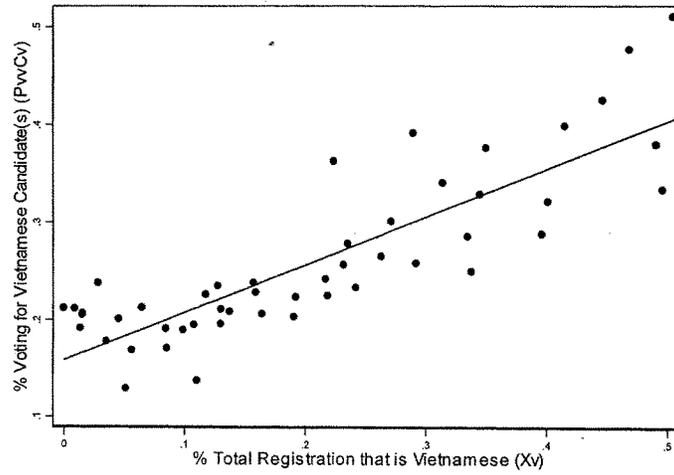
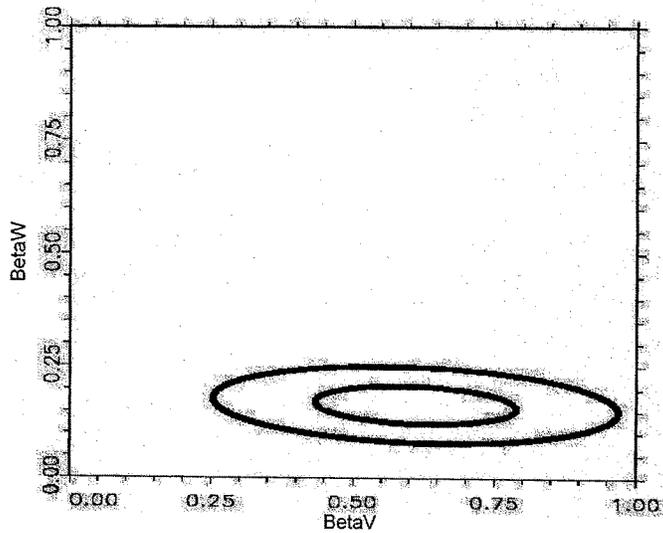
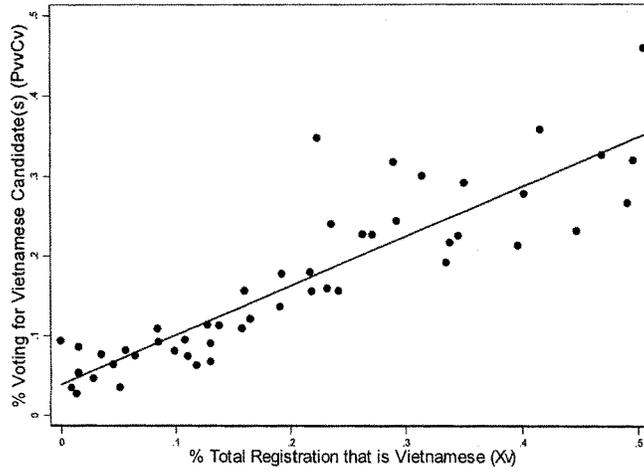


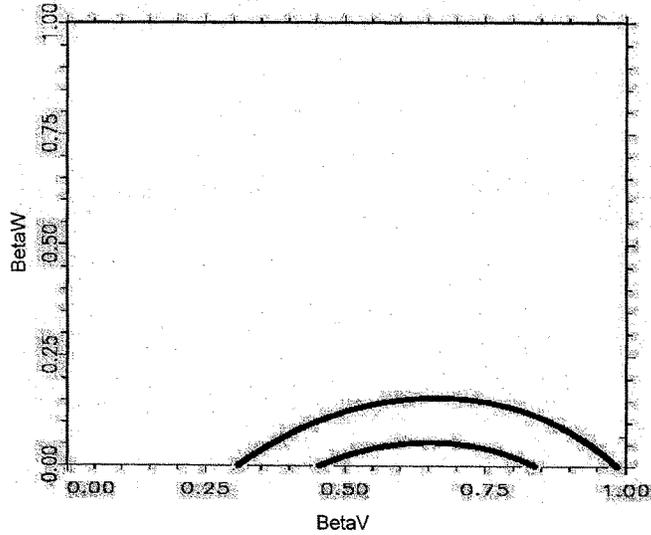
Figure 1b  
Case 1: Combined Lam and D.T. Nguyen – 1998 Westminster City Council (n=49)



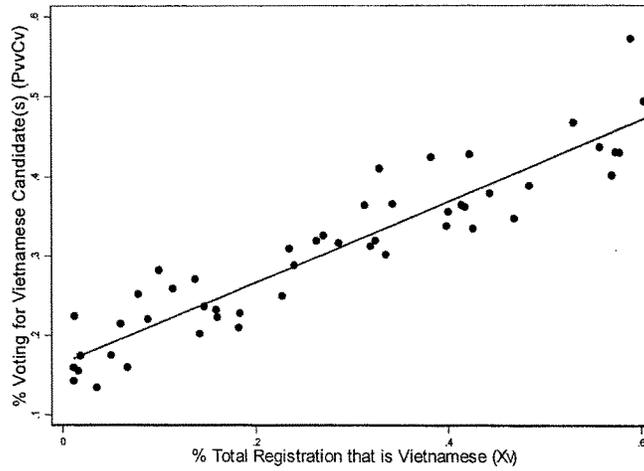
**Figure 2a**  
Case 2: Chuyen Nguyen – 1998 Westminster Mayor (n=49)  
(Linear model: adj.  $R^2=.79$ ,  $p<.001$ )



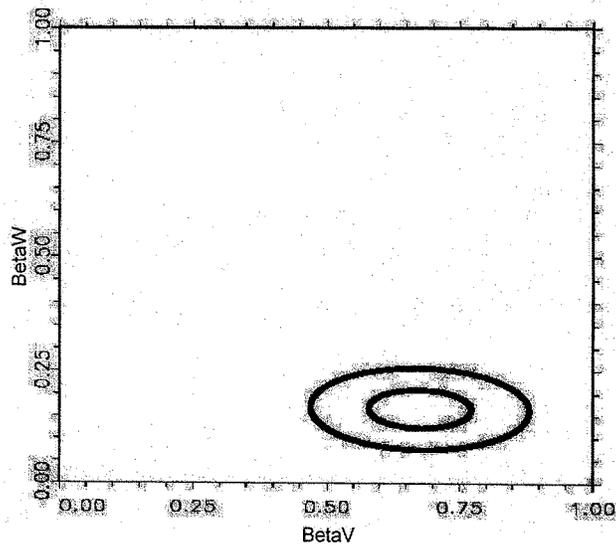
**Figure 2b**  
Case 2: Chuyen Nguyen – 1998 Westminster Mayor (n=49)



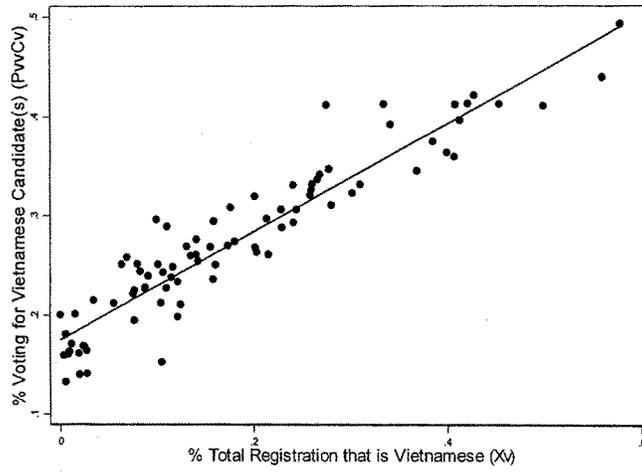
**Figure 3a**  
**Case 3: Combined Andy Quach, Duoc Tan Nguyen, and Phuoc Bui –**  
**2000 Westminster City Council (n=49)**  
(Linear model: adj.  $R^2=.86$ ,  $p<.001$ )



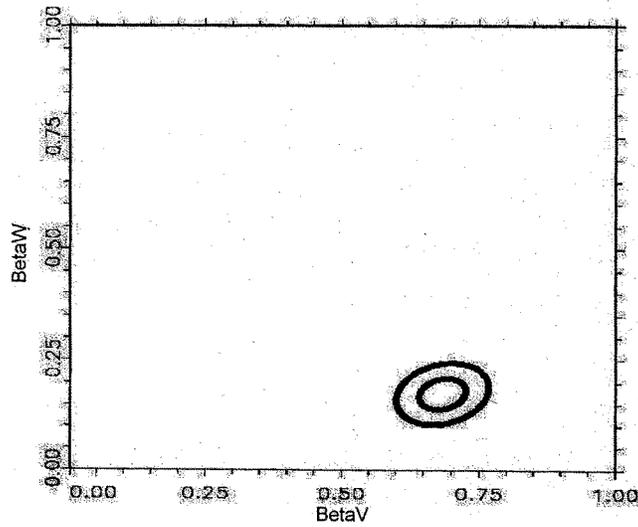
**Figure 3b**  
**Case 3: Combined Andy Quach, Duoc Tan Nguyen, and Phuoc Bui –**  
**2000 Westminster City Council (n=49)**



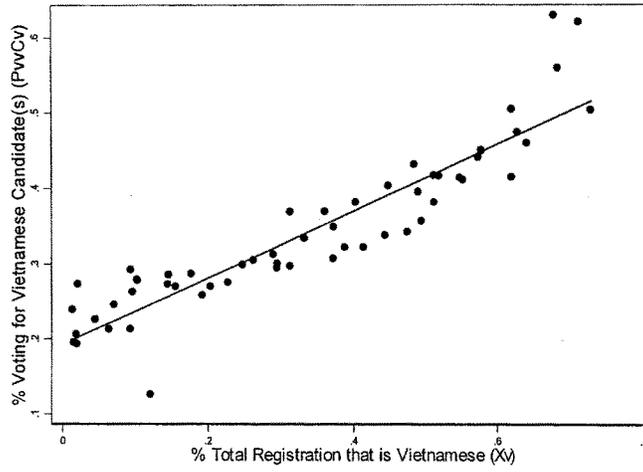
**Figure 4a**  
**Case 4: Van Tran – 2000 Garden Grove City Council (n=85)**  
(Linear model: adj.  $R^2=.89$ ,  $p<.001$ )



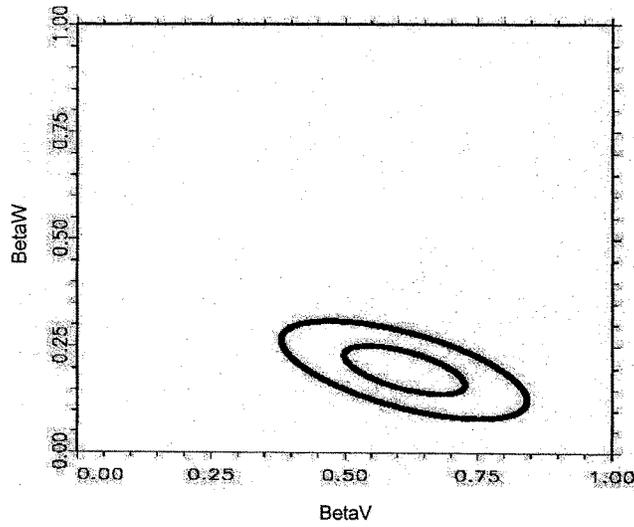
**Figure 4b**  
**Case 4: Van Tran – 2000 Garden Grove City Council (n=85)**



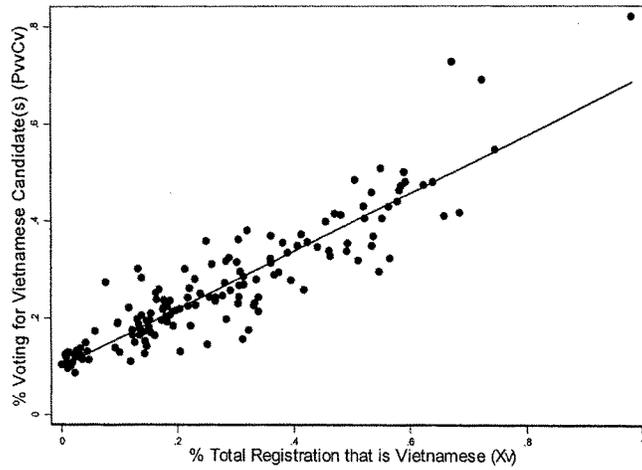
**Figure 5a**  
**Case 5: Andy Quach – 2002 Westminster City Council (n=57)**  
(Linear model: adj.  $R^2=.84$ ,  $p<.001$ )



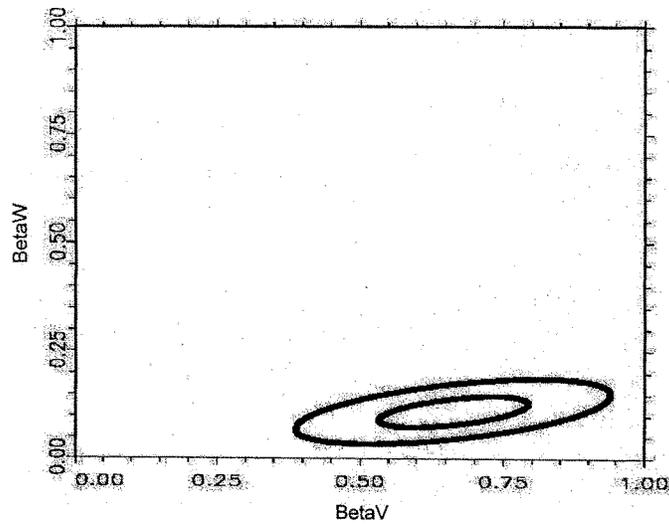
**Figure 5b**  
**Case 5: Andy Quach – 2002 Westminster City Council (n=57)**



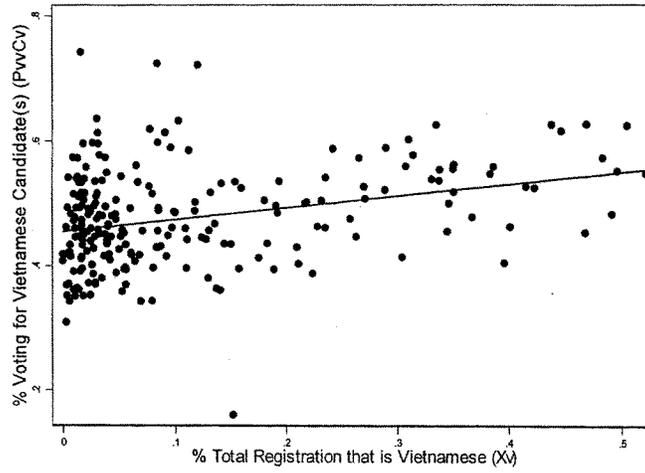
**Figure 6a**  
**Case 6: Lan Nguyen – 2002 Garden Grove Unified School District (n=147)**  
(Linear model: adj.  $R^2=.83$ ,  $p<.001$ )



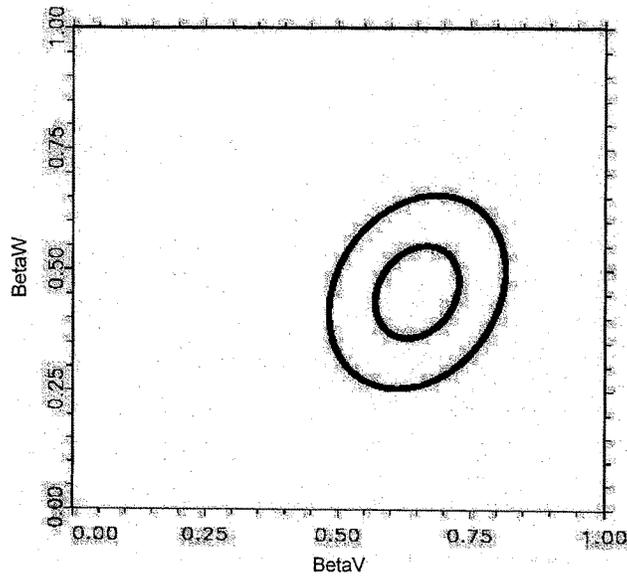
**Figure 6b**  
**Case 6: Lan Nguyen – 2002 Garden Grove Unified School District (n=147)**



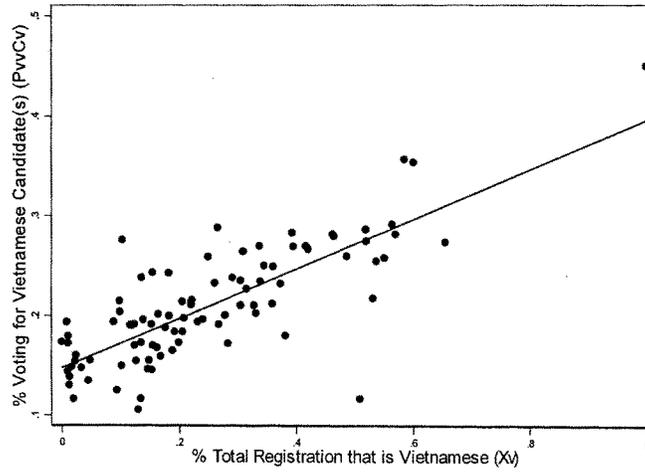
**Figure 7a**  
**Case 7: Michael Matsuda – 1998 State Assembly District 68 General (N=222)**  
(Linear model: adj.  $R^2=.09$ ,  $p<.001$ )



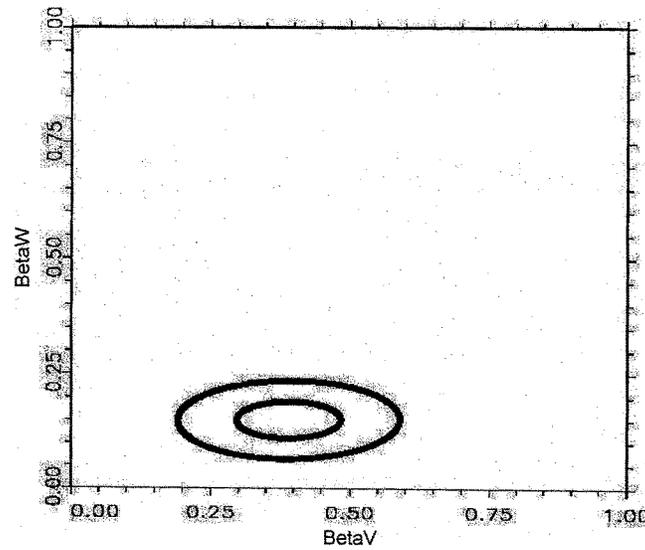
**Figure 7b**  
**Case 7: Michael Matsuda – 1998 State Assembly District 68 General (N=222)**



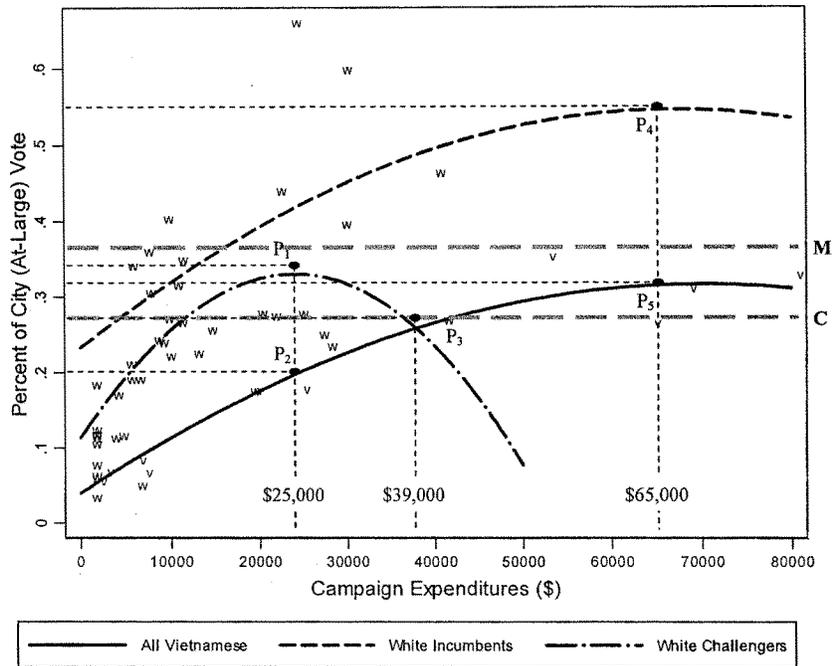
**Figure 8a**  
**Case 8: Joseph Pak – 2002 Garden Grove City Council (N=92)**  
(Linear model: adj.  $R^2=.62$ ,  $p<.001$ )



**Figure 8b**  
**Case 8: Joseph Pak – 2002 Garden Grove City Council (N=92)**



**Figure 9**  
**Spending-Vote Disparities Between Vietnamese and White Candidates**  
**City of Westminster Elections, 1992-2002 (N=51 candidates)**



Sources: Author analysis of campaign finance statements provided by the City Clerk of Westminster utilizing quadratic regression estimates. Dependent variable is candidate's vote percentage; independent variable is his or her total expenditures. W=White candidate, V=Vietnamese candidate. C = Fit for linear model of all winning council candidates ( $b=.26$ ,  $m=.00$ ,  $p<.001$ ). M= Fit for linear model of all winning mayoral candidates ( $b=.37$ ,  $m=.00$ ,  $p=.26$ ). One uncontested case (1994 mayoral) was dropped.

## ENDNOTES

<sup>1</sup> The Court defined RBV “simply that the race of voters correlates with the selection of a certain candidate or candidates”; polarization “refers to the situation where different races (or minority language groups) vote in blocs for different candidates” (2772).

<sup>2</sup> *LULAC v. Clements* 999 F. 2d 831 (5<sup>th</sup>. Cir. 1993), cert. denied 114 S. Ct. 878 (1994).

<sup>3</sup> *DeBaca v County of San Diego*, 794 F Supp 990 (S D Cal 1992), aff'd, *DeBaca v County of San Diego*, 5 F3d 535 (9th Cir 1993).

<sup>4</sup> Plots and EI models were run by King’s EzI program, which is available on his website.

<sup>5</sup> The reader is referred to the complete explication in King (1997).

<sup>6</sup> Variant and typographic analysis refers to the examination of each voter case to determine whether it is a variant of an established surname (e.g., “Nguyen” becoming “Winn”) or an error (e.g., “Nguyen” mistyped as “Ngyuen”). Surname matching, while offering the benefits of allowing the analysis of aggregate data, offers limitations – in the Vietnamese case, the possibility of surnames that overlap ethnicities and the omission of those who have taken the surname of their spouse or sponsor (Nakanishi 1986).

<sup>7</sup> The exceptions are Cases 2 and 6, where Chuyen Nguyen and Lan Nguyen were independents. Their major opponents were White Republicans.

<sup>8</sup> Because of this, and the generally low turnout of Hispanic voters yield standard errors of some concern in both the Goodman and King models, I have omitted formal discussion of the results for  $Phvc_v$  and  $\beta_h$ .

<sup>9</sup> Because the precinct level returns reported by the County do not include separate columns for absentee ballots (they are reported *in toto* for all precincts), it is quite possible that the estimates in this paper are underestimating the degree of polarization.

**Senate Judiciary Committee  
Executive Business Meeting  
Senator John Cornyn  
July 19, 2006**

41 years ago, upon signing the landmark Voting Rights Act of 1965 into law, President Lyndon Johnson – a former member of the Senate whose seat I am privileged to hold – described the Act’s passage as “a triumph for freedom as huge as any victory that has ever been won on any battlefield.”

President Johnson’s words captured the atmosphere surrounding the Act’s passage—a hard-fought victory at a tense time in history.

Adopted at the height of the civil rights movement in 1965, it is no secret why the Voting Rights Act was necessary. Numerous jurisdictions throughout the United States had engaged in the intentional, systematic disenfranchisement of blacks and other minorities from the election process.

As one of our witnesses noted, a Senate Report from 1965 found that in every voting discrimination suit that had been brought against Alabama, Louisiana, and Mississippi, both the district court and the court of appeals had found “discriminatory use of tests and devices”—devices such as literacy, knowledge, and moral character tests.<sup>1</sup> The Senate concluded that these were not “isolated deviations from the norm,” but rather “had been pursuant to a pattern of practice of racial discrimination.”<sup>2</sup> Such invidious practices had driven down the average registration rate for black citizens in these states to 29.3 percent.<sup>3</sup>

Worse yet, violence and brutality were commonplace. In 1961, a black voter registration drive worker in McComb, Mississippi was beaten by a cousin of the sheriff; a co-worker was ordered out of a registrar’s office at gunpoint and then hit with a pistol; a black sympathizer was murdered by a state representative; another black who asked for Justice Department protection to testify at the inquest was beaten (and three years later killed); a white activist’s eye was gouged out; and, finally, twelve Student Non-violent Coordinating Committee workers and local supporters were fined and sentenced to substantial terms in jail. And those were just a few of many incidents.<sup>4</sup>

This type of bigotry and hatred at the polls, coupled with escalating violence and even the murder of civil rights activists, is the backdrop against which the Voting Rights Act was adopted – permanently enshrining into law the long-unfulfilled promise of citizenship and democratic participation as guaranteed by the Fifteenth Amendment to the U.S. Constitution.

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<sup>1</sup> 89 S. REP. 162 at 9.

<sup>2</sup> *Id.* at 10.

<sup>3</sup> See *id.* at 42

<sup>4</sup> Abigail Thernstrom, *Whose Votes Count* (1987)

And the permanence of the Voting Rights Act is something, I am afraid, that often is misunderstood. The Act's core provision – found in Section 2 of the Act – prohibits the denial or abridgement of the right of any citizen to vote on account of race or color.

That provision is permanent. It does not expire and it will never expire.

The Act did adopt – for a temporary 5-year period – provisions designed to subject certain jurisdictions to federal oversight of their voting laws and procedures until the intent of the Act could be fully realized. This provision, along with later-added provisions designed to protect voters from discrimination based on their limited proficiency in the English language – has been renewed several times and will expire in the summer of 2007.

It is the renewal of these provisions that we consider in Congress today.

The good news is that the Act fulfilled its promise. It worked. Today, we live in a different – albeit still imperfect – world. Today, no one can claim that the kind of systematic, invidious practices that plagued our election systems 40 years ago exist in America. Today, the voter registration rate among blacks, for example, in covered jurisdictions is over 68.1 percent of the population – higher than the 62.2 percent found in non-covered jurisdictions.<sup>5</sup>

Indeed, a review of voter registration data since the Act's original passage in 1965 shows that covered jurisdictions have demonstrated equal or higher voter registration rates among black voters as non-covered jurisdictions since the mid 1970's.

[Reference Cornyn Appendix #1: African American Voter Registration at the end of this Report]

I recognize that this is not the only measure of performance for the Act. Another important indicator of the success of the Voting Rights Act is the continual decline to almost statistically negligible numbers of objections issued by the Department of Justice.

In 1982 – the last time we re-authorized the expiring provisions of the Act – of 2848 pre-clearance submissions filed with the Department of Justice pursuant to Section 5 – 66 were objected to, representing 2.3 percent of those submissions.<sup>6</sup>

Today, that number is far less. Indeed, just last year in 2005, the number of objections issued by DOJ was 1. 1 objection out of 3811 submissions, or .03%.<sup>7</sup>

<sup>5</sup> 2004 Election Data from the U.S. Census Bureau. Reflects the percentage as a percent of the population, as compared to as a percent of the Citizen Voting Age Population. Those numbers are 69.9% and 67.9%.

<sup>6</sup> House Hearings 109-79, Volume 1, page 13.

<sup>7</sup> Id.

Year	Submissions	Objections	Percent
1982	2848	66	2.32%
1983	3203	52	1.62%
1984	3975	49	1.23%
1985	3847	37	0.96%
1986	4807	41	0.85%
1987	4478	29	0.65%
1988	5155	39	0.76%
1989	3920	30	0.77%
1990	4809	37	0.77%
1991	4592	75	1.63%
1992	5307	77	1.45%
1993	4421	69	1.56%
1994	4661	61	1.31%
1995	3999	19	0.48%
1996	4729	7	0.15%
1997	4047	8	0.20%
1998	4021	8	0.20%
1999	4012	5	0.12%
2000	4638	4	0.09%
2001	4222	7	0.17%
2002	5910	21	0.36%
2003	4829	8	0.17%
2004	5211	3	0.06%
2005	3811	1	0.03%

A review of submissions shows a steady decline of the number of objections warranted or necessary, and stands as a testament to the success of the Voting Rights Act.

So in light of this evidence, the question before us is whether the expiring provisions should be re-authorized.

The hearings that we have held in this committee have been enlightening on this point. The Chairman has worked hard to try to hold a sufficient number of fair and balanced hearings.

Given our busy schedule, however, it has not always been easy to accomplish. In fact, at one point in May, when members of this committee were engaged in floor debate on the important issue of immigration reform, we were unable to muster a single Republican for one hearing, and for several, we were only able to muster a single member or two simply to chair the proceedings.

This, of course, is an important consideration – as I found it particularly troubling that the legislation was introduced in the Senate with findings adopted BEFORE we were ever able to hold these hearings – hearings that unfortunately have not been as well attended as I would have preferred.

In addition, I am concerned about the lack of time afforded our staffs to review the testimony submitted by witnesses. Indeed, unfortunately, 19 of the 21 witnesses testifying at the request of the minority were not timely submitted. The majority was not perfect either – with 2 witnesses submitting testimony late. This unfortunately inhibited the ability of staff to prepare adequately for the hearings – hearings that were conducted in a very short period of time.

In addition, as I understand it today, approximately 107 written questions remain outstanding to witnesses, and we have not yet submitted written questions for the final hearing – a hearing we held to understand the impact of the recent Supreme Court opinion, *LULAC v. Perry*.

These issues are complicated – and the witnesses that the Chairman has called and that the staff has worked hard to prepare have been compelling.

We have had numerous witnesses – from across the political spectrum and across racial boundaries – raise serious reservations about re-authorization as drafted. Witnesses from the United States Commission on Civil Rights, including Chairman Gerry Reynolds and members Peter Kersinow and Abigail Thernstrom, raised serious reservations about the constitutionality of the current draft. Liberal legal scholars, such as Rick Hasen, who runs a well-known election law blog, have opined that the Act may be in jeopardy in the Court if re-authorized as drafted. Even Samuel Issacharoff, whom the Senate Democrats called as an expert on voting rights during the Alito hearings, testified that the Act may well run into problems when challenged in the courts.

Indeed some of these witnesses – from across the political spectrum – offered ideas and possible amendments to improve the Act.

It appears to me that it would have been beneficial for the long term viability and continued success of the Voting Rights Act that we might have engaged in serious, reasoned deliberation over some of these possible improvements – improvements that would underscore its original purpose, modernize the Act to reflect the reality today in 2006, possibly expand its coverage to jurisdictions where recent abuses have taken place or perhaps have improved the so-called bail-out procedures.

For example, one idea that has been offered is to “update” the coverage formula. I don’t know if that is a good idea or not – but I would like to know. Some suggest that such an update would “gut” the Voting Rights Act. I for one certainly don’t want to see the Act “guttled,” but I am skeptical that this would be the result. The amendment that was voted on in the House, for example, would have updated the coverage “trigger” to the most recent 3 presidential elections from its current point of 1964, 1968 and 1972. As I understand it, the map after such an update would look like this:

[Reference Cornyn Appendix #2: Section 5 Coverage from Recent Election Data at the end of this report]

Now, if this is an accurate reflection of the impact – it certainly changes the map – removing some counties from coverage, and adding many others... but I don't think a reasonable, objective observer could assert that this would "gut" the Act.

It would have been beneficial for the nation for us to have a full discussion of ways to improve the Voting Rights Act – to ensure its important provisions are applied in a "congruent and proportional" way – something the Supreme Court will take into consideration if, or even when, this renewed Act is before it.

Today, the Senate Judiciary Committee will overwhelmingly vote to extend the expiring provisions of the Voting Rights Act and to adopt several substantial revisions included by the House of Representatives. There is little doubt that the Senate will take this legislation up promptly and pass it without amendment.

I think it important, therefore, to comment on the House revisions to the Act. There has been some debate about the meaning of these provisions. My understanding is that the purpose of these provisions is fairly straight forward – and I think the House legislative history reflects this. And that is, to ensure minorities are not prevented from holding elected office in bodies such as Congress and to ensure that no obvious and intentional discrimination is allowed to proceed. It is important that our understanding about these provisions be clear so that their application will be clear.

**With this understanding, Mr. Chairman, I will join my colleagues in passing this legislation.**

I do so because the Voting Rights Act is, quite simply, the most important and effective civil rights legislation ever passed. The extension of the Act's expiring provisions is important for the continued protection of voting rights – even though it would have been preferable, and even – possibly – constitutionally advisable, for us to have revised the application of the Act's pre-clearance and other provisions. Unfortunately, the Act's language was a bit of a foregone conclusion – prohibiting the kind of debate I would like to have seen.

Few issues are as fundamental to our system of democracy and the promise of equal justice under the law as the Voting Rights Act. I support re-authorization of the expiring provisions because the purpose of the VRA is genuine – it's goals are noble – and it's success is unparalleled.

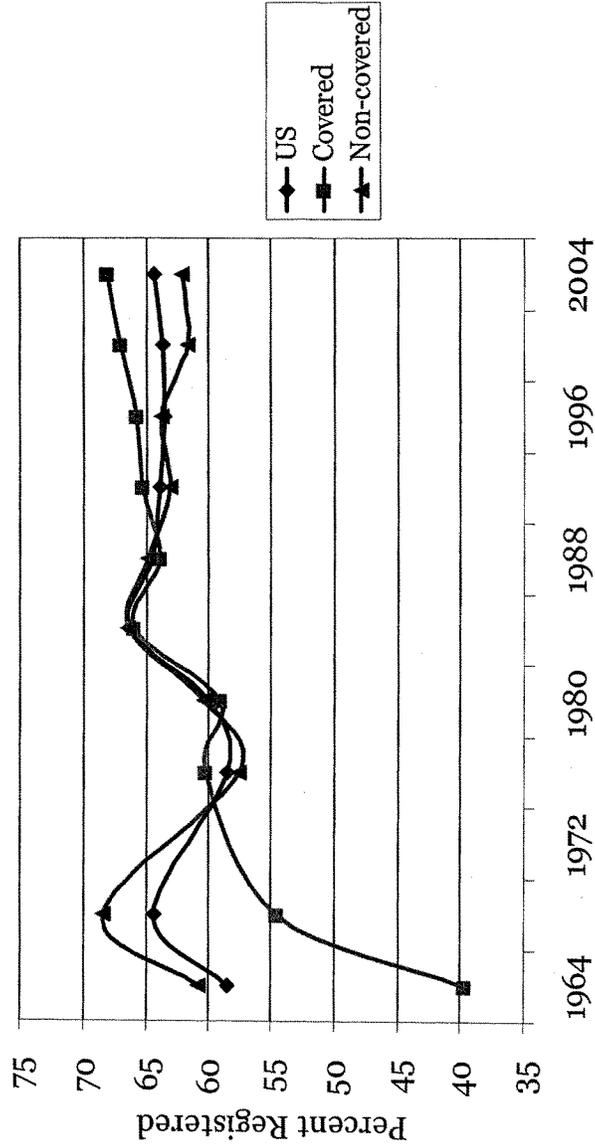
But I share the concern of Chief Justice Roberts when he wrote in dissent in *LULAC v. Perry*, that "[i]t is a sordid business, this divvying us up by race."<sup>8</sup>

It is my fervent hope that we will move beyond this "fixation" on race in our policy making and toward a color-blind society, lest we – in the words of Justice Anthony Kennedy – make "the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"<sup>9</sup>

<sup>8</sup> *League of United Latin American Citizens v. Perry*, 548 U.S. \_\_\_, 126 S.Ct. 2594, 2663 (2006) (Roberts, C.J., dissenting).

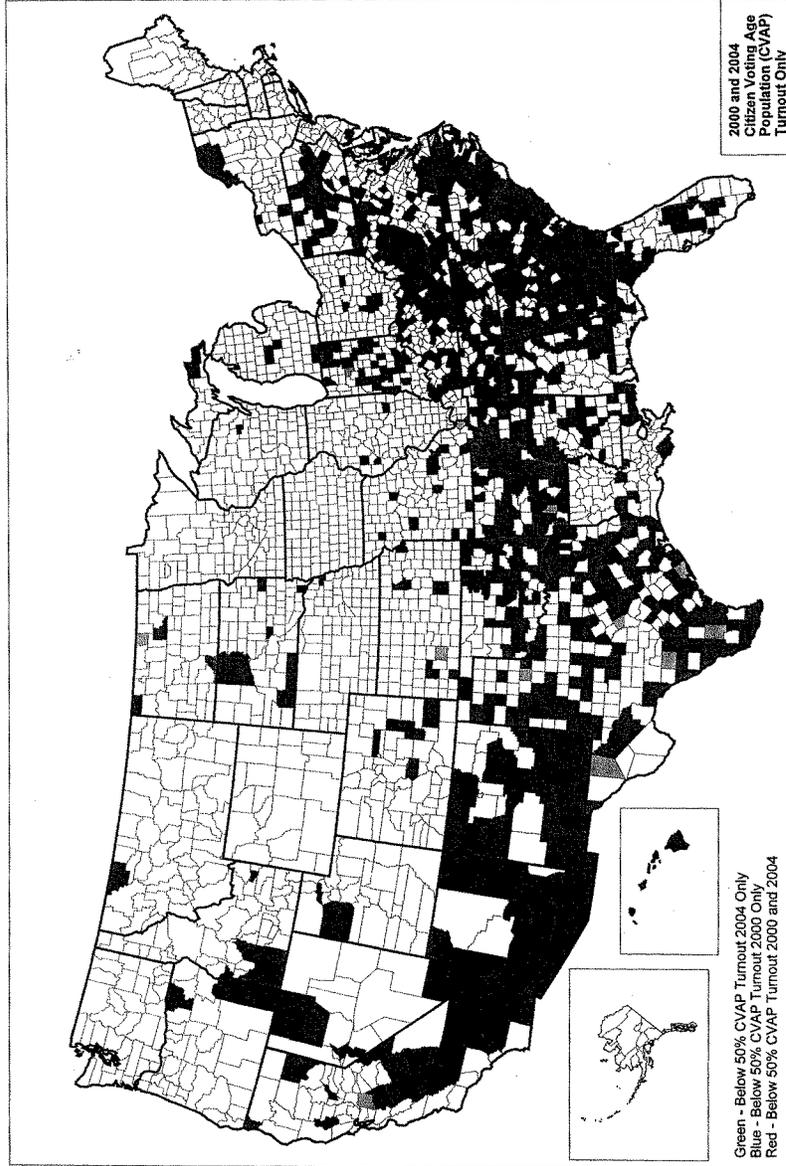
<sup>9</sup> *Miller v. Johnson*, 515 U.S. 900, 912 (1995)

Cornyn Appendix 1: African American Voter Registration



US Census Bureau, 1970 Senate Hearings and 1965 Congressional Record

**Cornyn Appendix 2: Section 5 Coverage on Recent Election Data**



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"Renewing the Temporary Provisions of the Voting Rights Act:  
Legislative Options after LULAC v. Perry"  
Thursday, July 13, 2006**

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May 25, 2006

Members  
United States Senate  
Washington, D.C. 20510

Dear Senator:

We are very pleased that the renewal of the Voting Rights Act has been launched as a bipartisan, bicameral effort, with the leadership of both parties committed to a timely reauthorization of the expiring provisions in the Act.

The Friends Committee on National Legislation joins hundreds of national organizations and local groups in urging you to signal your support for voting rights for all Americans by co-sponsoring S.2703, which was introduced by Judiciary Committee Chair, Senator Arlen Specter, with ranking member Senator Patrick Leahy and Senator Edward Kennedy. These initial sponsors have been joined (so far) by 41 others.

The Voting Rights Act, which was initially adopted in 1965, has been renewed four times under the leadership of both parties, and has guaranteed the right to vote to millions of citizens among racial, ethnic, and language minorities.

The renewable provisions of the Voting Rights Act are still needed. You may be aware that the House Judiciary Subcommittee on the Constitution held 10 hearings on the Voting Rights Act in 2005 and found significant evidence that barriers remain in many jurisdictions, keeping eligible voters from equal opportunities to participate in elections. The Senate Judiciary Committee has received these findings from the House, and is scheduling a few additional hearings to complete the record. In addition, the Leadership Conference on Civil Rights has sponsored state studies in fourteen states, documenting continued attempts to discriminate against certain minority voters. (See [www.RenewtheVRA.org](http://www.RenewtheVRA.org))

*It is important for the Senate to move ahead to renew the Voting Rights Act now, so that work can be completed on the bill this year.* The election season and other priorities may intervene next year; the strong bi-partisan support that this bill enjoys now should result in strong Senate support for the basic rights guaranteed by this legislation.

Section 5 of the Voting Rights Act is designed to prevent discrimination before it becomes a fact. It requires jurisdictions with a history of discrimination and with

evidence of continuing discrimination to “pre-clear” changes in voting procedures and laws, to ensure that the changes will not have the purpose or effect of discriminating on the basis of minority race or language. S. 2703 renews Section 5 and restores it to its original congressional intent, by authorizing the attorney general to block the implementation of voting changes that are motivated by a discriminatory purpose.

Because the right to vote is so fundamental to American democracy, it is appropriate to prevent abuse of that right in jurisdictions where there is reason to believe that discriminatory laws and procedures may continue to re-appear. *As in current law, the renewed Section 5 will allow jurisdictions to establish a new record of non-discrimination, and to remove themselves from Section 5 reviews.*

The bill also renews Section 203 to continue to provide language-minority citizens with equal access to voting. You may have heard a concern about welcoming new citizens who do not speak English and facilitating their participation in the exercise of their citizenship by providing materials in their first language. *In fact, about three-quarters of the people who need language assistance are native-born citizens who are more proficient in a first language other than English.* Ballot measures are complex enough when presented in one’s first language. How well would any of us do in our second or third language (if we have one)? The Voting Rights Act is not about excusing *new* citizens from a requirement to learn English; it is about giving *all* citizens the best opportunity to participate meaningfully in the fundamental rights of citizenship.

The Voting Rights Act continues to provide legal protection to one of the most basic rights of citizens – the right to vote. If you have co-sponsored S. 2703, thank you. We hope you will support Senate action on the legislation in the next several weeks. If you have not yet co-sponsored S. 2703, we urge you to step forward with other Senate leaders to endorse the renewal of the Voting Rights Act.

Sincerely,

Ruth Flower  
Senior Legislative Secretary  
Friends Committee on National Legislation

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**ROCHESTER**  
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 June 28, 2006

DEPARTMENT OF POLITICAL SCIENCE

Senator Arlen Specter  
 Chair, Senate Judiciary Committee  
 711 Hart Building  
 Washington, D.C. 20510

Dear Senator Specter:

I am a professor of political science and Director of the Center for the Study of African-American Politics at the University of Rochester. In January of 2007 I will join the faculty of Columbia University as a professor of political science. I have written extensively on African-American political participation, and most recently co-authored a study assessing the political participation of African-Americans since the civil rights movement. I have also been an expert witness to describe the importance of considering communities of interests in the state redistricting process.

I am writing you in support of renewing the Voting Rights Act (S. 2703). While some have argued that the section has outlived its purpose, those views substantially underestimate the power of the legislation in ensuring that minority voters have the ability to elect representatives of their choice. Eliminating Section 5 would encourage the return of electoral mechanisms that have the unfortunate consequence of diluting the influence of minority voters. Although a few commentators have speculated on the ability of minority voters to have their political interests represented in majority white districts through "substantive" representation, dismantling the ability of minority voters to elect representatives of their choice by sprinkling them into multiple legislative districts would severely limit political voices in minority communities. Diluting the influence of minority voters through schemes to maximize their "substantive representation" is akin to the type of redistricting strategies that were once used to suppress minority political power. Section 5 has allowed minority groups to overcome the barriers of diluting their political voices and it is important that the legislation remains a protector of minority voting rights.

In addition to providing minority voters with an equal opportunity to elect representatives of their choice, the Voting Rights Act, and by extension the Section 5 provision, has indirectly sustained the civic participation of African Americans since its inception. In a recently published longitudinal study I co-authored on the civic activism of African-Americans since the 1970s (*Countervailing Forces in African-American Civic Activism, 1973-1994*, Cambridge University Press, 2006, with Valeria Sinclair-Chapman and Brian McKenzie), we show that the indirect effects of Section 5 has been critical to bringing African-American citizens into the political mainstream. In the study we find that in states covered by the Voting Rights Act, the

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participation of African Americans in activities such as working for a better government group or contacting representatives about a problem was substantially enhanced by black office-holding. Indeed, the effects of descriptive representation on the civic participation of southern African-Americans were so potent in the first two full decades after the passage of the Voting Rights Act that it overshadowed the negative effects of debilitating economic forces in black communities, such as double-digit unemployment, rising prices in goods and services, and rising income gaps, which all lowered blacks' civic participation during the 21-year period of our analysis. The findings of the study indicate that the gap in the civic participation of whites and blacks could not have been narrowed in the states covered by Section 5 without the ability of black voters to elect public officials of their choice. Taking away the ability of minority voters to elect representatives of their choice might have the unintended consequence of lowering their civic participation.

While Section 5 does not, and certainly should not, guarantee the election of minority representatives from majority-minority districts, whoever is elected from those districts would have to prioritize the interests of their mostly minority constituency. Indeed, majority-minority districts may not be needed in every locality, depending upon the extent of racial bloc voting and white crossover voting. Unfortunately, there are many communities where racial bloc voting persists. Section 5 ensures that minority interests are not put on the back burner and its renewal would help to sustain the progress of civic inclusion of minorities that has been the hallmark of the Voting Rights Act.

If you have any questions about the potential effects of a weakened Voting Rights Act on minority civic participation, please feel free to call on me for assistance.

Respectfully,

Fredrick C. Harris  
Associate Professor of Political Science  
Director, Center for the Study of African-American Politics

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Testimony of

**SHERRILYN A. IFILL**

**Associate Professor of Law, University of Maryland School of Law**

**Before the Senate Committee on the Judiciary**

**Subcommittee on the Constitution, Civil Rights and Property Rights**

**“Renewing the Temporary Provisions of the Voting Rights Act: Legislative  
Options after *LULAC v. Perry*”**

**Hearing Regarding the Reauthorization of the Voting Rights Act**

**July 13, 2006**

**Background**

I am pleased to have the opportunity to offer my testimony in support of S. 2703, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006. My testimony is focused on the impact of the Supreme Court's recent ruling in *League of United Latin American Citizens, et al. v. Perry, et al.*, 548 U.S. \_\_\_(2006)(slip. op. no. 05-204)(LULAC), on Congress's efforts to renew the expiring provisions of the Voting Rights Act of 1965 (VRA). Although the Court's ruling arises in the context of several legal claims that did not touch upon Section 5 of the VRA, the ruling recognizes that voting discrimination persists throughout the State of Texas, which has the nation's 4th largest minority population,<sup>1</sup> and essentially reaffirms the importance of the expiring provisions of the Act. I strongly urge Chairman Arlen J. Specter and other Members of this Committee to pass S. 2703 to help ensure that African Americans, Latinos, Native Americans and other racial and language minority groups are able to participate meaningfully in the political process.

I am a civil rights lawyer and an Associate Professor of Law at the University of Maryland School of Law in Baltimore, Maryland. My coursework includes Civil Procedure, Constitutional Law and Voting Rights Law, among others. I have extensive experience litigating voting rights matters including challenges to discriminatory election schemes under the Voting Rights Act of 1965 and cases, on behalf of black voters, challenging the method of electing

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<sup>1</sup> According to 2005 U.S. Census Bureau estimates, Texas ranks 4th in the nation as a minority-majority state (after Hawaii, New Mexico, and California). The Texas State Data Center estimates that Hispanics could become a majority in the State by 2030.

judicial officers in Texas, Louisiana, and Oklahoma. I have also served as counsel for the petitioners in *Houston Lawyers' Ass'n. v. Atty. Gen'l. of Texas*, 501 U.S. 419 (1991), in which the U.S. Supreme Court held that Section 2 of the Voting Rights Act applies to judicial elections. Given my experience litigating voting rights matters in the State of Texas, I am struck by the Supreme Court's analysis of the Section 2 claim in *LULAC* and the similarities between circumstances currently affecting minority voters in the state, and the voting conditions that I encountered while litigating in Texas and other covered jurisdictions around the country during the 1980s and 1990s. In light of those similarities, I am alarmed by the claim advanced by some that the Court's decision in *LULAC v. Perry* in some way weakens the case for reauthorizing the key provisions of the Voting Rights Act contained in the draft bill before this Committee. To the contrary, the Court's decision in *LULAC v. Perry* affirms the continuing need for the preclearance provisions of Section 5 of the Act and reaffirms the principles by which courts have analyzed claims brought under section 2 since the 1982 amendments to the Act.

#### **Introduction**

In *LULAC*, the Supreme Court considered the legality of a redistricting plan that presented substantial issues of minority vote dilution occurring in the context of a contested, partisan-driven legislative session in the State of Texas. In its ruling, the Court determined that there was no "manageable" standard that could be employed to police partisan gerrymandering, and thus refused to

invalidate the redistricting plan on the basis of proposed legal theories that would limit partisan redistricting. The Court also rejected a Section 2 challenge to District 24, which incorporates significant parts of the Dallas-Forth Worth metropolitan area, in which African-American voters argued that they had effective electoral control of a Congressional district even though they constituted under 30 percent of the voting population in that district. Significantly, and most relevant for purposes of this hearing, the Court held that District 23 had to be redrawn because it results in impermissible vote dilution in violation of Section 2 of the Voting Rights Act (VRA).

In large part, the Court's ruling addresses the various legal claims raised to challenge the practice of one political party drawing legislative district lines to maximize its electoral advantage. However, to the extent that the Court's ruling bears on Congress's consideration of the expiring provisions of the VRA, it lies in the fact that the successful Section 2 vote dilution claim shows that voting discrimination persists today in covered jurisdictions, contrary to the views of those who attempt to deny this well supported fact. The VRA's protections remain important checks on voting discrimination which continues to have the tendency to "shape shift;" Congress has used evidence that jurisdictions have moved to adopt new and more sophisticated forms of discrimination to justify the necessity of Section 5 from the outset. My testimony will highlight a few points made by the Court that lend support to the current renewal bill. First, the Court recognized that discrimination persists on a statewide basis in Texas and is reflected, in part, by significant levels of racially polarized voting in state

elections. Second, the Court also suggested that intentional discrimination continues to stand as a threat within the political process. Third, the Court recognized that Section 5 is a compelling state interest, suggesting that any future challenge to the constitutionality of Section 5 would likely fail as similar challenges have in the past.<sup>2</sup> And finally, the Supreme Court's ruling supports the need for Congress to restore the "ability to elect" standard within the Section 5 context, thus bringing imperative uniformity and clarity to the way that minority electoral opportunities are measured within the judicial and administrative contexts.

#### **Supreme Court Recognition of Continued Racially Polarized Voting**

The *LULAC* Court recognized that significant levels of racially polarized voting continue to hamper minority electoral opportunities. This political reality highlights the continued need for the expiring provisions of the Act. Indeed, the Court recognized that polarization within challenged District 23 was "particularly severe," finding that the "Anglo citizen voting-age majority will often, if not always, prevent Latinos from electing the candidate of their choice in the district."<sup>3</sup> The *LULAC* case illustrates not only the existence of racially polarized voting, but more significantly, how knowledge of those voting patterns – which are vestiges of state-sponsored discrimination – can be used by governmental actors to structure electoral arrangements in ways that disadvantage minority voters. To

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<sup>2</sup> See e.g., *Lopez v. Monterey Cty.*, (involving a post-*Boerne* challenge to § 5. Court upheld the constitutionality of the § 5 preclearance provisions in the context of the substantial "federalism costs" of preclearance) 525 U.S. 266, 269 (1999).

<sup>3</sup> *Lulac*, 548 U.S. at 21.

state it more simply, racially polarized voting patterns plus governmental power can, and does, result in minority vote dilution in many covered jurisdictions.

#### **Discrimination as Shape Shifter**

Congress has compiled an extensive record that demonstrates that discrimination persists in the political process. This record illustrates the continuing need for Section 5 of the Voting Rights Act and provides a sufficient basis for Congress to reauthorize its expiring provisions. Although opponents have pointed to substantial progress made since the 1982 renewal, the evidence demonstrates that jurisdictions continue to find new ways to retrogress and dilute minority voting strength. Indeed, the *LULAC* Court recognized that the contested redistricting plan eliminated minority electoral opportunity in the face of growing numbers of politically cohesive Latino voters. This observation ties directly to well-established findings of Congress, in the context of previous renewal debates, showing that one of the periods of greatest danger for minority voting power occurs at the very time that minority communities are poised to exercise it. Consider, for example, that as early as the seminal Section 5 case of *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), the underlying discriminatory practices involved illustrated that once African Americans were able to register to vote, the rules of the game shifted resulting in restrictions that limited the effectiveness of their votes.

It is also noteworthy that the Court noted that the Texas redistricting plan “bears the mark of intentional discrimination that could give rise to an equal

protection violation.”<sup>4</sup> The Court also recognized that jurisdictions are often juggling various redistricting principles when it adopts a particular plan but noted that these principles, such as incumbency protection, “cannot justify the [negative] effect on minority voters.”<sup>5</sup> Similarly, in the Section 5 context, the preclearance process ensures that jurisdictions do not adopt retrogressive voting changes dressed up with justifications that bear the marks of apparent neutrality. Indeed, the Section 5 process is aimed at ferreting out those changes that place voters in a worse position and those changes may or may not have been adopted with any malice or apparent discriminatory intent. Nonetheless, the Court’s ruling in *LULAC* recognized that discriminatory intent may continue to surface within the political process. Experience shows that, more often than not, this discrimination may surface in different shapes and forms.<sup>6</sup> Indeed, the *LULAC* Court provides the most recent and compelling evidence of this fact. It bears emphasis that the Court’s opinion identifies many hallmarks of the voting discrimination in Texas that were so familiar to me when I litigated voting rights cases in that state much closer in time to the 1982 renewal.

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<sup>4</sup> *Id.* at 34. Moreover, this recognition on the part of the Court lends support to the language in proposed legislation that aims to restore § 5 to the pre-*Bossier II* standard by allowing the DOJ and courts to continue making preclearance determinations in a manner that is consistent with both constitutional prohibitions against discriminatory voting practices and the original legislative intent underlying the 1965 enactment of the Voting Rights Act.

<sup>5</sup> *Id.* at 35.

<sup>6</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (Section 5 was intended to prevent covered jurisdictions from “contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination”; Court explained that Congress enacted the extraordinary preclearance mechanism in Section 5 because it had reason to suppose that covered jurisdictions might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.).

**Partisanship Will Not Insulate Voting Changes from Review Regarding their Impact on Minority Voting Strength**

The *LULAC* ruling highlights the fact that intense partisan debates will not suffice to insulate those jurisdictions that adopt changes that either impair or retrogress minority voting strength. Some scholars have argued that, perhaps, statewide redistricting should be removed from the scope of Section 5 review because the high-stakes nature of those plans is almost always subject to litigation. While Section 5 itself did not block the voting discrimination in this case, a reality that perhaps illustrates, among other things, the difficulty of applying *Georgia v. Ashcroft*, there can be little doubt that the Voting Rights Act does play a vital role in protecting minorities in battles that are often characterized as solely partisan. If anything, *LULAC* illustrates that minorities cannot be used as fillers or as pawns for districts in a quest for a partisan power grab. Rather, protection of minority voting strength and compliance with the Voting Rights Act are a compelling state interest that must seriously be considered by line-drawers and politicians alike.

*LULAC* makes clear that it would be completely untenable to ask all minority voters facing continuing voting discrimination in covered jurisdictions to file and litigate complex Section 2 cases in order to vindicate their rights. Indeed, the time and resources involved would lead to too many communities bearing continued discrimination in the absence of funds and expertise to stop it.

**The Proposed Bill Will Bring Uniformity to the VRA Statutory Framework**

The proposed bill will bring needed uniformity and coherence to the Act's statutory framework by restoring the "ability to elect" standard in the Section 5 preclearance context. Currently, Section 2 of the VRA relies on the "ability to elect" standard in determining whether a particular voting practice or procedure dilutes minority voting strength. Specifically, in the redistricting context, Section 2 requires that courts look to see whether a redistricting plan impairs minority voting strength by eliminating the "opportunity to elect their candidate of choice." Section 2 courts perform this analysis by conducting a very thorough review that looks to the preconditions set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), while also considering the totality of the circumstances surrounding the challenged practice. Although the current Section 5 retrogression determination is different in that it looks only to whether a particular voting change places minority voters in a worse position, historically, the Justice Department and courts have made preclearance determinations by initially comparing minority electoral opportunities under the benchmark and proposed plans. It is this assessment of minority electoral opportunities that has long been consistent with Section 2 determinations about practices that provide minority voters an opportunity to elect candidates of choice.

The Court's recent ruling highlights the appropriate methodology for determining whether minority voters have an opportunity to elect candidates of choice. The proposed bill provides a needed coherence by restoring this methodology and standard in the Section 5 context and bringing a degree of

consistency between Sections 2 and 5 while continuing to recognize that they serve as distinct, but complimentary tools for attacking the same harm. The *LULAC* opinion demonstrates that the ability to elect standard is administrable, as both the Court and the Department of Justice (DOJ) had recognized for nearly 30 years prior to *Georgia v. Ashcroft*, 539 U.S. 461 (2003), *vacated and remanded*. Indeed, the Court determined that challenged District 23 was invalid under Section 2 because it no longer provided minority voters the opportunity to elect candidates of their choice. The Court recognized that the opportunity to elect candidates of choice in a Section 2 case requires more than the ability to influence the outcome between some candidates.<sup>7</sup>

Further, the Court emphasized the importance of making particularized determinations about minority electoral opportunity. Although the Court acknowledged that the challenged district was physically compact, the court noted that the *Gingles* compactness requirement refers to the compactness of the minority population, not the compactness of the contested district.<sup>8</sup> In reaching its holding, the Court noted that the old district fractured a politically cohesive population of minority voters who had forged an “efficacious political identity.”<sup>9</sup> This particularized determination is consistent with the approach used to measure electoral opportunities in the Section 5 context.

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<sup>7</sup> *Id.* at 40.

<sup>8</sup> See *Bush v. Vera*, 517 U.S. 952, 997 (1996).

<sup>9</sup> *LULAC*, 548 U.S. at 29.

### **Conclusion**

Although the recent *LULAC* ruling does not bear directly on the bill, to the extent that any relevant conclusions can be drawn from it, the Court affirms that the Voting Rights Act and the protections it affords are still a vital and necessary component of our nation's political life. Moreover, several Justices recognize that Section 5 is a compelling state interest and this strongly suggests that any future challenges to the constitutionality of the Act's retrogression provisions will likely be unsuccessful. *LULAC* does not require that Congress amend the language of the proposed bill. In fact, the ruling supports the importance of restoring the ability to elect standard in the Section 5 context to bring needed clarity, uniformity, and enhanced administrability to the Act's statutory framework.<sup>10</sup>

Most significantly, the *LULAC* Court recognized that racial discrimination against our nation's racial and language minorities persists to the present day -- at times in the context of statewide voting changes -- as does extreme levels of polarized voting such as the Court found on a statewide basis in Texas. This stark evidence of persisting discrimination not only bolsters Congress' authority to renew the expiring provisions but also highlights the continuing need for Section 5 to remain in effect in the covered jurisdictions.

Finally, the *LULAC* ruling highlights the fact that intense partisan struggles are not sufficient to insulate those jurisdictions that adopt changes that either impair or retrogress minority voting strength. Partisan battles, as illustrated by

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<sup>10</sup> It is worth noting that Assistant Attorney General Wan Kim of the Civil Rights Division, U.S. Department of Justice, offered testimony during these hearings that shows that the standards used for determining retrogression following *Georgia v. Ashcroft* are difficult to apply in the administrative context. This testimony lends strong support for restoring the ability to elect standard.

Texas's recent experience, may indeed pose a grave threat to minority voting rights.



WASHINGTON OFFICE  
NATIONAL MINISTRIES DIVISION

PRESBYTERIAN CHURCH (USA)

May 4, 2006

Dear Representative,

The General Assembly is the highest governing body of the Presbyterian Church (USA). There is a long history of approval for equal rights, opportunity and access to societal benefits and the benefits accorded to citizenship. Portions of this history are recounted below. The Voting Rights Act of 1965 needs to be reauthorized to assure that everyone has this right of citizenship. **Support HR 9.**

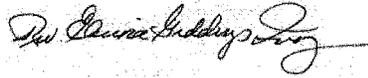
As early as 1956 the PCUSA General Assembly called upon Christians to work to eliminate the poll tax "and other restrictions which prevent many citizens from exercising their legal rights at the polls and which affront the dignity of persons ..." In 1957, with very strong words, the General Assembly went on record against means such as poll taxes and severe literacy tests used to deny voting rights to certain minority citizens, noting the price of this corporate dishonesty is political demagoguery in its worst form.

The 1962 Assembly urged federal leadership to eliminate racial restrictions of voting rights by any of the states. A 1960 Statement "urged state legislatures and the United States Congress to continue to work for legislation that will effectively secure and protect the rights of all citizens to vote, regardless of race; commends efforts to stimulate, train and protect 'African American' and other citizens in the exercise of their responsibility and vote by such agencies as United Church Women, the Southern Christian Leadership Conference, the Young Women's Christian Association, the National Association for the Advancement of Colored People, and the League of Women Voters; and Urged United Presbyterians to participate actively in these or other such legitimate efforts and to defend them against unwarranted and irresponsible attacks."

The 1963 Assembly, impressed with the civil rights movement, invited its principal leader, Martin Luther King, Jr., to address the Assembly. The 1981 and 1982, Assemblies also supported extension of the Voting Rights Act of 1965. A 1982 Statement "Affirms all efforts to include actively all citizens in the election process, including the use of bilingual ballots as mandated by the Voting Rights Act, and declares its opposition to actions by government that have the effect of discouraging such exercise of citizens rights."

The Presbyterian Church (USA) has 2.2 million members across the United States and Puerto Rico in 11,200 congregations. If you have further questions on this item, please contact me at 202-543-1126.

Sincerely,

A handwritten signature in cursive script, appearing to read "Rev. Elenora Giddings Ivory".

Rev. Elenora Giddings Ivory  
Director Washington Office, Presbyterian Church (USA)

**Written Testimony of Alexander Keyssar**  
Matthew W. Stirling, Jr. Professor of History and Social Policy  
Chair, Democratic Institutions and Politics  
Kennedy School of Government  
Harvard University

Submitted to the Senate Committee on the Judiciary  
June 12, 2006

I submit this testimony to the Senate Committee on the Judiciary in the hope that it may prove to be of assistance in considering renewal of the special provisions of the Voting Rights Act of 1965. I am aware that the committee has been holding hearings on this subject and that some questions have been raised regarding the necessity, or desirability, of renewing Section 5's pre-clearance provision as well as the language assistance provisions in Section 203.

I write as a scholar and as an historian who has spent many years studying the history of voting rights in the United States. In addition to numerous articles in scholarly journals and the popular press, I am the author of The Right to Vote: The Contested History of Democracy in the United States, published in the fall of 2000 (with a slightly updated paperback edition published the following year).<sup>1</sup> That book is a history of the right to vote in the United States from the nation's founding through the late 1990s. I am currently the Matthew W. Stirling, Jr., Professor of History and Social Policy at the Kennedy School of Government, Harvard University.

Contemporary political scientists, law professors, and voting rights lawyers are better equipped than I to analyze the operation and impact of specific provisions of the VRA since 1965. But as an historian, I would like to locate the current deliberations against the backdrop of the prolonged effort to achieve universal suffrage in the United States, an effort that stretched from the 1780s through the 1960s. Key features of that backdrop – and the dynamics of the history – seem to be directly relevant to your deliberations regarding reauthorization of the Voting Rights Act.

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<sup>1</sup> The book was awarded prizes as the best book in American history in 2001 by both the American Historical Association and The Historical Society. It was also a finalist for the Pulitzer Prize in History, the Los Angeles Times Book Award, and the Francis Parkman Prize.

Several historical patterns seem to be particularly pertinent, and they are itemized below.

1. The expansion of voting rights in the United States has been a very long and slow process. At our nation's birth, the franchise was highly restricted; and it took until roughly 1970 for the United States to achieve something close to universal suffrage. That the process took so long reveals a dimension of our history that is uncomfortable but that we need to acknowledge: our polity has always possessed men and women who opposed equal political rights for all citizens.
2. Progress in the expansion of the franchise has been piecemeal and fitful, not steady and gradual. There have been prolonged periods when efforts to broaden the franchise were stymied, sometimes followed by breakthrough moments where a great deal was achieved. The most prominent landmarks in the history of suffrage were: the early nineteenth century (when most property and tax requirements were removed); the post-Civil War era of Reconstruction (when the Fourteenth and Fifteenth Amendments were passed); 1920 (when the Nineteenth Amendment was finally ratified, enfranchising women); and the 1960s when both Congress and the Supreme Court took pioneering steps to guarantee democratic rights to Americans. The Voting Rights Act, of course, was at the center of this last surge in democratization.

The broad historical pattern suggests that progress towards expanding democratic rights has been possible only at particular historical junctures. It also suggests that curing systematic discrimination or bans in voting rights has generally been a prolonged process, taking many years to achieve. It took seventy-five years of organizing for women's suffrage to be achieved – and even longer for African Americans to secure their basic political rights.

3. In the course of our history, the right to vote has sometimes been narrowed as well as expanded: there have been many episodes where gains were reversed, and men and women who possessed the right to vote were subsequently disenfranchised. In some instances, such as women in New Jersey between 1790 and 1807, large groups of citizens who possessed the right to vote were subsequently disenfranchised by new legislation. In other examples, the reversals were partial, undercutting constitutional provisions or the intent of early legislation: e.g. in some states that had banned property or tax-paying requirements for voting for constitutional offices, those requirements were later re-instituted for municipal elections.

Among the many groups of voters who experienced these rollbacks in democratic rights, in different places and at different times, were: Native Americans (in various states); non-citizen declarants (in more than a dozen states); paupers or recipients of public welfare (roughly a dozen states); men and women who were illiterate (many states) or

illiterate in English (e.g. New York); men and women who did not pay taxes; convicted felons; and citizens whose jobs prevented them from getting to the polls before sundown.<sup>2</sup>

Indeed, disenfranchisements have been so frequent that during one prolonged period in our nation's history (roughly 1870 to 1920), the dominant trend was towards narrowing the franchise and reducing the proportion of citizens who possessed the right to vote. The progress of democracy in the United States has not been unilinear.

4. These rollbacks and reversals have been of immense significance in the history of racial restrictions on the right to vote. This sad pattern became visible even before the Civil War. Between 1790 and 1820, African Americans were disfranchised in three states where they had initially been permitted to vote; elsewhere de facto discrimination was formalized in law. In 1835, North Carolina added the word "white" to its constitutional requirements for voting; and in 1857 the Supreme Court ruled that African Americans, free or slave, could not be citizens of the United States. At the end of the 1850s, the percentage of African Americans who could vote in the United States was smaller than it had been at the nation's founding.<sup>3</sup>

This pattern, of course, was repeated in dramatic fashion in the decades that followed the Civil War. The Fourteenth and Fifteenth Amendments provided a solid constitutional foundation for banning

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<sup>2</sup> For details and documentation, see Keyssar, Right to Vote, Chapters 3, 5, 7.

<sup>3</sup> Keyssar, Right to Vote, pp. 54-55.

racial discrimination in voting, and for a decade or more (depending on the state), African Americans turned out to vote in large numbers, in both the South and the North. During the final decades of the nineteenth century, however – as is well known – the vast majority of African Americans in the South were disfranchised once again, thanks to the operation of a panoply of devices expressly designed to keep blacks from voting; this occurred in all of the jurisdictions covered by the Voting Rights Act of 1965.

Indeed, it was precisely this reversal – the disfranchisement of previously and formally enfranchised African Americans – that led to, and demanded, the Second Reconstruction of the 1960s and the passage of the Voting Rights Act of 1965. The VRA was, in effect, legislation designed to enforce the Fifteenth Amendment, which had already been the law of the land for nearly a century. The VRA was deemed necessary precisely because many states had chosen – for decades – to deliberately circumvent the Fifteenth Amendment.

5. In this context, the pre-clearance provision of Section 5 of the VRA must be understood as a mechanism to prevent another round of rollbacks and reversals in the gains achieved by African Americans.

The drafters of the VRA clearly recognized that the historical record made a powerful case for ongoing oversight and protection of the voting rights of African Americans: just as the Fifteenth Amendment had been circumvented by devices such as literacy tests, the intent of

the Voting Rights Act could readily be circumvented through other devices or alterations in the structure or mechanisms of elections. The pre-clearance provision was designed to prevent such circumventions, which would deprive American citizens of their political rights.

6. The denial of political rights to language minorities also has a long and complex history, dating back at least to the passage of the first literacy tests in the middle of the nineteenth century. As late as the 1940s, eighteen states denied the franchise to men and women who could not establish that they were literate in English. Although such restrictions were often justified as methods of insuring that the electorate was well-informed, in practice they commonly served to suppress the political participation of particular ethnic populations. The same was true of the more informal barriers that existed when non-English speaking citizens encountered ballots printed only in English. Section 203 of the 1975 Voting Rights Act constituted an affirmative step by the federal government to prevent the barrier of language from becoming a barrier to political participation.<sup>4</sup>

#### Conclusion

Over the very long run, the history of the right to vote in the United States is a history of increasing inclusion, of growing democratization. But that very long-run perspective ought not obscure how contested, and embattled, that history has been. Not all changes in voting rights law have been for the better; our country has not always

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<sup>4</sup> Keyssar, Right to Vote, pp. 227, 265.

moved in the direction of greater democratization; frequently, in one state or another, the change has been in the opposite direction.

As this Committee considers renewal or reauthorization of key provisions of the Voting Rights Act, I would urge it to be mindful of this historical record. Our history (as well as the history of other nations) makes plain that the right to vote can be as fragile as it is fundamental, and that a society committed to democracy needs to safeguard that right with great energy and ongoing zeal.

Thank you for permitting me to submit this testimony for your consideration.

**WHY SECTION 5 IS STILL NEEDED:  
Examples Where Continued and Persistent Voting Discrimination  
Has Been Prevented and Remedied by Section 5 and Other Provisions  
of the Voting Rights Act**

**Testimony of Jon Greenbaum  
Director of the Voting Rights Project  
Lawyers' Committee for Civil Rights Under Law**

**Presented to the Senate Judiciary Committee  
July 19, 2006**

**To the Honorable Arlen Specter, Chairman, Senate Judiciary Committee and the Honorable Patrick J. Leahy, Ranking Member, Senate Judiciary Committee:**

The Lawyers' Committee thanks you for your commitment to the voting rights of all Americans, and particularly for your consideration and support of Senate Bill 2703, which provides for reauthorization of the temporary provisions of the Voting Rights Act. As you are well aware, the combination of permanent and temporary provisions of the Voting Rights Act has changed the lives of minority citizens in the United States by enabling them to participate fully in the electoral process free from discrimination.

During the course of the Senate Judiciary Committee's consideration of Senate Bill 2703, which provides for reauthorization of the Voting Rights Act, some witnesses have testified about their view that jurisdictions covered under the Section 4 coverage formula have changed, and that requiring these jurisdictions to comply with the preclearance provisions of Section 5 is unfair.

The Lawyers' Committee reaches a different conclusion based on our extensive research on recent voting discrimination. The Lawyers' Committee created the National Commission on the Voting Rights, a politically and ethnically diverse body that held ten field hearings in 2005. In February 2006, the Commission issued a report, *Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005*. Three Commissioners have testified before this Committee or before the House Subcommittee on the Constitution with respect to Voting Rights Act reauthorization and the Commission's entire record of several thousand pages is part of the Senate record. Additionally, the Lawyers' Committee had primary editorial responsibility for ten of the fourteen state reports commissioned by the Leadership Conference on Civil Rights.

From this extensive research, it is apparent that not only is the record of recent discrimination in voting massive, but that many of the places that inspired the creation of the Voting Rights Act or that engaged in extensive voting discrimination during the early years of the Act continue to discriminate against those the Voting Rights Act aims to protect. The analysis below examines ten counties covered by Section 5 and reviews the stubborn and systematic resistance of governing bodies—and the constituents that helped them retain electoral control—to political empowerment of minority voters. It is important to note that these incidents of discrimination have been continuously exhibited in spite of Section 5 coverage. The examples provided below demonstrate the link between historic and present day voting discrimination that opponents of reauthorization claim does not exist.

If Section 5 is not reauthorized, the hundreds of thousands of minority citizens in the jurisdictions documented here and millions of minority citizens in other covered jurisdictions will be subject to extensive voting discrimination without the effective and efficient remedy Section 5 provides. Almost all of the discrimination discussed below relies on Section 5 determinations by the Department of Justice or on litigation and therefore cannot be dismissed as anecdotal.

The jurisdictions examined are Charleston County, South Carolina; Cochise County, Arizona; Dallas County, Alabama; DeSoto Parish, Louisiana; Dougherty County, Georgia; Grenada County, Mississippi; Hale County, Alabama; Lancaster County, South Carolina; Sumter County, South Carolina; and Waller County, Texas.

### 1. Charleston County, South Carolina

Beginning just before the passage of the Voting Rights Act of 1965, the city of Charleston systematically expanded its geographic area to diminish the electoral power of its black citizens. In 1974, after almost ten years of failing to seek Section 5 preclearance of these annexations, the city of Charleston submitted 25 annexations to the Attorney General pursuant to Section 5. In his objection letter, Assistant Attorney General for the Civil Rights Division J. Stanley Pottinger included a table that broke down the number of people added per annexation by race.<sup>1</sup> In not one of the 25 annexations were more blacks than whites added. Some of the more stunningly disproportionate annexations were those of November 10, 1964 (1,275 whites; 44 blacks); May 23, 1967 (198 whites; 2 blacks); October 28, 1969 (192 whites; 12 blacks); and July 17, 1973 (137 whites; 0 blacks). In light of these annexations (with a resulting cumulative gain of 3,456 white people), persistent racial bloc voting, and allegations of racially motivated annexations, the Department of Justice denied preclearance for the annexations.<sup>2</sup>

Charleston's retrogressive annexations did not end in the 1970s, despite the Department of Justice's objection. Throughout the 1990s, primarily through a series of annexations, the city enlarged its population by some 16,000 people, but reduced the percentage of voting-age blacks from 42% to 34%.<sup>3</sup> The benchmark redistricting plan for the city after the 2000 Census would have included six districts with majority-black populations, but only five with black voting-age majorities.<sup>4</sup> In the new plan, the city took advantage of this district in which the black population was big enough to be the majority in total population. It added to that sixth district an area that was expecting "rapid population growth" in the coming years, Daniel Island. That area would be "mostly white," given the prevailing prices of real estate there.<sup>5</sup> The Department of Justice concluded based on this and other demographic data that "in a matter of only a few years" the whites would outnumber the blacks in what was claimed to be a majority-black district for purposes of complying with the Voting Rights Act.<sup>6</sup> Whereas a slight change in the plan would have remedied this problem, the city officials responded that they did not want to make the

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<sup>1</sup> Letter from J. Stanley Pottinger to Morris D. Rosen at 2 (Sept. 20, 1974).

<sup>2</sup> *Id.* at 4. Mr. Pottinger added in his letter that had the annexations been submitted individually in a timely manner, some might have been precleared; the delay of the city in submitting the changes and its subsequent submission of them simultaneously doomed all the changes with significantly disparate effects on the racial composition of the city.

<sup>3</sup> The following draws substantially on John C. Ruoff & Herbert E. Buhl III, *Section 5 and the Voting Rights Act in South Carolina Since 1982* (2006).

<sup>4</sup> *Id.* at 23.

<sup>5</sup> Letter from R. Alex Acosta to Francis I. Cantwell at 2 (Oct. 12, 2001).

<sup>6</sup> *Id.*

change, because it would interfere with their goals of “neighborhood cohesiveness and maintaining constituent consistency.” This explanation was unacceptable to the Department.<sup>7</sup> In response, Daniel Island was incorporated into a different district, and the district to which it was going to be added remains a majority-black district.<sup>8</sup> The Charleston city council currently has five black members.<sup>9</sup> This instance highlights the importance of applying Section 5 to imminent, if future, retrogression. As the Supreme Court has said, “Section 5 looks not only to the present effects of changes but to their future effects as well.”<sup>10</sup>

In recent years, as the following excerpt from 2006 report of the National Commission on the Voting Rights Act explains, Section 2 and Section 5 have worked together, with Section 5 at times providing the necessary protection for minority voters with significant savings in government resources:

The differences between Section 2 and Section 5 are exemplified by two very different legal remedies that were recently obtained in Charleston County, South Carolina. In one, the Department of Justice and private plaintiffs filed an action in 2001 alleging that the at-large method of electing the nine-member county council, in combination with racially polarized voting, diluted minority voting strength in violation of Section 2.<sup>11</sup> In a county that was more than one-third black, no black candidates preferred by black voters had been elected in a decade, despite a cohesive black vote for several of them. The court’s opinion favoring the plaintiffs found a pattern of racially polarized voting. It also pointed to several instances in which African American voters were harassed and intimidated at the polls, and to political campaigns in which white candidates overtly or subtly raised the issue of race.<sup>12</sup>

The opinion was affirmed unanimously by the Court of Appeals for the Fourth Circuit,<sup>13</sup> and in the first election by districts, in 2004, black voters

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<sup>7</sup> *Id.* at 3.

<sup>8</sup> Ruoff & Buhl, *supra* note 3, at 23.

<sup>9</sup> See <http://www.ci.charleston.sc.us/dept/content.aspx?nid=661>.

<sup>10</sup> *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 420 (2000), *quoted in* Letter from R. Alex Acosta to Francis I. Cantwell at 2 (Oct. 12, 2001).

<sup>11</sup> Much of the following discussion is contained in South Carolina voting rights attorney Armand Derfner’s recent testimony before Congress. See *Statement of Armand Derfner before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 20 Oct. 2005, available at <http://judiciary.house.gov/OversightTestimony.aspx?ID=479> (last visited 7 Jan. 2006).

<sup>12</sup> *United States v. Charleston County*, 316 F. Supp. 2d 268, 277-278, 286 n.23, 295-97 (D.S.C. 2003).

<sup>13</sup> *United States v. Charleston County*, 365 F.3d 341 (4th Cir. 2004), cert. denied, 125 S. Ct. 606 (2004).

elected three black council members favored by black voters. The Section 2 suit responsible for this result was very expensive. Charleston County spent more than \$2 million defending its discriminatory election system. The county was ordered to pay the 56 Chapter Five private plaintiffs' attorneys' fees, which amounted to several hundred thousand dollars. In addition, the Department of Justice expended substantial resources in attorney time, travel costs, expert fees, and deposition expenses.

Like the county council, the Charleston County School Board has nine members. At the time of the county council trial, a majority of the school board, elected by a different method from that used by the county council, was black.<sup>14</sup> In 2003, while the county council case was on appeal, the South Carolina General Assembly, led by legislators from Charleston County, enacted a law changing the method of electing [members of] the school board to that which had been successfully challenged in the county council case. The Department of Justice objected to the change on the ground that it would decrease minority voting strength.<sup>15</sup> The Section 5 process thus prevented the implementation of a discriminatory voting change that could have taken several years and millions of dollars to invalidate in a Section 2 lawsuit.

## 2. Cochise County, Arizona

As of the 2000 Census, Cochise County was a majority white area in southeast Arizona, with Latinos comprising the second-largest racial group, at 26.5% of the County's almost 90,000 voting-age residents.<sup>16</sup> From the early 1970s to 2006, the temporary provisions of the Voting Rights Act have been used on behalf of Latino voters to vindicate their voting rights.

In 1972, the Cochise County College Board broke up concentrations of Latino voters, limiting their voting power, when it redistricted. In mid-July 1973, the Cochise County Attorney was advised by the Department of Justice that its Cochise College Board redistricting plan would require Section 5 approval. In late October, the County submitted its first request for approval. Two years passed with a series of incomplete submissions. Exasperated, the Department of Justice noted that "in view of the protracted pendency of this submission and your indication that the specific information we sought cannot be supplied, we have concluded that no useful purpose would be served by further delaying the Attorney General's determination."<sup>17</sup> The submitted plan had

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<sup>14</sup> *Charleston County*, 316 F. Supp. 2d at 283.

<sup>15</sup> Letter from R. Alexander Acosta to C. Havird Jones, Esq., 26 Feb. 2004, available at <http://judiciary.house.gov/OversightTestimony.aspx?ID=479> (last visited 7 Jan. 2006).

<sup>16</sup> U.S. Census Bureau, Census 2000 Summary File 1 (SF 1) 100-Percent Data [www.census.gov](http://www.census.gov) (last visited July 17, 2006).

<sup>17</sup> Letter from J. Stanley Pottinger to Richard J. Riley at 3 (Feb. 3, 1975).

fragmented Spanish surname concentrations of population in two districts,<sup>18</sup> diminishing Latinos' ability to elect their candidate of choice. Although the Department objected then, from 1975 to 1980 the County used a different plan, for which it did not seek preclearance.

Then, in 1983, the County adopted a new plan for the college district. The redistricting plan of 1983 was similarly discriminatory against Latinos. The County again provided inadequate responses to requests for additional information from the Department of Justice and was slow in providing its responses. In 1985, when the Department finally had enough data—much of which it had to obtain on its own—it found that whereas the benchmark plan would have provided the County's Latino community with one district in which it would have a citizen voting-age majority, the proposed plan gave it none. Because of the availability of non-discriminatory alternative plans and the lack of any explanation from the County about why it had again split the Latino vote, the Department objected to the plan.<sup>19</sup>

Because of its significant Latino population, Cochise County is covered by Section 203 of the Voting Rights Act for Spanish language. With an illiteracy rate more than ten times the national average, voter assistance is all the more crucial for effective exercise of the franchise by minority voters.<sup>20</sup> Concern about the ability of minority citizens to vote has led to federal monitors being sent to examine elections in Cochise since 2004.<sup>21</sup>

The Department of Justice sued the County in 2006 over its failure to translate election-related materials adequately and provide those materials to voters with limited proficiency in English. It had also not publicized the elections or registration deadlines, and had not provided information about early or absentee voting adequately available for those needing it in Spanish. Cochise County did not contest the lawsuit and the proposed settlement agreement is before the court.<sup>22</sup>

### 3. Dallas County, Alabama

Before the Voting Rights Act could provide protection for blacks and deterrents against violation of their voting rights, events in Dallas County, and the County seat, the city of Selma, precipitated the passage of Section 5. The following excerpt is taken from *The Impact of the Voting Rights Act in Alabama Since 1982* (forthcoming 2006):

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<sup>18</sup> *Id.*

<sup>19</sup> Letter from Wm. Bradford Reynolds to Sherry Marcell (Nov. 3, 1986).

<sup>20</sup> James Thomas Tucker & Rodolfo Espino, *Voting Rights in Arizona, 1982-2006* 14, available at <http://www.civilrights.org/issues/voting/ArizonaVRA.pdf>.

<sup>21</sup> Tucker & Espino, *supra* note 20, at 50.

<sup>22</sup> See *Gonzales v. Cochise County*, Case No. CV-06-304-TUC-FRZ ¶¶ 13-17 (D. Ariz.). Help America Vote Act ("HAVA") violations were also alleged in the Complaint, with the Attorney General objecting to failures by the County to post voting information in accordance with HAVA.

In Dallas County, Alabama, the Department of Justice instituted litigation in April 1961. At the time, only 1% of blacks in Dallas County were registered. After the Department of Justice would successfully eliminate one disfranchising device in court, Dallas County would implement one or more new disfranchising devices. As a result, by 1965, less than 5% percent of blacks in Dallas County were registered. The experience in Dallas County was used as a prime example by Congress in 1965 for the necessity of Section 5.<sup>23</sup>

Of course, Dallas County came to have an even more significant meaning pertaining to the Act. The nationally televised images of the violent assault on unarmed marchers crossing the Edmund Pettus Bridge in Selma – the county seat of Dallas County – on March 7, 1965, provided the impetus for President Lyndon Johnson to announce eight days later that he would be sending a voting rights bill to Congress. Less than five months later, the Voting Rights Act was signed into law.

Once blacks had the ability to vote, oppressive efforts by whites moved to tactics employed to dilute the black vote. Resistance to black electoral empowerment meant that Section 5 was invoked to protect black voters in Dallas County several times well into the 1980s. First, in 1980, the city of Selma tried to redistrict its councilmanic wards in a way that would significantly reduce the black population of a district in which a black candidate had narrowly lost in the previous election.<sup>24</sup> The Department of Justice would not let it do so. Then, in 1983, Selma passed an ordinance that would redistrict its wards, after they had been redistricted as single-member districts under a court-ordered plan. At the time, the city was 52.6% black, with 48.5% of the voting-age population. Blacks had actually been succeeding at the time in getting their candidates elected in five of the ten districts. Under the new plan, they could only realistically expect to elect their candidate of choice in four districts. The Department of Justice emphasized that having a 6-4 solution versus a 5-5 solution was not the problem, or rather was the likely outcome anyway given how severely polarized voting was along racial lines. The problem was that the city hadn't made an earnest effort even to *try* to redistrict in a manner that would roughly reflect the city's voting age population, even though alternatives that did a better job of doing so were proposed and rejected by the city council.<sup>25</sup>

A couple of years later, after a federal district court held Dallas County's at-large system for electing county commissioners violated Section 2 of the Voting Rights Act, the County submitted a districting plan with four single-member districts for Section 5 preclearance. Although moving from at-large voting to a single-member system in and of itself improved black electoral power, and therefore was not retrogressive in effect, there was ample evidence of discriminatory purpose. The hearings developing the proposed

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<sup>23</sup> H. Rep No. 89-439, at 10-11.

<sup>24</sup> Letter from Drew S. Days III to W. McLean Pitts (Apr. 29, 1980).

<sup>25</sup> Letter from Wm. Bradford Reynolds to Philip Henry Pitts (Apr. 20, 1984).

plan were closed to the black community, and one existing precinct was effectively bisected to prevent the black community in the precinct from electing an already-announced black candidate over the white incumbent.<sup>26</sup>

Sections 2 and 5 worked in tandem to battle discrimination in Dallas County's board of education electoral system as well. After a federal court held that the County's at-large system violated Section 2 by diluting black voting power, the County submitted a revised plan. But where it had followed the Voting Rights Act's prescription as to the method of election, by adopting a single-member districting system, the County then simply channeled the disenfranchising purpose behind the at-large system into a districting plan that packed many voters into one district and fragmented the rest, minimizing their opportunities to elect members to the board. This met with a Section 5 objection.<sup>27</sup> Section 5 thus protected the rights to political participation that minority voters had secured through Section 2.

Attempts to limit blacks' ability to elect their representatives of choice continued into the next decade.<sup>28</sup> Following the 1990 census, the black population of Selma increased its majority to 58.4%,<sup>29</sup> roughly the majority it enjoyed in Dallas County as a whole.<sup>30</sup> To counter these majorities, the County and city adopted different tactics. The Dallas County Board of Education submitted three different redistricting plans to the Department of Justice, with not one of them being approved,<sup>31</sup> and Selma submitted two different redistricting plans for election of its councilmembers, neither of which was given preclearance,<sup>32</sup> because both evinced discriminatory intent, specifically the intent to keep African Americans from controlling the council, as one might expect based on their population. All of the proposed plans packed blacks into districts where possible, and split up other concentrations to minimize their electoral influence. After the revised plans were approved, black candidates won enough elections to secure majorities in both governing bodies.

#### 4. DeSoto Parish, Louisiana

Officials in DeSoto Parish have used different techniques over the years to suppress black voting power. In 1969, the DeSoto Parish Police Jury passed an ordinance authorizing a

<sup>26</sup> Letter from Wm. Bradford Reynolds to Cartledge E. Blackwell, Jr. (Jun. 2, 1986).

<sup>27</sup> Letter from Wm. Bradford Reynolds to John E. Pilcher (June 1, 1987).

<sup>28</sup> The following discussion draws substantially on data presented in *The Impact of the Voting Rights Act in Alabama Since 1982* (forthcoming 2006).

<sup>29</sup> Letter from John R. Dunne to Philip Henry Pitts (Nov. 12, 1992).

<sup>30</sup> Letter from John R. Dunne to John E. Pilcher (May 1, 1992).

<sup>31</sup> Letters from John R. Dunne to John E. Pilcher (May 1, 1992; July 21, 1992; and December 24, 1992).

<sup>32</sup> Letter from John R. Dunne to Philip Henry Pitts (Nov. 12, 1992); Letter from James P. Turner (March 15, 1993).

change in its procedures for electing police jurors from ward-by-ward to at-large elections in 1971. The Department of Justice objected because of the retrogressive effect the law might have, but this was not its first objection to the tactic.<sup>33</sup> Rather, the objection followed an earlier objection to the enabling legislation, which had amended several of Louisiana's laws related to elections, apportionment of police jurors, and redistricting of police jury wards. Among other things, the legislation had removed the required minimum number of jury wards, meaning any parish in the state could adopt at-large elections. That legislation was later invalidated in its application to reapportionment of a parish school board.<sup>34</sup>

Then, in 1991, the Department objected to the redistricting of the police jury, as well as the realignment of voting precincts and creation of more precincts. The redistricting plan would have reduced the number of black-majority districts from five to three of the eleven total districts, even though blacks constituted 44% of the population and 42% of the voting age population of the parish. In light of the racial polarization that characterized police jury elections in DeSoto, the Department concluded that the plan would result in "a significant retrogression in minority voting strength in the parish as a whole."<sup>35</sup> It made no decision as to the voting precinct changes, because the validity of those changes would depend on whatever police jury plan was ultimately adopted. The plan that was eventually approved had four majority-black districts.

The 1992 redistricting plan for the DeSoto Parish School Board met with an objection on Section 5 grounds as well, because despite comprising 42% of the voting-age population of the parish, only three of the eleven districts in the plan submitted had black voting-age population majorities.<sup>36</sup> The objection should not have surprised anyone: the plan was the same one that had been adopted for the police jury redistricting—the same plan that the Department had objected to the previous year. The parish passed the plan, with little public input and in spite of a suggested alternative that would have provided for four majority-black districts.

Ten years later, in late 2002, the Department of Justice again interposed an objection to the school board's redistricting plan. Although in five of the districts, according to the benchmark plan, there were black voting-age majorities (and black candidates being elected), the proposed plan provided for only four districts in which blacks would have the opportunity to elect their representative of choice.<sup>37</sup>

#### **Dougherty County, Georgia**

In the midst of deep segregation in the 1940s and 1950s, some blacks began organizing voter registration drives under Reverend E. James Grant in Albany, the County seat in

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<sup>33</sup> Letter from David L. Norman to F. N. Gillespy (Aug. 6, 1971).

<sup>34</sup> See *LeBlanc v. Rapides Parish Police Jury*, 315 F. Supp. 783 (D.C. La. 1969).

<sup>35</sup> Letter from John R. Dunne to R.U. Johnson (Oct. 15, 1991).

<sup>36</sup> Letter from Deval L. Patrick to Walter Lee (Apr. 25, 1994).

<sup>37</sup> Letter from Andrew E. Lelling to Walter C. Lee and B.D. Mitchell (Dec. 31, 2002).

Dougherty County.<sup>38</sup> Even after passage of the Voting Rights Act of 1965, discriminatory changes in election laws still undermined effective exercise of the franchise by blacks. This was accompanied by overt racist acts against blacks in Albany and other places around Georgia.<sup>39</sup>

With the Voting Rights Act in place, a series of measures were taken in the early 1970s to limit blacks' enjoyment of the franchise. In 1971, after initially receiving an incomplete submission by the city of Albany of information necessary for the Department of Justice to apply Section 5 preclearance standards, the Department objected to the city's change of polling places.<sup>40</sup> The problem, said the Department, was that the Georgia legislature had passed a law that was not precleared but that required Dougherty County and city of Albany elections to be held the same day. Voting in two different places in one day would disproportionately affect blacks, who often would have to travel more substantial distances in order to vote in both places. The problems with these proposed changes and their anticipated effects on blacks continued into 1972.<sup>41</sup>

Then, in 1973, the city took advantage of the income disparities between the races by changing its election laws in ways that led to a Section 5 objection.<sup>42</sup> The changes included "substantial filing fees and deposits as a prerequisite to qualification for candidacy" without providing, as required by court precedent, for an alternative method for those unable to pay the fees. The fiscal inequality between whites and blacks in Albany meant the hefty fees would be significantly more onerous for black candidates to meet.<sup>43</sup> Section 5 stopped black candidates from being priced out of the political market.

In 1982, after a change in racial demographics over the previous decade, Dougherty County submitted a redistricting plan for the election of commissioners, pursuant to Section 5.<sup>44</sup> There were more blacks and fewer whites, yet the plan did not reflect this, having "unnecessarily" packed most of the County's blacks into two majority-black districts. The Department of Justice refused to preclear the change, because its "analysis of the plan under submission indicate[d] that its inevitable effect" would be to "dilute the voting strength of black citizens in Dougherty County."<sup>45</sup>

At the same time, Georgia's redistricting plan for the state House of Representatives also threatened to diminish black voting power in Dougherty County. The Department of Justice objected:

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<sup>38</sup> Lee W. Formwalt, *Moving Forward by Recalling the Past . . . : A Brief History of the Albany and Southwest Georgia Civil Rights Movements*, Albany Herald (Nov. 15, 1998).

<sup>39</sup> *Id.*

<sup>40</sup> Letter from David L. Norman to James V. Davis (Nov. 16, 1971).

<sup>41</sup> Letter from David L. Norman to James V. Davis (Jan. 7, 1972).

<sup>42</sup> Letter from J. Stanley Pottinger to James V. Davis (Dec. 7, 1973).

<sup>43</sup> *Id.* at 2.

<sup>44</sup> Letter from Wm. Bradford Reynolds to C. Nathan Davis (July 12, 1982).

<sup>45</sup> *Id.* at 1.

[U]nder the benchmark plan there was one district in Dougherty County with a substantial black majority (80.4 percent) and one district with a nominal black majority (50.8 percent), while the 1981 plan redrew the Dougherty County districts to have one district with a black majority of 73.5 percent while the next most heavily-black district was reduced to 45.9 percent.<sup>46</sup>

A decade later, in the 1992 House redistricting plan for Georgia, the Department of Justice concluded that “a finger-shaped area of Dougherty County had been placed into a majority-white district based in neighboring counties, apparently as a means of keeping an equal number of white and black members in county’s legislative delegation.”<sup>47</sup> The plan had been designed to limit black voting power in other ways as well, without giving serious consideration to the alternative plans that would not have done so.

As recently as 2002, there are still documented instances in which white elected officials have used redistricting plans to limit black voting power in Dougherty County. In Albany, the 2000 Census showed blacks made up 60.2% of the voting age population and as of September, 57.3% of the city’s registered voters were black. In one ward, the Census showed that blacks were now 51% of the population, but the proposed redistricting plan fractured that population, making blacks only 31% of the ward. The Department of Justice had harsh words for this attempt to maintain white dominance in the ward, noting “the evidence implies an intent to continue the city’s practice of ensuring that two majority white wards are maintained in the city, despite the major increases in black population in Ward 4 to a level over 50% black.”<sup>48</sup> This was not a hard conclusion to draw, given that the city’s own submission claimed one of its redistricting criteria was to “maintain ethnic ratios” by having four majority-black districts. The city offered no convincing explanation for why this necessitated moving the black population of Ward 4 to a ward that was already 90% black. This was part of a wholesale attempt to limit the progress blacks could make toward equality in Albany, including various ways in which segregation was maintained in the city’s school system.<sup>49</sup>

### **Grenada County, Mississippi**

The history of Section 5 objections here spans the gamut of voting rights abuses, with every possible attempt made to maintain white control of Grenada’s elected positions. In Grenada County, the Department of Justice interposed objections to at-large elections, numbered posts, and a multi-member plan in 1971. In 1972, the Department objected to at-large elections and numbered posts again, as well as a majority vote requirement. In 1975, an objection to certain annexations by the County was withdrawn after the County

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<sup>46</sup> Robert Kengle, *Voting Rights in Georgia, 1982-2006* at xii (2006), available at <http://www.civilrights.org/issues/voting/GeorgiaVRA.pdf>.

<sup>47</sup> *Id.* at xiii.

<sup>48</sup> Letter from J. Michael Wiggins to Al Grieshaber, Jr. at 2 (Sept. 23, 2002).

<sup>49</sup> See Lee W. Formwalt, *Albany Movement*, *The New Georgia Encyclopedia* (2003).

annexed a minority area. In 1976, the Department objected to a redistricting plan for election of district supervisors. In 1987, the Department objected to the redistricting again, noting that black residents of the County had had no “meaningful input” into the redistricting plan design.<sup>50</sup>

The next year, the County tried to change the method of selecting the two school district trustees who represent areas of the County outside the city of Grenada from at-large elections to appointment by the board of supervisors of the County; electing them in an at-large system would have allowed blacks more representation on the board. Taking into account the prevalence of racially polarized voting, the Department objected because the change “would be retrogressive to the significant black voting strength in the outlying area of the county.”<sup>51</sup>

More recently, some instances of discrimination in Grenada have been subtler, with facially neutral efforts that, when applied, clearly show the racial struggle is ongoing in the city. This is hardly surprising, for the racial composition of the city could hardly be more even: the 2000 Census counted 7,333 white residents and 7,342 black residents.<sup>52</sup> One example of this subtle discrimination took place in a special referendum held by the city in late 1996. One of the procedural aspects of the election was a limit on those who transported voters to voting booths from assisting more than one of those voters in the voting booth. In January of 1997, four months after holding the referendum, the County submitted that election for preclearance. Despite claims of the city that the rule was adopted by mistake and in any event not applied during the election, the Department of Justice objected, citing reports of voters prohibited from receiving assistance under the auspices of that rule, remarking on the rule’s violation of Section 208 of the Voting Rights Act, and noting that all reports of the rule’s application related to black voters.<sup>53</sup>

The city of Grenada’s gradual shift to becoming a majority-black district has nonetheless led to more desperate, not-so-subtle attempts to maintain white control. While the city had a slim white majority according to the 1990 Census, a special census commissioned by the city and conducted by the Census Bureau in 1997 revealed that the racial demographics had changed to the point that now blacks comprised a majority of the voting-age population. Officials in Grenada tried to delay the electoral consequences of this shift however they could. Grenada avoided having municipal elections several times, such that the only way elections were held was by a court order from the Mississippi Supreme Court requiring special elections to be held in February 1998.<sup>54</sup> The city also responded to Department of Justice requests with incomplete submissions repeatedly. In July 1998, the Department of Justice was granted summary judgment on Grenada’s

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<sup>50</sup> Letter from Wm. Bradford Reynolds to George C. Cochran (June 2, 1987).

<sup>51</sup> Letter from Wm. Bradford Reynolds to Holmes S. Adams at 2 (May 9, 1988).

<sup>52</sup> U.S. Census Bureau, Census 2000: Summary File 1 (SF 1) and Summary File 3 (SF 3), [www.census.gov](http://www.census.gov) (last visited July 12, 2006).

<sup>53</sup> Letter from Isabelle Katz Pinzler to James McRae Criss (March 3, 1997).

<sup>54</sup> *Hubbard v. City of Grenada*, No. 3:96CV172-S-A, 1998 U.S. Dist. LEXIS 11949, at \*1 (N.D. Miss. July 1, 1998).

violation of Section 5,<sup>55</sup> the relief being immediate elections under a plan that would ensure black majorities in three wards and 45% of the population in a fourth, according to the 1990 Census. In August 1998, the Department of Justice blocked three actions by Grenada County in relation to the election of city councilmembers: an annexation, a cancellation of a general election, and a redistricting plan for the city of Grenada. In its letter interposing an objection to the changes, the “adverse impact” of the proposed actions on minority voters was deemed to be “substantial.”<sup>56</sup> To battle the black demographic—and, inevitably, electoral—takeover, the annexation would have increased the geographic area of the city by almost 400%, adding enough white voters to tip the scales back so that whites were the majority again; the redistricting plan would have reduced electoral opportunities for black voters; and the cancellation seemed to have been based on a fear that black candidate would win in one of the city’s majority-black wards.<sup>57</sup> Thus, every change was based on the intent to discriminate against black voters.<sup>58</sup>

The continued Voting Rights Act violations by the County of Grenada have led the Department of Justice to send election observers to its precincts as recently as the 2000 federal election, with a total of 171 observers having been sent since 1967.

#### **Hale County, Alabama**

Voting rights for blacks in Hale County have been endangered since before the passage of the Voting Rights Act, and would be in great jeopardy still today, were it not for the protection offered by its soon-to-be expiring provisions. The following excerpt is taken from *The Impact of the Voting Rights Act in Alabama Since 1982* (forthcoming 2006):

Hale County, a Black Belt county, serves as an example of a majority-black county where the effort to suppress full black electoral participation has persisted, and only because of the Voting Rights Act—particularly the preclearance and the examiner/observer provisions—have African Americans been able to overcome this entrenched and continuing discrimination.

Prior to the passage of the Voting Rights Act, African Americans in Hale County who wanted to register and vote faced tremendous obstacles – the poll tax, literacy tests, and harassment. As of May 1964, only 3.9% of the black voting age population was registered to vote.<sup>59</sup> On August 9, 1965, three days after the Voting Rights Act was passed, the

<sup>55</sup> *Id.* at \*12.

<sup>56</sup> Letter from Bill Lann Lee to T.H. Freeland IV at 2 (Aug. 17, 1998).

<sup>57</sup> *Id.* at 2-3.

<sup>58</sup> *Id.* at 6. The objection was withdrawn in 2005 when blacks comprised a majority of the city council and its annexations were no longer deemed to be racially selective.

<sup>59</sup> *United States v. Hale County*, 496 F. Supp. 1206, 1211 (D.D.C. 1980) (three-judge court).

Department of Justice certified Hale County as a jurisdiction where a federal examiner had the authority to register black voters.<sup>60</sup> Not coincidentally, on August 10, 1965, the Alabama Legislature passed legislation changing the method of electing Hale County commissioners from single-member districts to at-large voting.<sup>61</sup>

Though Hale County began to elect its commissioners at large, Hale County did not submit this voting change to at-large elections until 1974. The Department of Justice objected to the change.<sup>62</sup> Hale County then sought preclearance from the District Court of the District of Columbia. In reviewing the change, the court found black candidates lost all thirty times they ran for county-wide office, including eleven times for county commissioner. The court found that the elections were characterized by racial bloc voting, that black citizens suffered from educational and economic impediments traceable to a history of discrimination that impacted their right to vote, and that black voters were subjected to intimidation and harassment in trying to exercise their right to vote. The court found that these factors, when combined with at-large voting, prevented black candidates from getting elected county commissioner.<sup>63</sup> The court held that Hale County failed to show that the change did not have a discriminatory purpose or effect and it denied preclearance.<sup>64</sup>

Since the 1982 reauthorization, much of the focus has been on the elections in the City of Greensboro, the county seat in Hale County, and the Voting Rights Act has played a major role. The city attempted to deannex property "shortly after it became known that subsidized public housing would be built on the property and that there was a strong perception in both the black and white communities that such housing would be occupied largely or exclusively by black persons. . ."<sup>65</sup> The Department of Justice objected to the change.

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<sup>60</sup> The federal examiner provisions, contained at Sections 6-9 and 13, apply to all the jurisdictions subject to the coverage formula in Section 4(a). Examiners have the authority to register voters and to monitor elections by utilizing federal observers. In the early years of the Act, examiners were used for both purposes. Over time, the registration function of the examiner has become used less frequently, to the point where it is not used at all today, whereas the monitoring function has continued. See United States Department of Justice, Voting Section, *About Federal Examiners and Observers*, available at [http://www.usdoj.gov/crt/voting/examine/activ\\_exam.htm](http://www.usdoj.gov/crt/voting/examine/activ_exam.htm) (last viewed July 5, 2006).

<sup>61</sup> *Hale County*, 496 F. Supp. at 1210.

<sup>62</sup> Letter from J. Stanley Pottinger to Sue W. Seale (Apr. 23 1976).

<sup>63</sup> *Hale County*, 496 F. Supp. at 1212-15.

<sup>64</sup> *Id.* at 1215-16.

<sup>65</sup> Letter from William Bradford Reynolds to John C. Jay, Jr. (October 21, 1985).

In 1987, the city's at-large method of electing its five county commissioners was challenged as part of the *Dillard* litigation. Though the city admitted to a Section 2 violation shortly after the litigation was filed, it took *ten* years for a final remedial plan to be implemented.<sup>66</sup> During the litigation, the Department of Justice objected to two different plans under Section 5 adopted by the city council on the grounds that, given the history of discrimination and the pattern of racially polarized voting, the plans limited black voters to the opportunity to elect two of the five council members even though blacks comprised 62 percent of the total population and 56 percent of the voting age population. The Department found that both plans fragmented the black population.<sup>67</sup> Ultimately, the plan ordered by the court was drawn by a court-appointed Special Master. Although the Special Master did not consider race at all when drawing the plan and instead followed "traditional redistricting criteria," the plan contained three districts where two-thirds or more of the population was black.<sup>68</sup>

Observers have played a critical role in elections in Hale County. Beginning in 1966, observers have monitored elections in Hale County twenty-two times, including twelve times since 1982. In the June 5, 2006, primary election, the Department of Justice sent observers to "ensure that the right of voters to participate in the primary election is not denied on the basis of their race."<sup>69</sup> Testifying before the National Commission on the Voting Rights Act, Alabama State Senator Bobby Singleton spoke of the significance of federal observers. In particular, he testified about a particularly intense election in 1992:

We had at that time, still, white minorities . . . in that community who were still in control of the electoral process, holding the doors, closing the doors on African-American voters before the . . . voting hours were over. I . . . had to go to jail because I was able to snatch the door open and allow people who was coming from the local fish plant . . . whom they did not want to come in, that would have made a difference in the . . . votes on that particular day. We've experienced that in the city of Greensboro . . . over and over again, and even in the county of Hale.<sup>70</sup>

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<sup>66</sup> *Dillard v. City of Greensboro*, 956 F. Supp. 1576 (M.D. Ala. 1997).

<sup>67</sup> Letter from John R. Dunne Nicholas H. Cobbs, Jr. (December 4, 1992); Letter from James P. Turner to Nicholas H. Cobbs, Jr. (January 3, 1994).

<sup>68</sup> *City of Greensboro*, 956 F. Supp. at 1581-82.

<sup>69</sup> U.S. Department of Justice, "Justice Department to Monitor Elections in Alabama, California, New Jersey, New Mexico and South Dakota," June 5, 2006, *available at* [http://www.usdoj.gov/opa/pr/2006/June/06\\_crt\\_347.html](http://www.usdoj.gov/opa/pr/2006/June/06_crt_347.html) (last viewed July 5, 2006).

<sup>70</sup> National Commission on the Voting Rights Act, *Protecting Minority Voters: The*

Singleton further testified about how critical observers were in enabling minority voters to elect a majority on most of the elected bodies in Hale County, including school board, county government, most city councils, as well as a black circuit court judge, black circuit clerk, and state representative.<sup>71</sup> Hale County exemplifies both the continuing persistence of voting discrimination against African Americans in Hale County and the success of Voting Rights Act in remedying and preventing that discrimination.

#### **Lancaster County, South Carolina**

In the years following passage of the Voting Rights Act of 1965, at-large elections were used in many jurisdictions covered by Section 5 where larger white populations voting as a bloc could submerge any minority voting power. Lancaster County was no exception.<sup>72</sup> In 1972, 1976, and 1984, Lancaster County adopted staggered terms for election of its at-large county board of education members and area boards of trustees.<sup>73</sup> The Department of Justice warned the County repeatedly that at-large elections in areas where racial bloc voting exists would be subject to Section 5 scrutiny, because this electoral system “limits the potential for black voters to participate effectively in the electoral process by reducing the ability of those voters to use single-shot voting.”<sup>74</sup> The County ultimately adopted a single-member system.<sup>75</sup>

Other election law changes in Lancaster County have also been met with Section 5 objections. Along with a host of other electoral changes, the city of Lancaster began requiring majority votes for judicially contested elections in 1976.<sup>76</sup> The changes were only submitted on October 25, 1982, and the Department of Justice objected in December to the majority-vote requirement, having already objected to an identical proposed change in 1978.

The city later experienced other Voting Rights Act problems when the NAACP filed a Section 2 lawsuit against it in 1989. Following a settlement, the city adopted a redistricting plan that expanded the city council’s size and changed the election system from a seven-member at-large electoral structure to a hybrid system, in which six of nine councilmembers were elected from single-member districts. The Department objected

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*Voting Rights Act at Work 1982-2005* 62-63 (2006).

<sup>71</sup> *Id.* at 63.

<sup>72</sup> The following discussion draws substantially on Ruoff & Buhl, *supra* note 3.

<sup>73</sup> *See id.* at 33; Letter from Wm. Bradford Reynolds to C. Havird Jones, Jr. (Apr. 27, 1984); Letter from J. Stanley Pottinger to Treva Ashworth (July 30, 1974).

<sup>74</sup> Letter from Wm. Bradford Reynolds to C. Havird Jones, Jr. at 1 (Apr. 27, 1984).

<sup>75</sup> Ruoff & Buhl, *supra* note 3, at 33.

<sup>76</sup> Letter from Wm. Bradford Reynolds to Paul S. Paskoff (Dec. 27, 1982).

the change, because the effect of the changes would be to reduce black representation on the council in favor of white councilmembers' incumbency.<sup>77</sup>

#### **Sumter County, South Carolina**

In Sumter County, the history of discrimination in voting is a long one.<sup>78</sup> The Sumter County Council instituted at-large elections in 1967, allowing white majorities to dominate where a single-member district system would have in all likelihood provided blacks some representation on the Council. The Council did not seek preclearance, and operated the at-large system until 1974. After passage of the 1975 Home Rule Act, Sumter changed its structure in accordance with the Act's designation of a Council-Administrator form with at-large elections. On December 3, 1976, the Department of Justice objected to implementation of the form, and an injunction was ultimately issued by the U.S. District Court for South Carolina, enjoining the at-large system.<sup>79</sup>

After several failed requests to the Attorney General for reconsideration of the Section 5 objection, the County managed to convince a three-judge panel that the requests for consideration were in fact preclearance requests, and that the Attorney General had failed to interpose an objection in time to stop the changes.<sup>80</sup> The Supreme Court rejected this argument and reversed the lower court's decision.

When, in 1984, the Council attempted to secure a declaratory judgment preclearing its adoption of at-large elections, the District Court of the District of Columbia rejected the proposed plan, citing the dearth of elected black officials under the at-large system—only one had been elected in the years in which it was in place. The Court held that “[a] fairly drawn single-member district plan for the Sumter County Council is more likely to allow black citizens to elect candidates of their choice in three of seven districts (or 42.8 percent of the representation on the Council).”<sup>81</sup> Among the Court's findings was a failure by the Council to show that “the legislature did not pass Act 371 in 1967 for a racially discriminatory purpose at the insistence of the white majority in Sumter County” or “that the at-large system was not maintained after 1967 for racially discriminatory purposes and with racially discriminatory effect.”<sup>82</sup> Thereafter, elections for the Council were single-member.

The racial composition of the Council had substantially changed by 2001, following the adoption of the single-member system. Three of its members were black, with Sumter County overall having a 47% black (and 49% non-Hispanic white) population. One district, District 7, had seen a particularly extreme demographic shift in the 1990s, and despite having a white elected official, was now 59% black. Redrawing the district, the

<sup>77</sup> Ruoff & Buhl, *supra* note 3, at 33.

<sup>78</sup> The following discussion draws substantially on Ruoff & Buhl, *supra* note 3.

<sup>79</sup> *See id.* at 17.

<sup>80</sup> *Blanding v. Dubose*, 509 F. Supp. 1334 (D.S.C. 1981).

<sup>81</sup> *County Council of Sumter County v. United States*, 596 F. Supp. 35, 37 (D.D.C. 1984).

<sup>82</sup> *Id.* at 38.

County reduced that majority of 59% to a minority of 49%, and the Department of Justice objected to the plan, finding it to be retrogressive.<sup>83</sup>

There were several attempts over the succeeding months to obtain preclearance, with public hearings to evaluate alternatives, all racially charged and to no avail. At one of these meetings, a white council member was heard to say that the objections were “about black power,” while another moved to appeal the decision to the Supreme Court, “because it was . . . imperative to defend the rights of Asian (.9 percent of the population) and Hispanic (1.8 percent of the population) minorities who would get no district.”<sup>84</sup> The Council ultimately remained without a plan until November 25, 2003, when a new plan was adopted. With a 55% black voting-age population, a black member was elected commissioner of District 7.<sup>85</sup>

#### **Waller County, Texas**

Prairie View, a majority-black city in Waller County, is home to Prairie View A&M University, a historically black institution of higher education. During the 1970s, when students wanted to vote, the County registrar made many attempts to stop them from doing so, contending they were not legally residents of the County. Stopping the students was especially important, because at the time, according to the 1970 Census, blacks had a slim majority of the County’s population, at 52.5%, and the proposed changes would exclude 2,000 blacks from voting.<sup>86</sup> Given that the 1970 Census put the population of Waller County just above 14,000 people (including those not eligible to vote),<sup>87</sup> eliminating the students would have drastically changed the racial dynamic of Waller County elections and maintained white control of Waller County’s elected positions. These tactics were struck down by a federal district court, which found the efforts to prevent students from voting violated the Fourteenth and Twenty-Sixth Amendments. The Court of Appeals affirmed, and the Supreme Court summarily affirmed in favor of the students.<sup>88</sup>

In the early 1990s, indictments of several students at Prairie View A&M were issued for “illegal voting”, but the indictments were subsequently dropped.<sup>89</sup> This was yet another

<sup>83</sup> Letter from Ralph F. Boyd, Jr. to Charles T. Edens (June 27, 2002).

<sup>84</sup> Ruoff & Buhl, *supra* note 3, at 18.

<sup>85</sup> *Id.* at 19.

<sup>86</sup> Letter from J. Stanley Pottinger to Hayden Burns (July 27, 1976).

<sup>87</sup> U.S. Census Bureau, *1970 Census of Population: Texas*, Vol. I, Part 45, at 28, available at

<http://www2.census.gov/prod2/decennial/documents/00496492v1p45s1ch02.pdf>.

<sup>88</sup> *Symm v. United States*, 439 U.S. 1105 (1979), *aff’g United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978) (holding unconstitutional the denial to Prairie View students of the presumption of bona fide residency extended to other Walker County residents).

<sup>89</sup> National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work 1982-2005* 65 (2006).

example of using misreadings of residency requirement technicalities to try to get around protection for minority voters.

Discrimination against blacks has survived through 2004 in Waller County. Two students from the University tried to run for local office in the March 2004 primary. One of them vied for a seat on the Walker County Commissioners' Court, which is the governing body of the County. Students at the University were threatened by the white criminal district attorney, who said he would prosecute as voting in that election as a felony. He withdrew these threats after the University's NAACP chapter and five students sued him, barely a month before the election. Five days after the lawsuit was filed, the Commissioners' Court voted to limit severely the hours of operation of the early-voting polling place closest to the University campus. With the primary falling during the students' spring break, this change had a disproportionate effect on them. This was no accident, and certainly not without precedent—using the academic calendar to prevent blacks in the University community from voting was first challenged in 1978, when school district elections were scheduled during summer vacation months.<sup>90</sup>

In response, the University student NAACP chapter filed a Section 5 enforcement action against Waller County for the change.<sup>91</sup> The County canceled the proposed changes, and with their voting rights restored by Section 5, over 300 students voted during the early voting period. The outcome was a victory for the student running in the primary, who would in all likelihood have lost otherwise.

Students are not the only blacks who have been confronted by resistance from some whites to their full participation in the political process. Although it was not the first time redistricting had been used to limit the election of black officials, 2001 was the most recent attempt to do so in Waller County. In 2001 the Department of Justice objected to several proposed changes that would have had retrogressive effects on minority voting strength, including redistricting plans, voting precinct changes, polling place switching and elimination, and early voting changes. In one precinct, the redistricting plan for county commissioner would have carved apart the politically cohesive group of blacks and Latinos that together had been electing their candidate of choice for the past five years, in close elections, over white candidates that received solid backing from white supporters. Without Section 5, the marginal success rate of black candidates in that precinct would have in all likelihood vanished under the proposed plan as soon as the next election.<sup>92</sup>

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<sup>90</sup> Letter from Drew S. Days III to Richard G. Sedgely (Mar. 10, 1978).

<sup>91</sup> See generally National Commission on the Voting Rights Act, *supra* note 89, at 65-66.

<sup>92</sup> Letter from J. Michael Wiggins to Denise Nancy Pierce (June 21, 2002).



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May 4, 2006

**Co-Sponsor Voting Rights Reauthorization and Amendments Act of 2006 (S. 2703)**

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**COMPLIANCE/ENFORCEMENT  
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**EXECUTIVE DIRECTOR**  
Walter J. Haddad

Dear Senator:

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, we write to vigorously support and urge you to co-sponsor S. 2703, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (VRARA). S. 2703 is critical to ensuring the continued protection of the right to vote for all Americans.

The Voting Rights Act (VRA) is considered by many to be our nation's most effective civil rights law. Congress enacted the VRA in direct response to evidence of significant and pervasive discrimination taking place across the country, including the use of literacy tests, poll taxes, intimidation, threats, and violence. By outlawing the tests and devices that prevented minorities from voting, the VRA put teeth into the 15<sup>th</sup> Amendment's guarantee that no citizen can be denied the right to vote because of the color of his or her skin. The VRA was initially passed in 1965 and has been renewed four times by bipartisan majorities in the U.S. House, and signed into law by both Republican and Democratic presidents. In the 41 years since its initial passage, the VRA has enfranchised millions of racial, ethnic, and language minority citizens by eliminating discriminatory practices and removing other barriers to their political participation. In doing so, the VRA has empowered minority voters and has helped to desegregate legislative bodies at all levels of government.

Throughout the 109<sup>th</sup> Congress, during ten oversight hearings that considered the ongoing need for the VRA, the House Judiciary Subcommittee on the Constitution found significant evidence that barriers to equal minority voter participation remain. The oversight hearings examined three of the VRA's key provisions that are set to expire in August of 2007: Section 5, which requires that certain jurisdictions with a history of discrimination in voting obtain federal approval prior to making any changes affecting voting, thus preventing the implementation of discriminatory practices; Section 203, which requires certain jurisdictions to provide language assistance to citizens who are limited-English proficient; and Sections 6 through 9, which authorize the federal government to send observers to monitor elections for compliance with the VRA.

The evidence gathered by the House subcommittee revealed continuing and persistent discrimination in jurisdictions covered by Section 5 and Section 203 of the VRA. The oversight hearings found that a second generation of discrimination has emerged that



serves to abridge or deny minorities their equal voting rights. Jurisdictions continue to attempt to implement discriminatory electoral procedures on matters such as methods of election, annexations, and polling place changes, as well as through redistricting conducted with the purpose or the effect of denying minorities equal access to the political process. Likewise, the oversight hearings demonstrated that citizens are often denied access to VRA-mandated language assistance and, as a result, the opportunity to cast an informed ballot. We are confident that the Senate Judiciary Committee hearings will further bolster the need to renew and restore the VRA.

S. 2703 is a direct response to the evidence of discrimination that was gathered by the subcommittee. It addresses this compelling record by renewing the VRA's temporary provisions for 25 years. The bill reauthorizes and restores Section 5 to its original congressional intent, which has been undermined by the Supreme Court in *Reno v. Bossier Parish II* and *Georgia v. Ashcroft*. The *Bossier* fix restores the ability of the Attorney General, under Section 5 of the Act, to block implementation of voting changes motivated by a discriminatory purpose. The *Georgia* fix clarifies that Section 5 is intended to protect the ability of minority citizens to elect their candidates of choice. Section 203 is being renewed to continue to provide language-minority citizens with equal access to voting, using more frequently-updated coverage determinations based on the American Community Survey Census data. The bill also keeps the federal observer provisions in place, and authorizes recovery of expert witness fees in lawsuits brought to enforce the VRA.

The right to vote is the foundation of our democracy and the VRA provides the legal basis to protect this right for all Americans. We urge you to support this critical civil rights legislation. To co-sponsor the VRARA, please contact Dimple Gupta, Chief Counsel in Senator Specter's office, at (202) 224-5225, [Dimple\\_Gupta@judiciary-rep.senate.gov](mailto:Dimple_Gupta@judiciary-rep.senate.gov); Kristine Lucius, Senior Counsel in Senator Leahy's office, at (202) 224-7703, [Kristine\\_Lucius@judiciary-dem.senate.gov](mailto:Kristine_Lucius@judiciary-dem.senate.gov); or Charlotte Burrows, Counsel in Senator Kennedy's office, at (202) 224-7878, [Charlotte\\_Burrows@judiciary-dem.senate.gov](mailto:Charlotte_Burrows@judiciary-dem.senate.gov). If you or your staff have any further questions, please feel free to contact Nancy Zirkin, LCCR Deputy Director, or Julie Fernandes, LCCR Senior Counsel, at (202) 466-3311.

Sincerely,

Wade Henderson  
Executive Director

Nancy Zirkin  
Deputy Director



LEAGUE OF WOMEN VOTERS®  
OF THE UNITED STATES

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Greenwich, Connecticut

May 9, 2006

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*Executive Director*  
**Nancy E. Tate**

To: Members of the U.S. Senate

From: Kay J. Maxwell, President

Re: Support S. 2703, Reauthorization of the Voting Rights Act

The League of Women Voters of the United States is pleased to endorse S. 2703, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006. We believe that the Senate should pass this legislation as drafted and we urge you to support and cosponsor this important civil rights bill.

The League of Women Voters has supported the Voting Rights Act and its reauthorization for decades. Since our founding in 1920, protecting and promoting the right of every citizen to vote has been a guiding principle of the League of Women Voters. The Voting Rights Act has institutionalized that principle by outlawing discriminatory practices in elections and protecting the rights of minority voters. Americans are proud of the Voting Rights Act and rely on it to protect the essential expression of our democracy, the citizen's right to vote.

As the Senate begins hearings on the reauthorization, we note that there is still significant evidence that there are major barriers to equal minority voter participation. Unfortunately, some minority voters still face obstacles to voting, whether from attempts to dilute the strength of minority voters through unfair redistricting or from the lack of bilingual ballots for citizens who are limited English proficient – the contemporary equivalent of the last century's literacy test.

As important provisions of the Voting Rights Act are set to expire in 2007, the League believes that it is critical that Congress reauthorize Section 5, the pre-clearance provision, Section 203, the language assistance provision as well as Sections 6 through 9, the observer provisions. These sections need to be reauthorized to continue to provide a strong deterrent and the necessary oversight of persistent voting rights violations.

Leagues and League members throughout the country will be engaging citizens and raising awareness about the importance of the Voting Rights Act. We urge you to cosponsor and strongly support S. 2703.

Statement  
United States Senate Committee on the Judiciary  
**TIME CHANGE--Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after  
LULAC v. Perry**  
July 13, 2006

**The Honorable Patrick Leahy**  
United States Senator , Vermont

Statement of Senator Patrick Leahy  
Ranking Member, Committee on the Judiciary

“Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after LULAC v. Perry”

Hearing before the Subcommittee on the Constitution,  
Civil Rights and Property Rights  
July 13, 2006

As we convene this hearing today, the House of Representatives is, after some delay, debating the House bipartisan bill to reauthorize the Voting Rights Act, a companion bill to the bipartisan bill we have been considering in the Senate, S. 2707.

The efforts in the House today have finally received the strong endorsement of the White House. In its Statement of Administration Policy released today, the Administration stated that not only is it “strongly committed to renewing the Voting Rights Act and therefore supports House passage of H.R. 9,” but also that it, “supports the legislative intent of H.R. 9 to overturn the U.S. Supreme Court’s 2003 decision in *Georgia v. Ashcroft* and its 2000 decision in *Reno v. Bossier Parish School Board*.”

This morning, we on the Senate Judiciary Committee sought to take up and report our bill. It has been on our agenda since June 22. It is time for us to act. I noted this morning that although the matter has been pending for several weeks, not a single amendment to the bill has been circulated or filed. I take that as a sign that our bipartisan bill, which 12 of the 18 Members of the Judiciary Committee have cosponsored, is ready for reporting by the Judiciary Committee.

I have been urging that the Voting Rights Act reauthorization bill be made a priority of the Judiciary Committee. I appreciate Chairman Specter’s willingness to invoke Committee Rule V to limit last minute amendments. I appreciate his willingness to schedule a special session next Wednesday devoted to Voting Rights Act reauthorization so that we can fulfill his commitment to report the bill to the Senate by July 20. We will work with the Republican and Democratic leaders of the Senate promptly to schedule this important matter for floor debate and get it done.

This afternoon's hearing reminds us of the continuing importance of the Voting Rights Act, as demonstrated most recently by the Supreme Court's decision in the Texas case. It is not strictly a hearing on the bill or even on reauthorizing the Voting Rights Act. When the Chairman agreed to this hearing two weeks ago, I understood that it would be a hearing about the recent Supreme Court decision in the LULAC v. Perry case. In that case the Supreme Court recognized the continued vitality of the Voting Rights Act and in accordance with the Voting Rights Act found that 100,000 Latino Americans had suffered illegal disenfranchisement by the Tom Delay-led redistricting scheme in Texas.

I hope that no one is using this hearing to delay completing our important work on legislation to reauthorize the Voting Rights Act. The Supreme Court's decision in the LULAC case did not question the constitutionality of the Voting Rights Act or limit congressional power to reauthorize the Act. The Supreme Court's failure to raise any constitutional concerns about the Voting Rights Act while holding the disenfranchisement of 100,000 Latino voters illegal is a good sign, a sign that any doubt about constitutionality of protecting fundamental rights like voting from discrimination has long been settled. No justice took the opportunity to take a swipe at the reauthorization of the Voting Rights Act. No justice questioned congressional power to provide for fairness as we have in the Voting Rights Act.

I agree with Chairman Specter on the importance of establishing a robust record so that our reauthorization can pass constitutional muster. With the Chairman's leadership, the Committee has done that. We have compiled thousands of pages of documentary evidence and heard the testimony of dozens of witnesses. The Supreme Court's finding that the right to vote of 100,000 Latino's was abridged in Texas in violation of the Voting Rights Act only further demonstrates the continuing need for the Act. If this is to be considered a hearing on reauthorization of the Voting Rights Act, then it is the 21st hearing we have had on reauthorization in the House and the Senate.

But this is not a hearing on reauthorization legislation. The Supreme Court's decision in LULAC did not involve any of the Voting Rights Act's expiring provisions. The Voting Rights Act reauthorization seeks to reauthorize three expiring provisions of the Voting Rights Act: Section 5, requiring preclearance of voting changes in certain states and jurisdictions; Section 203, which guarantees language assistance in certain jurisdictions; and Sections 6-9, which provide for federal examiners and observers to monitor elections. It also restores Congress' original intent behind Section 5. The Supreme Court's determination that Texas' redistricting plan violated the Voting Rights Act was decided under Section 2.

The LULAC case did not address pre-clearance under Section 5, or the standards used in pre-clearing voting changes. Our reauthorization bill clarifies that, under Section 5, a district must afford the minority community an equal opportunity to elect a candidate of choice, which can be accomplished-- but does not have to be-- by using a majority-minority district. It is not correct to claim, as some have done, that the Voting Rights Act reauthorization would require the creation of "majority-

minority districts.”

I want to thank our witnesses for testifying today. Professor Joaquin Avila is an Assistant Professor of Law at Seattle University School of Law and nationally recognized minority voting rights expert who served as President and General Counsel of MALDEF from 1982 to 1985 and has devoted his private practice exclusively to the protection of minority voting rights. Professor Sherrilyn Ifill is a civil rights lawyer and an Associate Professor of Law at the University of Maryland School of Law in Baltimore, Maryland, where she teaches civil procedure, constitutional law and an array of civil rights courses. Prior to teaching, she served as an Assistant Counsel at the NAACP Legal Defense and Educational Fund, Inc., where she litigated voting rights cases, in particular on behalf of African-American voters challenging the method of electing judicial officers in Texas, Louisiana and Oklahoma. Nina Perales is the Southwest Regional Counsel for MALDEF in San Antonio, Texas, directing MALDEF's litigation, advocacy and public education in Texas, New Mexico, Colorado and six additional southern and western states.

Ms. Perales, who specializes in voting rights litigation, including redistricting and vote dilution challenges, successfully argued the LULAC case before the United States Supreme Court. I commend each of them on their work and thank them for being with us today.

It is time to move forward with our bipartisan bill. Prior to the enactment of the Voting Rights Act, minorities faced major barriers to participation in the political process, through the use of such devices as poll taxes, exclusionary primaries, intimidation by voting officials, language barriers, and systematic vote dilution. We have made significant progress toward a more inclusive democracy but the obstacles to full enjoyment of the franchise have not been eliminated. Fortunately, instances of blatant denials of the right to vote are far less common, but the abridgment of the right is still a problem in some parts of the country. We should not let this historic Act sunset or permit backsliding merely because the obstacles have become more subtle. We owe it those who struggled so long and hard to transform the landscape of political inclusion so that all Americans could enjoy its bounty by reauthorizing this historic act without further delay.

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May 10, 2006

**Please Cosponsor the Voting Rights Act  
Reauthorization and Amendments Act of 2006**

Dear Senator:

On behalf of the Mexican American Legal Defense and Educational Fund (MALDEF), I am writing to vigorously support and urge you to cosponsor S. 2703, the Voting Rights Act Reauthorization and Amendments Act of 2006.

Throughout our Nation's history, opening the doors of the polling place to people who have been previously excluded has been the right thing to do. What started as a privilege reserved for white, property-owning males has become a right of citizenship for all men and women, without regard to wealth, race, or national origin. Forty years ago, Dr. Martin Luther King and freedom activists inspired Congress and President Johnson to enact the Voting Rights Act. Since then, the Voting Rights Act has made our democratic principles a reality.

Certain prohibitions in the Voting Rights Act are permanent law. Others, such as Sections 5 and 203 of the Act, must be periodically reexamined and renewed by Congress. Section 5 focuses extra attention upon election law changes in some states to prevent discriminatory changes from being implemented. Section 203 makes elections more understandable to citizens and removes unnecessary barriers to citizen participation.

The House hearings highlighted that while progress has been made under the VRA, much work remains to be done. The House record, over 8,000 pages in length, clearly demonstrates that significant discrimination in voting is still pervasive in jurisdictions covered by the expiring provisions of the Act.

S. 2703 addresses this compelling record by renewing the VRA's temporary provisions for 25 years. The bill reauthorizes and restores Section 5 to reflect its original congressional intent. Section 203 is being renewed to continue to provide language minority citizens with equal access to a meaningful voting process. The bill also keeps the federal observer provisions in place and authorizes recovery of expert witness fees in lawsuits brought to enforce the VRA.

I urge you to support this critical civil rights legislation by cosponsoring S. 2703. To cosponsor S. 2703, please contact: Dimple Gupta, Chief Counsel for the Constitution in Senator Specter's office, at (202) 224-5225, [Dimple\\_Gupta@judiciary-rep.senate.gov](mailto:Dimple_Gupta@judiciary-rep.senate.gov); Kristine Lucius, Senior Counsel in Senator Leahy's office, at (202) 224-7703,

[Kristine Lucius@judiciary-dem.senate.gov](mailto:Kristine_Lucius@judiciary-dem.senate.gov); Charlotte Burrows, Counsel in Senator Kennedy's office at 202-224-4031, [charlotte\\_burrows@judiciary-dem.senate.gov](mailto:charlotte_burrows@judiciary-dem.senate.gov); or, Gaurav Laroia, Counsel in Senator Kennedy's office, at (202) 224-7878, [Gaurav\\_Laroia@judiciary-dem.senate.gov](mailto:Gaurav_Laroia@judiciary-dem.senate.gov). If you or your staff has any further questions, please contact Peter Zamora, MALDEF Legislative Attorney, at 202-293-2828.

Sincerely,

A handwritten signature in black ink, appearing to read "John Trasviña". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Trasviña" written in a continuous, flowing script.

John Trasviña  
Interim President and General Counsel  
Mexican American Legal Defense and Educational Fund



**Educational Fund** empowering Latinos to participate fully in the American political process

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 Hon. **Jaao Zapata**  
*Florida State Representative*

**Executive Director**

Mr. Arturo Vargas

†Deceased

May 9, 2006

Dear Senator:

On behalf of the National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund, I write to express our support for S. 2703, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, and to urge you to co-sponsor this critical legislation. Swift passage of S. 2703, without amendment, is essential for the continued protection of the right to vote for all Americans, including Latino U.S. citizens. The NALEO Educational Fund is the leading nonprofit organization that facilitates full Latino participation in the American political process, from citizenship to public service. Our constituency includes the more than 6,000 Latino elected and appointed officials nationwide.

Latino U.S. citizens have experienced a long legacy of electoral discrimination that continues in many areas of this country. Congress recognized this fact in the Voting Rights Act of 1965 (VRA), when it removed language barriers to political participation by Puerto Rican citizens. Ten years later, Congress extended Section 5 and Section 203 coverage to "persons of Spanish Heritage" because of the extensive record of discrimination against Latinos in education and voting, including the use of literacy tests, poll taxes, intimidation, threats, and violence. These provisions have been a bulwark to stop efforts to deny Latino U.S. citizens of their fundamental right to vote and to participate at all levels of government. Since 1985, the number of Latino elected officials has grown by over 60 percent, from 3,147 to 5,041 in January 2005.

Despite the great strides Latinos have made under the VRA, we still have a long way to go. Although Latinos comprise 8.2 percent of all voting age U.S. citizens in the United States, Latinos comprise only 1 percent of all elected officials. The national registration and turnout rates of Latino voting age U.S. citizens continue to trail those of non-Latino Whites, by 17.3 percent and 7.9 percent, respectively. Language barriers pose significant obstacles for Latino voters in many parts of the United States, which are compounded by widespread violations of constitutional and statutory protections for voters who need assistance with navigating the complexities of the voting process. Many jurisdictions continue to purposefully erect barriers with the purpose or effect of denying Latino voters their first right of citizenship: an equal and meaningful voice in the democratic process.

Throughout the 109<sup>th</sup> Congress, during Senate and House oversight and legislative hearings considering the ongoing need for the VRA, there has been significant evidence that barriers to equal minority voter participation remain. The hearings have examined three of the VRA's key provisions that are set to expire in August of 2007: Section 5, which requires that certain jurisdictions with a history of discrimination in voting obtain federal approval prior to making any changes affecting voting, thus preventing the implementation of discriminatory practices; Section 203, which requires certain jurisdictions to provide language assistance to citizens who are not yet fully proficient in English; and Sections 6 through 9, which authorize the federal government to send observers to monitor elections for compliance with the VRA.

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Voting Rights Reauthorization and Amendments Act of 2006 (S. 2703)

Page 2

The evidence gathered during the hearings highlights the continuing need for the expiring provisions of the VRA. Two states (Arizona and Texas) and twelve political subdivisions of four additional states are covered under Section 5's approval requirement because of discriminatory practices against Latino voters. Texas leads the nation in discriminatory voting changes stopped by Section 5 and in the number of successful voting discrimination cases. The impact on the local level is clear in communities such as Bexar County (San Antonio), where Section 5 prevented the elimination of early polling places serving predominately Latino neighborhoods.

In addition, four states (Arizona, California, New Mexico, and Texas) and 65 political subdivisions in sixteen additional states are covered by Section 203 and are required to provide language assistance to Latino U.S. citizens who do not yet speak English proficiently enough to navigate the complexities of the voting process. Section 203 really makes a difference to these communities. In San Diego County, California, Latino registration was up 21% one year after the Department of Justice successfully sued the County for violating Section 203. The federal observer provisions have been a key part of enforcement of Sections 5 and 203, particularly in Arizona, California, Illinois, New Mexico, New York, and Texas.

S. 2703 is a direct response to the evidence of discrimination that has been gathered by Congress. It addresses this compelling record by renewing the VRA's temporary provisions for 25 years. The bill reauthorizes and restores Section 5 to its original congressional intent, which has been undermined by the Supreme Court in *Reno v. Bossier Parish II* and *Georgia v. Ashcroft*. The *Bossier* fix restores the ability of the Attorney General, under Section 5 of the Act, to block implementation of voting changes motivated by a discriminatory purpose. The *Georgia* fix clarifies that Section 5 is intended to protect the ability of minority citizens to elect their candidates of choice. Section 203 is being renewed to continue to provide language-minority citizens with equal access to voting, using more frequently-updated coverage determinations based on the American Community Survey Census data, which will help ensure that Section 203 remains responsive to the growth in the nation's Latino population. The bill also keeps the federal observer provisions in place, and authorizes recovery of expert witness fees in lawsuits brought to enforce the VRA.

The right to vote is the foundation of our democracy and the VRA provides the legal basis to protect this right for all Americans. The VRA helped fuel Latino political progress, by increasing the number of Latinos elected to serve in public office and enhancing opportunities for Latino voters to become full participants in the American political process. S. 2703 will now shape the future of our democracy, by making it stronger, more vital and responsive to all of our citizen's voices. We urge you to support this critical civil rights legislation. To co-sponsor S. 2703, please contact Dimple Gupta, Chief Counsel for the Constitution in Senator Specter's office, at (202) 224-5225, [Dimple\\_Gupta@judiciary-rep.senate.gov](mailto:Dimple_Gupta@judiciary-rep.senate.gov); Kristine Lucius, Senior Counsel in Senator Leahy's office, at (202) 224-7703, [Kristine\\_Lucius@judiciary-dem.senate.gov](mailto:Kristine_Lucius@judiciary-dem.senate.gov); Charlotte Burrows, Counsel in Senator Kennedy's office at (202) 224-4031, [Charlotte\\_Burrows@judiciary-dem.senate.gov](mailto:Charlotte_Burrows@judiciary-dem.senate.gov); or, Gaurav Laroia, Counsel in Senator Kennedy's office, at (202) 224-7878, [Gaurav\\_Laroia@judiciary-dem.senate.gov](mailto:Gaurav_Laroia@judiciary-dem.senate.gov). If you or your staff have any further questions, please feel free to contact Dr. James Tucker at (202) 546-2536, [jtucker@naleo.org](mailto:jtucker@naleo.org), or Rosalind Gold at (213) 747-7606 ext. 120, [rgold@naleo.org](mailto:rgold@naleo.org).

Sincerely,

  
Arturo Vargas  
Executive Director

**THE EXPERIENCE OF LATINO ELECTED OFFICIALS AND  
CIVIC LEADERS WITH VOTING DISCRIMINATION:  
THE CONTINUING NEED FOR THE TEMPORARY  
PROVISIONS OF THE VOTING RIGHTS ACT**

**Dr. James Thomas Tucker**

**July 2006**



### **Acknowledgments**

The NALEO Educational Fund and its staff are grateful to the 190 Latino elected and appointed officials and civic leaders who provided extensive information about their experiences with voting discrimination and the difference the Voting Rights Act makes in stopping it.

Our deepest appreciation for former NALEO Educational Fund staff members Susie Valenzuela and Jennifer Gill; Ms. Valenzuela placed hundreds of calls to members of NALEO's elected official constituency, encouraging them to respond to the survey. Ms. Gill also assisted with contacting survey respondents. We are also grateful for the work of Evan Bacalao, NALEO Educational Fund Research Associate, for his tireless efforts in helping to prepare the survey instrument, coding data, and providing invaluable insight into conducting this study; Jon Greenbaum, Director of the Voting Rights Project at the Lawyers' Committee for Civil Rights Under Law, for providing many helpful suggestions on survey questions and for his work on the early survey instrument; Rosalind Gold, Senior Director of Policy, Research and Advocacy for the NALEO Educational Fund, for her incalculable assistance on every facet of this study and her direct work with members of NALEO's constituency in regional strategy sessions and leadership conferences to encourage their responses; and Arturo Vargas, Executive Director of the NALEO Educational Fund, for his unyielding support for this project and the NALEO Educational Fund's work on reauthorization of the expiring provisions of the Voting Rights Act.

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## I. Executive Summary.

Latino voters have been protected under the permanent provisions of the Voting Rights Act since it was originally signed into law in August of 1965. Specifically, Latino voters were protected from voting discrimination under Section 2 of the Act. Spanish-speaking voters educated in Puerto Rico were entitled to receive election materials and assistance in Spanish under Section 4(e) of the Act. Federal courts also were given authority under section 3 of the Act to authorize federal observer coverage in jurisdictions where voting rights violations occurred.

In 1975, Alaska Native, American Indian, Asian, and Spanish language minority voters became protected under the Act's temporary provisions. Certain covered jurisdictions are required to provide language materials and oral language assistance in elections pursuant to Section 203 of the Act. In addition, many jurisdictions with large populations of Latino voters, including the entire states of Arizona and Texas and certain counties in California, Florida, and New York, became subject to the preclearance provisions of Section 5 of the Act. Under Section 5, all voting changes must be submitted to the Attorney General of the United States for approval before they are implemented, to prevent discrimination against minority voters. The federal observer provisions in Sections 6-9 of the Act have facilitated compliance and enforcement of these protections. Each of these provisions was renewed when President Bush signed the Voting Rights Act Reauthorization Act into law on July 27, 2006.

In order to assess the perspectives of Latino elected officials and civic leaders on the continuing need for coverage under the temporary provisions of the Voting Rights Act, the NALEO Educational Fund conducted a survey of its elected and appointed official constituents and civic leader stakeholders. The survey respondents provided substantial evidence of the continuing need for this coverage.

- 52.6 percent of surveyed Latino elected officials and civic leaders reported that they have personally experienced or observed discrimination in an activity related to running for or holding a public office.
- More than 30 percent of all respondents reported experiencing or observing discrimination in campaigning, appointments, racial or ethnic appeals, racially polarized voting, and redistricting.
- 52.0 percent of surveyed Latino elected officials and civic leaders reported that they have personally experienced or observed voting discrimination against Latinos or other minorities.
- Approximately one-quarter or more of all respondents reported experiencing or observing discrimination in voter assistance, voter challenges, checking in at the polling place, polling place locations and changes, and poll worker recruitment.

- 86.2 percent of surveyed Latino elected officials and civic leaders reported a need for Spanish-language assistance in public elections activities where they reside.
- Although most respondents indicated election materials are offered in Spanish, some indicated that some or all materials are not and less than half indicated that language assistance is available in Spanish at all stages of the elections process.
- Only 12.9 percent of surveyed Latino elected officials and civic leaders reported having experience with Section 5 submissions.
- Many Latino elected officials and civil leaders urged the United States Department of Justice to de-politicize the Section 5 preclearance process and to heed the recommendations of career lawyers over the decisions of political appointees.
- Only 18.3 percent of surveyed Latino elected officials and civic leaders reported that federal observers or monitors had been present for elections in their jurisdictions.
- Most Latino elected officials and civic leaders who had experience with federal observer coverage had favorable reports about its impact on minority voter participation.

In summary, while Latino voters have been able to make much progress under the temporary provisions of the Voting Rights Act, much work remains to be done. Examples of continuing discrimination and the exclusion of Latino voters provide compelling evidence for the twenty-five year extension of the expiring provisions of the Act.

**II. Survey Participants and Methodology.**

This survey assesses the perspectives of Latino elected and appointed officials and civic leaders about the continuing need for the three temporary provisions of the Voting Rights Act of 1965: Section 5 of the Act, which requires that certain jurisdictions with a history of voting discrimination submit any voting changes to the Attorney General of the United States for approval before they are implemented or enforced; Sections 6 through 9 of the Act, which authorize the Attorney General to deploy federal observers to certain jurisdictions to prevent voting discrimination, enforce compliance with the Act, and assess progress in jurisdictions under federal court orders; and Section 203 of the Act, which requires that certain jurisdictions provide language assistance to voters in their native languages, including Spanish.

The respondents are members of the constituency of the National Association of Latino Elected and Appointed Officials (NALEO). They include Latino elected and appointed officials from virtually every level of federal, state, and local government, as well as Latino civic leaders. The NALEO Educational Fund initially solicited its Latino elected and appointed official constituency and civic leaders stakeholders to participate in the survey. We then conducted targeted outreach to secure responses from a group of approximately 500 elected officials and stakeholders who had attended policy technical assistance sessions or expressed an interest in the Voting Rights Act. A total of 190 of individuals responded between February and late May 2006.

Figure 1: Number of Latino elected or appointed officials responding to survey, by State.

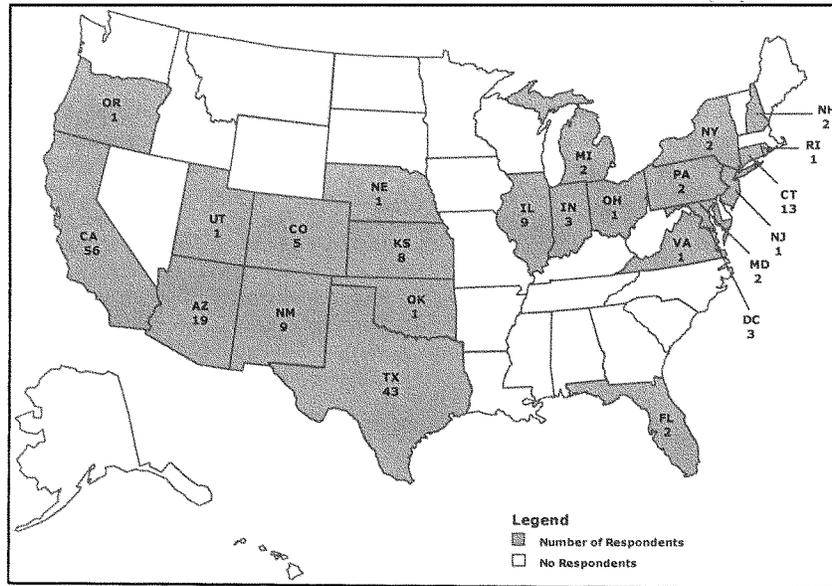


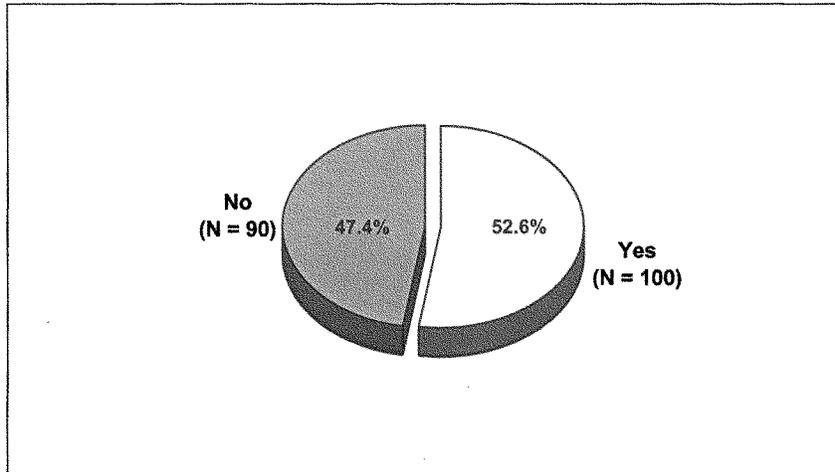
Figure 1 depicts the number of NALEO respondents, by state. The percentages generally are proportionate to the number of Latino elected officials in the identified states, with the greatest number of responses (over half) coming from California and Texas, where over half of all Latino elected and appointed officials serve in public office.

With the exception of approximately twenty-five responses, all of the surveys were completed through an online questionnaire available through an Internet link. A copy of the survey instrument is included as Appendix A to this report.

**III. Respondents Who Have Personally Experienced or Observed Discrimination in Running for Holding a Public Office.**

As Figure 2 indicates, a majority of the 190 respondents, 52.6 percent (N = 100), indicated that they had personally experienced or observed discrimination in an activity related to running for or holding a public office.

Figure 2: Elected officials reporting that they have personally experienced or observed discrimination in an activity related to running for or holding a public office.



There are several activities in which respondents indicated they had experienced discrimination. In many cases, respondents reported that they have both experienced and observed discrimination.

Figure 3: Types of activities related to running for or holding a public office for which elected officials reported they have personally experienced or observed discrimination.

Election Activity	Number Who Have Experienced	Number Who Have Observed	Number Who Have Both Experienced & Observed	Total	Percent of all Respondents
Campaigning	27	24	21	72	37.9%
Appointments	19	27	18	64	33.7%
Racial or ethnic appeals	22	22	17	61	32.1%
Racially polarized voting	20	19	19	58	30.5%
Redistricting/district boundaries	17	27	13	57	30.0%
Changes in power after election	15	21	17	53	27.9%
Candidate nomination process	11	28	11	50	26.3%
Candidate slating	9	25	11	45	23.7%
Candidate qualifying process	10	23	10	43	22.6%
Election rules or procedures	12	18	11	41	21.6%
Changes in procedure after election	9	18	11	38	20.0%
Method of election	5	21	10	36	18.9%
Other	9	9	7	25	13.2%

Campaigning was the most common activity for which discrimination was reported, with more than one-third (37.9 percent) reporting they had personally observed or experienced it. Some of this discrimination was by election officials, including a “double standard in how election laws and campaign laws are enforced.”<sup>11</sup> For example, another respondent reported that a limited-English proficient Latino circulator of a petition was told by Anglos that “her signatures were invalid (though they weren’t)” and they told her that she needed “to sign a withdrawal affidavit.”<sup>12</sup> In another jurisdiction, “dirty campaign tactics [are] utilized against Latinos and African-Americans.”<sup>13</sup> One respondent observed that discriminatory campaign activities are commonplace at “political forums, public events, dinners, etc.”<sup>14</sup> In other instances, a respondent noted discrimination occurred in a 2005 school board election,<sup>15</sup> while another reported they occurred “in countless city and school board elections during the past thirty years.”<sup>16</sup>

Some discriminatory campaigning activities include direct threats or intimidation. One respondent reported that public officials engaged in that conduct, including “overly aggressive police and fire involvement in political campaigns which leads to harassment of campaign workers and voters, especially those of different ethnicity and language ability.”<sup>7</sup> The respondent further reported:

Campaign workers for a Latino candidate were stopped and detained and asked for “papers.” Campaign workers were told that they could not get out the vote before 8 a.m. [Latino] voters were told that they had to put a sign in their lawn for a non-Latino candidate because it had a police insignia on it.<sup>8</sup>

Still another Latino official reported, “A school administrator approached a neighbor who had put up one of my signs in front of their house.”<sup>9</sup> In another instance, a respondent noted, “Individuals were threatened if they publicly came out in support of a candidate that was not of their particular group. Members of the community received threatening phone calls and [were told] that they were going to lose their jobs, etc.”<sup>10</sup> One respondent noted that after local police harassed election workers, it “was reported to DOJ” (the United States Department of Justice).<sup>11</sup>

Disparate appointment opportunities were the second most common discriminatory activity reported, including 33.7 percent of all respondents.<sup>12</sup> Many Latino elected officials reported that Latinos were completely shut out of official appointments, which were limited to non-Latinos.<sup>13</sup> In other cases, it is simply a “lack of effort ... to appoint a minority on the Board.”<sup>14</sup> For instance:

The people asked to apply for an appointment were mainly Anglo, until I started to convince some Hispanics to apply. The Board appointed a non-minority to keep the Board all Anglo.<sup>15</sup>

This discrimination continues even after Latinos are elected. As one official stated, “I have served in the city council for [several] years and have yet to be selected as mayor. [Another Latino] served ten years and yet was never vice mayor. The other ... [Anglo] members continue to pass the baton for mayor back and forth!”<sup>16</sup>

The nomination process, like appointments, also has been used to discriminate against Latinos. Over one-quarter of respondents, 26.3 percent, reported experiencing or observing discriminatory nominations.<sup>17</sup> Sometimes this discrimination is overt, such as a direct effort “10-15 years ago ... to keep a Latino from being nominated ... because of ethnicity.”<sup>18</sup> Often, it was less direct, with officials simply failing to consider Latino applicants.<sup>19</sup>

Candidate-slating also has caused many Latinos to be excluded from any meaningful opportunity to run for office, even if they can be nominated. Candidate-slating allows private individuals or groups to informally prepare a slate of preferred candidates before

the election, rendering the election itself nothing more than a formality. Almost one-quarter of respondents, 23.7 percent, reported discriminatory candidate-slating practices in their jurisdiction.<sup>20</sup> As one respondent explained:

Another form of discrimination against minority candidates is the practice of slating by majority incumbents. During my first attempt at ... office, the incumbents' slate did not allow me a fair and open chance at one of [the] available positions. In a more current example, the slate has chosen a neophyte, majority male candidate to fill an open position prior to a primary, closing the doors on a highly qualified Latina who has held public office and been a well-recognized state party official.<sup>21</sup>

Latino candidates often cannot get any endorsements from non-Latino organizations and have to rely exclusively on groups from their own ethnic communities.<sup>22</sup> Frequently, majority groups will unify “with the only reason being racial.”<sup>23</sup>

Nearly a third of respondents reported racial appeals during elections.<sup>24</sup> Local media made many of these appeals. One respondent decried “disrespectful and discriminatory” statements by a newspaper about the Latino mayor and city council, referring to them as the “tortilla republic.”<sup>25</sup> Several elected officials reported that local press and editorials contained “clearly racially prejudicial overtones,”<sup>26</sup> “very racial comments in print,”<sup>27</sup> “subtle racial appeals,”<sup>28</sup> “making the language and the background of the candidate an agenda item during campaigns,”<sup>29</sup> or simply refusing to provide any “positive information” on Latino candidates.<sup>30</sup>

In many jurisdictions, private citizens were no better than the local media in making racial appeals based upon Spanish heritage, surnames, or accents. One Latino elected official reported being told that “because of my last name I couldn't win my election” and “having been born in Mexico, I was questioned about my loyalty” to the United States.<sup>31</sup>

In another jurisdiction, “an Anglo candidate targeted only Anglo residents” and campaign workers stated “to voters, ‘don't you want someone like you to represent you’ in reference to an Anglo candidate.”<sup>32</sup> Elsewhere, discriminatory campaign mailers were used.<sup>33</sup> In addition, “there were several instances of candidates who spoke English with an accent and were belittled because of it.”<sup>34</sup>

Often, Anglo voters and Anglo elected officials acknowledged they were apprehensive about supporting a Latino candidate purely based upon their ethnicity or surname. Some of this disparate treatment included “the way someone is addressed or ... looked at when walking into meetings or forums.”<sup>35</sup> One Latino elected official observed, “My surname is not obviously Latino. [There was] some constituent discomfort when my ethnicity [was] revealed.”<sup>36</sup> Another respondent reported:

The power brokers in my community were surprised that I was so articulate because I have a Spanish name. People who didn't know me

assumed my qualifications were less than my rivals. I was constantly questioned about my qualifications when my rivals were not.<sup>37</sup>

Similarly, a Latina elected official stated, "Some community citizens were apprehensive on having a female Hispanic as board president."<sup>38</sup>

These racial appeals clearly had an impact on elections: 30.5 percent of all respondents reported racially polarized voting in their communities, with the overwhelming majority of these respondents also reporting the presence of racial appeals during election activities.<sup>39</sup> Sometimes, dilution of the Latino vote was facilitated by Anglos placing a second Latino candidate on the ballot.<sup>40</sup> As one elected official indicated, "Within the Democratic Party, all Latinos are given a primary election and hardly ever make it past the primary" because of racially polarized voting.<sup>41</sup> Another candidly noted, "The Board had always had a majority "White" board and wanted to keep it that way."<sup>42</sup>

Thirty percent of respondents reported redistricting or gerrymandering practices that discriminated against Latinos.<sup>43</sup> In some cases, these practices combined with racial bloc voting to defeat Latino candidates of choice:

[We] tried to change a white dominated county... The population breakdown in the 1970s and 1980s was slightly a Hispanic majority over white. The results of the election were overwhelmingly in favor of the white candidate. It was rumored that bloc voting was taking place as well as redistricting.<sup>44</sup>

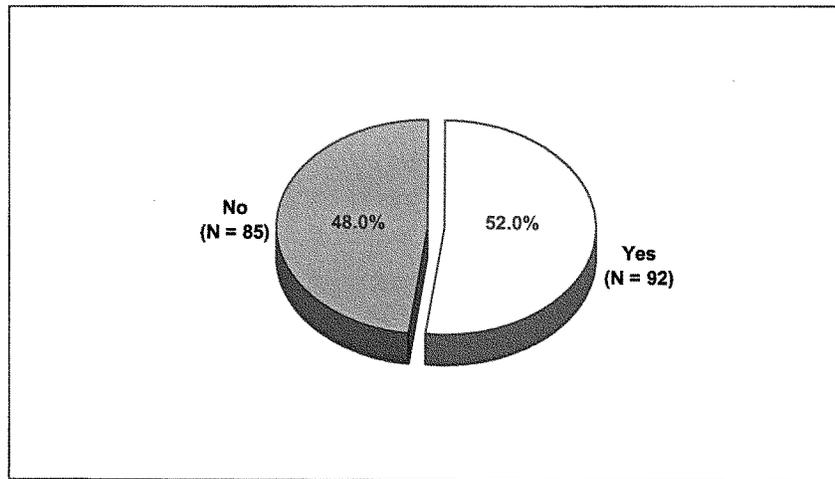
In many jurisdictions, redistricting reportedly trailed demographic changes. As one respondent noted, "Even though there was a huge increase in Latino population in [the] County, after 2000 Census/redistricting, there was no correlative increase in opportunity seats for Latinos at all jurisdictional levels."<sup>45</sup> Instead, "past redistricting has shored up incumbent territories by pushing Latinos into other districts."<sup>46</sup>

Finally, one in five respondents reported that when Latino candidates were successful in being elected, they were often faced with new rules or procedures that limited their voice on the elected body.<sup>47</sup> One respondent explained, "Once elected, the majority changes the rules to limit the powers of minority members. Also, minority elected officials receive higher scrutiny than non-minorities."<sup>48</sup>

#### IV. Respondents Who Have Personally Experienced or Observed Discrimination in Voting.

Figure 4 shows that nearly the same percentage of the 177 respondents, 52.0 percent (N = 92), indicated that they had personally experienced or observed discrimination against Latino or minority voters in a public election-related activity. Figure 5 depicts the types of activities in which respondents indicated they had experienced discrimination.

Figure 4: Elected officials reporting that they have personally experienced or observed discrimination against Latino or minority voters in any public election-related activities.



Voter assistance practices were the most frequently reported form of election-related discrimination, with nearly a third of respondents experiencing or observing it.<sup>49</sup> One respondent reported, “Poll watchers are mostly white older folks who will not take the time to help elderly Latinos.”<sup>50</sup> Another indicated, “Spanish-speaking voters [were] not given assistance when voting for the first time and [were] not ... allowed a friend to assist or translate.”<sup>51</sup> One respondent even said, “I was ordered to not use Hispanic information at the polling place in a community that is 75% Latino.”<sup>52</sup>

Much of the discriminatory voter assistance comes in the form of inadequate language assistance for limited-English proficient Latino voters who need to receive information in Spanish to cast a meaningful ballot. Many respondents indicated that local election officials failed to recruit, hire, and train enough bilingual poll workers.<sup>53</sup> Even where some language assistance is offered to Spanish speakers, it often is insufficient. One respondent stated:

The county does not always have Spanish speakers at early voting locations. There is a lot done to have Spanish speakers at the polls, but they are hard to recruit and not every location has one. There is room for improvement.<sup>54</sup>

In a few cases, inadequate language assistance is a thing of the recent past, such as one instance in which the respondent observed “a Hispanic citizen being turned away from the polling place” approximately four to six years ago, before proper assistance was available.<sup>55</sup>

Figure 5: Types of public election-related activities for which elected officials reported they have personally experienced or observed discrimination against Latino or minority voters.

Election Activity	Number Who Have Experienced	Number Who Have Observed	Number Who Have Both Experienced & Observed	Total	Percent of all Respondents
Voter assistance	6	36	13	55	31.1%
Voter challenges (citizenship, ID, etc.)	8	33	7	48	27.2%
Checking in at the polling place	8	24	15	47	26.6%
Polling place locations and changes	9	21	15	45	25.4%
Poll worker recruitment	9	24	11	44	24.9%
Voter registration	11	20	9	40	22.6%
Absentee voting	10	21	8	39	22.0%
Early or mail-in voting	10	20	8	38	21.5%
Casting a ballot at the polls	5	19	9	33	18.6%
Casting a provisional ballot	8	16	8	32	18.1%
Voter purges	6	15	6	27	15.3%
Counting of ballot	4	12	7	22	12.4%
Other	4	0	0	4	2.3%

Approximately twenty-seven percent of all respondents reported personally experiencing or observing discriminatory use of voter identification requirements or challenges to suppress the Latino vote.<sup>56</sup> According to one respondent, “I have seen challenges and other things based on race.”<sup>57</sup> For example, another respondent indicated, “I was asked if I was a citizen. Also, when I tried to drop my absentee ballot off, I was asked to show

ID.”<sup>58</sup> Even where voter identification requirements are facially neutral, they can still have a disparate effect on Latinos. One respondent reported, “Indiana now requires a picture ID from voters at the polls, and at the same time the state is closing Motor Vehicle offices in poor areas.”<sup>59</sup>

According to roughly one-quarter of all respondents, polling place locations and changes likewise have a disparate impact on Latino voters.<sup>60</sup> In some instances, this involved last-minute polling place changes that were not adequately communicated to Latino voters:

Polling places were moved right before the primary election in 2004, due to supposed [Americans with Disabilities Act] code compliances, which so happened to be in minority ethnic districts. [Election officials] sent out a “white” postcard stating the change, in small type. Our turnout was so bad that year.<sup>61</sup>

Likewise, a respondent noted, “People would go to the advertised place to vote and would find that their site was closed and directed to go to another polling place,” with “[t]he majority of polls closed ... in Latino populated areas of the city.”<sup>62</sup> In some cases, early voting locations have been changed at the last minute, having a negative impact on Latino voter participation.<sup>63</sup>

Untimely polling place changes can combine with discriminatory provisional voting procedures to disenfranchise Latino voters. Under the Help America Vote Act (HAVA), all states are required to adopt non-discriminatory procedures for ensuring that a voter whose name does not appear on a voter registration list is offered a “provisional ballot” that will be counted if the voter’s eligibility is later confirmed.

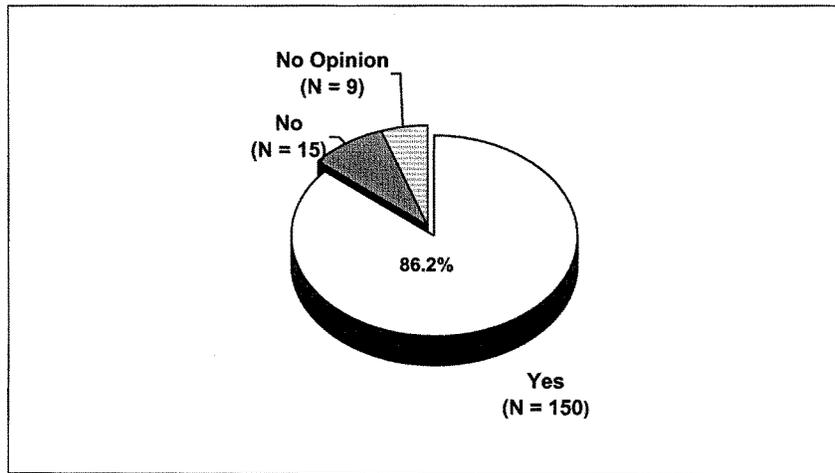
One respondent reported that when the names of Latino voters did not appear on the voter registration list, they “were not told of [the] ability to vote with a provisional ballot.”<sup>64</sup> This can be a particular problem for Latino voters who have recently moved and are eligible to vote.<sup>65</sup> Another respondent reported, “Folks were not allowed to vote once they were inside the building and 8 p.m. approached. They were not provided with provisional ballots when [they] requested one.”<sup>66</sup> In a separate instance, Latino voters were “told that they already voted when they hadn’t” and were “told that they no longer vote in the district when they do,” turning them away without a provisional ballot.<sup>67</sup>

Many respondents reported that election officials directly discriminated against Latino voters in their treatment at the polls. For example, “election officials purposely turn[ed] voters away by using delay tactics and rude behavior ... using derogatory language to intimidate and chase away voters.”<sup>68</sup> Frequently, “Latinos were questioned more thoroughly by poll workers.”<sup>69</sup> In addition, another respondent observed “minority voters having to wait longer than non-Latino voters to cast their ballots.”<sup>70</sup> Such discriminatory treatment at the polls severely impairs Latino voter participation.

**V. Respondents Reporting the Need for Spanish Language Assistance in their Communities, its Availability, and Quality.**

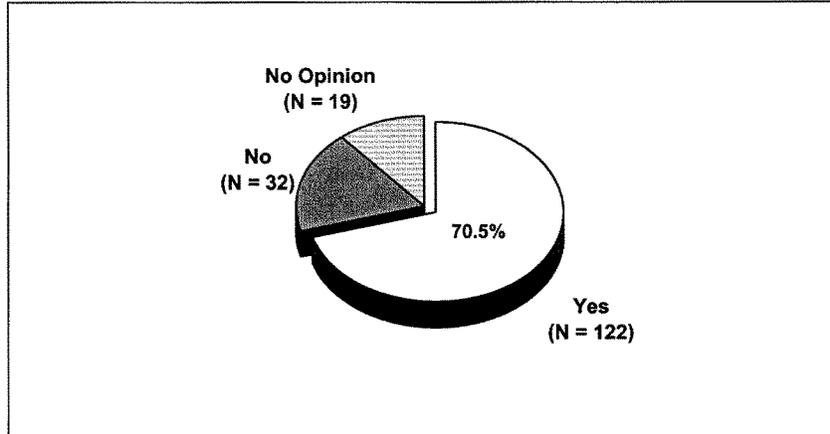
As depicted in Figure 6, an overwhelming majority of all respondents reported a need for Spanish language assistance in public elections in their communities. Among the 174 respondents, 86.2 percent (N = 150) indicated language assistance is needed, with only 8.6 percent (N = 15) saying there is no need; the remaining 5.2 percent (N = 9) expressed no opinion.

Figure 6: Elected officials reporting a need for Spanish-language assistance in public election activities where they live.



Many of these respondents indicated that the need for language assistance is unmet. As depicted in Figure 7, nearly one in five (N = 32) reported that their jurisdictions do not make all written public election-related materials available in Spanish. These materials include ballots,<sup>71</sup> sample ballots and voter information guides,<sup>72</sup> voting instructions,<sup>73</sup> voter registration materials,<sup>74</sup> signs,<sup>75</sup> and “most documents, if not all.”<sup>76</sup>

Figure 7: Elected officials reporting all written public election-related materials are available in Spanish where they live.



In several instances, only some elections materials are available in Spanish, often those provided by the Secretary of State. For example, one respondent observed, “only voter registration [forms] and I believe absentee ballots are in Spanish, everything else is not.”<sup>77</sup> Another respondent opined, “I don’t think we have enough written information in Spanish for the voters.”<sup>78</sup> In some cases, Spanish language materials are “poorly written” and “confusing.”<sup>79</sup> In other cases, respondents reported, “we do not have material in Spanish that fully explains the issue at hand, therefore making it difficult for a Spanish-dominant voter to make an informed decision.”<sup>80</sup>

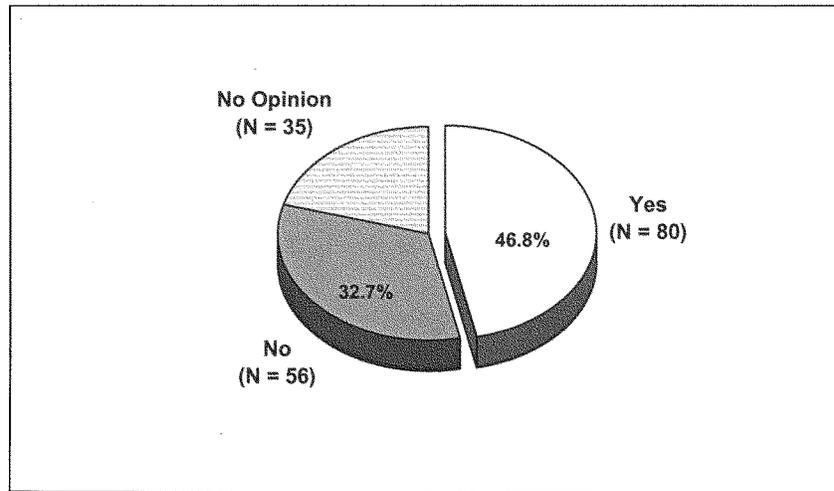
Federal language assistance requirements play a vital role in ensuring that Spanish materials and assistance are available to voters who need them. As one respondent explained:

Until bilingual ballots were federally mandated for my voting district with a high multilingual, multicultural immigrant population, no voting information was available to new voters in their own language, from voter registration forms and completion instructions, to the actual voting process. There were no bilingual judges or assistants to help first-time voters.<sup>81</sup>

Absent the language assistance provisions of the Voting Rights Act, many jurisdictions will not provide assistance to voters in Spanish.

Lack of oral language assistance presents an even greater obstacle to Spanish language voters. As depicted in Figure 8, fewer than half (N= 80) of the 171 respondents to this question indicated that oral language assistance is available at some stage of the public elections process. It is likely that a much smaller percentage of jurisdictions provide oral language assistance in Spanish at all stages of the public elections process.

Figure 8: Elected officials reporting that oral language assistance is available in Spanish at some stages of the public elections process where they live.



Numerous respondents indicated that although their respective jurisdictions had some bilingual election workers, they were not available “in all cases.”<sup>82</sup> Many respondents reported that there is “not enough oral language assistance throughout the public election process,”<sup>83</sup> including “at the city and county offices,”<sup>84</sup> “when they call the registrar of voters with a question,”<sup>85</sup> or “at the registration office in the clerk and recorder’s office.”<sup>86</sup> As a result, language assistance is unavailable for many election activities other than voting, including “registration, candidate information ... mail in voting and early voting.”<sup>87</sup>

Many respondents indicated that their jurisdiction does not have enough bilingual poll workers available to provide oral language assistance. One respondent explained, “It is available at certain locations. It is not available as a matter of doing business.”<sup>88</sup> Another respondent indicated, “Not all polling places have bilingual personnel to assist with voting, especially in the suburbs where many Latinos are moving into what used to be an all Anglo community.”<sup>89</sup> As one respondent observed, “It’s a hit and miss situation ... it just depends if the election clerks are bilingual, but there is no requirement for that.”<sup>90</sup> Another noted that the Latino community has to request bilingual poll workers

“for each election,” and if not, “they don’t provide for one.”<sup>91</sup> Student translators<sup>92</sup> and Spanish language media<sup>93</sup> can fill in some of these gaps. However, absent the availability of enough bilingual poll workers, some Spanish-speaking voters are turned away without being able to vote.<sup>94</sup>

Even where bilingual poll workers are available, they often are not proficient in Spanish. One respondent described the Spanish language skills of “those offering assistance” as “very often very low.”<sup>95</sup> Another observed, “If the person registering does not bring a translator, the individuals at the poll location speak barely broken Spanish,” and thereby can prevent the voter from casting a meaningful ballot.<sup>96</sup>

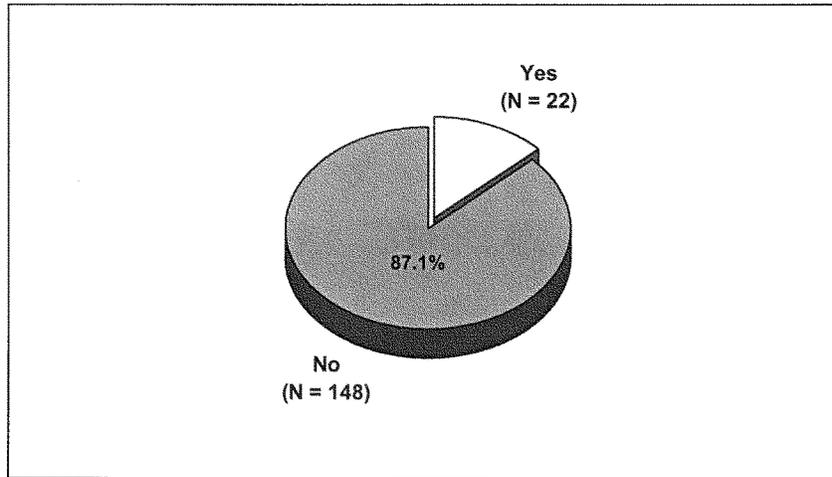
Elsewhere, Anglo election officials or voters prevent language assistance from being offered to voters in Spanish. One respondent stated, “Many individuals prefer directions in Spanish, but are not allowed to ask, and if they do they are told to just do their best.”<sup>97</sup> In another case, a respondent wrote, “People need assistance and when a ...site president or volunteer [from one political party] tries to help, the...Anglo...site president or volunteer [from the other political party] cries foul.”<sup>98</sup> These comments demonstrate that while much progress has been made under the language assistance provisions of the Voting Rights Act, jurisdictions and their election officials still need to make significant progress toward ensuring full compliance with those provisions.

#### **VI. Respondents Who Have Experience with the Submission of Voting Changes under Section 5 of the Voting Rights Act.**

Few of the respondents reported that they have experience with the submission of voting changes to the United States Department of Justice under Section 5 of the Voting Rights Act. As depicted in Figure 9, only 12.9 percent (N = 22) reported such experience. It is unclear why such a small percentage of Latino elected officials have experience with the Section 5 submission process, particularly because over half of all Latino elected officials reside in Section 5-covered jurisdictions. More study is needed on this issue.

All of the narrative comments received from respondents on the Section 5 process pertained to the recent Texas redistricting plan that was recently struck down by the United States Supreme Court in *LULAC v. Perry*.<sup>99</sup> One respondent echoed the findings of the Supreme Court (before the decision was issued), noting, “The changes in congressional voting districts in Texas were discriminatory to Latinos and divided communities that historically had voted together.”<sup>100</sup>

Figure 9: Elected officials reporting they have experience with the submission of voting changes to the United States Department of Justice under Section 5 of the Voting Rights Act.

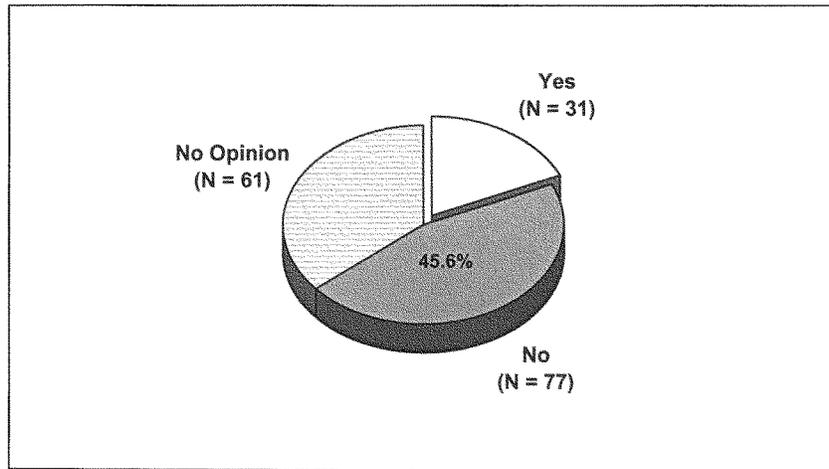


Largely as a result of the Texas redistricting case, many respondents specifically urged that the Section 5 submission process be de-politicized. One recommended, “Have a bi-partisan panel to remove the authority of political appointees overruling staff recommendations” at the Department of Justice.<sup>101</sup> Others agreed.<sup>102</sup> Another suggested “there should be a weighting system in place to put emphasis on career staff recommendations versus appointed staff overrides.”<sup>103</sup> As one respondent concluded, “Keep politics out of it and force the DOJ attorneys to adhere to laws, rules, policies, and procedures” regarding Section 5 submissions.<sup>104</sup>

#### **VII. Respondents Who Have Experience with Federal Observer Coverage under Sections 6-9 of the Voting Rights Act.**

Similarly, few respondents reported experience with the federal observer provisions of the Voting Rights Act. Figure 10 depicts that only 18.3 percent (N = 31) of the 169 respondents reported that federal observers or federal attorneys have monitored elections in their local area.

Figure 10: Elected officials reporting that federal observers or federal attorneys have monitored elections in their local area.



Many respondents who have experience with federal observers or federal attorneys indicated that they have made a difference in providing Latino voters with equal access to the election process. One respondent indicated “their presence made a difference because of respect for authority.”<sup>105</sup> Another respondent observed, “Monitors were placed in high minority voter polling sites. [They] assured people that minority families were welcome at the polls.”<sup>106</sup>

Some respondents indicated that they were unaware of the federal observer program and wanted more information about it.<sup>107</sup> These responses demonstrate that the United States Department of Justice needs to engage in more outreach to Latino and other racial, ethnic, and language minority communities about the program.

Several respondents requested that federal observer coverage be more accessible to Latino voters and that there be a reduction in “red tape and layers of bureaucracy” that inhibits their use.<sup>108</sup>

Some respondents suggested how jurisdictions be selected for observer coverage. One asked that coverage be directed at areas with high numbers of limited-English proficient Latino voters.<sup>109</sup> Others suggested that observer coverage be done randomly or unannounced to more accurately reflect what happens at the polls in their absence.<sup>110</sup> One respondent indicated, “Districts that have been mandated to reduce potential voting rights and access violations should be routinely monitored over three subsequent elections.”<sup>111</sup> Another respondent explained, with some exasperation, that elections were so bad in their jurisdiction, “Bring Jimmy Carter to observe. Really, we need a multinational observer team.”<sup>112</sup>

In some cases, respondents suggested that federal observers need to be used in the least intrusive way possible. As one respondent indicated, “Make sure the federal monitoring of public elections does not interfere [with] or intimidate Latino voters.”<sup>113</sup> Another stated, “If federal monitors are to be placed in traditional minority precincts, they should be sensitive to the community, [be] courteous, professional and not overzealous in conducting their duties as monitors.”<sup>114</sup> Most suggested that this could be achieved by hiring “the monitors from the local area,” “make sure they are minorities,” and “that they speak Spanish.”<sup>115</sup>

Others asked that federal observers and monitors include other activities in their observer coverage. As one explained:

Federal monitoring of public elections only observes if voters are being discouraged or intimidated from voting but they do not take into consideration the uneven distribution of voting machines in low-minority versus high-minority precincts. I’ve observed lines out the door and around the block in many minority dominant districts for lack of enough voting machines, while across town in suburban precincts no lines are observed. Federal monitors should also consider this distribution when determining if elections violations are occurring.<sup>116</sup>

Another suggested that federal observers “review the voting records in high Latino populated areas,” presumably to see if Latino and other minority voters were experiencing disproportionately low turnout.<sup>117</sup> Yet another respondent asked that federal observers and monitors “review the polling locations and the notices that are posted regarding polling locations. It is very difficult to find many voting sites on Election Day.”<sup>118</sup> One respondent also asked that federal observers be “more visible prior to the election” and share information on “rights and abuses” occurring at the polls.<sup>119</sup>

### **VIII. Conclusion.**

The Voting Rights Act has made the promise of our democracy a reality for millions of Latino citizens. This Nation has made great strides towards providing all citizens equal access to the political process, regardless of their race, color, ethnicity, or language ability. Nevertheless, as Congress recently found in renewing the expiring provisions of the Act for another twenty-five years, many barriers to participation remain for Latino voters. This survey of Latino elected and appointed officials and civic leaders corroborates the substantial record developed during the reauthorization process. It shows the direct impact the Voting Rights Act has on individual citizens who strive to exercise their fundamental right to vote. It also demonstrates that we still have a long ways to go before our democracy offers a full and fair opportunity for all of our citizens’ voices to be heard.

**Endnotes**

- <sup>1</sup> Respondent 153.
- <sup>2</sup> Respondent 355.
- <sup>3</sup> Respondent 269.
- <sup>4</sup> Respondent 301.
- <sup>5</sup> Respondent 353.
- <sup>6</sup> Respondent 17.
- <sup>7</sup> Respondent 139.
- <sup>8</sup> Respondent 139.
- <sup>9</sup> Respondent 304.
- <sup>10</sup> Respondent 141.
- <sup>11</sup> Respondent 316.
- <sup>12</sup> *See* Figure 3.
- <sup>13</sup> Respondents 347, 349, 354.
- <sup>14</sup> Respondent 204.
- <sup>15</sup> Respondent 291 (emphasis added).
- <sup>16</sup> Respondent 201.
- <sup>17</sup> *See* Figure 3.
- <sup>18</sup> Respondent 351.
- <sup>19</sup> Respondents 342, 347.
- <sup>20</sup> *See* Figure 3.
- <sup>21</sup> Respondent 359.
- <sup>22</sup> Respondents 56, 139, 335, 359.
- <sup>23</sup> Respondent 160.
- <sup>24</sup> *See* Figure 3.
- <sup>25</sup> Respondent 146.
- <sup>26</sup> Respondent 121.
- <sup>27</sup> Respondent 146.
- <sup>28</sup> Respondent 337.
- <sup>29</sup> Respondent 99.
- <sup>30</sup> Respondent 349.
- <sup>31</sup> Respondent 265.
- <sup>32</sup> Respondent 262.
- <sup>33</sup> Respondent 207.

- <sup>34</sup> Respondent 150.
- <sup>35</sup> Respondent 301.
- <sup>36</sup> Respondent 124.
- <sup>37</sup> Respondent 25.
- <sup>38</sup> Respondent 48.
- <sup>39</sup> *See* Figure 3.
- <sup>40</sup> Respondent 172.
- <sup>41</sup> Respondent 5.
- <sup>42</sup> Respondent 56.
- <sup>43</sup> *See* Figure 3.
- <sup>44</sup> Respondent 89.
- <sup>45</sup> Respondent 340; *see also* Respondent 337.
- <sup>46</sup> Respondent 124.
- <sup>47</sup> *See* Figure 3.
- <sup>48</sup> Respondent 360.
- <sup>49</sup> *See* Figure 5.
- <sup>50</sup> Respondent 162.
- <sup>51</sup> Respondent 139.
- <sup>52</sup> Respondent 372.
- <sup>53</sup> Respondents 5, 13, 27, 56, 83, 84, 316, 329, 354, 355; *see also* Figure 8.
- <sup>54</sup> Respondent 371.
- <sup>55</sup> Respondent 338.
- <sup>56</sup> *See* Figure 5.
- <sup>57</sup> Respondent 98.
- <sup>58</sup> Respondent 305.
- <sup>59</sup> Respondent 50.
- <sup>60</sup> *See* Figure 5.
- <sup>61</sup> Respondent 215.
- <sup>62</sup> Respondent 36.
- <sup>63</sup> Respondent 306.
- <sup>64</sup> Respondent 139.
- <sup>65</sup> Respondent 268.
- <sup>66</sup> Respondent 280.
- <sup>67</sup> Respondent 134.
- <sup>68</sup> Respondent 189.
- <sup>69</sup> Respondent 25.

- <sup>70</sup> Respondent 342.
- <sup>71</sup> Respondents 127, 190, 329.
- <sup>72</sup> Respondents 50, 96, 127, 271, 281, 305, 329, 372.
- <sup>73</sup> Respondent 26.
- <sup>74</sup> Respondent 96.
- <sup>75</sup> Respondent 141.
- <sup>76</sup> Respondent 255.
- <sup>77</sup> Respondent 233.
- <sup>78</sup> Respondent 334.
- <sup>79</sup> Respondent 254.
- <sup>80</sup> Respondent 189.
- <sup>81</sup> Respondent 359.
- <sup>82</sup> Respondent 344; *see also* Respondents 17, 48, 69, 162, 304, 316, 340, 342, 355, 371.
- <sup>83</sup> Respondent 288.
- <sup>84</sup> Respondent 127.
- <sup>85</sup> Respondent 305.
- <sup>86</sup> Respondent 5.
- <sup>87</sup> Respondent 307.
- <sup>88</sup> Respondent 301.
- <sup>89</sup> Respondent 339.
- <sup>90</sup> Respondent 306.
- <sup>91</sup> Respondent 280.
- <sup>92</sup> Respondent 139.
- <sup>93</sup> Respondent 335.
- <sup>94</sup> Respondent 201.
- <sup>95</sup> Respondent 254.
- <sup>96</sup> Respondent 141.
- <sup>97</sup> Respondent 26.
- <sup>98</sup> Respondent 80.
- <sup>99</sup> 126 S. Ct. 2594 (June 28, 2006).
- <sup>100</sup> Respondent 360.
- <sup>101</sup> Respondent 311.
- <sup>102</sup> Respondent 16.
- <sup>103</sup> Respondent 360.
- <sup>104</sup> Respondent 340.
- <sup>105</sup> Respondent 17.

- <sup>106</sup> Respondent 265.
- <sup>107</sup> Respondents 141, 146, 294.
- <sup>108</sup> Respondent 89.
- <sup>109</sup> Respondents 123, 372.
- <sup>110</sup> Respondents 52, 83, 99, 305.
- <sup>111</sup> Respondent 359.
- <sup>112</sup> Respondent 254.
- <sup>113</sup> Respondent 281.
- <sup>114</sup> Respondent 311.
- <sup>115</sup> Respondents 17, 41, 360.
- <sup>116</sup> Respondent 33.
- <sup>117</sup> Respondent 271.
- <sup>118</sup> Respondent 11.
- <sup>119</sup> Respondent 207.

Appendix A: Survey Instrument



Questions marked with a \* are required

**NALEO Educational Fund Voting Rights Act Questionnaire**

**This questionnaire will take approximately five minutes to complete.** The status bar at the top of the screen will inform you of how much of the questionnaire you have completed as you answer the questions.

As part of the effort to reauthorize the Voting Rights Act, we are seeking to document instances in which Latino and/or Spanish-speaking voters continue to experience discrimination in voting. In addition, we are seeking to document experiences where the Voting Rights Act has enhanced the electoral opportunities for Latino and/or Spanish-speaking voters. We would appreciate your assistance in our efforts. **Please take a few moments to complete this questionnaire.**

**All responses to this questionnaire will be kept strictly confidential.** We are asking for your contact information to allow us to keep you informed about our progress on reauthorization and, if necessary, to follow up with you about your responses.

Please complete each entry.  
Preferred Salutation

First Name \*

Last Name \*

Name of Elected or Appointed Office (e.g., State Representative, Mayor, Councilmember, School Board Member, School Board Trustee, etc.) \*

Name of Jurisdiction you Represent (e.g., Smallville, Middleton School District, etc.) \*

Business or Mailing Address

City

State \*

Postal Code

E-mail Address \*

Would you like to receive e-mail alerts from the NALEO Educational Fund? \*

Yes

No

As a Latino elected or appointed official or a candidate for office, have you **personally experienced or observed** discrimination in any activity related to running for or holding a public office?

Yes

No

In which of the following activities related to running for or holding a public office have you **personally experienced or observed** discrimination against other Latino or minority candidates? (check all that apply)

	Experienced	Observed	Both	Neither
Candidate nomination process	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Candidate qualifying process	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Appointments	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Campaigning	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Election rules or procedures	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Redistricting/district boundaries	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Method of election	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Candidate-slating	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Racial or ethnic appeals	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Changes in power after election	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Changes in procedure after election	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Racially polarized voting	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

For "other" discrimination, please specify.

▲

▼

Please describe the circumstances of the discrimination you identified above.

Have you **personally experienced or observed** discrimination in any public election-related activities?

Yes

No

In which of the following public election-related activities have you **personally experienced or observed** discrimination against Latino or minority voters? (check all that apply)

	Experienced	Observed	Both	Neither
Poll worker recruitment	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Voter registration	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Early or mail-in voting	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Absentee voting	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Voter purges	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Polling place locations and changes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Checking in at the polling place	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Casting a provisional ballot	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Voter assistance	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Voter challenges (citizenship, ID, etc.)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Casting a ballot at the polls	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Counting of ballot	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Other (please specify)

- 

For "other" discrimination, please specify.



Please describe the circumstances of the discrimination you identified above.



Is there a need for Spanish-language assistance in public-election activities where you live?

- Yes  No  Do not know

Are all **written public election-related materials** (voter registration materials, sample ballots, absentee ballots, publicity, signs, forms, ballots, etc.) available in Spanish where you live?

- Yes  No  Do not know

Please describe the **written public election-related materials** that are not available in Spanish where you live:



Is **oral language assistance** available to voters who need assistance in Spanish at any stage of the public elections process (registration, at election office, at polling place, etc.) where you live?

- Yes                       No                       Do not know

Please describe any stages of the public elections process for which **oral language assistance** is not available to voters who need assistance in Spanish:

Do you have any experiences with the submission of voting changes to the United States Department of Justice under Section 5 of the Voting Rights Act?

- Yes     No

Do you believe that any of these voting changes discriminated against Latinos or other minority voters?

- Yes                       No                       Do not know

Did the United States Department of Justice object to any of the voting changes that you believe were discriminatory?

- Yes                       No                       Do not know

Please describe the circumstances of the discrimination you identified above.

Did the United States Department of Justice approve/preclear any of the voting changes that you believe were discriminatory?

- Yes       No       Do not know

Please describe the circumstances of the precleared change(s) identified above:



Please provide any suggestions on how to improve the Section 5 preclearance process:



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Have federal observers or federal attorneys monitored elections in your local area?

- Yes       No       Do not know

Please describe the circumstances of federal observer or federal attorney coverage identified above, including what difference, if any, the coverage made:



Have you ever requested to have federal observers or federal attorneys monitor an election?

Yes

No

Were federal observers or federal attorneys sent to monitor the election?

Yes

No

Do not know

Please provide any suggestions on how to improve federal monitoring of public elections:



Please contact [rgold@naleo.org](mailto:rgold@naleo.org) if you have any questions regarding this survey.



*ASIAN AMERICANS AND REAUTHORIZATION OF THE VOTING RIGHTS ACT*

*Glenn D. Magpantay &  
Nancy W. Yu*

## ARTICLES

## ASIAN AMERICANS AND REAUTHORIZATION OF THE VOTING RIGHTS ACT

Glenn D. Magpantay & Nancy W. Yu<sup>1</sup>

### I. INTRODUCTION

In 2007, certain provisions of the federal Voting Rights Act will expire unless Congress reauthorizes them.<sup>2</sup> These include the provisions for language assistance (Section 203)<sup>3</sup> and enforcement (Section 5).<sup>4</sup> Asian Americans, like African Americans and Latinos, continue to face voting discrimination and grow in population. The Voting Rights Act's expiring provisions have helped to ensure that Asian Americans, and other racial and ethnic minorities, can fully exercise their right to vote. This article will review Section 203 and will discuss strengthening the provision as Congress considers reauthorization. The goal is to ensure that all Americans, particularly those who have suffered a legacy of discrimination, can fully participate in the political franchise.

### II. BACKGROUND

#### A. *Asian Americans in the United States*

Asian Americans are one of the fastest-growing minority groups in the nation, estimated to number almost twelve million.<sup>5</sup> More and more are becoming U.S. citizens through naturalization and are registering to vote. Almost half (43%) of all Asian Americans 18 or over are limited English

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2. The Voting Rights Act is codified at 42 U.S.C. §§ 1973-1973aa-6 (2000).

3. § 1973aa-1a.

4. § 1973c.

5. Census 2000 identified 11,898,828 individuals who are of Asian heritage. U.S. CENSUS BUREAU, CENSUS 2000 PHC-T-1, TABLE 3: "POPULATION BY RACE ALONE, RACE IN COMBINATION ONLY, RACE ALONE OR IN COMBINATION, AND HISPANIC OR LATINO ORIGIN, FOR THE UNITED STATES: 2000" (2001), available at <http://www.census.gov/population/www/cen2000/phc-t1.html>. Asian American growth since 1990 is 72.2% (a "maximum" number as identified by the census report). U.S. CENSUS BUREAU, CENSUS 2000 PHC-T-1, TABLE 4: "DIFFERENCE IN POPULATION BY RACE AND HISPANIC OR LATINO ORIGIN, FOR THE UNITED STATES: 1990 TO 2000" (2001), available at <http://www.census.gov/population/www/cen2000/phc-t1.html>.

proficient<sup>6</sup> and eighty-one percent speak a language other than English in their homes.<sup>7</sup> Sixty-six percent of Asian Americans are citizens, most of whom (53%) acquired citizenship through naturalization.<sup>8</sup>

Because Asian Americans are often newly naturalized immigrants, they are typically “unfamiliar with the American electoral process, having come from Asian countries with political systems very different from [that of] the United States and which may even lack a tradition of voting.”<sup>9</sup> They often do not understand even basic political procedures, such as the need to register by a certain date in order to be eligible to vote in particular elections, the importance of enrolling in a political party in order to vote in primaries, and how to operate voting machines.<sup>10</sup>

For example, the Chinatown Voter Education Alliance found that in 1982, 35.2% of Chinatown voters, as compared to 18.9% of voters outside of Chinatown, went to the polls but did not vote – or mistakenly lost their votes through inadvertence – once they were in the voting booths. Many of these defects could [have been] remedied by providing bilingual materials.<sup>11</sup>

Special efforts are needed to prepare Asian American voters to fully participate in elections.

Moreover, economically disadvantaged Asian Americans face additional barriers to the free exercise of the right to vote.<sup>12</sup> In Chinatown, New York, for example, many Asian Americans are poor or working class, employed in restaurants and garment factory sweatshops. The struggle for day-to-day survival severely reduces their ability to involve themselves in the political process, which seems removed from their daily lives.<sup>13</sup> Ballots, voting materials, and poll workers conversant in Asian languages greatly facilitate Asian American access to the vote.

Since 1988, the Asian American Legal Defense and Education Fund (AALDEF) has conducted nonpartisan multilingual exit polls of Asian Americans and monitored elections to document instances of anti-Asian voter disenfranchisement.<sup>14</sup> In 2004, AALDEF expanded its multilingual

6. Defined as percentage of Asian Americans 18 or over who do not speak English only or English “very well.” U.S. CENSUS BUREAU, CENSUS 2000 SUMMARY FILE 3, TABLE PCT62D: “AGE BY LANGUAGE SPOKEN AT HOME BY ABILITY TO SPEAK ENGLISH FOR THE POPULATION 5 YEARS AND OVER” (2001), available at <http://www.census.gov/Press-Release/www/2002/sumfile3.html>.

7. *Id.*

8. U.S. CENSUS BUREAU, CENSUS 2000 SUMMARY FILE 3, TABLE PCT63D: “PLACE OF BIRTH BY CITIZENSHIP STATUS” (2001) available at <http://www.census.gov/Press-Release/www/2002/sumfile3.html>.

9. *Language Assistance Provisions of the Voting Rights Act, Hearing on S. 2236 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong. 286 (1992) [hereinafter *1992 Hearings*] (statement of Margaret Fung, Executive Director of the Asian American Legal Defense and Education Fund, on file with author); See also S. REP. NO. 102-315, at 12 (1992).

10. *1992 Hearings*, *supra* note 9, at 12 (statement of Margaret Fung).

11. *Id.*

12. THE COALITION FOR ASIAN AMERICAN CHILDREN AND FAMILIES, HALF-FULL OR HALF-EMPTY? HEALTH CARE, CHILD CARE, AND YOUTH PROGRAMS FOR ASIAN AMERICAN CHILDREN IN NEW YORK CITY (1999).

13. *1992 Hearings*, *supra* note 9, at 8-9 (statement of Margaret Fung).

14. For a full review of AALDEF’s exit poll and election monitoring activities, see Glenn D. Magpantay, *Ensuring Asian American Access to Democracy in New York City*, 2 AAPI NEXUS 87 (2004).

exit poll to 23 cities in 8 states and surveyed almost 11,000 Asian American voters.<sup>15</sup> It was the largest survey of its kind. The poll found that 41% of Asian American voters were limited English proficient.<sup>16</sup> In prior polls focused on New York City, AALDEF found that almost 70% of Chinese Americans and 80% of Korean Americans were limited English proficient.<sup>17</sup>

### B. History of Voting Discrimination

Over the past 18 years, AALDEF's election monitoring efforts have found that Asian Americans have had to overcome a series of discriminatory barriers to exercise their right to vote.<sup>18</sup> Many of these barriers were very similar to the forms of discrimination against language minority voters that Congress found in 1975.<sup>19</sup> The same types of voting discrimination present in 1975 continue to this day.

Through its poll monitoring efforts, AALDEF has found evidence of rude and hostile behavior by poll workers toward Asian American and limited English proficient voters, as well as racist remarks targeted against these voters.<sup>20</sup> In one such instance, a poll site supervisor in Richmond Hill, Queens, NY said: "I'll talk to [Asian voters] the way they talk to me when I call to order Chinese food," which was then followed with random English phrases with a mock Chinese accent.<sup>21</sup> Another site supervisor in Borough Park, Brooklyn, NY asked: "How does one tell the difference between Chinese and Japanese?" and brought her fingers to each side of her eyes and moved her skin up and down.<sup>22</sup> A poll worker in Edison, NJ carried on stating: "If you're an American, you better lose the rest of the [Asian] crap." A poll worker in Falls Church, VA commented to other poll workers, after he offered candy to a Pakistani American voter who politely

15. AALDEF, THE ASIAN AMERICAN VOTE 2004: A REPORT ON THE MULTILINGUAL EXIT POLL IN THE 2004 PRESIDENTIAL ELECTION (2005) [hereinafter AALDEF ASIAN AMERICAN VOTE 2004 REPORT].

16. *Id.* at 5.

17. ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2002 ELECTIONS IN NYC: AN ASSESSMENT OF NEW YORK CITY COMPLIANCE WITH THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT (2003) [hereinafter AALDEF ELECTION 2002 REPORT] at 4.

18. *Diaz v. Silver*, 978 F. Supp. 96, 101 (E.D.N.Y. 1997), *aff'd mem.*, 522 U.S. 801 (1997) (citing Affidavit of Michael Shen at ¶ 25); ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2004 ELECTIONS: LOCAL COMPLIANCE WITH THE VOTING RIGHTS ACT AND HELP AMERICA VOTE ACT (HAVA) IN NY, NJ, MA, RI, MI, IL, PA, VA (2005) [hereinafter AALDEF ELECTION 2004 REPORT]; ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2003 ELECTIONS IN NYC: AN ASSESSMENT OF THE NEW YORK CITY BOARD OF ELECTIONS COMPLIANCE WITH THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT (2004) [hereinafter AALDEF ELECTION 2003 REPORT].

19. S. REP. NO. 94-295, at 25-27 (1975), as reprinted in 1975 U.S.C.C.A.N. 774, 792-93. These incidents are the basis from which Congress enacted the Language Assistance Provisions of the Voting Rights Act, see discussion *infra*.

20. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 16; AALDEF ELECTION 2003 REPORT, *supra* note 18, at 6; S. REP. NO. 94-295, *supra* note 19, at 26 (finding intimidation at the polls).

21. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 16.

22. *Id.*

declined in observance of Ramadan: "If you think certain cultures are weird, you should read about [Muslims]. They're really weird."<sup>23</sup>

AALDEF's poll monitoring efforts have also uncovered inappropriate or racially disparaging remarks made by elected officials and other voters.<sup>24</sup> In one such instance, several white voters at a poll site in Jackson Heights, Queens, NY yelled at Asian Americans, saying: "You all are turning this country into a third-world waste dump!"<sup>25</sup> A Democratic Party representative came to a poll site in Fort Lee, NJ and publicly claimed that there were no legitimate Korean American voters in the district and that the Korean American voters coming to vote were not "from here."<sup>26</sup> In Edison, NJ, voters made a litany of racist comments about how Asian Americans were not, or should not be, American citizens.<sup>27</sup>

Some Asian American voters have also complained that they were treated differently, sometimes with more discourtesy, than white voters.<sup>28</sup> Election officials in Boston, MA reported that poll workers at one site segregated voters by race and made minority voters form one line apart from white voters in order to vote.<sup>29</sup> They claimed that 'separate but equal' lines for those who were limited English proficient would speed up the voting process for others.<sup>30</sup> A poll worker in Jackson Heights, Queens, NY approached AALDEF's poll monitor to demand that he tell Asian American voters to vote faster because "one of his people" was waiting to vote.<sup>31</sup> Another poll worker blamed Asian American voters for holding up the lines saying: "You Oriental guys are taking too long to vote." Asian American voters complained that they felt unduly rushed to vote.<sup>32</sup>

Poll workers discouraged Asian Americans from voting and even tried to turn them away.<sup>33</sup> At one poll site in Williamsburg, Brooklyn, NY, a Chinese voter's name was inadvertently not listed in the book of registered voters and so the poll worker tried to turn him away.<sup>34</sup> Although the voter could have voted by provisional ballot,<sup>35</sup> the poll worker denied this request and argued that the voter should not be allowed to vote.<sup>36</sup> At other poll sites in Palisades Park and Fort Lee, NJ, Korean American voters com-

23. *Id.*

24. S. REP. NO. 94-295, at 26 (reporting on outright exclusion and intimidation at the polls).

25. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 16-17.

26. *Id.*

27. *Id.*

28. S. REP. NO. 94-295, at 26 (citing denial of ballot by failing to locate voters' names on precinct lists).

29. Meeting with Geraldine Cuddyer, Chair, Boston Election Comm., and Michelle Tassinari, Legal Counsel, Mass. Sec'y of State, with Glenn Magpantay, AALDEF, in Boston, Mass. (April 26, 2005). The U.S. Department of Justice brought suit against the City of Boston for such discriminator treatment. *United States v. City of Boston*, Civ. 05-11598 WGY (D. Mass. 2005).

30. *Id.*

31. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 17.

32. *Id.*

33. S. REP. NO. 94-295, at 26 (noting "memories of past discourtesies . . . may compound the problems for many language minority voters.").

34. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 17.

35. Provisional ballots are an alternative method of ballot-casting that are available in special circumstances. These ballots allow voters to cast votes when their names do not appear on lists of eligible voters located at poll sites. Help America Vote Act § 302, 42 U.S.C. § 15482 (2002).

36. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 17.

plained that poll workers were impatient towards first-time voters, and were rude, hostile, and unhelpful in giving voting instructions.<sup>37</sup>

Earlier in 2005, shortly before the New Jersey primary elections, two talk radio hosts on 101.5 FM in New Jersey ("The Jersey Guys") made several racist remarks about a Korean American candidate for mayor in Edison, NJ.<sup>38</sup> Speaking in an incoherent, mock-Asian accent, they commented that the candidate was "capitalizing on the rapid growth of the Asian community in Edison. . ." And, in response to a caller's statement that "Indians have taken over Edison," responded: "It's like you're a foreigner in your country, isn't it?" Federal observers reported that a poll worker said that when a Gujarati or Hindi-speaking voter appeared, she would "send them to the nearest gas station."<sup>39</sup>

Asian American voters encountered a number of other voting difficulties<sup>40</sup> in addition to these inappropriate and racist remarks which created intimidating and hostile voting environments.

Just like African American and Latino voters in Florida in 2000, many Asian Americans in 2004 were turned away from poll sites because their names were missing from lists of registered voters.<sup>41</sup> This was often due to the faulty processing or mishandling of voter registration forms by election administrators.<sup>42</sup> Under the Help America Vote Act, these voters had the right to vote by provisional ballot to preserve their votes.<sup>43</sup> But poll workers did not offer these ballots to voters or, in some cases, denied voters this right. Voters were simply turned away.<sup>44</sup> Even when provisional ballots were offered, many were not counted.<sup>45</sup>

Identification checks are not required to vote in most jurisdictions,<sup>46</sup> however, poll workers racially profiled Asian American voters and required them to prove their identities, verify their addresses, and sometimes even produce naturalization certificates.<sup>47</sup> There is no evidence that any white voters were ever required to provide naturalization certificates in order to vote.

Asian Americans were also given inadequate notice of their poll site assignments, or their site assignments were suddenly changed.<sup>48</sup> On Election Day, voters were often redirected, sometimes wrongly, to other poll

37. *Id.*

38. S. REP. NO. 94-295, at 26.

39. *Oversight Hearing on the Voting Rights Act: Section 203-Bilingual Election Requirements, Part I: Before the Subcomm. on the Constitution Of the H. Comm. on the Judiciary 109th Cong. 4 (2005) [hereinafter 2005 Hearings]* (statement of Margaret Fung, Executive Director, AALDEF, on file with author); Jerry Barca, *Feds to Watch Edison Vote*, NEW BRUNSWICK HOME NEWS TRIBUNE, Nov. 2, 2005.

40. S. REP. NO. 94-295, at 26.

41. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 17-18; AALDEF ELECTION 2003 REPORT, *supra* note 18, at 5, 14-15; S. REP. NO. 94-295, at 26.

42. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 17-18.

43. Help America Vote Act § 302, 42 U.S.C. § 15482 (2002).

44. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 17-18; AALDEF ELECTION 2003 REPORT, *supra* note 18, at 5, 14-15; S. REP. NO. 94-295, at 26 (finding denials of ballots).

45. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 17-18.

46. *See* Help America Vote Act § 303.

47. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 20.

48. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 21, AALDEF ELECTION 2003 REPORT, *supra* note 18, at 10-11; S. REP. NO. 94-295, at 26 (discussing locations of poll sites).

sites only to be sent back to their original sites.<sup>49</sup> Many who had voted in prior elections complained that they were never informed that they were assigned to new poll sites.<sup>50</sup> In 2004, several voters were so frustrated that they decided not to vote at all.<sup>51</sup> Others simply could not exercise their right to vote because they could not find the other poll site or did not have enough time to get to the other site before polls had closed.<sup>52</sup>

On top of all this, several poll workers and election officials were unhelpful or unknowledgeable about proper election procedures and election laws.<sup>53</sup> Poorly trained and inefficient poll workers caused chaos in several poll sites.<sup>54</sup> This contributed to long lines that deterred voters from voting.<sup>55</sup>

AALDEF has documented racial animus and denials of the right to vote in numerous elections and in elections across the country.<sup>56</sup> Discrimination against Asian Americans occurs not only in the voting context, but also in housing, employment, the administration of justice, as well as through hate crimes, and police misconduct.<sup>57</sup> Combined, all of this thwarts Asian American political involvement. Because of continued voting discrimination, Congressional action imposing remedies is necessary so that Asian Americans have fair and equal access to the ballot.<sup>58</sup> In 1975, Congress found that language minority voters encountered these same exact forms of discrimination and responded by amending the Voting Rights Act with a provision requiring language assistance in voting.<sup>59</sup>

49. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 21.

50. *Id.*

51. *Id.*

52. *Id.*

53. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 21, AALDEF ELECTION 2003 REPORT, *supra* note 18, at 11-12, S. REP. NO. 94-295, at 26.

54. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 23-24

55. *Id.*

56. AALDEF ELECTION 2003 REPORT, *supra* note 18; AALDEF ELECTION 2002 REPORT, *supra* note 17; AALDEF, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE NYC 2001 ELECTIONS (2002) [hereinafter AALDEF ELECTION 2001 REPORT]; AALDEF, ACCESS TO DEMOCRACY DENIED: AN ASSESSMENT OF THE NYC BOARD OF ELECTIONS COMPLIANCE WITH THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT, SECTION 203, IN THE 2000 ELECTIONS (2000) (unpublished work, on file with author); NAT'L ASIAN PAC. AM. LEGAL CONSORTIUM, ACCESS TO DEMOCRACY: LANGUAGE ASSISTANCE AND SECTION 203 OF THE VOTING RIGHTS ACT (2000).

57. S. REP. NO. 94-295, at 27 n.21 (citing *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943), *Yu Chong Eng v. Trinidad*, 271 U.S. 500 (1926); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

58. See 42 U.S.C. §§ 1971-73 (2000); H.R. REP. NO. 102-655, at 7 (1992), as reprinted in 1992 U.S.C.C.A.N. 766, 771 (discussing lawsuits to protect Asian American voting rights); S. REP. NO. 102-315, at 5-6 (1992) (discussing the history of discrimination against Asian Americans). *But see* H.R. REP. NO. 102-655, at 15 (dissenting report); S. REP. NO. 94-295, at 26-27.

59. S. REP. NO. 94-295, at 26-27.

## II. THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT

### A. Overview of Section 203

The Language Assistance Provisions of the Voting Rights Act, codified at Section 203, mandate translations of ballots and other voting materials as well as oral language assistance.<sup>60</sup>

In 1975, Congress found that limited English proficiency was a serious barrier to political participation.<sup>61</sup> Congress found that "the four language minority groups covered by Section 203—Hispanics, Asian Americans, American Indians, and Alaska Natives—continue to experience educational inequities, high [English] illiteracy rates and low voting participation." These groups were registered to vote at much lower rates than non-Hispanic whites.<sup>62</sup> So, in 1975, Congress enacted, in 1982 reauthorized, and in 1992 strengthened, Section 203 to increase the voter registration and political participation of these groups.

Section 203 was not designed nor intended to capture all language minority groups across the nation.<sup>63</sup> It was tailored to cover sufficiently large citizen voting-age language minority groups that were limited English proficient and faced voting discrimination.<sup>64</sup> This was accomplished by Section 203's test for coverage, or "trigger."<sup>65</sup>

Section 203 mandates language assistance whenever the census, reported every ten years, finds that a political subdivision has either 5% or more than 10,000 voting-age citizens who speak the same Asian, Hispanic, or Native American language, are limited English proficient, and, as a group, have a higher illiteracy rate than the national illiteracy rate.<sup>66</sup>

In 1992, Congress strengthened Section 203 to include the 10,000 numerical trigger. As a direct result, ten counties in New York, California, and Hawaii were mandated to provide ballots, voting materials, and language assistance in Asian languages.<sup>67</sup>

After the next census in 2000, sixteen counties in seven states were required to provide assistance in an Asian language or multiple Asian languages. These included counties in Alaska, California, Hawaii, Illinois, New York, Texas, and Washington for Chinese, Korean, Filipino, Vietnamese, or Japanese language assistance.<sup>68</sup> The exact jurisdictions and

60. Minority Language Materials and Assistance, 28 C.F.R. §§ 55.14-55.21 (2001).

61. S. REP. NO. 94-295, at 24; S. REP. NO. 102-315, at 4.

62. S. REP. NO. 102-315, at 4.

63. S. REP. NO. 102-315, at 10.

64. *Id.*; H.R. REP. NO. 102-655, at 7 (1992).

65. 42 U.S.C. Sec. 1973aa-1a(b)(2)(A)(2000).

66. *Id.*

67. Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 C.F.R. pt. 55, app. (2005). The counties and languages include Alameda County, CA (Chinese), Los Angeles County, CA (Chinese, Filipino, Japanese, Vietnamese), Orange County, CA (Vietnamese), San Francisco County, CA (Chinese); Honolulu County, HI (Filipino, Japanese), Kauai County, HI (Filipino), Maui County, HI (Filipino); Kings County, NY (Chinese), New York County, NY (Chinese), Queens County, NY (Chinese).

68. Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002) (Notices).

languages currently covered under Section 203 are listed in Table 2: Existing Coverage for Asian Language Minority Groups, *infra*.<sup>69</sup>

Jurisdictions covered under Section 203 must ensure that covered language minority groups can effectively vote in elections.<sup>70</sup> Section 203 primarily requires covered jurisdictions to provide the following types of assistance: (1) translated written materials, including ballots, voter registration forms, voting instructions, notifications, and announcements;<sup>71</sup> (2) oral assistance such as interpreters, bilingual poll workers, and bilingual/multilingual voter hotlines;<sup>72</sup> and (3) publicity regarding the elections and availability of bilingual assistance,<sup>73</sup> such as signs at polling sites, announcements in language minority radio, television and newspapers,<sup>74</sup> and direct contact with language minority community organizations.<sup>75</sup> The underlying theory is that democracy works best when all voters understand and are educated about the electoral process.

#### B. Effectiveness of Section 203

Section 203 has opened up the political process to tens of thousands of Asian Americans.<sup>76</sup> At the most fundamental level, translated ballots have enabled Asian American voters to exercise their right to vote independently and privately inside the voting booth.<sup>77</sup> The mandate for interpreters in poll sites has been instrumental for Asian American voters who are not fully proficient in English.<sup>78</sup>

In 1992, when three counties in New York City were first covered under Section 203, more than 54,000 Chinese Americans in Manhattan and

69. *Id.*

70. 28 C.F.R. § 55.2 (b) (1), (2).

71. §§ 55.15, 55.19.

72. §§ 55.18, 55.20. Sometimes assistance must be provided in more than one dialect of the language. For instance, although there is one written form of Chinese, there are several spoken dialects, like Cantonese, Mandarin, Toisan, and others. *Id.*

73. § 55.20.

74. Of those polled, over 51% of Asian American voters got their news about politics and community issues from the ethnic press. AALDEF ASIAN AMERICAN VOTE 2004 REPORT, *supra* note 18, at 12.

75. 28 C.F.R. § 55.20.

76. H.R. REP. NO. 102-655, at 15-17 (1992) (dissenting report querying about the effectiveness of language assistance in increasing the political participation of minority groups); S. REP. NO. 102-315 (1992) (dissenting report querying same).

77. Critics of Section 203 have asserted that bilingual ballots perpetuate voter fraud. 2005 Hearings, *supra* note 39 (statement of Linda Chavez, President, One Nation Indivisible, citing a litany of sensationalistic newspaper clippings, on file with author) at 4-5. But there have been no direct findings that bilingual ballots have caused voter fraud. If anything, the lack of bilingual ballots has caused poll worker fraud and election abuse. In *United States v. Boston*, limited English proficient Chinese voters and the Chinese Progressive Association complained that because the ballots were not translated into their language, poll workers took voters' ballots and completed the ballots for them. Had ballots been translated, voters could have made their own independent choices. Declaration of Lydia Lowe, and Declaration of Siu Tsang, *United States v. City of Boston*, Civ. 05-11598 WGY (D. Mass. 2005). Interestingly, anti-203 witness Linda Chavez cited Boston University President John Silber's 1996 congressional testimony against bilingual ballots. Silber is from the very city, and also ran for governor from the very state, in which voter fraud occurred because of the absence of bilingual ballots in Asian languages. Chavez Testimony at 4.

78. 2005 Hearings, *supra* note 39 (statement of Margaret Fung).

Queens benefited from the availability of Chinese language materials.<sup>79</sup> Community exit polls, then and more recently, documented that the main beneficiaries were first-time voters, newly naturalized citizens, and voters with no formal U.S. education or less than a high school education.<sup>80</sup>

According to AALDEF's 2004 exit poll of almost 11,000 Asian American voters in 8 states, almost a third needed some form of language assistance in order to vote. Almost half (46%) were first-time voters.<sup>81</sup> In jurisdictions covered under Section 203, more than half of the respondents from covered language minority groups were limited English proficient.

Section 203 has also aided grassroots efforts to increase voter registration among eligible Asian Americans, most profoundly in New York.<sup>82</sup> As compared to a decade ago, when only a small number of nonpartisan groups actively registered voters, there are now scores of new Asian American groups doing voter education and registration in the Korean, Filipino, Indian, Pakistani, Bangladeshi, Cambodian, and Vietnamese communities.<sup>83</sup> This has largely been possible because of multilingual voter registration forms required under Section 203. Illustrating these efforts, from 2001 to 2004, Asian American voter registration increased by 40%.<sup>84</sup>

Most importantly, Section 203 has contributed to Asian American electoral success.<sup>85</sup> Prior to 2001, no Asian American had ever been elected to the New York City Council, New York State Legislature, or U.S. Congress from New York, notwithstanding an Asian American population of over 800,000. In fact, as late as 1996, many elected representatives from Asian American neighborhoods held the Asian American community in disdain.<sup>86</sup> In recent years, more Asian Americans have run for political office. In 2001, 13 Asian American candidates ran for New York City Council and one was finally elected to the City Council.<sup>87</sup> In 2004, an Asian American was elected to the New York State Assembly for the first time.<sup>88</sup> That same year, a Vietnamese American was elected to the state legislature from Harris County, TX for the very first time as well, after it

79. *Diaz v. Silver*, 978 F. Supp. 96, 101 (E.D.N.Y. 1997), *aff'd mem.*, 522 U.S. 801 (1997) (citing Affidavit of Michael Shen at ¶ 25).

80. AALDEF ELECTION 2001 REPORT, *supra* note 56; ASIAN PACIFIC AMERICAN LEGAL CENTER, NOVEMBER 1998 SOUTHERN CALIFORNIA VOTER SURVEY REPORT (1999); NAT'L ASIAN PAC. AM. LEGAL CONSORTIUM, *supra* note 56; AALDEF ELECTION 2002 REPORT, *supra* note 17, at 6; AALDEF ELECTION 2004 REPORT, *supra* note 18, at 14-15.

81. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 14-15.

82. S. REP. NO. 102-315 (1992) (dissenting report querying whether language assistance increases Asian American voter registration).

83. 2005 *Hearings*, *supra* note 39 (statement of Margaret Fung). See, e.g., [www.apava.org](http://www.apava.org) (website for the Asian Pacific American voting Alliance, a coalition of several Asian American organizations in New York City working on voter registration).

84. *Asian-American Voters Could Swing Mayoral Election* (New York 1 News television broadcast Feb. 9, 2005).

85. It is important to note that, notwithstanding these successes, today as well as in 1975, "language minority citizens for the most part have not successfully challenged white political domination." S. REP. NO. 94-295, at 26.

86. Celia W. Dugger, *Queens Old-Timers Uneasy As Asian Influence Grows*, N.Y. TIMES, Mar. 31, 1996, at A1 (quoting City Councilwoman Julia Harrison, who represents Flushing, as describing Asian immigrants as "colonizers," and more like "marauding invaders" instead of immigrants, and mistakenly describing Bok Choy as dandelion).

87. 2005 *Hearings*, *supra* note 39 (statement of Margaret Fung).

88. *Id.*

became covered for Vietnamese language assistance under Section 203. Section 203 has been highly effective in opening up the political franchise to Asian Americans.

### C. Enforcement of Section 203

#### 1. Section 203 Implementation and Compliance

Although Section 203 has made the vote more accessible to countless Asian Americans, and in spite of the substantial efforts covered jurisdictions have made to fully comply with Section 203, AALDEF's poll monitoring efforts have shown that implementation problems remain.<sup>89</sup>

For example, in New York City during the 2000 Presidential Election, party headings were incorrectly translated on ballots, listing Republican candidates as Democrats and vice versa.<sup>90</sup> Repeatedly, in New York City, Los Angeles and Orange Counties, and San Francisco and Alameda Counties, poll workers kept translated materials hidden and unavailable to voters.<sup>91</sup> On a number of occasions, poll workers did not even bother to open supply kits containing translated materials.<sup>92</sup> As late as 2002, Hawaii had not translated voter registration forms even though they were mandated to provide these since 1992.<sup>93</sup> At poll sites, translated signs were posted in obscure locations or not posted at all.<sup>94</sup> Voters have also complained about the lack of interpreters and interpreters speaking the wrong language or dialect.<sup>95</sup>

In 2004, at one poll site in Jackson Heights, Queens, NY, a Chinese American voter who asked for language assistance was directed to a Korean interpreter who could not help.<sup>96</sup> At another site in Queens, NY, a poll inspector, when asked about the availability of translated materials, sarcastically replied, "What, are we in China? It's ridiculous."<sup>97</sup> These problems resulted in numerous Asian Americans losing their ability to vote.

The Department of Justice has dispatched federal attorneys to monitor for Section 203 compliance.<sup>98</sup> Recently, the Department has been filing lawsuits to remedy these deficiencies.<sup>99</sup> These efforts have helped to ensure that jurisdictions fully comply with Section 203.

89. AALDEF ELECTION 2001 REPORT, *supra* note 56.

90. William Murphy, Mae Cheng & Herbert Lowe, *Spirit Willing, System Weak*, NEWSDAY, Nov. 8, 2000, at A10; Editorial, *Bungled Ballots in Chinatown*, N.Y. TIMES, Jan. 1, 2001, at A12.

91. See Glenn D. Magpantay, *Asian American Access to the Vote: The Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond*, 11 ASIAN L.J. 31, 40-42 (2004).

92. See *id.* at 41.

93. Interview with Dwayne D. Yoshina, Chief Elections Officer, State Office of Elections, Pearl City, HI (Nov. 20, 2003) (notes on file with author).

94. Magpantay, *supra* note 91, at 41-43; AALDEF ELECTION 2003 REPORT, *supra* note 18, at 6, 8-9.

95. Magpantay, *supra* note 91, at 43-44.

96. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 16.

97. 2005 Hearings, *supra* note 39, at 4 (statement of Margaret Fung).

98. 28 C.F.R. § 55.14(a), (b) (2001).

99. Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 C.F.R. § 55.2(b)(1), (2) (2001). See, e.g., *United States v. City of Rosemead* (C.D. Cal. 2005), *United States v. San Diego County* (S.D. Cal. 2004), *United States v. City of Boston* (D. Mass. 2005), and other cases filed by the Department of Justice, Voting Section, available at <http://www.usdoj.gov/crt/voting/litigation/caselist.htm> (visited Dec. 8, 2005).

## 2. Section 203 and Section 5

Another mechanism for enforcement has been Section 5 of the Voting Rights Act.<sup>100</sup> Under Section 5, certain jurisdictions with a history of voter discrimination must obtain “preclearance” before any change to any voting procedure or practice can be implemented. When jurisdictions are covered under both Sections 5 and 203 – such as New York (NY), Kings (NY) and Alameda (CA) Counties and the State of Texas – the two provisions combined have been powerful tools to ensure that language minorities have full access to the vote.

Section 5 requires that plans for compliance with Section 203, or changes to current practices to comply with Section 203, must be precleared. During the preclearance period, interested individuals and community groups may review the submission and comment.<sup>101</sup> As a result, interested groups have real opportunities to shape local language assistance programs.

Section 5 played a pivotal role in shaping the Chinese Language Assistance Program in New York, which was first adopted after the city became covered under Section 203 in 1992. Although the Board of Elections had agreed to provide sample ballots and voting instructions in Chinese for the 1994 primary elections, it claimed that New York’s mechanical-lever voting machines did not have space for the candidates’ names in Chinese. AALDEF met on numerous occasions with local election officials to convince them that candidates’ names must be transliterated into Chinese, reasoning that the transliterated name was the single most important piece of information on the ballot to voters.<sup>102</sup>

One reason why this is of paramount importance is because Asian-language media outlets also transliterate the names of candidates. Section 203 regulations contemplate Asian-language media outlets as a source of news for language minority groups.<sup>103</sup> AALDEF found in its 2004 exit poll that more than half of the 11,000 respondents (over 51%) received their news about politics and community issues from the ethnic press, rather than mainstream media outlets.<sup>104</sup> Even Section 203’s critics readily admit the “long tradition in the United States of ethnic newspapers—often printed in languages other than English—providing political guidance to readers in the form of sample ballots and visual aids that explain how to vote.”<sup>105</sup> Because of the manner in which Asian Americans receive political and candidate information, the transliteration of candidates’ names on ballots was critical.

Community groups pressed for fully translated ballots that included the transliteration of candidates’ names. Unfortunately, political and me-

100. 42 U.S.C. § 1973c.

101. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51.29 (2001) (allowing individuals and groups to make comments under Section 5).

102. 2005 *Hearings*, *supra* note 39, at 5 (statement of Margaret Fung).

103. S. REP. NO. 94-295, at 33 (1975), 28 C.F.R. § 55.18 (e) (discussing minority media).

104. AALDEF ELECTION VOTE 2004 REPORT, *supra* note 18, at 12.

105. 2005 *Hearings*, *supra* note 39, at 7 (statement of Linda Chavez, on file with author, quoting JOHN J. MILLER, *THE UNMAKING OF AMERICANS: HOW MULTICULTURALISM HAS UNDERMINED AMERICA’S ASSIMILATION ETHIC*, 242-43 (1998)).

dia advocacy only went so far.<sup>106</sup> Ultimately, the denial of preclearance of the Board of Elections's language assistance program under Section 5 is what forced the recalcitrant Board to provide fully translated machine ballots with candidates' names in Chinese. Section 5's comment and preclearance process gave community groups and individuals the ability to design meaningful local language assistance programs.<sup>107</sup>

In addition, under Section 5, federal observers have been sent to monitor elections in jurisdictions covered by Section 203.<sup>108</sup> This has been exceedingly helpful in moving local elections administrators to better comply with Section 203 and remedy deficiencies.<sup>109</sup> For example, in the 2000 elections, many voters were turned away because there were too few interpreters at poll sites.<sup>110</sup> The Department of Justice's monitoring and reporting of this problem persuaded the Board of Elections to maintain a backup pool of interpreters who could be assigned on the day of the election. This has helped alleviate the problem of the lack of interpreters in subsequent elections.

The guarantees of the Voting Rights Act and the Constitution have been realized for many Asian Americans because of Sections 5 and 203. Both provisions are necessary to protect the right to vote for language minority groups.

### III. REAUTHORIZATION OF THE VOTING RIGHTS ACT

The Asian American population remains one of the fastest growing communities of color in the United States. Asian American citizens of voting age numbered 3.9 million in 1996, and rose from 4.7 million in 2000 to 6.7 million in 2004. Asian American voter turnout is also steadily increasing, from 1.7 million in 1996 to nearly 3 million in 2004.<sup>111</sup>

As Congress considers reauthorization of the Voting Rights Act in 2007, Sections 5 and 203 must both be preserved. But while Section 203 has significantly increased the accessibility of the voting booth for hundreds of thousands of Asian Americans, full access to the right to vote is still far off for many others. The 2007 reauthorization should expand coverage of the Voting Rights Act to ensure that currently disenfranchised Asian Americans will not be overlooked.

106. During one lively meeting of the election commissioners, over one hundred Asian Americans packed the hearing room, carrying banners and Chinese-language signs demanding their right to fully-translated bilingual ballots. An August 19, 1994 *New York Times* editorial delivered a scathing rebuke of the Board of Elections' inaction under the Voting Rights Act: "That sounds like the foot-dragging bureaucratic arguments that have been raised all over America at one time or another against giving minorities their rights. It is no excuse for not obeying the law." 2005 *Hearings*, *supra* note 39, at 5 (statement of Margaret Fung).

107. *Id.*

108. 42 U.S.C. § 1973c (2004).

109. *Id.*

110. Murphy, Cheng & Lowe, *supra* note 90.

111. 2005 *Hearings*, *supra* note 39 (statement of Margaret Fung).

### A. Background of the 1992 Amendment

Thirteen years ago, AALDEF testified before Congress in support of the Voting Rights Act Language Assistance Act of 1992.<sup>112</sup> AALDEF supported the creation of the new, alternate benchmark of 10,000 language minority citizens to trigger Section 203 coverage, because large concentrations of Asian Americans in New York and other urban areas were not covered under the existing five-percent trigger.<sup>113</sup> Prior to 1992, under the five-percent approach, only San Francisco and certain counties in Hawaii were required to provide materials in Asian languages.<sup>114</sup>

In fact, under the five-percent trigger, dense urban jurisdictions with large limited English proficient voting populations were not covered while, curiously, jurisdictions with smaller populations were covered (see Table 1, *infra*).<sup>115</sup> Ninety-seven percent of Asian Americans lived in densely populated urban areas,<sup>116</sup> yet an unduly large number of limited English proficient language minority voting-age citizens were needed for urban jurisdictions to meet the five-percent threshold.<sup>117</sup>

TABLE 1: NUMBER OF LIMITED ENGLISH PROFICIENT VOTING-AGE CITIZENS FROM A SINGLE LANGUAGE MINORITY COMMUNITY NEEDED TO MEET THE FIVE-PERCENT THRESHOLD (IN 1990)<sup>118</sup>

URBAN		NON-URBAN	
Los Angeles County, CA	443,158	Napa County, CA	5,538
San Francisco County, CA	36,198		
Cook County, IL	255,253	Peoria County, IL	9,141
Kings County, NY	115,033	Orange County, NY	15,382
New York County, NY	74,377	Albany County, NY	14,629
Queens County, NY	97,579		
Honolulu County, HI	41,812	Kauai County, HI	2,559

Congress determined in 1992 that a 10,000 person benchmark was an appropriate trigger to solve this conundrum.<sup>119</sup>

112. 2005 *Hearings, supra* note 39, at 4 (statement of Margaret Fung); S. REP. NO. 102-315, at 12 (1992).

113. At that time, no Asian American had ever been elected to Congress, the New York State Legislature or the New York City Council. AALDEF found in its multilingual exit polls of Asian American voters that 4 out of 5 voters in Manhattan's Chinatown and Flushing, Queens did not speak or read much English, and that they would vote more often if bilingual assistance were provided. 2005 *Hearings, supra* note 39 (statement of Margaret Fung); S. REP. NO. 102-315, at 12.

114. See 2005 *Hearings, supra* note 39 (statement of Margaret Fung); S. REP. NO. 102-315, at 12.

115. H.R. REP. NO. 102-655, at 8 (1992) (finding that the 5% trigger excluded jurisdictions that needed Asian language assistance).

116. Memorandum from Leadership Conference on Civil Rights on Section 203 Modifications and Clarifications, to voting rights listserv (July 20, 2005) [hereinafter LCCR Memo] (on file with author).

117. *Id.*

118. *Id.*

119. H.R. REP. NO. 102-655, at 8 (concluding on 10,000 trigger); S. REP. NO. 102-315, at 17 (discussing the effects of 20,000 and concluding on 10,000 trigger).

The adoption of the 10,000 trigger in 1992 had widespread bipartisan support in Congress.<sup>120</sup> As a result, 200,000 Asian Americans nationwide, in 10 counties in California, Hawaii and New York, were covered under Section 203.<sup>121</sup> The number of covered jurisdictions increased again after the 2000 census, with 16 counties in 7 states required to provide assistance in one or more Asian languages. Over 672,750 Asian Americans are now covered for language assistance, with some jurisdictions providing assistance in one or more Asian languages (see Table 2 *infra*).<sup>122</sup>

Since 2000, Asian Americans have grown tremendously in a number of localities<sup>123</sup> but many still do not qualify for language assistance, such as: Southeast Asians (Cambodians and Thai) in Los Angeles, CA and parts of Eastern Massachusetts; Koreans in the Greater Chicago Area, IL, Honolulu, HI, Fairfax, VA and Bergen County, NJ; South Asians (Bangladeshis and Pakistanis) in New York City, NY; Vietnamese in Fairfax, VA and Dorchester, MA; and Chinese in Montgomery County, MD, Middlesex County, NJ and Boston, MA.

Among these states, New Jersey, Virginia, and Massachusetts have no Section 203 coverage for any Asian language. Among the others, Section 203 covers some Asian languages, but not the Asian languages listed above. The availability of bilingual ballots and voting materials must be expanded to enfranchise these emerging communities.

#### B. *Expanding Language Assistance*

Modifying the Section 203 trigger to a lower population threshold will expand language assistance to cover more language minority groups in more jurisdictions.<sup>124</sup>

##### 1. *Lowering the Trigger to 5,000*

An analysis of census data reveals that adjusting the five-percent trigger has little or no impact on determinations for Asian language minority

120. 2005 *Hearings*, *supra* note 39 (statement of Margaret Fung).

121. *Id.*

122. 2005 *Hearings*, *supra* note 39 (Fact Sheet on Lowering the Numerical Trigger to Improve the Effectiveness of Section 203, submitted by AALDEF, on file with author).

123. TERRANCE J. REEVES & CLAUDETTE E. BENNETT, *WE THE PEOPLE: ASIANS IN THE UNITED STATES* (2002), available at <http://www.census.gov/prod/2004pubs/censr-17.pdf>.

124. Another way to expand Section 203 is to change the geographic unit of county to smaller political subdivisions such as towns or even congressional districts. See 42 U.S.C. § 1973aa-1a(b) (2004). Including towns in the definition of a political subdivision may bring in other language minority groups, particularly in the East Coast and Midwest, under Section 203 coverage. There are many small cities and towns in which Asian Americans are large and compact alone, but too few to meet the trigger for the larger county. Section 203 covered jurisdictions smaller than counties for language assistance, most notably various cities in Massachusetts and Rhode Island and incorporated towns in Connecticut for Spanish assistance. Voting Rights Act Amendments of 1992, Determinations Under 203, 67 Fed. Reg. at 48,872 (July 26, 2002). However, Section 203 considers political subdivision to be the geographic unit in which elections are administered. The definition of "political subdivision" in the Voting Rights Act is "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. § 19731(c)(2); 28 C.F.R. § 55.1 (2001). These are usually counties. Therefore to apply Section 203 coverage to smaller units than the unit in which elections are administered might be unworkable at the local level.

groups.<sup>125</sup> By contrast, a reduction in the 10,000 numerical trigger will expand Section 203 coverage to include more Asian American communities. In 1992, Congress considered various options for the numeric approach, eventually settling on 10,000.<sup>126</sup> In 2007, Congress should consider lowering the trigger to either 7,500 or 5,000.

Under the 10,000 trigger, five Asian language groups (Chinese, Korean, Filipino, Vietnamese, and Japanese) are covered in 16 jurisdictions. As shown in Table 3, *infra*,<sup>127</sup> under a 7,500 trigger, seven Asian language groups (adding Cambodian and Asian Indian) would be covered in 17 jurisdictions. Although a 7,500 trigger would technically add nine jurisdictions for six languages, many of these new jurisdictions are already covered under the 10,000 trigger for some Asian language assistance. The real new effect would be adding Chinese coverage in Sacramento County, CA; Cambodian in Los Angeles County, CA; Korean in Cook County, IL; and Asian Indian in Queens County, NY. It is well known that these groups are growing in these counties, and that they have encountered voting difficulties. Yet there has been no protection under Section 203.

As shown in Table 4, *infra*,<sup>128</sup> if the trigger was reduced to 5,000, eight Asian language groups (the original five plus Cambodian, Asian Indian, and Thai) would be covered in 21 jurisdictions. Again, this would add ten new jurisdictions, but half of them are already covered under the 10,000 trigger for some Asian language assistance. The real new effect would be the same as for the 7,500 trigger, and adding Thai in Los Angeles County, CA; Chinese in Montgomery County, MD; and Vietnamese and Korean in Fairfax County, VA. Again, these groups are growing in these counties, have encountered voting difficulties, yet have no protection under Section 203.

Reducing the 10,000 trigger by half has a more modest effect than one might initially suspect. The number of jurisdictions covered for any particular Asian language increases from 16 to 21, a net of only five entirely new jurisdictions. The Asian language groups increases from five to eight, specifically adding Cambodian, Thai, and Asian Indian. Counties in two new states, Virginia and Maryland, would be covered.

Moreover, lowering the trigger to 5,000 would not cause a watershed for Spanish language assistance either. Some advocates have expressed concern that Congress might be averse to an enormous expansion of Section 203 coverage, and would consequently not authorize any expansion at all.<sup>129</sup> The change to the 5,000 trigger will not have such an effect on either Spanish language or Asian language assistance. Under the present regime, 217 jurisdictions are covered for Spanish. Lowering the numerical trigger

125. 2005 *Hearings*, *supra* note 39 (Fact Sheet on Lowering the Numerical Trigger to Improve the Effectiveness of Section 203, submitted by AALDEF, on file with author).

126. Congress also consider a 20,000 numerical trigger but settled on 10,000. H.R. REP. NO. 102-655 (1992) at 8; S. REP. NO. 102-315, at 17 (1992).

127. *Id.*

128. This analysis does not take into consideration the rates of growth of these populations or adjust for the undercount of various Asian American communities in the 2000 census.

129. The authors believe that an expansion of Spanish language assistance is also necessary and warranted, but no within the scope of this article. Nevertheless, statistical exploration of this impact using census data is provided to guide those who may be interested.

to 7,500 only adds 6 new Spanish jurisdictions, for a total of 223 jurisdictions. Lowering to 5,000 adds 29 new Spanish jurisdictions, for a total of 246 jurisdictions. Such increases are hardly a watershed.

On the other hand, lowering the percentage trigger would have a comparatively small impact for Asian language assistance but a more dramatic effect on Spanish language assistance. Reducing the trigger to 4% or even 3% would add only 3 new jurisdictions for Asian language assistance. But a reduction to 4% would add 36 new jurisdictions for Spanish assistance, and a reduction to 3% would add 81 jurisdictions. Lowering to 2% would add 8 new jurisdictions for Asian language assistance but 187 new jurisdictions for Spanish language assistance. In essence, modifying the percentage trigger has a more dramatic effect on Latinos, while modifying the numerical trigger has a more dramatic effect on Asian Americans. Nevertheless, reducing the numerical trigger is beneficial for *both* Asian Americans and Latinos.

TABLE 2: EXISTING COVERAGE FOR ASIAN LANGUAGE  
MINORITY GROUPS<sup>130</sup>

	GROUP	CITIZEN VOTING AGE POPULATION (CVAP)	CVAP & LIMITED ENGLISH PROFICIENT	ILLITERACY RATE
<b>ALASKA</b>				
Kodiak Island Borough	FILIPINO	870	470	12.77
<b>CALIFORNIA</b>				
Alameda County	CHINESE	62,155	28,280	10.98
Los Angeles County	CHINESE	189,820	95,700	10.71
Los Angeles County	KOREAN	79,740	42,390	2.67
Los Angeles County	FILIPINO	156,320	34,985	4.46
Los Angeles County	VIETNAMESE	48,070	30,340	10.42
Los Angeles County	JAPANESE	85,765	12,510	2.88
Orange County	VIETNAMESE	71,075	45,730	6.90
Orange County	CHINESE	39,565	14,805	4.36
Orange County	KOREAN	25,235	12,240	2.37
San Diego County	FILIPINO	78,195	17,155	4.58
San Francisco County	CHINESE	102,815	58,735	16.89
San Mateo County	CHINESE	32,570	11,780	6.24
Santa Clara County	VIETNAMESE	48,375	31,265	5.76
Santa Clara County	CHINESE	61,620	24,895	5.12
Santa Clara County	FILIPINO	44,950	11,245	3.65
<b>HAWAII</b>				
Honolulu County	FILIPINO	111,270	24,815	10.44
Honolulu County	JAPANESE	169,865	13,865	5.27
Honolulu County	CHINESE	88,600	12,640	13.49
Maui County	FILIPINO	18,620	5,350	13.08
<b>ILLINOIS</b>				
Cook County	CHINESE	26,200	11,645	9.36
<b>NEW YORK</b>				
Kings County	CHINESE	51,290	33,635	13.32
New York County	CHINESE	41,770	21,070	21.33
Queens County	CHINESE	66,715	37,865	8.05
Queens County	KOREAN	18,525	11,835	6.46
<b>TEXAS</b>				
Harris County	VIETNAMESE	28,405	16,970	7.81
<b>WASHINGTON</b>				
King County	CHINESE	28,430	10,535	9.35

130. Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48871-77 (July 26, 2002); U.S. CENSUS BUREAU, REDISTRICTING DATA PROGRAM, REDISTRICTING DATA 2000 (2004), [http://www.census.gov/rdo/www/data\\_and\\_products.html](http://www.census.gov/rdo/www/data_and_products.html).

TABLE 3: COVERAGE LOWERING THE NUMERICAL TRIGGER TO 7,500

	GROUP	CITIZEN VOTING AGE POPULATION (CVAP)	CVAP & LIMITED ENGLISH PROFICIENT	ILLITERACY RATE
<b>CALIFORNIA</b>				
Alameda County	FILIPINO	43,895	9,335	5.57
Los Angeles County	CAMBODIAN	12,135	7,830	29.44
Sacramento County	CHINESE	19,715	8,085	16.14
San Diego County	VIETNAMESE	17,285	9,915	8.93
San Francisco County	FILIPINO	29,360	8,295	7.11
San Mateo County	FILIPINO	37,185	8,695	4.60
<b>ILLINOIS</b>				
Cook County	KOREAN	18,770	8,930	4.54
<b>NEW YORK</b>				
Queens County	ASIAN INDIAN	43,900	8,640	3.18
<b>WASHINGTON</b>				
King County	VIETNAMESE	13,605	8,230	10.27

TABLE 4: ADDITIONAL COVERAGE LOWERING THE NUMERICAL TRIGGER TO 5,000

	GROUP	CITIZEN VOTING AGE POPULATION (CVAP)	CVAP & LIMITED ENGLISH PROFICIENT	ILLITERACY RATE
<b>CALIFORNIA</b>				
Alameda County	VIETNAMESE	12,095	7,075	11.10
Contra Costa County	CHINESE	19,945	6,070	4.70
Los Angeles County	ASIAN INDIAN	29,740	5,405	5.27
Los Angeles County	THAI	10,405	5,130	5.56
Sacramento County	VIETNAMESE	8,060	5,010	11.08
San Diego County	CHINESE	20,195	6,295	10.09
<b>HAWAII</b>				
Honolulu County	KOREAN	20,010	5,830	5.75
<b>ILLINOIS</b>				
Cook County	ASIAN INDIAN	27,310	6,630	4.00
Cook County	FILIPINO	33,550	5,955	3.36
<b>MARYLAND</b>				
Montgomery County	CHINESE	14,755	5,815	4.47
<b>TEXAS</b>				
Harris County	CHINESE	16,385	7,025	9.32
<b>VIRGINIA</b>				
Fairfax County	VIETNAMESE	11,920	6,960	4.89
Fairfax County	KOREAN	12,090	5,970	1.68

The tables also show that lowering the numerical trigger to 7,500 would remove language barriers for at least 77,955 limited English proficient Asian American citizens eligible to vote (see Table 3). An additional 79,170 citizens would receive language assistance if the numerical trigger were lowered to 5,000 (see Table 4). To expand access to the vote and ameliorate political barriers that Asian American voters have endured, Congress should reauthorize Section 203 of the Voting Rights Act with a new numerical trigger of 5,000 persons.

## 2. *Justification for Lowering the Trigger*<sup>131</sup>

### a. Asian American Need for Language Assistance

Just as Congress enacted an expansion of Section 203 in 1992, another expansion is also needed in 2007. AALDEF's multilingual exit poll documented high rates of limited English proficiency and low levels of U.S. educational attainment among Asian American voters (see Table 5 *infra*).<sup>132</sup>

In AALDEF's survey, more than a third (38%) of all respondents stated that the November 2004 elections were the first U.S. elections in which they had voted. 82% of all respondents were foreign-born naturalized citizens. 29% had no formal education in the United States.<sup>133</sup> Only 14% identified English as their native language. 41% were limited English proficient,<sup>134</sup> of which over a third (37%) were first-time voters.<sup>135</sup>

Lowering the trigger would create coverage in various counties for Asian-language assistance in particular Asian languages, including Chinese, Korean, Filipino, Vietnamese, Japanese, Cambodian, Asian Indian, and Thai. As seen in Table 5, AALDEF found that among Chinese American voters in 2004, more than half (52%) were limited English proficient and more than a third (37%) had no formal U.S. education.<sup>136</sup> Among Korean voters, well over half (59%) were limited English proficient and almost a third (31%) had no formal U.S. education. Among Filipino voters, while only 5% were limited English proficient, 17% had no formal U.S. education.<sup>137</sup> Among South Asian voters, one in five (19%) were limited English proficient and 17% had no formal U.S. education.<sup>138</sup> Among Southeast Asian voters, almost half (47%) were limited English proficient and one in

131. Much of this section was written with the assistance of the Leadership Conference on Civil Rights. See LCCR Memo, *supra* note 116.

132. AALDEF ELECTION 2004 REPORT, *supra* note 18. This data is extremely valuable because while the census can report data on limited English proficiency and educational attainment for citizens of voting age, almost no one has this data specifically for voters. Characteristics of voters are important to consider in efforts to remedy voting barriers.

133. The census phrases questions on educational attainment without distinguishing between education completed abroad and education acquired in the United States. The percentages presented in this report reflect educational attainment only in the U.S. S. REP. NO. 94-295, at 26 (1975).

134. Limited English proficiency is defined as the ability to read English less than "very well." H.R. REP. NO. 102-655, at 7 (1992). See note 6, *supra*. Compare *supra* note 6, showing that according to census data, 43% of all Asian Americans 18 or over are limited English proficient.

135. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 10.

136. *Id.*, at 9.

137. It is important to note that no Filipinos were surveyed in California and Hawaii where they are known to have higher rates of limited English proficiency.

138. "South Asian" describes voters of Indian, Bangladeshi, Pakistani, Sri Lankan and other South Asian descent.

five (19%) had no formal U.S. education.<sup>139</sup> Every Asian American group had higher rates of limited English proficiency and lower than average educational attainments.<sup>140</sup> Asian American voters need language assistance to effectively cast their votes.

Lowering the trigger to 5,000 would specifically capture counties in Illinois for Korean language assistance, and Virginia for Korean and Vietnamese language assistance.

In Illinois, AALDEF found that among Asian American voters in 2004, 37% were limited English proficient and 25% had no formal U.S. education. Almost half of those respondents were Korean American, and all were in Cook County.<sup>141</sup>

Cook County has the nation's third-largest Korean American population. In 2004, the Korean American Resource & Cultural Center (KRCC) persuaded the county to voluntarily provide some assistance like translations of instructions and voter guides. Yet such efforts have not adequately addressed the great need for assistance.<sup>142</sup> KRCC has documented many voting barriers faced by Korean Americans in Cook County.<sup>143</sup> AALDEF has found that, among Korean voters, more than half are limited English proficient. About a third needed interpreters or translated materials. Limited English proficiency rates for Korean American voters were higher than the overall average for all Asian American voters surveyed in Cook County.<sup>144</sup>

The Asian American population in Virginia has grown by 62% since 1990, numbering more than a quarter million. In Fairfax County, the Vietnamese population has doubled over that span, numbering about 20,000 by the year 2000. The Asian Pacific American Legal Resource Center in Virginia has initiated a language rights project that seeks to expand language assistance for Asian Americans to government services.<sup>145</sup>

The Center, along with AALDEF, found that among Asian American voters in 2004, 22% were limited English proficient, and 16% had no formal U.S. education. Almost a third were Southeast Asian, and 12% were Korean American, most of whom resided in Fairfax County.<sup>146</sup>

Among Vietnamese voters in Fairfax County, more than half were limited English proficient. About a quarter needed interpreters or translated materials. Limited English proficiency rates for Vietnamese American voters were higher than the overall average for all Asian American voters

139. "Southeast Asian" describes voters of Vietnamese, Cambodian, Thai and other Southeast Asian descent.

140. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 9.

141. *Id.* at 14-15.

142. *Id.*

143. Testimony of Kat Choi, KRCC, before the National Voting Rights Commission of the Lawyers Committee for Civil Rights at the Midwest Regional Hearing, Minneapolis, MN (July 22, 2005) (on file with author).

144. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 14-15.

145. *Id.* at 15.

146. *Id.* at 14-15.

surveyed in Northern Virginia.<sup>147</sup> Asian American voters in Virginia also faced many voting barriers.<sup>148</sup>

Because of limited English proficiency, low rates of educational attainment, and past voting barriers, Section 203 should be expanded to ensure that Asian Americans are fully able to participate in the political process.

As discussed *supra* in Part II.B, the prime beneficiaries of language assistance have been first-time voters.<sup>149</sup> Language assistance correlates with increased political participation of Asian Americans. It expands access to the vote and, consequently, more Asian Americans can exercise their right to vote.

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147. *Id.* at 15.

148. Letter from Glenn D. Magpantay, Staff Attorney, AALDEF, and Nicholas Rathod, Language Access Project Director, Asian Pacific American Legal Resource Center, to Michael Brown, Chairman, Barbara Hildenbrand, Vice Chairwoman, and Jean Jensen, Sec'y, Va. State Bd. of Elections; Allen H. Harrison, Jr., Chairman, Charlene N. Bickford, Vice Chairwoman, and Fred G. Berghoefer, Sec'y, Arlington County Electoral Bd.; and Nancy Krakover, Chairwoman, Larry E. Byrne, Vice Chairman, and Margaret K. Luca, Sec'y, Fairfax County Electoral Bd. (May 9, 2005) (RE: Observations of the General Election in Northern Virginia on November 2, 2004).

149. Compare H.R. REP. NO. 102-655, at 15 (1992) (dissenting report arguing that language does not increase political participation of language minority groups).

TABLE 5: CHARACTERISTICS OF RESPONDENTS OF AALDEF'S  
MULTILINGUAL EXIT POLL, NOV. 2004<sup>150</sup>

ALL RESPONDENTS	FIRST-TIME VOTER	FOREIGN-BORN	NO FORMAL U.S. EDUCATION	ENGLISH AS NATIVE LANGUAGE	LIMITED ENGLISH PROFICIENT	LARGEST ASIAN POPULATIONS
10,789	38%	82%	29%	14%	41%	46% Chinese <sup>151</sup> 25% South Asian 14% Korean 6% Southeast Asian <sup>152</sup> 5% Filipino

## STATE

New York	36%	84%	34%	14%	46%	56% Chinese 24% South Asian 13% Korean 4% Filipino
New Jersey	35%	85%	18%	11%	23%	39% Asian Indian 24% Korean 20% Chinese 13% Filipino
Massachusetts	42%	84%	22%	6%	55%	47% Chinese 28% Vietnamese 15% Cambodian
Rhode Island	45%	61%	4%	21%	25%	84% Southeast Asian 11% Filipino
Illinois	37%	77%	25%	12%	37%	48% Korean 21% South Asian 13% Chinese 9% Filipino
Michigan	64%	50%	16%	29%	18%	27% Arab 19% Bangladeshi 19% Chinese
Virginia	35%	77%	16%	21%	22%	29% Southeast Asian 25% South Asian 15% Chinese 12% Korean
Pennsylvania	43%	68%	36%	13%	43%	81% Chinese 13% Southeast Asian

## ETHNIC GROUP

Chinese	37%	79%	37%	10%	52%	N/A
Korean	35%	87%	31%	10%	59%	N/A
Filipino	27%	75%	17%	22%	5%	N/A
South Asian	42%	88%	17%	20%	19%	52% Indian 18% Bangladeshi 15% Pakistani 14% Indo-Caribbean
Southeast Asian	46%	85%	21%	6%	47%	53% Vietnamese 22% Cambodian 7% Thai 7% Laotian 4% Hmong

150. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 9.

151. Includes Asian Indian, Bangladeshi, Pakistani, Indo-Caribbean, Sri Lankan, and Nepalese.

152. Includes Vietnamese, Cambodian, Laotian, Hmong, Thai, Indonesian, Burmese, and Malaysian.

TABLE 6: CHARACTERISTICS OF LANGUAGE MINORITY GROUPS,  
AALDEF'S MULTILINGUAL EXIT POLL, NOV. 2004<sup>153</sup>

STATE - LOCALITY	LANGUAGE MINORITY GROUP	FIRST-TIME VOTER	LIMITED ENGLISH PROFICIENT	NEEDED INTERPRETER	NEEDED TRANSLATED MATERIALS
NEW YORK					
- Manhattan	Chinese	34%	56%	41%	39%
- Queens	Chinese	34%	51%	29%	31%
	Korean	35%	67%	34%	49%
	Bangladeshi	50%	31%	26%	24%
	Pakistani	44%	21%	26%	19%
- Brooklyn	Chinese	44%	67%	48%	47%
	Bangladeshi	55%	43%	33%	33%
	Pakistani	49%	41%	29%	35%
NEW JERSEY					
- Bergen Co.	Korean	35%	55%	21%	33%
- Middlesex Co.	Indian	40%	13%	20%	19%
	Chinese	31%	26%	12%	14%
MASSACHUSETTS					
- Boston	Chinese	36%	65%	43%	52%
- Dorchester	Vietnamese	45%	74%	60%	55%
- Lowell	Cambodian	62%	41%	37%	34%
- Quincy	Chinese	32%	46%	16%	22%
RHODE ISLAND					
- Providence	Cambodian	39%	36%	23%	15%
ILLINOIS					
- Cook Co.	Korean	31%	59%	22%	37%
MICHIGAN					
- Dearborn	Arab	38%	6%	28%	27%
- Hamtramck	Bangladeshi	42%	59%	26%	33%
	Arab	46%	38%	30%	24%
VIRGINIA					
- Falls Church	Vietnamese	59%	55%	29%	24%
- Annandale	Vietnamese	36%	43%	29%	29%
PENNSYLVANIA					
- Philadelphia	Chinese	42%	44%	25%	31%

b. New Populations Covered: Southeast Asians<sup>154</sup>

Under the current Section 203 trigger, one particular Asian American community has been largely left out – Southeast Asians.<sup>155</sup> Southeast Asian Americans are largely from Cambodia, Laos, Vietnam, and Thailand. Most arrived in the U.S. as refugees after the Vietnam War or are the children of refugees. There are more than 1.8 million Southeast Asians in the United States and their naturalization rates outpace the national average. At the same time, they are much less likely than most Americans to hold college degrees, more likely to have had no formal education, and more likely to live in poverty.<sup>156</sup>

153. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 12.

154. Much of this subsection was written with the assistance of the Leadership Conference on Civil Rights, *see* LCCR Memo, *supra* note 116.

155. Vietnamese is a covered language in a number of jurisdictions, but other Southeast Asian languages have not been captured thus far. Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48871-77 (July 26, 2002).

156. LCCR Memo, *supra* note 116.

Congress recognized that educational disparities significantly affect the ability of language minorities to participate in the electoral process.<sup>157</sup> Notwithstanding the model minority myth, educational attainment among Southeast Asians remains low.<sup>158</sup> Many Southeast Asian American students receive inferior education. Students who are limited English proficient are often unable to participate in English as a Second Language (ESL) programs or receive adequate bilingual assistance in the classroom due to school systems' inability to effectively provide such programs.<sup>159</sup> Students leave school with below-average English proficiency.<sup>160</sup> The inability or limited ability to read English thwarts the attempts of many individual Southeast Asian Americans to participate in the electoral process.<sup>161</sup>

Southeast Asians fall within the group of citizens that Congress intended to protect and empower under Section 203.<sup>162</sup> They are limited English proficient and have low levels of educational attainment. Additionally, because of their heroic service to American pilots during the Vietnam War, special naturalization rules apply to certain Southeast Asian veterans and their families, which allow them to take the citizenship test in their own language.<sup>163</sup> Lowering the trigger to 5,000 would capture Khmer (Cambodian), Vietnamese, and Thai languages in many jurisdictions.

#### c. Constitutional Considerations<sup>164</sup>

Undoubtedly, there is a great need for language assistance in voting because of such high rates of limited English proficiency, as well as low rates of U.S. educational attainment.<sup>165</sup> However, need alone is insufficient to justify Section 203 protection. A finding of voting discrimination is also essential to warrant congressional action mandating language assistance.<sup>166</sup> The U.S. Supreme Court has held that such discrimination must

157. H.R. REP. NO. 102-655, at 6 (1992) (discussing Asian American immigrant children and the lack of ESL teachers in schools); S. REP. NO. 102-315, at 6 (1992) (discussing *Lau v. Nichols*, lack of ESL courses, and lack of educational equity); S. REP. NO. 94-295, at 28-29 (1975).

158. LCCR Memo, *supra* note 116. 26.2% of Cambodians, 45% of Hmong and 22.7% of Laotians have had no formal schooling, compared to 1.4% of the overall population. Similarly, census data shows that only 9.1% of Cambodians, 7.4% of Hmong and 7.6% of Laotians obtain a bachelor's degree or higher, compared to 24.4% of the overall U.S. population.

159. *Id.* For example, in 1997, California only had 72 certified bilingual Vietnamese teachers for 47,663 Vietnamese-speaking students (ratio = 1:662), 28 certified bilingual Hmong teachers for 31,165 Hmong-speaking students (ratio = 1:1,113), and 5 certified bilingual Khmer teachers for 20,645 Khmer-speaking students (ratio = 1:4,129).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. While we would have liked to have made this section much more expansive, constitutional issues are only cursorily reviewed here because the focus of the present article is the reauthorization of expiring provisions of the Voting Rights Act. A fuller discussion on the constitutionality of VRA is certainly needed, however. We raise the issue here simply to assert our belief that Section 203 is a legitimate, justified, and necessary act of Congress that bears no constitutional infirmity.

165. Compare H.R. REP. NO. 102-655, at 6 (1992) (dissenting report stating that no showing of need for language was made in 1992 hearings). Critics of Section 203 have also wrongly asserted that there is low use of translated voting materials. 2005 *Hearings, supra* note 39, at 7 (statement of Linda Chavez).

166. S. REP. NO. 102-315, at (1992) (dissenting report).

be purposeful<sup>167</sup> and the remedy congruent and proportional<sup>168</sup> to ameliorate the discrimination.

Purposeful discrimination against Asian American voters is well-documented. The 2004 election revealed racist poll workers; voters, elected officials, and others who created intimidating and hostile environments for Asian American voters; disparate treatment of Asian American voters compared to white voters; poll workers who discouraged Asian Americans from voting; racial profiling at poll sites through inappropriate identification checks or demands for naturalization certificates; and poll site changes without any or with poor notice given to Asian American voters.<sup>169</sup> These practices have categorically disenfranchised Asian American voters.<sup>170</sup>

Asian Americans, in jurisdictions which an expanded Section 203 would cover, also faced numerous voting barriers. For example, in Virginia, one voter complained that he was required to furnish additional forms of identification after he had already provided a valid form of identification under state law.<sup>171</sup> Moreover, this voter's white companion, who was also voting at the site, was not asked to show any identification whatsoever.<sup>172</sup> At another poll site a poll worker mocked an Asian American voter exclaiming: "Your name is the longest I've ever seen!" which made the voter feel extremely uncomfortable.<sup>173</sup> Asian American voters also complained that their names had been mysteriously removed from voter lists.<sup>174</sup> Reducing the trigger to 5,000 will cover counties in Virginia for Asian language assistance and may help ameliorate these problems by helping Asian Americans to better understand the voting process, proper voting procedures, and to know about and know how to assert their rights.<sup>175</sup> Reducing the trigger to 7,500, on the other hand, would not provide coverage for any county in Virginia.

Section 203 is not designed nor intended to capture all language minority groups across the nation.<sup>176</sup> It is tailored to cover groups in areas where there are sufficiently large citizen voting-age populations that are limited English proficient and have low rates of educational attainment.<sup>177</sup>

167. *Washington v. Davis*, 426 U.S. 229 (1976); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1976); *City of Mobile v. Bolden*, 466 U.S. 55 (1980).

168. *City of Boerne v. Flores*, 521 U.S. 507 (1997); *see also* *U.S. v. Lopez*, 514 U.S. 549 (1995).

169. The limitation on congressional action is even stricter when the federal statute in question involves areas usually considered a matter of state authority. *Bd. of Tr. of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001). Election administration is typically a matter of state law. U.S. CONST. art. I, § 4 ("The Times, Places, and Manner of holding Elections . . . shall be prescribed in each State by the Legislature thereof; but Congress may at any time by Law make or alter such Regulations. . ."). However in the area of voting rights, as illustrated in the situations here of anti-Asian voter discrimination, it is the States and their actors and agents, who are the discriminators. Therefore, the need for Congressional oversight in elections is necessary and justified.

170. *See supra* discussion in Part II. B. History of Voting Discrimination

171. *See* Letter, *supra* note 148.

172. *Id.*

173. *Id.*

174. *Id.*

175. This would partially satisfy congruency under *City of Boerne v. Flores*, 521 U.S. 507 (1997).

176. S. REP. NO. 102-315, at 10 (1992).

177. *Id.*

Section 203 in itself<sup>178</sup>—and a lower numerical trigger of 5,000—will not only provide more Asian American communities with greatly needed language assistance, it would also provide a remedy that is congruent and proportional to the harm to ameliorate the discrimination encountered by Asian American voters.<sup>179</sup>

### 3. *Other Options for Expansion*<sup>180</sup> – *Eliminate the Illiteracy Requirement*<sup>181</sup>

Another way to expand language assistance is through the elimination of the illiteracy requirement, or the use of a different measure for this requirement.<sup>182</sup> Section 203 requires that a language minority group must have a higher illiteracy rate than the national illiteracy rate, as a group.<sup>183</sup> The current determination of illiteracy is having less than a fifth grade education.<sup>184</sup> This test has little to do with English proficiency. Indeed, limited English proficiency is already an element of Section 203's test for coverage.

Furthermore, the measure of illiteracy through educational attainment is problematic for other reasons. Educational attainment is assessed through a question on the census form that is ambiguous and could lead to unintended results.<sup>185</sup> The question on the census form asking about educational attainment could be interpreted as asking about education received *either in the United States or abroad*.<sup>186</sup> The illiteracy requirement

178. S. REP. NO. 94-295, at 25 (finding "inadequate numbers of minority registration personnel, uncooperative registrars, and the disproportionate effect of purging laws on non-[E]nglish speaking citizens because of language barriers").

179. *City of Boerne v. Flores*, 521 U.S. 507 (1997); *see also* *U.S. v. Lopez*, 514 U.S. 549 (1995).

180. Some have discussed that the language minority groups covered under Section 203 should be expanded to go beyond Asian, Native American and Latino languages. The reason why these languages were covered is because these groups have endured a history of *de jure* discrimination and that discrimination was widespread among the states. Section 203 is remedial and looks to correct the lingering effects of past discrimination. Examples in the Asian American context include: the Chinese Exclusion Act, the internment of Japanese, anti-miscegenation laws, the prohibition of Orientals from testifying against white men or owning property. *See generally*, *Korematsu v. U.S.* 323 U.S. 214 (1944); *Hirabayashi v. U.S.*, 320 U.S. 87 (1943), *Yu Chong Eng v. Trinidad*, 271 U.S. 500 (1926); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Any language minority group seeking coverage must be able to demonstrate the same, and to satisfy federalism concerns, such discrimination must be widespread. Because of this, European languages are not included under Section 203. One argument might be made for Arab Americans and other Middle Easterners or "West Asians," and that they may have a history and have endured widespread discrimination, especially in since September 11. ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, SPECIAL REGISTRATION: DISCRIMINATION AND XENOPHOBIA AS GOVERNMENT POLICY (2004). Arabs and other Middle Easterners are classified as "white" in the census and so they are not included under Section 203. This is a discussion which must be further explored but is outside the scope of this article.

181. Magpantay, *supra* note 91, at 55.

182. 42 U.S.C. § 1973aa-1a(b)(2)(a)(ii) (2004); Magpantay, *supra* note 91, at 55.

183. § 1973aa-1a(b)(2)(a)(ii) ("the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate").

184. H.R. REP. NO. 94-196 (1975); § 1973aa-1a(b)(3)(E) ("the term 'illiteracy' means the failure to complete the 5th primary grade").

185. Letter from Asian Pacific American Legal Center of Southern California, to James F. Holmes, Director, Bureau of the Census, U.S. Department of Commerce (Feb. 9, 1998) (Re: Section 203: Census calculations of language minority groups requiring bilingual voting assistance).

186. *Compare AALDEF ELECTION 2004 REPORT*, *supra* note 18 (measuring educational attainment specifically in the United States).

and/or measure has disqualified languages and jurisdictions from Section 203 coverage.

The Los Angeles Korean American community provides an excellent example. After the 1990 census, the Korean American population in Los Angeles, which was already large and growing, exceeded Section 203's numerical threshold.<sup>187</sup> The populations should have qualified for mandated Korean language assistance, but many Korean Americans misinterpreted the illiteracy question on the census form, believing that the census questions pertaining to educational attainment referred to education they had received in the United States *or in Korea*. As a result, although Korean Americans were limited English proficient within the meaning of Section 203, they were deemed to *not* need language assistance.

This dilemma also resurfaces when the trigger is lowered to 5,000. Based exclusively on 5,000 limited English proficient voting-age citizens, Section 203 would cover Bergen County, NJ for Korean language assistance. However, the population's illiteracy rate is not high enough. In spite of the population's low level of English proficiency and history of voting disenfranchisement, particularly in Palisades Park and Fort Lee as described earlier,<sup>188</sup> Bergen County would not be included for Korean assistance.<sup>189</sup>

Section 203's test for coverage should be amended by eliminating the requirement of higher illiteracy. Alternatively, the test should be revised to be specific to education received in the United States.

### C. Frequency for Testing for Coverage and Census Concerns

Section 203 jurisdictional and language coverage is determined once every ten years, pursuant to the decennial census. As Congress considers reauthorization, more frequent testing of coverage should be allowed. Current developments at the U.S. Census Bureau make this option possible and particularly opportune.

#### 1. Use of Census Data<sup>190</sup>

The U.S. Census Bureau collects data through a short questionnaire sent to every household in the nation and a longer questionnaire sent to a sampling of households. The "short-form" asks basic questions such as age, race, gender, and family relationships. The "long-form" asks many more questions. In addition to the short-form's basic questions, it also asks about citizenship, the ability to speak English, housing type, income, educational attainment, occupation, etc. Section 203 coverage is determined by using data from the "long-form."<sup>191</sup> The long-form is only received by

187. Letter from Stewart Kwoh, President and Executive Director, and Bonnie Tang, Staff Attorney, Asian Pac. Am. Legal Ctr. to Gloria Molina, Supervisor, First District, County of Los Angeles (Sept. 1, 1998).

188. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 14-17.

189. Phone interview with Dan Ichinose, Project Dir., Demographic Research Unit, Asian Pac. Am. Legal Ctr. of S. Cal., by Glenn Magpantay, Staff Attorney, AALDEF (April 27, 2005) (notes on file with author).

190. LCCR Memo, *supra* note 116.

191. 42 U.S.C. § 1973aa-1a(b)(2)(A) (2004).

approximately 17% of the total population and is used to determine characteristics about the entire population.<sup>192</sup>

The Census Bureau is looking to discontinue the decennial long form and replace it with the American Community Survey (ACS). The Bureau claims ACS will provide critical economic, social, demographic, and housing information on an annual basis instead of once every 10 years. One out of 480 households in every U.S. county, American Indian and Alaska Native area, and Hawaiian Homeland area will receive the ACS questionnaire each month. Surveys are sent out to randomly selected addresses (not to individuals). An individual address has a chance of being selected once every five-year period.<sup>193</sup> The survey will be sent to approximately 2.5 percent of all U.S. households each year, as compared with the long form which is sent to 17% of households every ten years.<sup>194</sup>

## 2. *Frequency of Section 203 Determinations*<sup>195</sup>

Because ACS is replacing the long-form entirely, Section 203 coverage determinations must be made based upon the new ACS data. 2010 is the first year the Census Bureau will capture data for populations in all areas because it needs time to accumulate a large enough sample to produce reliable and accurate data.<sup>196</sup> Thus, 2010 is the first year that ACS data will be used to determine Section 203 coverage.<sup>197</sup> Once sufficient data is collected, the Census Bureau will release tabulations based on rolling three-year averages annually for areas with populations between 20,000 and 65,000, and rolling five-year averages annually for areas as small as census tracts.<sup>198</sup>

ACS is being implemented so that communities, businesses and other decision-makers will have more timely and relevant census data.<sup>199</sup> The change to ACS provides the opportunity for Section 203 determinations to occur more frequently and with greater sensitivity. This would be particularly appropriate today, when growth, migration and immigration rates show that today's society is increasingly mobile.<sup>200</sup>

To this point, Section 203 determinations have been made on a decennial basis because census data was available only on a decennial basis. ACS will allow census data to be compiled as a five-year rolling average beginning in 2010. With data thus available on an annual basis, Section 203 determinations should be made every 5 years beginning in the year 2010 to more accurately reflect society's mobility while still providing the Census Bureau ample time to run the needed analyses.

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192. LCCR Memo, *supra* note 116.

193. *Id.*

194. *Id.*

195. Magpantay, *supra* note 91.

196. LCCR Memo, *supra* note 116.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

### 3. *Impact of the Change*

Currently, because Section 203 coverage is determined only once every ten years, language minority groups are left with little access to the vote.<sup>201</sup> Various Asian American communities have experienced tremendous population growth in every decade. Even though a language minority group within a jurisdiction would meet the test for coverage mid-decade, the community must wait until after the decennial census to be officially covered.<sup>202</sup> Congress should change Section 203 to make more frequent how often coverage is determined.<sup>203</sup>

This was the exact problem in New York. The Korean American population grew tremendously in the 1980s but after the 1990 census, it was about 250 persons short of meeting Section 203's 10,000 trigger.<sup>204</sup> Although the community continued to grow throughout the 1990s, perhaps meeting the new threshold as early as 1992, the community had to wait until after the 2000 census for coverage.<sup>205</sup> The same occurred with the Vietnamese community in San Diego, CA after the 2000 census. The 2000 census reported a Vietnamese-speaking voting age population with limited English proficiency of 9,915, short 85 persons below the 10,000 person trigger to bring San Diego County under Section 203 coverage.<sup>206</sup> Again, though the community has continued to grow and would even have met the trigger the following year, required language coverage had to wait until after the 2010 census. Testing for coverage more frequently will resolve dilemmas such as these.

### 4. *Other Concerns*

There are, however, concerns about the ability of ACS to gather accurate data on language minorities. There is already an undercount of racial and ethnic minorities in the census.<sup>207</sup> The Census Bureau estimated that it missed 6.4 million people in the 2000 Census, who were disproportionately racial and ethnic minorities, poor, and children, and double-counted 3.1 million people, most of whom were white or affluent. This yielded a net undercount of 3.3 million people.<sup>208</sup> In this differential undercount, Asian Americans were twice as likely to be missed as whites, African Americans

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201. Magpantay, *supra* note 91.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. Notice of Lodgement and Memo. of Agreement in *U.S. v. San Diego County* (S.D. Cal 2004) (June 23, 2004).

207. Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999); U.S. CENSUS MONITORING BOARD PRESIDENTIAL MEMBERS, FINAL REPORT TO CONGRESS (2001); Press Release, U.S. Census Monitoring Board Presidential Members, U.S. Census Monitoring Board Presidential Members Submit Final Report to Congress (Sept. 26, 2001) available at <http://govinfo.library.unt.edu/cmb/cmbp/news/FinalReport.asp.htm>; Deepa Iyer, *Will Asian Pacific Americans Count in the Next Decade?: The Importance of Census 2000 to Asian Pacific Americans*, 6 UCLA ASIAN PAC. AM. L. J. 44 (2000).

208. U.S. CENSUS MONITORING BOARD PRESIDENTIAL MEMBERS, *supra* note 208; see also Press Release, *supra* note 208.

three times more likely, and Latinos four times.<sup>209</sup> Asian Americans were missed in the census.

Current ACS design methodology provides little assurance that certain language minorities will be accurately counted.<sup>210</sup> Questions such as whether enough language minorities will be counted or whether the form will be translated or surveyors will be bilingual in the appropriate languages, give advocates pause regarding the ability of ACS to accurately determine the number of language minority groups.<sup>211</sup> Even if Asian Americans want to be counted in the census, they may face difficulties in being able to do this.

Lastly, the ACS form will only be sent to about 2.5% of the population on an annual basis. The few that do receive the ACS and speak a language other than English at home are asked to evaluate their own English proficiency. The form requests that they respond to a question inquiring how well they speak English by checking one of the four answers provided: "very well," "well," "not well," or "not at all."<sup>212</sup> The Census Bureau has determined that most respondents over-estimate their English proficiency and therefore, those who answer other than "very well" are deemed limited English proficient.<sup>213</sup> The flaws in this self-evaluation significantly reduce the number of people who would otherwise benefit from Section 203.<sup>214</sup>

Smaller Asian ethnic populations that are limited English proficient have been among the hardest to count, resulting in significant undercounts in these populations.<sup>215</sup> Because many Asian American communities, as well as Native American/Alaskan populations are smaller populations and are substantially limited English proficient, lowering the numerical trigger from 10,000 to 5,000 will help mitigate and offset the effect of the undercount on these communities.<sup>216</sup> In the end, the limitations of ACS are another reason for lowering the numerical trigger.<sup>217</sup>

209. *Id.*

210. LCCR Memo, *supra* note 116; compare Maki Becker, *Asians Watching Census, Legal Defense Fund Wary of Undercount*, DAILY NEWS, July 6, 2000, at Q11; Valerie Alvord, *Asians Are Eager to Be Counted in California, Census Finds Community Harder to Reach in N.Y.*, USA TODAY, April 19, 2000, at 16A; Mae M. Cheng, *Down for the Count, Low Response to Census in Queens' Minority Communities*, NEWSDAY, April 7, 2000, at A7; Steven Lee Myers, *Census Letters Go to 120 Million Wrong Addresses*, N.Y. TIMES, Feb. 28, 2000, at A15; David Stout, *Census Takers Uneasy as Mail Response Lags*, N.Y. TIMES, April 5, 2000, at A16.

211. LCCR Memo, *supra* note 116; Iyer, *supra* note 208 (discussing the importance of an accurate census count).

212. Letter, *supra* note 133.

213. *Id.*; H.R. REP. NO. 102-655, at 8 (1992); S. REP. NO. 102-315, at 10 (1992).

214. LCCR Memo, *supra* note 116.

215. GLENN D. MAGPANTAY AND PHILIP M. LIU, COUNTING ASIAN AMERICANS: AN EVALUATION OF CENSUS 2000 PROGRAMS AND POLICIES (2000).

216. Another way to correct for the undercount is to use modern scientific techniques, like statistical sampling, to ensure the most accurate census data. U.S. CENSUS MONITORING BOARD PRESIDENTIAL MEMBERS, *supra* note 208; Press Release, *supra* note 208. Sampling, as a supplement to an actual enumeration or headcount, will ensure that Asian American and other language minorities are accurately counted. Congress should more explicitly support the use of statistical sampling. See *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999).

217. LCCR Memo, *supra* note 116.

#### IV. CONCLUSION

Section 203 does not capture all Asian Americans across the nation and so many who should be eligible to receive language assistance do not.<sup>218</sup> Section 203 is, however, tailored to cover large citizen voting-age language minority groups that are limited English proficient and have faced a history and widespread voting discrimination.<sup>219</sup> Those populations are different now than they were thirteen years ago when Section 203 was enacted, and so the formula for Section 203 should be modified accordingly.

In reauthorization, there is no doubt that Section 203, along with Section 5, must continue to exist to protect the right to vote for Asian Americans. Continued aggressive enforcement of Section 203, through Section 5 and by other means, is needed. Reauthorization is also an occasion to expand language assistance to currently non-covered Asian American groups and jurisdictions.

An expansion of Section 203 is necessary and justified. Statistical exploration of census data detailed herein demonstrates that, for Asian Americans, it is best to reduce the trigger to 5,000. This would capture the areas and language minority groups with the most growth, highest rates of limited English proficiency, and those who have faced voting discrimination. Such an expansion would be commensurate, proportional and congruent to ameliorating past discrimination.

Congress should also eliminate the illiteracy requirement, or apply a different measure of this requirement than educational attainment, because this requirement has served to erroneously disqualify several jurisdictions from coverage. Congress should also codify more frequent testing of coverage, given that data from the census used to test for coverage will soon be available more frequently.

Asian American populations have surged throughout the United States. They are becoming citizens and attempting to participate in the nation's political franchise, but have encountered many voting barriers. Section 203 has helped to ensure that these Americans, and indeed all Americans, may fully and fairly exercise their right to vote.

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218. S. REP. NO. 102-315, at 10.

219. *Id.*; H.R. REP. NO. 102-655; at 7.

## NATIONAL CONGRESS OF AMERICAN INDIANS

May 5, 2006

Dear Senator:



## EXECUTIVE COMMITTEE

## PRESIDENT

Joe A. Garcia  
Chikay Chingneh  
(Pueblo of San Juan)

## FIRST VICE-PRESIDENT

Jefferson Keel  
Chickasaw Nation

## RECORDING SECRETARY

Juana Majel  
Pauma-Yuima Band of Mission  
Indians

## TREASURER

W. Ron Allen  
Jamestown S'Klallam Tribe

## REGIONAL VICE-PRESIDENTS

ALASKA  
Hilla Williams  
Yupik

EASTERN OKLAHOMA  
Joe Grayson, Jr.  
Cherokee Nation

## GREAT PLAINS

Mark Allen  
Hanksville Santee Sioux

## MIDWEST

Rahel Chicksa  
Stockbridge-Munsee

## NORTHEAST

Randy Noka  
Narragansett

## NORTHWEST

Ernie Stenegar  
Cowichan Tribe

## PACIFIC

Cheryl Seidner  
Wiyot

## ROCKY MOUNTAIN

Raymond Parker  
Chippewa-Cree Business  
Committee

## SOUTHEAST

Leon Jacobs  
Lumbee Tribe

## SOUTHERN PLAINS

Steve Johnson  
Assiniboine Shawnee

## SOUTHWEST

Manuel Heart  
Life Mountain Ute Tribe

## WESTERN

Kathleen Kitchayan  
San Carlos Apache

## EXECUTIVE DIRECTOR

Jacqueline Johnson  
Tlingit

## NCAI HEADQUARTERS

1301 Connecticut Avenue, NW  
Suite 200  
Washington, DC 20036  
202.468.7767  
202.468.7767 fax  
www.ncai.org

On behalf of the National Congress of American Indians, the nation's oldest and largest organization of American Indian and Alaska Native tribal governments, I write to express our support for S. 2703, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, and to urge you to co-sponsor this important legislation. Swift passage of S. 2703 will ensure the continued protection of the right to vote for all Americans, including the first Americans. Attached please find an NCAI Resolution passed by tribal leaders calling upon Congress to reauthorize the Voting Rights Act.

Native Americans have experienced a long history of disenfranchisement as a matter of law and of practice that, unfortunately, too often persists today. Native Americans were given citizenship in 1924, but it took nearly 40 years for all 50 states to eliminate all express legal impediments to Indian voting. New Mexico, the last state to give Native Americans the franchise, did not do so until 1962—3 years before the passage of the Voting Rights Act. In addition, many states required that Indians be “civilized” or move away from their reservation communities before being permitted to vote. Once given the right to vote, Indians faced the same discriminatory mechanisms—poll taxes, literacy tests, and intimidation—that kept other minorities from voting.

Several of the provisions of the Voting Rights Act, which many people consider to be our most effective civil rights law, that will expire in 2007 have been important for ensuring the right to vote for American Indians and Alaska Natives. Several jurisdictions with large Native populations—including all of Arizona and Alaska and certain counties in South Dakota—are “covered jurisdictions” for Section 5 purposes. This coverage has protected Native communities from a number of attempts to diminish the Native voice through changes to the methods of conducting elections, the locations of polling places, or redistricting schemes.

In addition, the value of Section 203 to Indian country cannot be overstated. Today, 88 jurisdictions in 17 states are covered jurisdictions that need to provide language assistance to American Indians and Alaskan Natives. In many Native communities, tribal business is conducted exclusively or primarily in Native languages. Many Native people, particularly our elders, speak English only as a second language. Even if they have English language skills, many Indian people have said that they feel more comfortable speaking their Native language and are better able to understand complicated ballot issues in their Native language.

Furthermore, it is the policy of the federal government, as expressed in the Native American Languages Act of 1990 (NALA) to “preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages.” The NALA was the first, and may be the only, federal law to guarantee the right of a language minority group to use its language in “public proceedings.” Disenfranchising Native Americans by failing to provide language

assistance in the electoral process to those who need it would surely violate this statutory right. Section 203 ensures all Native people, particularly our elders, many of whom speak English poorly if at all, have access to the ballot box. At the same time, it recognizes the importance of preserving and honoring indigenous languages and cultures.

Although we have made tremendous progress in the past 40 years, discrimination against American Indians and Alaska Natives in voting is still a reality in many communities. For example, a recent report from the New Mexico State Advisory Committee to the United States Commission on Civil Rights recounts the ways in which the Voting Rights Act has been used to protect Native voters in New Mexico, but noted that American Indians are still dramatically underrepresented in statewide offices as a result of persistent discrimination. Similarly, a recent report on voting rights in Alaska found that the State of Alaska, where Alaska Natives make up 19% of the population, continues to conduct English-only elections, despite being covered by both Section 203 and Section 4(f)(4). The report also states that 24 remote Alaska Native villages did not have a polling place in the 2004 election. S. 2703 is a direct response to this type of evidence of ongoing discrimination.

With more and more Native people participating in elections for the first time, the protections of the Voting Rights Act will continue to be critically important to ensuring that all individuals have full and meaningful access to participation in our democracy. We urge you to support this critical civil rights legislation. To co-sponsor S. 2703, please contact: Dimple Gupta, Chief Counsel for the Constitution in Senator Specter's office, at (202) 224-5225, [Dimple.Gupta@judiciary-rep.senate.gov](mailto:Dimple.Gupta@judiciary-rep.senate.gov); Kristine Lucius, Senior Counsel in Senator Leahy's office, at (202) 224-7703, [Kristine.Lucius@judiciary-dem.senate.gov](mailto:Kristine.Lucius@judiciary-dem.senate.gov); Charlotte Burrows, Counsel in Senator Kennedy's office at 202-224-4031, [charlotte.burrows@judiciary-dem.senate.gov](mailto:charlotte.burrows@judiciary-dem.senate.gov); or, Gaurav Laroia, Counsel in Senator Kennedy's office, at (202) 224-7878, [Gaurav.Laroia@judiciary-dem.senate.gov](mailto:Gaurav.Laroia@judiciary-dem.senate.gov). If you or your staff have any further questions, please feel free to contact Virginia Davis, NCAI Associate Counsel, at (202) 466-7767.

Sincerely,



Joe Garcia  
President, National Congress of American Indians

## NATIONAL CONGRESS OF AMERICAN INDIANS



The National Congress of American Indians  
Resolution #TUL-05-090

**TITLE: Support Reauthorization of Provisions Set to Expire in the Voting Rights Act**

## EXECUTIVE COMMITTEE

## PRESIDENT

Joe A. Garcia  
Chiricahua Ojibwa  
(Pueblo of San Juan)

## FIRST VICE-PRESIDENT

Jefferson Keel  
Chickasaw Nation

## RECORDING SECRETARY

Juana Maja  
Pitcairni-Yuma Band of Mission  
Indians

## TREASURER

W. Ron Allan  
Jamestown S'Kallam Tribe

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ALASKA  
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EASTERN OKLAHOMA  
Joe Grayson, Jr.  
Cherokee Nation

## GREAT PLAINS

Mark Allen  
Flandreau Sisseton Sioux

## MIDWEST

Robert Chicks  
Stockbridge-Munsee

## NORTHEAST

Randy Noka  
Narragansett

## NORTHWEST

Ernie Stansgar  
Coeur d'Alene Tribe

## PACIFIC

Cheryl Seidner  
Wiyot

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Raymond Parker  
Chippewa-Cree Business  
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Steve Johnson  
Apsatke Shawnee

## SOUTHWEST

Wansel Heart  
Ute Mountain Ute Tribe

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Kathleen Kitcheyan  
San Carlos Apache

## EXECUTIVE DIRECTOR

Jequeline Johnson  
Tingit

NCAI HEADQUARTERS  
1501 Connecticut Avenue, NW  
Suite 200  
Washington, DC 20036  
202.486.7767  
202.486.7797 fax  
www.ncai.org

**WHEREAS**, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

**WHEREAS**, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

**WHEREAS**, through its unique relationship with Indian nations and tribes, the federal government has established programs and resources to meet the educational needs of American Indians, Alaska Natives, and Native Hawaiians, residing on and off their reserved or non-reserved homelands; and

**WHEREAS**, while the Indian Citizenship Act made Native Americans eligible to vote in 1924, state law determined who could actually vote, which effectively excluded many Native Americans from political participation for decades; and

**WHEREAS**, the Voting Rights Act was enacted to remove barriers to political participation and prohibit the denial of the right to vote on account of race or color and as a result, the Voting Rights Act has guaranteed millions of Americans the equal opportunity to participate in the political process and is considered one of the most successful civil rights laws ever enacted by Congress; and

**WHEREAS**, while much progress has been made in the area of voting rights, significant hurdles to securing voting rights for still remain as documented by a recent court case in South Dakota detailing three decades of systematic voting rights abuses against Native Americans; and

**WHEREAS**, while most of the Voting Rights Act is permanent, some provisions are set to expire in 2007, including: a requirement that states with a documented history of discriminatory voting practices obtain approval from federal officials before they change election laws; provisions that guarantee access to bilingual election materials for citizens with limited English proficiency; and the authority to send federal examiners and observers to monitor elections in order to prevent efforts to intimidate minority voters at the polls.

**NOW THEREFORE BE IT RESOLVED**, that the NCAI, in light of the history of discrimination that minorities have experienced when voting, and the proven effectiveness of the Voting Rights Act, encourages Congress to:

1. Re-enact the Section 5 pre-clearance requirements for 25 years, consistent with the time period adopted with the 1982 extension. These provisions directly impact nine states (South Dakota, Arizona, California, New York, Florida, Michigan, Louisiana, Mississippi, and Texas) with a documented history of discriminatory voting practices, and local jurisdictions in seven others by requiring them to submit planned changes in their election laws or procedures to the U.S. Department of Justice or the District Court in Washington, D.C. for pre-approval. Congress should also consider options for modifying the mechanism by which coverage is determined in order to expand coverage to additional areas with a high concentration of Native Americans.
2. Renew Section 203 for 25 years so that the indigenous people of what is now called the United States and other Americans who are limited in their ability to speak English can continue to receive assistance when voting. Of the 466 local jurisdictions impacted by this provision, 102 jurisdictions must assist American Indians and Alaska Natives in 18 states. Congress also should modify the formula by which these covered jurisdictions are identified in order to provide more communities with Section 203 assistance.
3. Renew Sections 6 to 9, which authorize the attorney general to appoint election monitors and poll watchers to ensure voters are free from harassment, intimidation, or other illegal activity at the polls on Election Day; and

**BE IT FINALLY RESOLVED**, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

**CERTIFICATION**

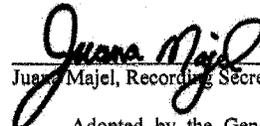
The foregoing resolution was adopted at the 2005 Annual Session of the National Congress of American Indians, held at the 62<sup>nd</sup> Annual Convention in Tulsa, Oklahoma on November 4, 2005 with a quorum present.



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Joe Garcia, President

**ATTEST:**



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Juana Majel, Recording Secretary

Adopted by the General Assembly during the 2005 Annual Session of the National Congress of American Indians held from October 30, 2005 to November 4, 2005 at the Convention Center in Tulsa, Oklahoma.



May 18, 2006

Re: Voting Rights Act Reauthorization and Amendments Act of 2006

Dear Senator,

c/o National CAPACD  
1001 Connecticut Ave NW  
Suite 730  
Washington, DC 20036  
TELEPHONE: 202-223-2442  
FACSIMILE: 202-223-4144  
WEBSITE: www.ncapasonline.org

**OFFICERS**

*Lisa Hasegawa, Chair*  
National Coalition for Asian Pacific  
American Community Development

*Kiran Abuja, Vice Chair of Programming*  
National Asian Pacific American  
Women's Forum

*Jeff Caballero, Vice Chair of Membership*  
Asian Pacific American Community  
Health Organizations

*Ho Tran, Secretary*  
Asian & Pacific Islander American  
Health Forum

*Dawn Thor, Treasurer*  
Southeast Asia Resource Action Center

**MEMBER ORGANIZATIONS**

Asian American Institute  
Asian American Justice Center

Asian & Pacific Islander American  
Health Forum

Asian and Pacific Islander American  
Vote

Asian Pacific American Labor Alliance,  
AFL-CIO

Association of Asian Pacific  
Community Health Organizations

Hmong National Development, Inc.  
Japanese American Citizens League

Korean American Coalition

National Alliance of Vietnamese American  
Service Agencies

National Asian American Pacific Islander  
Mental Health Association

National Asian Pacific American Bar  
Association

National Asian Pacific American  
Women's Forum Consortium

National Asian Pacific Center on Aging

National Coalition for Asian Pacific  
American Community Development

National Federation of Filipino  
American Associations

National Korean American Service &  
Education Consortium

Organization of Chinese Americans

Sikh American Legal Defense and  
Education Fund

South Asian American Leaders of  
Tomorrow

Southeast Asia Resource Action Center

On behalf of the National Council of Asian Pacific Americans (NCAPA), a coalition of 21 leading national APA organizations, and the other undersigned Asian American groups, we write to vigorously support and to urge you to co-sponsor the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (S. 2703). NCAPA, founded in 1996, serves to represent the interests of the greater Asian American community and to provide a national voice for Asian American issues. S. 2703 is critical to ensuring the continued protection of the right to vote for all Americans, including Asian Americans.

The Voting Rights Act (VRA) is our Nation's most successful civil rights law and has enjoyed strong bipartisan support. Congress enacted it in direct response to persistent and purposeful discrimination through literacy tests, poll taxes, intimidation, threats, and violence. The VRA has enfranchised millions of racial, ethnic, and language minority citizens by eliminating discriminatory practices and removing other barriers to their political participation. In the process, the VRA has made the promise of democracy a reality for Asian Americans.

Key provisions of the Voting Rights Act of 1965, are scheduled to expire in 2007, including Section 203, the language assistance provisions. Section 5 prevents voting practices with a discriminatory purpose or effect from being implemented. Section 203 requires certain jurisdictions to provide language assistance to voters in areas with high concentrations of citizens who are limited-English proficient and illiterate. Sections 6-9 authorize the federal government to use observers in elections to monitor VRA compliance.

The Act is designed to combat voting discrimination and to break down language barriers to ensure that Asian Americans and other Americans can vote. Asian Americans have long suffered discrimination at the polls and still face language barriers when attempting to vote. Asian American citizens with limited English proficiency can have difficulty understanding complex voting materials and procedures. The language assistance provision has made democracy real for many Asian American citizens by guaranteeing effectively remove language barriers to voting and permitting all eligible voters to participate fully in the democratic process by casting meaningful ballots in U.S. elections. Sections 5 and the federal examiner and observer program has prevented voting practices that would have harmed Asian American voters.

While progress has been made under the VRA, much work remains to be done. The reality is that there is continuing significant discrimination in voting that is still pervasive in jurisdictions covered by the expiring provisions of the Act. S. 2703 addresses this continued voting discrimination by renewing and restoring the VRA's temporary provisions for 25 years.

The right to vote is the foundation of our democracy and the VRA provides the legal basis to protect this right for all Americans, including Asian Americans. We urge you to support this critical civil rights legislation and to oppose any attempts to weaken the VRA, especially Section 203. To co-sponsor S. 2703, please contact: Dimple Gupta, Chief Counsel for the Constitution in Senator Specter's office, at (202) 224-5225, [Dimple\\_Gupta@judiciary-rep.senate.gov](mailto:Dimple_Gupta@judiciary-rep.senate.gov); Kristine Lucius, Senior Counsel in Senator Leahy's office, at (202) 224-7703, [Kristine\\_Lucius@judiciary-dem.senate.gov](mailto:Kristine_Lucius@judiciary-dem.senate.gov); Charlotte Burrows, Counsel in Senator Kennedy's office at 202-224-4031, [charlotte\\_burrows@judiciary-dem.senate.gov](mailto:charlotte_burrows@judiciary-dem.senate.gov); or, Gaurav Laroia, Counsel in Senator Kennedy's office, at (202) 224-7878, [Gaurav\\_Laroia@judiciary-dem.senate.gov](mailto:Gaurav_Laroia@judiciary-dem.senate.gov). If you or your staff have any further questions, please feel free to contact Terry M. Ao, AAJC Senior Staff Attorney, at (202) 296-2300.

Sincerely,

Asian American Institute

Asian American Justice Center

Asian & Pacific Islander American Health Forum

Asian and Pacific Islander American Vote

Asian Pacific American Labor Alliance, AFL-CIO

Hmong National Development, Inc.

National Alliance of Vietnamese American Service Agencies

Japanese American Citizens League

National Asian Pacific American Bar Association

National Asian Pacific American Women's Forum

National Coalition for Asian Pacific American Community Development

National Korean American Service & Education Consortium

Organization of Chinese Americans

Sikh American Legal Defense and Education Fund

Sikh Coalition

South Asian American Leaders of Tomorrow

Southeast Asia Resource Action Center



Janet Murguía, President

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The Honorable Arlen Specter  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Patrick J. Leahy  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

**Re: Voting Rights Act Reauthorization and Amendments Act of 2006**

Dear Chairman Specter and Congressman Leahy:

On behalf of the National Council of La Raza (NCLR), the largest national Latino civil rights organization in the U.S., I am writing to strongly support S. 2703, the "Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (VRAVA)." Thank you for the leadership role, along with Senator Edward M. Kennedy, which you both have taken on this important legislation and for your commitment to further develop the strong record begun by the House Judiciary Committee through hearings in the Senate Judiciary Committee. Your continued support and sponsorship of S. 2703 is imperative to renew and restore the vitality of the Voting Rights Act of 1965.

The right to vote is a fundamental civil right for all Americans, and NCLR supports efforts to remove barriers that inhibit Americans, especially the most vulnerable in our society, from exercising their right to vote. NCLR works to protect the right to vote for eligible Latinos and to encourage civic participation.

The Voting Rights Act of 1965 (VRA) is the most successful civil rights law ever enacted. Designed to strengthen the Fifteenth Amendment of the Constitution, it eliminated voting barriers, such as literacy tests and poll taxes, which kept African American, Latino, and other minority voters away from voting booths and without a political voice. The VRA prohibits discrimination based on race and national origin and requires certain jurisdictions to provide language assistance to minority voters.

Three key provisions of the VRA will expire next year, unless they are renewed. Section 5 prevents voting practices with a discriminatory purpose or effect from being implemented.

**Regional Offices:** Atlanta, Georgia • Chicago, Illinois • Los Angeles, California • New York, New York  
Phoenix, Arizona • Sacramento, California • San Antonio, Texas • San Juan, Puerto Rico  
LA RAZA: The Hispanic People of the New World



Section 203 requires certain jurisdictions to provide language assistance to voters in areas with high concentrations of citizens who are limited-English-proficient and less literate than the national average. And, Sections 6-9 authorize the federal government to use observers to monitor VRA compliance.

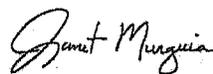
While progress has been made under the VRA, there is still much work to be done. For example, despite the fact that the language assistance provision of the VRA has been in place for the past 30 years, there is evidence that some jurisdictions are still not in full compliance with the federal language assistance requirements, and that Latino voters still face discrimination based on language capability. Failure to reauthorize the language minority provisions of the Act would result in the disenfranchisement of more than four million Latinos.

In addition, Section 5 has been critical to preserving the voting rights of Latinos because it allows a discriminatory change to be stopped before harm is done. The states of Texas and Arizona as well as certain counties in New York are covered by Section 5 of the VRA, which has made a significant difference in the ability of Latino voters in these areas to exercise their right to vote. As more Latinos move to historically-covered jurisdictions such as Georgia and Louisiana, Section 5 will provide protections needed there as well.

S. 2703 addresses these issues by renewing the VRA's temporary provisions for 25 years. The bill reauthorizes and restores Section 5 to the original congressional intent that has been undermined by the Supreme Court in *Reno v. Bossier Parish II* and *Georgia v. Ashcroft*. The *Bossier* fix prohibits implementation of any voting change motivated by a discriminatory purpose. The *Georgia* fix clarifies that Section 5 is intended to protect the ability of minority citizens to elect their candidates of choice. Renewal of Section 203 will ensure that language minority citizens will continue to be provided with equal access to voting without language barriers, using coverage determinations based on the American Community Survey Census data. The bill also keeps the federal observer provisions in place and authorizes recovery of expert witness fees in lawsuits brought to enforce the VRA.

Again, thank you for your leadership on this issue, and I urge you both to continue to vigorously support S. 2703.

Sincerely,



Janet Murguía  
President and CEO

**CITY OF SALEM, VIRGINIA**

OFFICE OF THE GENERAL REGISTRAR  
P.O. BOX 207      191 CLAY STREET  
ZIP CODE 24154

June 23, 2006

The Honorable Arlen Specter  
United States Senate  
Chairman, Senate Judiciary Committee  
711 Hart Building  
Washington, DC 20510

The Honorable Patrick J. Leahy  
United States Senate  
Ranking Democratic Member,  
Senate Judiciary Committee  
433 Russell Senate Office Building  
Washington, DC 20510

RE: Voting Rights Act of 1965, as amended

Dear Senators Specter and Leahy:

I am the General Registrar in Salem, Virginia. I have worked in the Office of the General Registrar in Salem for eighteen years, including the last two years in my current capacity. My understanding is that the Judiciary Committee of the United States Senate is currently reviewing whether to reauthorize the expiring provisions of the Voting Rights Act, including the preclearance and bailout sections. I am writing to share Salem, Virginia's experience with the bailout process.

On May 25, 2006, the City of Salem, Virginia filed a complaint in the United States District Court for the District of Columbia, seeking to "bailout" from coverage under the special provisions of the Voting Rights Act. A copy of the complaint is

enclosed. Under Section 5 of the Voting Rights Act, the city is currently required to obtain preclearance from either the District Court for the District of Columbia or the Attorney General for any change in voting standards, practices, or procedures. If the District Court grants the city a declaratory judgment that the city qualifies for a "bailout," the city will no longer need federal approval for changes affecting voting.

During my time in the Registrar's Office, I have not been responsible for making the city's Section 5 submissions, but I am familiar with the submissions and the process because they affected my work. Generally, the process of making submissions is routine and not a huge burden on the office's resources. On occasion, however, we have made changes requiring preclearance with elections approaching and needed a prompt decision by the DOJ. We believe DOJ has been cooperative and responsive to our requests for expedited review. For example, we moved a polling place just prior to the recent May 2<sup>nd</sup> election. The DOJ gave us an answer (i.e., preclearance) in plenty of time to prepare for the election. My experience has been that the DOJ will not use the 60 days it has by statute to make a decision when minor changes are involved, or if the circumstances require an expedited response.

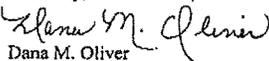
Similarly, the DOJ has been cooperative, rather than adversarial, in our pursuit of the bailout. In fact, the DOJ has worked with our legal counsel to facilitate our pursuit of the bailout. We understand, for example, that the DOJ interviewed people in the Salem community and to review our records to make sure that we have met our obligations under the Voting Rights Act. The DOJ is making sure that we meet the requirements for a bailout and has provided us feedback to ensure that we provide all of the information necessary for the DOJ to make an informed decision. All of the indications are that the City will meet the requirements for a bailout and we expect the bailout to be forthcoming.

The process of seeking a bailout has been neither time-consuming nor expensive. It took me about a week, working off-and-on, to put the materials together to support our complaint. The Voting Rights Act requires jurisdictions seeking to bailout to present evidence of minority voter registration and turnout, changes in minority voting

participation over time, and disparities (if any) between minority and non-minority participation levels. We do not keep voting statistics by race, but we were able to show that as of 2005, 78.7 percent of our voting age population was registered to vote. Employees of the DOJ also did some of the leg work, and they reviewed our files and theirs to check whether we had submitted all of our voting changes for preclearance. The overall costs of a bailout for the City will be less than \$5000, which includes all legal fees and costs. This is not an insignificant sum for a city our size, but it was not unduly burdensome either. Moreover, we believe a bailout will be cost-effective for the City in the long run, and will enable us to make routine voting changes without delay.

I am aware that several other jurisdictions located in Salem's vicinity plan to seek a bailout after the June statewide primary election. I am currently working with three registrars in our area and have heard there are an additional eight jurisdictions interested in pursuing bailout. Based on our experience in Salem, I believe that more jurisdictions would seek to bailout if they were aware of the opportunity and understood the requirements. It does not require the time and money that many jurisdictions assume it does, and it is not a burdensome process either. In my opinion, bailout provides a real option for those jurisdictions that have complied with their Section 5 obligations and no long warrant federal oversight.

Sincerely,

  
Dana M. Oliver  
General Registrar,  
Salem, Virginia



WHITE HOUSE INITIATIVE ON  
ASIAN AMERICANS AND PACIFIC ISLANDERS

June 26, 2006

Re: Voting Rights Act Reauthorization and Amendments Act of 2006

Dear Senator,

As Chairman of the President's Advisory Commission on Asian Americans and Pacific Islanders, I strongly encourage you to reach a bipartisan consensus on the Voting Rights Act Reauthorization and Amendments Act of 2006 (S. 2703). In particular, I encourage you to consider the importance of Section 203, which requires that certain state and local jurisdictions provide assistance in languages other than English to voters who are limited English proficient. This provision helps to ensure that the voters are casting their ballots effectively and correctly.

President George W. Bush established the President's Advisory Commission on Asian Americans and Pacific Islanders to improve the quality of life of Asian Americans and Pacific Islanders through greater participation in federal programs where they may be underserved. Over the past year and a half, the Commission has conducted 14 community site visits all across the country. One of the major concerns we have as a Commission is that some communities do not seem to have equal access to federal resources as the result of language barriers. If this is the case with federal resources, we hope the Voting Rights Act (VRA) is able to ensure that citizens do not face the same challenges when it comes to their right to vote.

The VRA has enjoyed strong bipartisan support, and I hope you to continue defending U.S. citizens' right to vote. One of the greatest things about the United States is that it encourages people who have been here for a long time and who have been contributing to society to be civically engaged. In fact, certain persons are exempt from English literacy requirements when applying for citizenship, such as the elderly who have resided in the United States for a long period of time, the physically or developmentally disabled, and certain Hmong veterans who helped the United States during the Vietnam War and came to the United States as refugees.

Voting can be an intimidating and complicated process, even for voters who are native English speakers. For new citizens whose first language is not English, the voting process is even more difficult to maneuver. Language assistance also helps native-born voters who, due to limited educational opportunities, are limited English proficient. Pride is rarely compromised in many Asian cultures, and without language assistance, many simply decide to avoid the entire process rather than ask for help. For many new citizens, one of the most cherished rights upon becoming a U.S. citizen is the right to vote—a right that many did not have in their native country.

I urge you to consider the importance of Section 203 of the VRA and how it impacts communities that include citizens with limited English proficiency. We would all like to participate in our country's democratic process, so please allow the VRA to provide the legal basis to protect this right for all Americans.

Sincerely,

A handwritten signature in black ink, appearing to read "Rudy Pamanujan".

Rudy Pamanujan, Chair  
President's Advisory Commission on  
Asian Americans and Pacific Islanders

06/30/2006 3:04PM



Nina Perales, Southwest Regional Counsel  
Mexican American Legal Defense and Educational Fund (MALDEF)

Testimony before the Senate Judiciary Subcommittee on the Constitution,  
Civil Rights, and Property Rights  
Re: “Renewing the Temporary Provisions of the Voting Rights Act:  
Legislative Options After *LULAC v. Perry*”

Thursday, July 13, 2006

Chairman Brownback, Senator Feingold, and Members of the Subcommittee, thank you for the opportunity to testify today regarding the Supreme Court’s decision in *LULAC v. Perry* and its impact upon the reauthorization of the Voting Rights Act. I am Nina Perales, Southwest Regional Counsel for the Mexican American Legal Defense and Educational Fund (MALDEF). MALDEF successfully litigated the Voting Rights Act claim in *LULAC v. Perry* on behalf of the GI Forum of Texas and Latino voters. I argued G.I. Forum’s appeal before the Supreme Court on March 1, 2006.

On June 28, 2006, the Supreme Court invalidated the 2003 Texas congressional redistricting plan. The Court found that Texas’s redistricting plan discriminated against Latino voters in violation of Section 2 of the Voting Rights Act because the State improperly diluted the voting strength of Latinos when it redrew Congressional District 23 (CD23).<sup>1</sup>

The Texas 2003 redistricting map made drastic changes to the State’s congressional districts. In South and West Texas, home to all of the State’s Latino citizen majority districts, the Legislature dismantled CD23, removing over 100,000 Latinos from the district to shore up the re-election chances of the incumbent, who had steadily lost the support of Latino voters in the preceding decade. In an attempt to compensate for the loss of electoral opportunity in CD23, the Legislature inserted a new Latino-majority CD25 into the region; CD25 spanned 300 miles from Travis County to Hidalgo County on the U.S. Mexico border.

The Supreme Court concluded that Texas had transformed CD23 from an opportunity district to one in which Latino voters could no longer elect their candidate of choice. The Court applied the traditional 3-part test for vote dilution (established in *Thornburg v.*

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<sup>1</sup> Notably, the 2003 plan marks the second statewide redistricting plan by Texas to be invalidated under the Voting Rights Act in this decade. In 2001, the DOJ interposed an objection to the Texas House of Representatives redistricting plan because it discriminated against Latinos.

*Gingles*), finding that Latinos could comprise a majority in CD 23, that Latinos voted cohesively in CD23 and Anglos normally voted as a bloc to defeat the minority-preferred candidate in CD23.<sup>2</sup> Finally, under the totality of circumstances, the Court noted that the changes to CD 23, combined with the legacy of discrimination against Latino voters in Texas, illegally diluted Latino voting strength.

The Court's ruling in *LULAC v. Perry* affirms the continuing need for the vital legal protections for minority voters codified in the temporary provisions of the Voting Rights Act. The Court found that discrimination on the basis of race in elections persists in Texas, a jurisdiction covered under Section 5 of the Act. By redrawing CD 23, the State of Texas "took away the Latinos' opportunity because Latinos were about to exercise it," an act that, according to the Court, "bears the mark of intentional discrimination that could give rise to an equal protection violation."<sup>3</sup>

The Court examined the changes to CD 23 against the backdrop of Texas' "long, well-documented history" of voting discrimination against Latinos and African Americans, which resulted in its inclusion as a jurisdiction which is covered statewide under Section 5.<sup>4</sup> The Court's opinion also acknowledged the significant history of past discrimination against Latinos in Texas, and its impact to deny Latinos' participation in the electoral process.<sup>5</sup> This history of discrimination, noted the Court, provides necessary context for the redrawing of CD 23. As Justice Kennedy wrote, the States' changes to the district "undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming politically active and cohesive."<sup>6</sup>

Although Latinos in Texas have always comprised a significant portion of the state's population, until the 1970's their ability to register and vote was limited by a series of discriminatory official practices including the poll tax, white primaries and an annual voter registration requirement. Latino voter registration and turnout continues to lag behind that of Anglos in Texas and voting continues to be highly racially polarized. The Court in *LULAC v. Perry* specifically noted the District Court's finding that voting is racially polarized in South and West Texas, as well as in Texas as a whole, and characterized the voting in District 23, where the violation occurred, as "especially severe."<sup>7</sup>

Importantly, the Court upheld the right of minority voters to exercise an undiluted vote in the modern redistricting context where political parties manipulate electoral boundaries to achieve partisan advantage. Texas had argued that partisanship and incumbency protection, not race, had motivated the removal of Latinos from CD 23. The Court's analysis of this contention serves a strong warning to states that attempt to manipulate

<sup>2</sup> Slip. Op. (Kennedy, J.) at 20-29. See also MALDEF Merits Brief at 3-10 and 38-41, available at [http://www.maldef.org/pdf/GI\\_Forum\\_Merits\\_Brief.pdf](http://www.maldef.org/pdf/GI_Forum_Merits_Brief.pdf).

<sup>3</sup> *LULAC v. Perry*, 548 U.S. \_\_\_, No. 05-204, slip op. at 34 (June 28, 2006) (opin. of Kennedy, J.).

<sup>4</sup> Slip op. at 34 (Kennedy).

<sup>5</sup> I have attached MALDEF's report on discrimination in voting in Texas to this report to provide further information regarding pervasive discrimination in elections in Texas.

<sup>6</sup> Slip op. at 34 (Kennedy).

<sup>7</sup> *Id.* at 21 (Kennedy).

minority voters geographically to achieve a particular political result. While the Court noted that “incumbency protection can be a legitimate factor in districting,” it was clearly deeply troubled that Latinos voters bore the brunt of the State’s politically-motivated redistricting.<sup>8</sup> As Justice Kennedy wrote,

Even if we accept the District Court’s finding that the States’s action was taken primarily for political, not racial reasons ... the redrawing of the district lines was damaging to the Latinos in District 23. The State not only made fruitless the Latinos’ mobilization efforts but also acted against those Latinos who were becoming most politically active, dividing them with a district line through the middle of Laredo. . . The policy [of incumbency protection] becomes even more suspect when considered in light of evidence suggesting that the State intentionally drew District 23 to have a nominal Latino voting-age majority (without a citizen voting-age majority) for political reasons. This use of race to create the facade of a Latino district also weighs in favor of appellants’ claim.<sup>9</sup>

The Court concluded that Texas’ policy, “whatever its validity in the realm of politics, cannot justify the effect on Latino voters.”<sup>10</sup> The nation’s highest court has thus interpreted Section 2 of the Voting Rights Act to provide important protection to minority voters in the face of harmful redistricting, even when that redistricting is motivated by “political” intent or incumbency protection.

The Court’s opinion also contributes to the overwhelming evidence of continuing discrimination against minorities in elections that is currently in the record underlying the Voting Rights Act reauthorization. This record, which is over 12,000 pages in length, has been developed in a series of legislative hearings held in the House and Senate Judiciary Committees in order to develop a record of constitutional violations as required for remedial legislation under the Supreme Court standard in *City of Boerne v. Flores*.

Because the Supreme Court’s holding in the Texas redistricting case addressed several legal claims, none of which implicated any of the temporary provisions of the VRA, there is no direct correlation between the Court’s holding in this case and the reauthorization of the temporary provisions of the Act. It is critical to note, however, that eight (8) Justices wrote to express their view that Section 5 can be a compelling state interest to support to the creation of minority opportunity districts. Because the case did not, and could not, involve the question whether the Texas plan was retrogressive under Section 5, it is noteworthy that these eight justices went out of their way to rebuff those who have attacked the constitutional validity of Section 5 today.

Section 2 does not provide an adequate alternative to the voter protections provided by the Department of Justice under Section 5 of the VRA. First, the cost to private individuals of litigating claims under Section 2 of the Act is very high. Therefore, the effective privatization of the Department of Justice’s antidiscrimination function under Section 5 would result in a severe reduction in the effectiveness of the Act’s protections

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<sup>8</sup> Slip op. at 35 (Kennedy).

<sup>9</sup> Slip. Op. (Kennedy, J.) at 34-35. See also MALDEF Merits Brief at 27-31.

<sup>10</sup> Slip op. at 34 (Kennedy).

against discrimination in elections. Secondly, private causes of action under Section 2 occur following discrimination in elections such that elected officials will enjoy the fruits of discrimination while litigation is brought by private individuals, which often takes several years. Even after a Section 2 case is successful, officials elected under discriminatory conditions will benefit from the political advantage of incumbency when a new election is ordered under Section 2. The availability of a private cause of action under Section 2 is simply not an effective substitute for the Department's effective enforcement of Section 5.

In conclusion, the Supreme Court's opinion in *LULAC v. Perry* provides important support for the full reauthorization of temporary provisions of the Voting Rights Act. In holding that Texas's 2003 redistricting plan discriminated against Latino voters, the Court recognized that the critical protections of the Act remain essential to protect minority voters living in jurisdictions covered under Section 5. I urge the Senate to quickly approve the renewal of the temporary provisions of the Act as provided for by S. 2703 so that minority voters may continue to receive the benefit of the Act's critical voter protections.

**A Fitting Celebration:  
Adoption of the Voting Rights Act Amendment**

*"Nobody's free until everybody's free."* – Fannie Lou Hamer

*"I would like to be known as a person who is concerned about freedom and equality and justice and prosperity for all people."* – Rosa Parks

*"Women, if the soul of the nation is to be saved...you must become its soul."* – Coretta Scott King

These three remarkable women speak to the most basic aspirations of our nation. In their unparalleled grace and majesty, they embodied the struggle for justice and equality of all people.

Congress appropriately titled the legislation extending key sections of the Voting Rights Act *The Fannie Lou Hamer, Rosa Parks, Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006*. This gesture was more than symbolic. Not only does the measure pay tribute to these three heroines of our nation's struggle for racial justice, it acknowledges the countless unsung heroines of the march to freedom.

The struggle to win the right to vote, like all major campaigns for equal justice, has been paid with sacrifice, toil, and sometimes blood. Many of the foot soldiers have been women. Women historically have been the life-force of all social justice movements—whether the abolition movement of the 19<sup>th</sup> Century, the suffrage movement of the early 20<sup>th</sup> Century, or the current struggle for racial and equal justice being waged today on many fronts by a multi-racial, multi-ethnic force of women who collectively represent the soul and essence of our nation's highest ideals.

Those who join us to demand immediate passage of the Fannie Lou Hamer, Rosa Parks, Coretta Scott King legislation know that equal ballot access and the right to elect representatives of one's choice are inextricably tied to the unfinished promise of equal justice. The Voting Rights Act made the 19<sup>th</sup> Amendment giving women the right to vote a reality for women of color. The VRA has been critical in the increased numbers of Latina, Asian American, Native American, and African American women elected officials. In 1970, five years after the passage of the Act, there were 160 Black women elected officials; in 2001, that number was 3,200—a vast majority of them in Southern states. Giving a voice to the voiceless has always benefited women.

We are calling upon Congress to *act now*. Adoption of the expiring provisions of the Voting Rights Act will exalt substance over symbolism and be the most fitting celebration of the courageous women for which this legislation is titled.

**Signatures attached**

**Signed,****Dr. Dorothy I. Height**

Chair & President Emerita,  
National Council of Negro Women, Inc.;  
Chairperson, Leadership Conference on  
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Executive Director  
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Former Chair  
U.S. Commission on Civil Rights

**Anna Burger**

Secretary/Treasurer  
Service Employees International Union  
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**Camille O. Cosby****Dr. Thelma Daley**

Director  
Women in the NAACP

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Organization for the Relief of  
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**Candy S. Hill**

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Catholic Charities USA

**Signed,****Margaret Huang**

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Economist, author and commentator

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Organization of Chinese Americans

**Nancy Zirkin**  
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VOTING RIGHTS IN ALABAMA  
1982-2006

A REPORT OF RENEWTHEVRA.ORG  
PREPARED BY JAMES BLACKSHER, EDWARD STILL, NICK  
QUINTON, CULLEN BROWN AND ROYAL DUMAS

JUNE 2006



VOTING RIGHTS IN ALABAMA, 1982-2006

**JAMES BLACKSHER,<sup>1</sup> EDWARD STILL<sup>2</sup>, NICK QUINTON<sup>3</sup>, CULLEN BROWN<sup>4</sup>, ROYAL DUMAS<sup>5</sup>**

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<sup>1</sup>Civil Rights Litigator

<sup>2</sup>Civil Rights Litigator

<sup>3</sup>University of Alabama student

<sup>4</sup>University of Alabama student

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## INTRODUCTION TO THE VOTING RIGHTS ACT

For decades, Alabama has been at the center of the battle for voting rights equality. Several of the pre-1965 voting cases brought by the Department of Justice and private parties were in Alabama. The events of Bloody Sunday in Selma, Alabama, in 1965 served as a catalyst for the introduction and passage of the Voting Rights Act of 1965. Between passage of the Act in 1965 and the last major reauthorization of the Act in 1982, the temporary provisions of the Act that apply to Alabama—the Section 5 preclearance provisions and the federal observer provisions—were employed repeatedly to prevent voting discrimination.

Since the 1982 reauthorization, significant voting discrimination in Alabama has continued. Not only has the Department of Justice objected to forty-six submissions under Section 5 and sent observers to Alabama sixty-seven times, but the federal courts have found several times that the state of Alabama and/or its political subdivisions have engaged in intentional discrimination. Though there has been significant progress in electoral access and equality for Alabama's African-American citizens, it has largely been as the result of extensive voting rights enforcement. Indeed, voting remains largely racially polarized, and black candidates rarely get elected in majority-white districts. The recent unsuccessful efforts in 2003 and 2004 to remove discriminatory aspects of Alabama's 1901 Constitution through voter referenda are indicative of the racial cleavage that exists in Alabama to this day. Under the circumstances, the preclearance and observer provisions continue to be needed.

**I. The Temporary Provisions of the Voting Rights Act that Apply to Alabama**

Alabama is one of nine states that is covered under the formula found at Section 4(a) of the Act that subjects the state and each of its political subdivisions to the preclearance provision of Section 5 of the Act and the observer and examiner provisions of Sections 6-9 and 13.<sup>6</sup> Since the 1965 inception of the Act, Alabama has been subject to these temporary provisions, which expire in August 2007 if not reauthorized by Congress.

For statewide covered jurisdictions like Alabama, Section 5 requires federal preclearance of any voting change made by any political jurisdiction. Any proposed changes in voting or electoral procedures must be submitted either to the Attorney General or to a three-member panel of the U.S. District Court for the District of Columbia for preclearance before the changes can be implemented.<sup>7</sup> The submitting authority must demonstrate that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race

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<sup>6</sup> 42 U.S.C. § 1973 et seq., as amended.

<sup>7</sup> 42 U.S.C. § 1973c.

or color” or membership in a language minority group.<sup>8</sup> Unless and until preclearance is obtained, the change cannot be implemented.

The observer provisions enable the Attorney General to send observers to monitor polling place and vote counting activities in any Alabama jurisdiction that has been certified for coverage.<sup>9</sup> The Attorney General can certify a jurisdiction for coverage under one of two circumstances: (1) the Attorney General has received twenty or more complaints from residents of a jurisdiction “that they been denied the right to vote on account of race or color” or membership in a language minority group and the Attorney General believes the complaints to be meritorious or (2) the Attorney General determines that certification is necessary to enforce the guarantees of the fourteenth or fifteenth amendment.<sup>10</sup>

## II. A Brief History of Pre-1982 Voting Discrimination in Alabama

Alabama has historically been in the forefront of discriminating against minority voters.<sup>11</sup> In 1901, as part of a Constitutional Convention, Alabama adopted several devices designed to disfranchise black voters, including a poll tax and literacy test. These devices resulted in the virtual elimination of the black electorate in Alabama – the number of black registered voters decreased from more than 180,000 voters in 1900 to less than 3,000 in 1903.<sup>12</sup>

Beginning in the 1940s, when the courts began to take the first steps to recognize the voting rights of black voters, the Alabama legislature took several steps designed to disfranchise black voters. The legislature passed, and the voters ratified, a state constitutional amendment that gave local registrars greater latitude to disqualify voter registration applicants. Black citizens in Mobile successfully challenged this amendment as a violation of the fifteenth amendment.<sup>13</sup> The legislature also changed the boundaries of Tuskegee to a 28-sided figure designed to fence out blacks from the city limits. The Supreme Court unanimously held that this “racial gerrymander”

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<sup>8</sup> *Id.*

<sup>9</sup> 42 U.S.C. § 1973f.

<sup>10</sup> 42 U.S.C. § 1973d.

<sup>11</sup> The history recounted in this section is indebted to the discussion in Peyton McCrary, Jerome A. Gray, Edward Still, and Huey L. Perry, “Alabama,” in *QUIET REVOLUTION IN THE SOUTH*, 38-52 (Chandler Davidson and Bernard Grofman eds. 1994).

<sup>12</sup> *Id.* at 44.

<sup>13</sup> *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949) (three-judge court), *aff’d*, 336 U.S. 933 (1949).

violated the Constitution.<sup>14</sup> In 1961, as discussed more fully below, the Alabama legislature also intentionally diluted the effect of the black vote by instituting numbered place requirements for local elections.<sup>15</sup>

When the Department of Justice was first given authority to bring voting rights cases on behalf of black citizens in 1957, Alabama jurisdictions were a primary area of focus. In Dallas County, Alabama, the Department of Justice instituted litigation in April 1961. At the time, only one percent of blacks in Dallas County were registered. The Department of Justice would successfully eliminate one disfranchising device in court, after which Dallas County would implement one or more new disfranchising devices. As a result, by 1965, less than five percent of blacks in Dallas County were registered. The experience in Dallas County was used as a prime example by Congress in 1965 for the necessity of Section 5, a provision designed to prevent jurisdictions from devising new ways to discriminating against minority voters.<sup>16</sup>

Of course, Dallas County came to have an even more significant meaning pertaining to the Act. The nationally televised images of the violent assault on unarmed marchers crossing the Edmund Pettus Bridge in Selma – the county seat of Dallas County – on March 7, 1965, provided the impetus for President Lyndon Johnson to announce eight days later that he would be sending a voting rights bill to Congress. Less than five months later, the Voting Rights Act was signed into law.

Between the 1965 enactment of the Voting Rights Act and the 1982 reauthorization, the temporary provisions had a substantial impact. The Department of Justice objected 59 times to Section 5 submissions by the state of Alabama or one of its political subdivisions.<sup>17</sup> In addition, the Department of Justice sent observers to Alabama jurisdictions 107 times during the same period of time.

Moreover, just as Alabama litigation played a substantial role in the 1965 enactment, it played a similar role in the 1982 reauthorization. The amendment of Section 2 of the Voting Rights Act – a major permanent provision of the Act – in 1982<sup>18</sup> was Congress' response to the Supreme

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<sup>14</sup> *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

<sup>15</sup> McCrary et al., at 46-47.

<sup>16</sup> H. Rep No. 89-439, at 10-11.

<sup>17</sup> The National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005*, Map 5A (2006).

<sup>18</sup> Pub.L. 97-205, § 3, 96 Stat. 134 (June 29, 1982).

Court's decision in *City of Mobile v. Bolden*<sup>19</sup>, which imposed a discriminatory intent requirement on constitutional vote dilution claims. Mobile had changed from a mayor-alderman form of government to a city commission form of government in 1911 where commissioners were elected at-large and each ran portions of the government. This was a period of intense political struggle between white propertied and working classes in Alabama. A coalition of urban industrialists and Black Belt planters had used race to get enough of the white yeoman and working classes to vote against their own interests and approve the disfranchising 1901 Alabama Constitution. In Mobile, the district court found, "the desire to place the business and professional classes in control of Mobile's government and to exclude the lower classes from participation was an important factor in adopting the commission government in 1911. . . ."<sup>20</sup> Mobile's white middle and working classes, whose numbers mushroomed in the port city's defense industries during and after World War II, had been trying for years to wrest political power from the old-family elites, who were able to use the at-large city commission form of government to install officials beholden to them. Alabama's white yeomanry had historically favored single-member districts to elect candidates of their choice, but their ancestral dedication to the subordination of African Americans had caused them to relent to the widespread use of at-large election schemes promoted by the monied classes.<sup>21</sup> This heritage of white supremacy effectively blocked electoral reform in Mobile, which became one of the last cities in the United States to retain the city commission form of government. Indeed, in 1981, while the *Bolden* case was still pending on remand, Mobile's white electorate defeated a referendum proposal to change the commission form of government.<sup>22</sup>

The district court's April 1982 decision on remand in *Bolden*, which found that the 1911 change was adopted with a discriminatory intent, finally provided a federally-imposed reason to reform the outmoded commission government. It pointed out that, unless a legislative remedy was forthcoming, the court would force the three Mobile city commissioners to run from single-member districts, and the practice of dividing executive department functions among the commissioners would become constitutionally suspect.<sup>23</sup> This gave Mobile's local legislative delegation in 1985 the impetus it needed to enact a mayor-council system with single-member

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<sup>19</sup> 446 U.S. 55 (1980).

<sup>20</sup> 542 F. Supp. 1950, 1075 (S.D. Ala. 1982).

<sup>21</sup> "In 1876, the Democratic legislature eliminated elections altogether for county commissions in eight black-majority counties, authorizing the governor to appoint county commissioners." McCrary et al., at 42-43.

<sup>22</sup> Mobile Register, July 15, 1981, at A1, col. 5.

<sup>23</sup> *Bolden*, 542 F. Supp. at 1077-78.

council districts, which the voters subsequently approved.<sup>24</sup> By this time, Congress had amended Section 2 of the Voting Rights Act to create the discriminatory results standard. The message sent by this strengthening of the Act was a national determination, finally, to provide racial minorities effective access to political power.

### III. Voting Discrimination in Alabama since 1982

As in the pre-1982 period, Alabama has continued to be a battleground in the effort to achieve voting rights equality in the last twenty-four years. The temporary provisions have been employed frequently: the Department of Justice has objected to 46 Section 5 submissions from Alabama, 7 from the state and 39 from local jurisdictions. Moreover, Department of Justice observers have been dispatched to monitor elections 67 times.<sup>25</sup> A map showing where the local objections have been interposed is appended to the back of this report.

Beyond this quantitative data, since 1982, federal courts have found that the system of appointing pollworkers and methods of election for local jurisdictions arose from an intentionally discriminatory state policy. The remedies to these policies affected virtually every county in Alabama. Some jurisdictions proved to be defiant in adopting a method of election that would provide minority voters an equal opportunity to elect candidates of choice. Others attempted to nullify the effect of the affirmative litigation, and in some cases were prevented from doing so by Section 5. Additionally, in 1987, the Supreme Court found that the city of Pleasant Grove – a racial enclave with no black citizens – failed to demonstrate under Section 5 that its annexation policy was nondiscriminatory. The congressional and legislative redistrictings in the past three decades have also demonstrated the significant impact that the Voting Rights Act has had in creating and maintaining opportunities for minority voters to elect candidates of their choice.

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<sup>24</sup> Ala. Act 85-229, p. 96; Ala. Code § 11-44C-2 (setting “a special election to be held on May 14, 1985, said call for the purpose of determining whether such city shall adopt the court ordered district commission form of government in accordance with the consent decree entered into by the parties and approved by the court on April 7, 1983, in the case of Bolden vs. City of Mobile, Civil Action No. 75-297, or in the alternative the mayor-council form of government, authorized by this chapter. . .”). The Hobson’s choice produced by the federal court’s remedy also gave the black caucus of the local delegation, led by the late Senator Michael Figures, the leverage to negotiate the famous super-majority provision in Mobile’s charter, which requires five votes on the seven-member council to conduct any business. Ala. Code § 11-44C (supp. 2005). Because three of the seven districts have black voting majorities, the council members elected by African Americans have a potential veto power on matters vital to the interests of the black community. See e.g., Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. CR-CL L. REV. 173, 247 (1989).

<sup>25</sup> *Protecting Minority Voters*, Maps 5A, 5B, 10B. In addition, federal observers were sent to Hale County for the recent June 6, 2006 primary election.

While active enforcement of the Voting Rights Act has led to a significant expansion in equality for minority voters, there remains a strong undercurrent of racial division that affects voting. Voting remains racially polarized and in two recent referenda, Alabama voters refused to remove segregationist and discriminatory provisions of the Alabama Constitution.

A. Intentional discrimination in pollworker appointment

Shortly after the 1982 reauthorization, black citizens in Alabama challenged the method of appointing poll officials under Section 2 of the Voting Rights Act. By means of a preliminary injunction, the federal court ordered 65 of Alabama's 67 counties to institute programs aimed at appointing more African Americans as poll officials.<sup>26</sup> The court based its ruling on these findings of fact:

The past reality in Alabama has been that black citizens of the state were not only prohibited from participating in the political process, they were taught that this was the rule of law and society, the transgression of which merited severe punishment. In effect, state and local governments intentionally created an atmosphere of fear and intimidation to keep black persons from voting.

The present reality in Alabama is that many black citizens, in particular the elderly and uneducated, still bear the scars of this past, and are still afraid to engage in the simple act of registering to vote and voting. However, these fears can often be substantially allayed by the open and substantial presence of other black persons in the role of poll officials at voting places. Nevertheless, black persons are grossly underrepresented among poll officials, with the result that polling places across the state continue to be viewed by many blacks as areas circumscribed for whites and off-limits for blacks.<sup>27</sup>

The claims against the state of Alabama went to trial. In 1988, the district court held that Alabama laws and processes related to appointing election officials were intentionally discriminatory.<sup>28</sup>

B. Intentional discrimination in methods of electing local bodies

By far the biggest advance in equal access for African Americans came after May 28, 1986, when a federal district court made findings that, in the century following Reconstruction, the Alabama Legislature had purposefully switched from single-member districts to at-large election of local governments as needed to prevent black citizens from electing their candidates of choice, and

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<sup>26</sup> *Harris v. Graddick*, 593 F. Supp. 128 (M.D. Ala. 1984).

<sup>27</sup> *Id.* at 133.

<sup>28</sup> *Harris v. Siegelman*, 695 F. Supp. 517, 526 (M.D. Ala. 1988).

that the general laws of Alabama governing all at-large election systems throughout the state had been manipulated intentionally during the 1950s and 1960s to strengthen their ability to dilute black voting strength.<sup>29</sup> The court concluded: "From the late 1800's through the present, the state has consistently erected barriers to keep black persons from full and equal participation in the social, economic, and political life of the state."<sup>30</sup> Based on these findings, the district court expanded the *Dillard v. Crenshaw County* litigation to include a defendant class of 17 commissions, 28 county school boards, and 144 municipalities who were then employing at-large election systems tainted by the racially motivated general laws.<sup>31</sup> Appended to the back of this report are the county commissions, school boards, and municipalities that were affected by the *Dillard* cases; a substantial majority of the counties had at least one electoral body that was affected.

On June 29, 1986, one month after the initial *Dillard* decision, the U.S. Supreme Court gave enforcement of Section 2 a big boost when it handed down *Thornburg v. Gingles*.<sup>32</sup> The legal standards established by *Gingles* simplified the elements of proof for racial vote dilution claims. But in Alabama, it was not so much the new legal particulars that influenced majority white government throughout the state as it was the Supreme Court's broad message that, in an environment of racially polarized voting, protected minorities have a right to election structures that will provide them an equal opportunity to participate in the political process and to elect candidates of their choice. This resounding national mandate essentially provided the political cover Alabama's elected officials might have needed to justify to their majority-white constituencies their decisions not to continue defending racially discriminatory election systems when they were challenged in court. Most of the local jurisdictions in the defendant class entered into consent decrees negotiated by state and local black political leaders, although a few

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<sup>29</sup> *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1356-60 (M.D. Ala. 1986). The court even found that, following adoption of the 1875 Alabama "Redeemer" Constitution, elections in some Black Belt counties were suspended altogether. "Following this 'redemption' by the white-supremacist Democratic party, the state legislature passed a series of local laws that eliminated elections for county commission and instead gave the governor the power to appoint the commissioners. This system of gubernatorial appointment was particularly favored in black belt counties threatened with black voting majorities. According to the plaintiffs' historian, the gubernatorial appointment system is widely understood to have been designed to prevent the election of black county commissioners." *Id.* at 1358. The rules imposed by general law on all at-large elections, which still remain in place, included anti-single-shot provisions, numbered places, and a majority-vote requirement. *Id.* at 1360.

<sup>30</sup> *Id.* at 1360.

<sup>31</sup> *Dillard v. Crenshaw County*, CA No. 85-1332 Doc 491 and 492 (M.D. Ala., April 3, 1987).

<sup>32</sup> 478 U.S. 30 (1986).

proceeded to trial and judgment.<sup>33</sup> Twelve of the 17 county commissions changed to single-member districts, one agreed to use cumulative voting rules with its at-large elections<sup>34</sup>, and four are still pending judgment. Twenty-three of the 28 county boards of education changed to single-member districts, one agreed to use cumulative voting rules with its at-large elections, and four are still pending judgment. One hundred two of the 144 municipalities changed to single-member districts, 13 agreed to change to multimember districts, 20 agreed to use limited voting rules with their at-large elections<sup>35</sup>, five agreed to use cumulative voting rules with their at-large elections, two agreed to use plurality-win rules with their at-large elections, and two are still pending judgment.<sup>36</sup>

Some of the *Dillard* jurisdictions would not agree to consent decrees providing a complete remedy for the dilution of black citizens' votes, and the district court had to adjudicate the remedy issues based on the jurisdictions' admissions of liability. For example, the Baldwin County Board of Education proposed five single-member districts, none of which had an

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<sup>33</sup> *Dillard v. City of Greensboro*, 865 F. Supp. 773, 870 F. Supp. 1031 (M.D. Ala. 1994); *vacated and remanded*, 74 F.3d 230 (11th Cir. 1996) (voting rights), *on remand*, 946 F. Supp. 946 (M.D. Ala. 1996), 956 F. Supp. 1576 (M.D. Ala. 1997), 996 F. Supp. 1576 (M.D. Ala. 1997); *Dillard v. City of Foley*, 926 F. Supp. 1053 (M.D. Ala. 1995); *Dillard v. Crenshaw County (Calhoun County)*, 831 F.2d 246 (11th Cir. 1987); *Dillard v. Baldwin County Commission*, 694 F. Supp. 836, 837 (M.D. Ala. 1988), *aff'd summarily*, 863 F.2d 878 (11th Cir. 1988); *Dillard v. Baldwin County Bd. of Educ.*, 701 F. Supp. 808, 686 F. Supp. 1459 (M.D. Ala. 1988); *Dillard v. Town of North Johns*, 717 F. Supp. 1471 (M.D. Ala. 1989).

<sup>34</sup> *Dillard v. Chilton County Bd. of Education*, 699 F. Supp. 870, 875 (M.D. Ala. 1988), *aff'd* 868 F.2d 1274 (11th Cir. 1989) (table) ("The cumulative voting system proposed by the parties cures the plaintiffs' § 2 claims to the extent the claims rest on intentional discrimination. . . . [T]he system provides black voters in the county with a realistic opportunity to elect candidates of their choice, even in the presence of substantial racially polarized voting. As stated above, the court must address whether the cumulative voting scheme proposed by the parties is illegal or against public policy. There is nothing in federal constitutional or statutory law that prohibits its use. The scheme is acceptable under federal law.") (footnote omitted).

<sup>35</sup> *Dillard v. Town of Cuba*, 708 F. Supp. 1244, 1246 (M.D. Ala. 1988) ("The court believes that the proposed limited voting system offers all black citizens of Cuba the potential to elect candidates of their choice, even in the face of substantial racially polarized voting, which apparently exists in the town.")

<sup>36</sup> See attached lists.

effective black voter majority.<sup>37</sup> The court cited both its earlier intent findings<sup>38</sup> and the results standard for proving a Section 2 violation<sup>39</sup> recently announced in *Thornburg v. Gingles* as bases for adopting the plaintiffs' proposed seven single-member district plan. It interpreted the mandate of the 1982 Voting Rights Act to require full and effective relief: "Congress has made clear that a 'court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.'"<sup>40</sup> And it rejected the school board's contention that the sole majority-black district in the plan it ordered was not sufficiently compact:

The court therefore believes, especially in light of § 2's strong national mandate, that a district is sufficiently geographically compact if it allows for effective representation. For example, a district would not be sufficiently compact if it was so spread out that there was no sense of community, that is, if its members and its representative could not effectively and efficiently stay in touch with each other; or if it was so convoluted that there was no sense of community, that is, if its members and its representative could not easily tell who actually lived within the district. Also of importance, of course, is the compactness of neighboring districts; obviously, if, because of the configuration of a district, its neighboring districts so lacked compactness that they could not be effectively represented, the *Thornburg* standard of compactness would not be met. These are not, however, the only factors a court should consider in assessing a proposed district; because compactness is a functional concept, the number and kinds of factors a court should consider may vary with each case, depending on the local geographical, political, and socio-economic characteristics of the jurisdiction being sued.

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<sup>37</sup> *Dillard v. Baldwin County Bd. of Education*, 686 F. Supp. 1459 (M.D. Ala. 1988).

<sup>38</sup> The court stated: "The plaintiffs have relied on this court's earlier findings in *Crenshaw County*, unchallenged here, that the Alabama legislature adopted numbered place laws in 1961 in order to make local at-large elections systems 'more secure mechanisms for discriminations' against the state's black citizens. 640 F. Supp. at 1357. In other words, the state adopted numbered place laws and continued to maintain at-large systems across the state for the specific purpose of racial discrimination. The evidence is undisputed that the Baldwin County Board of Education's at-large system, including the numbered-place feature, is a product of these racially discriminatory efforts of the Alabama legislature. Moreover, as demonstrated in Part III of this opinion, the evidence is overwhelming that the enactments continue today to have their intended racist effect. The plaintiffs have therefore established a prima facie case of intentional racial discrimination." *Id.* at 1468.

<sup>39</sup> *Id.* at 1462-63.

<sup>40</sup> *Id.* at 1469 (quoting 1982 U.S. Code Cong. at 208).

The seven-member redistricting plan proposed by the plaintiffs meets this functional standard.<sup>41</sup>

In other *Dillard* jurisdictions, extended trial proceedings and court rulings were necessary before and after all-white local governing bodies finally agreed to consent decrees. In North Johns, a tiny municipality near Birmingham, after the mayor agreed to a consent decree that changed the method of electing council members from at-large voting to single-member districts, the district court found that he intentionally withheld state mandated ethics forms from the African-American candidates:

The mayor was aware that Jones and Richardson, as black candidates, were seeking to take advantage of the new court-ordered single-member districting plan and that their election would result in the town council being majority black. The court is convinced that Mayor Price acted as he did in order to prevent this result, or at least not to aid in achieving it.<sup>42</sup>

Foot-dragging was especially widespread in Alabama's Black Belt counties, where white political control was nearly everywhere threatened by majority-black populations. For example, in Camden, county seat of Wilcox County, on the eve of trial, the city council, which had been maneuvering to preserve a white voter majority, finally agreed to annex long excluded African-American neighborhoods, including the neighborhood called Wilson Quarters.<sup>43</sup> The council's assent to the 1990 consent decree resulted not only from the threat of protracted trial proceedings, but from close scrutiny by the Department of Justice, which declined to preclear white neighborhood annexations to Camden in the 1960s until the city adequately explained why it had refused to annex adjacent black neighborhoods.<sup>44</sup>

The city of Valley, a new municipality that carved white residential areas out of Chambers County, was challenged by the *Dillard* plaintiffs to justify its refusal to annex several adjacent black neighborhoods. The district court stayed the city's 1988 elections pending resolution of the dispute, and on December 12, 1988, it approved a consent decree in which Valley agreed to

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<sup>41</sup> *Id.* at 1466.

<sup>42</sup> *Dillard v. Town of North Johns*, 717 F. Supp. 1471, 1476 (M.D. Ala. 1989).

<sup>43</sup> *Dillard v. City of Camden, CA* No. 87-T-1169-N (M.D. Ala, Jan. 17, 1990).

<sup>44</sup> See letter from James P. Turner to Lynda K. Oswald (Jan. 31, 1989); letter from James P. Turner to Andrew W. Cromer, Jr. (March 13, 1989) (requesting additional information in Section 5 preclearance process).

facilitate annexation of the black neighborhoods.<sup>45</sup> The terms of the consent decree provided that Valley would not change to single-member districts until the 1992 elections. Before the districts were drawn, Valley tried to annex another 243 persons, only two of whom were black, but the Department of Justice denied preclearance pending completion of the transition to district elections.<sup>46</sup> Finally, after all the black annexations were completed, the Valley City Council adopted a seven single-member district plan that included two majority-black districts, and the case was dismissed.<sup>47</sup>

A particularly egregious example was the effort of Etowah County to sidestep the effect of the *Dillard* cases. The Etowah County Commission was one of the *Dillard* jurisdictions that had agreed in a consent decree to change its at-large election system to single-member districts, one of which had a black voter majority.<sup>48</sup> But as soon as a black commissioner was elected, the white-majority commission voted to exclude its new member from the traditional practice of giving each commissioner executive powers over the road construction and maintenance operations in his district. Instead of control over a road camp and crew, “Coach” Presley, the first African American ever elected to the Etowah County Commission, was assigned the executive functions of maintaining the county courthouse building and grounds; in effect, he was put in charge of the janitorial staff.<sup>49</sup> When the county commission refused to submit for Section 5 preclearance the resolutions making these changes, black citizens asked a three-judge district court to rule that the resolutions could not be enforced until they had been precleared.<sup>50</sup> The district court enjoined enforcement of one resolution but not another, based on their respective practical impacts on the electoral power of black voters.<sup>51</sup> The Supreme Court, however, in *Presley v. Etowah County Commission*, held that none of the commission’s resolutions met the statutory definition of a “voting qualification or prerequisite to voting, or standard, practice, or

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<sup>45</sup> *Dillard v. Crenshaw County (City of Valley)*, CA No. 85-T-1332-N (M.D. Ala., Dec. 12, 1988).

<sup>46</sup> Letter from John R. Dunne to David R. Boyd (Dec. 31, 1990).

<sup>47</sup> *Dillard v. Crenshaw County (City of Valley)*, CA No. 85-T-1332-N (M.D. Ala., Jan. 6, 1992).

<sup>48</sup> *Dillard v. Crenshaw County*, Civil Action No. 85-T-1332-N (M.D. Ala. Nov. 12, 1986).

<sup>49</sup> See *Presley v. Etowah County Commission*, 869 F. Supp. 1555, 1560-63 (M.D. Ala. 1994).

<sup>50</sup> In the same civil action, plaintiffs also challenged similar changes on the Russell County Commission that had not been submitted for §5 preclearance. See *Presley*, 502 U.S. 491, 498-99 (1992); *Mack v. Russell County Commission*, 840 F. Supp. 869 (M.D. Ala. 1993).

<sup>51</sup> *Presley*, 502 U.S. at 497-98.

procedure with respect to voting.”<sup>52</sup> It declared that “[c]hanges which affect only the distribution of power among officials are not subject to Section 5 because such changes have no direct relation to, or impact on, voting.”<sup>53</sup> The Court was unwilling to consider the Justice Department’s regulatory efforts to distinguish the internal changes of power that affected the voting power of protected minorities from those that did not.<sup>54</sup> Thus Section 5 was interpreted to stop its reach at the voting booth and to provide no protection against the myriad devices white-majority governments in Alabama would employ to minimize the powers of officials elected by black majorities. Fortunately, in Etowah County, the 1986 consent decree contained this saving provision: “[W]hen the District 5 [the majority-black district] and 6 Commissioners are elected in the special 1986 election, they shall have all the rights, privileges, duties and immunities of the other commissioners, who have heretofore been elected at-large, until their successors take office.”<sup>55</sup> Based on this judicially enforceable contractual commitment, on remand the district court ordered the Etowah County Commission to negotiate a fair division of powers that complied with the consent decree.<sup>56</sup>

After publication of the 1990 Census, the battle to preserve white control in the Black Belt focused on Selma and Dallas County, the city and county where the Voting Rights Act was born in 1965 after the assault of peaceful marchers on the Edmund Pettus Bridge. The black population of Selma had increased from 52.1 percent to 58.4 percent,<sup>57</sup> and the black population of the entire county had increased from 54.5 percent to 57.8 percent.<sup>58</sup> The Department of Justice refused to grant Section 5 preclearance to three different redistricting plans submitted by the Dallas County Board of Education<sup>59</sup> and two different redistricting plans submitted by the city of Selma<sup>60</sup> on the ground that they exhibited a purpose to prevent African Americans from electing candidates of their choice to a majority of the seats on both bodies. All the plans packed as many

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<sup>52</sup> *Id.* at 502 U.S. at 491, 504 (quoting 42 U.S.C. § 1973c).

<sup>53</sup> *Id.* at 506.

<sup>54</sup> *Id.* at 505-06.

<sup>55</sup> *Presley v. Etowah County Commission*, 869 F. Supp. at 1559.

<sup>56</sup> *Id.* at 1574.

<sup>57</sup> Letter from John R. Dunne to Philip Henry Pitts (Nov. 12, 1992).

<sup>58</sup> Letter from John R. Dunne to John E. Pilcher (May 1, 1992).

<sup>59</sup> Letters from John R. Dunne to John E. Pilcher (May 1, 1992; July 21, 1992; and December 24, 1992).

<sup>60</sup> Letter from John R. Dunne to Philip Henry Pitts (Nov. 12, 1992); Letter from James P. Turner (March 15, 1993).

black voters as possible into a minority of districts, then fragmented the remainder of the black population. The plans that eventually were precleared at last provided black citizens an equal opportunity in these racially polarized constituencies and resulted in the election of black majorities on the Dallas County School Board and Selma City Council.

In 1988, the Chilton County Commission, with the consent of the state, agreed not only that its at-large election system violated the Voting Rights Act, but it agreed to a remedy that increased the number of commissioners from four to seven, all to be elected at large by cumulative voting rules.<sup>61</sup> The consent decree expressly provided:

The defendant shall request the local legislative delegation to enact legislation providing for the form of government agreed to herein. This court ordered form of government shall remain in effect only until such legislation is enacted by the legislature and precleared in accordance with the provisions of the Voting Rights Act of 1965.<sup>62</sup>

Fifteen years later the Chilton County Commission still had not asked its local delegation to procure passage of a local act adopting the consent decree election system, and members of an all-white group calling themselves Concerned Citizens of Chilton County intervened to demand a return to the old at-large, numbered-place system.<sup>63</sup> They had been following developments in *Dillard v. Baldwin County Commission* and argued that recent Eleventh Circuit decisions prohibited federal courts from even approving a consent decree under the Voting Rights Act to increase the number of commissioners or to use cumulative voting.<sup>64</sup> They took the argument

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<sup>61</sup> *Dillard v. Chilton County Commission*, 694 F. Supp. 836 (M.D. Ala.1988), *aff'd summarily*, 863 F.2d 878 (11th Cir. 1988).

<sup>62</sup> CA No. 2:87-1179-T (M.D. Ala.), Doc. 26 at 1-1.

<sup>63</sup> Chilton County is the home of one of the more active klaverns of the Ku Klux Klan and the site of a huge Confederate battle flag erected by the Sons of Confederate Veterans to fly over Interstate 65 between Montgomery and Birmingham, which black legislators have condemned as offensive. Julie Arrington, "Lawmakers declare war on battle flag," MONTGOMERY ADVERTISER, July 3, 2005 (online edition).

<sup>64</sup> The successful operation of Chilton County's cumulative voting system has received considerable scholarly comment. See e.g., Richard L. Engstrom et al., *One Person, Seven Votes: The Cumulative Voting Experience in Chilton County, Alabama*, in AFFIRMATIVE ACTION AND REPRESENTATION: SHAW V. RENO AND THE FUTURE OF VOTING RIGHTS 285 (Anthony Peacock ed., 1997); Richard H. Pildes and Kristen A. Donoghue, *Cumulative Voting in the United States*, U. OF CHI. LEG. FORUM 241 (1995). Bobby Agee, the African-American county commissioner stated: "Cumulative voting has done a lot to portray Chilton County in a positive light. I would rather have reporters to interview us for C.V. as opposed to having them come down to talk

made in *Baldwin County* a big step further, contending that a court-approved agreement entered into by black citizens and their county and state governments could not be enforced, if a remedy the state agreed to exceeds what a federal court could impose had the case gone to trial. This position is contrary to Supreme Court precedents, but the district court has kept the issue under submission for nearly a year, obviously concerned about the rulings that have been coming from the Eleventh Circuit. The Alabama Attorney General, instead of urging the district court to uphold the state's 1988 agreement, sided at first with the white intervenors and then withdrew from any participation in the matter.<sup>65</sup>

If there had been no federal requirement that changes in election practices not cause retrogression in the electoral opportunities of protected minorities, and that the jurisdiction must seek and receive preclearance before the changes can be implemented, black voters in Chilton County today would be completely shut out of county commission office. Confronted with the anti-consent decree campaign of the Concerned Citizens, the Chilton County Commission in 2003 adopted a resolution, over the objection of the sole black commissioner, asking the local legislative delegation to pass a local act reducing the size of the commission to four, restoring the probate judge as *ex officio* chair, repealing cumulative voting, and thus ending any opportunity for African Americans to elect a candidate of their choice.<sup>66</sup> The U.S. Attorney General refused to consider Chilton County's submission of the 2003 local act for preclearance until and unless the district court dissolved the 1988 consent decree.<sup>67</sup> This scenario demonstrates that, without the protections of Section 5 of the Voting Rights Act, some white-majority state and local governments in Alabama will bow to pressure from their white constituents and return to the racially discriminatory election practices of the past. "We would be having a totally different conversation if it didn't exist," said Chilton Commissioner Bobby Agee. "A very important protection. We would have been at ground zero without Sec. 5."<sup>68</sup>

The preclearance provisions of Section 5 of the Voting Rights Act were indispensable to the ability of black political leaders at the state and local level and their lawyers to ensure that all the court-ordered single-member district plans in *Dillard* and other voting rights cases were redrawn fairly with 1990 census data. The no-retrogression rule and the requirement of obtaining preclearance of redistricting plans before new elections could be held empowered representatives

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about the headquarters of the Klan." Interview with Commissioner Agee, January 2006.

<sup>65</sup> Hearing, April 22, 2005, in *Dillard v. Chilton County Commission*, CA No. 2:87cv1179-T (M.D. Ala.).

<sup>66</sup> Ala. Act No. 2003-217.

<sup>67</sup> Letter from Joseph D. Rich to John Hollis Jackson and Dorman Walker (Oct. 29, 2003).

<sup>68</sup> Interview with Commissioner Agee, January 2006.

of black voters to negotiate on an equal basis with white-majority local governments. As a result, with some oversight by the Department of Justice, the gains achieved in the 1980s were protected, and in some instances, there were further advances in the ability of African Americans to elect candidates of their choice.

C. Intentional discrimination in annexations

In *City of Pleasant Grove v. United States*,<sup>69</sup> the United States Supreme Court affirmed the district court's denial of Section 5 preclearance to two annexations to the city of Pleasant Grove on the ground that the city had engaged in a racially selective annexation policy. Pleasant Grove was an all-white city with a long history of discrimination that was located in an otherwise racially mixed part of Alabama. The Supreme Court stated that "in housing, zoning, hiring, and school policies [the city's] officials have shown unambiguous opposition to racial integration, both before and after the passage of the civil rights laws."<sup>70</sup> The city sought preclearance for two annexations, one for an area of white residents who wanted to attend the all-white Pleasant Grove school district instead of the desegregated Jefferson County school district, the other for a parcel of land that was uninhabited at the time but where the city planned to build upper income housing that would likely be inhabited by whites only.<sup>71</sup> At the same time, the city refused to annex two predominantly black areas. The district court held "that the city failed to carry its burden of proving that the two annexations at issue did not have the purpose of abridging or denying the right to vote on account of race."<sup>72</sup> In affirming the district court's decision, the Supreme Court stated:

It is quite plausible to see appellant's annexation [of the two parcels] as motivated, in part, by the impermissible purpose of minimizing future black voting strength. Common sense teaches that appellant cannot indefinitely stave off the influx of black residents and voters – indeed, the process of integration, long overdue, has already begun. One means of thwarting this process is to provide for the growth of a monolithic white voting block, thereby effectively diluting the black vote in advance. This is just as impermissible a purpose as the dilution of present black voting strength. To hold otherwise would make appellant's extraordinary success in resisting integration thus far a shield for further resistance. Nothing could be further from the purposes of the Voting

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<sup>69</sup> 479 U.S. 462 (1987).

<sup>70</sup> *Id.* at 465.

<sup>71</sup> *Id.* at 465-66.

<sup>72</sup> *Id.* at 467. The district court also stated that even if the burden had been on the United States, it would have found discriminatory intent on behalf of the city. *Id.* at 467 n.7.

Rights Act.<sup>73</sup>

The *Pleasant Grove* case is a modern example of what occurred decades ago in *Gomillion* – the manipulation of city borders to fence out blacks.

D. The Voting Rights Act and Congressional and Legislative Redistricting in Alabama

The 1982 reauthorization had an immediate impact on the ability of African Americans in Alabama to elect their favored candidates to the Alabama Legislature. Alabama is the state in which the Supreme Court established “one person, one vote” as a substantive constitutional requirement for all state elective representation systems.<sup>74</sup> Even though the disfranchising 1901 Alabama Constitution called for the Legislature to redistrict after every decennial census, this mandate had simply been ignored, and the original 1901 House and Senate boundaries were still in place after publication of the 1960 census. Federal courts were forced to draw the legislative districts in use during the 1960s and 1970s.<sup>75</sup> As a result of court-ordered redistricting, the first two African Americans to serve in the Alabama Legislature since Reconstruction, Fred Gray and Thomas Reed, were elected to the House in 1970.<sup>76</sup> In the first election following the 1980 census, seventeen African Americans were elected to the House and three to the Senate.<sup>77</sup> This first election in 1982 was carried out using districts adopted by the Alabama Legislature and slightly modified by a federal court pending Section 5 preclearance of the statutory plans.<sup>78</sup> The Department of Justice, through Assistant Attorney General William Bradford Reynolds, had denied preclearance to the redistricting plan the Legislature had enacted in 1981, because it had

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<sup>73</sup> *Id.* at 471-72.

<sup>74</sup> *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quoting Justice Douglas in *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

<sup>75</sup> See generally *Burton v. Hobbie*, 561 F. Supp. 1029, 1030-32 (M.D. Ala. 1983) (three-judge court).

<sup>76</sup> Fred Gray, *BUS RIDE TO JUSTICE* 237-53 (1995); Robert J. Norrell, *REAPING THE WHIRLWIND: THE CIVIL RIGHTS MOVEMENT IN TUSKEGEE* 190-200 (1986).

<sup>77</sup> See James U. Blacksher and Larry Menefee, *From Reynolds, v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 *HAST. L.J.* 1, 39 n.261 (1982).

<sup>78</sup> *Burton v. Hobbie*, 543 F. Supp. 235 (M.D. Ala.) (3-judge court), *aff'd* 459 U.S. 961 (1982).

reduced the number of majority-black districts and the size of black majorities in other districts.<sup>79</sup> On June 1, 1982, the Alabama Legislature, sitting in an emergency special session, adopted a second redistricting bill, Act No. 82-629, in an effort to meet the U.S. Attorney General's objections.<sup>80</sup> This was the plan the federal court modified for use in the 1982 election, on the condition that it would impose its own plan in a special 1983 election if the Legislature was unable to satisfy Section 5 of the Voting Rights Act. But on August 2, 1982, Reynolds also objected to Act No. 82-629, even though it arguably cured the retrogression problems, because it appeared intentionally to fragment black voting strength in the western Black Belt counties.<sup>81</sup> There is no doubt that the Attorney General's objection was influenced by the ringing mandate of the 1982 Voting Rights Act to provide protected minorities equal access to the electoral process. And there is no doubt this federal mandate of full equal access, under both Section 2 and Section 5, strengthened the negotiating hand of African-American legislators and political leaders in the Legislature's next attempt to obtain Section 5 preclearance prior to the federal court's 1983 deadline.

The result was Act No. 83-154, a compromise plan to which black legislators agreed, an historic first for Alabama. The legislative leaders, black and white, flew to Washington, D.C. to attend a congratulatory press conference called by Assistant Attorney General Reynolds after the plan received Section 5 preclearance.<sup>82</sup> The federal court gave its blessing to the 1983 plan in an opinion by Judge Frank Johnson which began:

The day may have now arrived to which the late Judge Richard T. Rives referred when expressing his feelings and the feelings of many of us in *Dent v. Duncan*, 360 F.2d 333 (5th Cir.1966):

I look forward to the day when the State and its political subdivisions will again take up their mantle of responsibility, treating all of their citizens equally, and thereby relieve the federal Government of the necessity of intervening in their affairs. Until that day arrives, the responsibility for this intervention must rest with those who through their ineptitude and public disservice have forced it.

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<sup>79</sup>Section 5 objection letter, William Bradford Reynolds to Charles A. Graddick (May 6, 1982).

<sup>80</sup> *Burton v. Hobbie*, 543 F. Supp. at 236-37.

<sup>81</sup> Section 5 objection letter, William Bradford Reynolds to Charles A. Graddick (August 2, 1982).

<sup>82</sup> "Alabama Voting Plan Cleared," NEW YORK TIMES (March 1, 1983) (available at <http://select.nytimes.com/search/restricted/article?res=F1061EFC3D5D0C728CDDAA0894DB484D81>).

Id. at 337-38. Enactment of Act No. 83-154 marks the first time in Alabama's history that its Legislature has provided an apportionment plan that is fair to all the people of Alabama.<sup>83</sup>

In the ensuing 1983 special election, 20 African Americans were elected to the 105-member House, and five were elected to the 35-member Senate.

In 1992, the U.S. Attorney General also objected to the congressional redistricting plan enacted by the Alabama Legislature, on the ground that the fragmentation of black population concentrations in the state was evidence of "a predisposition on the part of the state political leadership to limit black voting potential to a single district."<sup>84</sup> However, because of a deadline imposed by a three-judge federal district court, there was insufficient time for the Legislature to attempt to cure the Section 5 objection, and the court proceeded to order implementation of a congressional plan that also contained only a single majority-black district.<sup>85</sup>

The racial gerrymandering Fourteenth Amendment jurisprudence introduced by the Supreme Court in *Shaw v. Reno* in 1993 came into play in Alabama in the 1990s.<sup>86</sup> African-American members of the Alabama House and Senate and the leaders of longstanding, predominately black political organizations in Alabama had parlayed their gains under the 1983 legislative redistricting plans into often effective coalitions with some white elected officials. They were able to negotiate a post-1990 Census legislative redistricting plan that passed the House but was blocked in the Senate. Relying on the mandates of both Section 2 and Section 5 of the Voting Rights Act, black plaintiffs filed suit in state court to obtain a racially fair redrawing of the House and Senate districts. Only a month before *Shaw* was handed down, the state court approved a consent decree negotiated by black political leaders and white state officials.<sup>87</sup> The consent decree plan increased the number of majority-black House districts to 27 (of 105) and the number of majority-black Senate districts to eight (of 35). In 1997, however, white plaintiffs filed a federal lawsuit claiming, among other things, that the 1993 state court consent decree plan

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<sup>83</sup> *Burton v. Hobbie*, *supra*, 561 F. Supp. at 1030.

<sup>84</sup> Letter from John R. Dunne to Jimmy Evans, March 27, 1992, p. 1.

<sup>85</sup> *Wesch v. Hunt*, 785 F. Supp. 1491 (S.D. Ala. 1992) (three-judge court), *aff'd sub nom. Camp v. Wesch*, 504 U.S. 902 (1992), and *Figures v. Hunt*, 507 U.S. 901 (1993).

<sup>86</sup> 509 U.S. 630 (1993). The subsequent cases in the *Shaw v. Reno* line include *United States v. Hays*, 515 U.S. 737 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 517 U.S. 899 (1996) ("*Shaw II*"); *Bush v. Vera*, 517 U.S. 952 (1996); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Sinkfield v. Kelley*, 531 U.S. 28 (2000); *Easley v. Cromartie*, 532 U.S. 234, 121 S.Ct. 1452 (2001).

<sup>87</sup> *Sinkfield v. Camp*, CA No. 93-689-PR (Cir. Ct. Montgomery County, May 12, 1993).

violated the *Shaw* principles.<sup>88</sup> After lengthy, complicated proceedings in both federal and state courts, a three-judge federal court “ultimately held that seven of the challenged *majority-white* districts were the product of unconstitutional racial gerrymandering and enjoined their use in any election.”<sup>89</sup> On direct appeal, the U.S. Supreme Court vacated the district court judgment and remanded the case with instructions that the complaint be dismissed for failure to satisfy the standing requirements of *United States v. Hays*.<sup>90</sup> The Court did not address the merits of the *Shaw* claims, nor did it respond to the contentions of African-American defendants that, because of the decades-long history of black communities in Alabama organizing to pursue their legitimate political objectives, the plan their representatives successfully negotiated reflected a constitutionally protected exercise of African Americans’ First Amendment rights. For the time being, the gains Alabama’s black citizens had won under the Voting Rights Act were preserved.

Section 5 of the Voting Rights Act played a decisive role in the redrawing of congressional and state legislative districts in Alabama following publication of the 2000 Census. For the first time since 1901, without supervision of a federal court, the Alabama Legislature passed, and the Governor signed into law, redistricting statutes for congressional, House, Senate and state Board of Education seats. All four of these statutes received Section 5 preclearance and survived court challenges by white voters contending that they systematically discriminated against whites by overpopulating their districts and that they violated the *Shaw v. Reno* racial gerrymandering standards.<sup>91</sup> Black legislators were able to leverage the no-retrogression command of Section 5 successfully “to pull, haul, and trade to find common political ground” with their white Democratic and Republican colleagues.<sup>92</sup> Instead of attempting to maximize the number of seats black voter majorities control, African-American legislators were able to maintain the overall electoral power of blacks, while working with white legislators to consciously balance both racial and partisan interests with fair, neutral districting criteria.<sup>93</sup> Without the protection of Section 5,

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<sup>88</sup> See generally the procedural history of this litigation in the jurisdictional statement filed by the state defendants in *Sinkfield v. Kelley*, 531 U.S. 28 (2000).

<sup>89</sup> *Sinkfield v. Kelley*, 531 U.S. 28, 29 (2000) (emphasis added).

<sup>90</sup> 515 U.S. 737 (1995).

<sup>91</sup> See [http://www.legislature.state.al.us/reapportionment/districts\\_2001.html](http://www.legislature.state.al.us/reapportionment/districts_2001.html); *Montiel v. Davis*, 215 F. Supp.2d 1279 (S.D. Ala. 2002) (3-judge court); *Rice v. English*, 835 So.2d 157 (Ala. 2002); *Gustafson v. Johns*, \_\_\_ F.Supp. \_\_\_, 2006 WL 1409083 (S.D. Ala., May 22, 2006) (3-judge court).

<sup>92</sup> Brief of Amici Curiae Leadership of the Alabama Senate and House of Representatives filed in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), 2003 WL 22490664 at \*9 (citing *Georgia v. Ashcroft*, 539 U.S. 461, 483 (2003) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)).

<sup>93</sup> *Montiel v. Davis*, 215 F. Supp.2d 1279 (S.D. Ala. 2002) (three-judge court).

in Alabama's racially polarized environment, there would be little or no incentive for white legislators to bargain with the African-American minority in the Alabama Legislature.

E. The Persistence of Racially Polarized Voting

Highly racially polarized voting patterns persist to the present day in Alabama. The pattern has been found to exist on a statewide basis by the U.S. Attorney General,<sup>94</sup> expert voting witnesses<sup>95</sup> and federal courts.<sup>96</sup> Without exception, based on numerous analyses by expert witnesses, federal courts<sup>97</sup> and the Department of Justice<sup>98</sup> have found severe racial polarization

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<sup>94</sup> Section 5 objection letter, John R. Dunne, Assistant Attorney General for Civil Rights, to Jimmy Evans, Attorney General of Alabama, p. 2 (March 27, 1992).

<sup>95</sup> Report of Gordon G. Henderson, PhD., Sinkfield defendants Exhibit 184, in *Kelley v. Bennett and Sinkfield*, 96 F. Supp.2d 1301 (M.D. Ala.) (three-judge court), *rev'd on other grnds*, *Sinkfield v. Kelley*, 531 U.S. 28, 121 S.Ct. 446 (2000).

<sup>96</sup> *White v. Alabama*, 867 F. Supp. 1519, 1552 (M.D. Ala. 1994), *vacated on other grnds*, 74 F.3d 1058 (11th Cir. 1996) (citing testimony of Dr. Gordon Henderson and Letter from Assistant Attorney General Deval L. Patrick to Alabama Attorney General Jimmy Evans, dated April 14, 1994 (file document no. 65), at 5).

<sup>97</sup> *Dillard v. Baldwin County Commission*, 222 F. Supp.2d 1283, 1290 (M.D. Ala. 2002), *aff'd*, 376 F.3d 1260 (11th Cir. 2004) ("The plaintiffs have shown that black citizens of Baldwin County still suffer from the racially polarized voting and from historically depressed conditions, economically and socially."); *Wilson v. Jones*, 45 F. Supp.2d 945, 951 (S.D. Ala. 1999), *aff'd sub nom. Wilson v. Minor*, 220 F.3d 1297 (11th Cir. 2000) (Dallas County); *Dillard v. City of Greensboro*, 946 F. Supp.2d 946, 952 (M.D. Ala. 1996); *Dillard v. Town of Louisville*, 730 F. Supp. 1546, 1549 (M.D. Ala. 1990); *Dillard v. Town of Cuba*, 708 F. Supp. 1244, 1246 (M.D. Ala. 1988); *Dillard v. Chilton County Bd. of Education*, 699 F. Supp. 870, 874 (M.D. Ala. 1988), *aff'd* 868 F.2d 1274 (11th Cir. 1989) (table); *Dillard v. Crenshaw County*, 649 F. Supp. 289, 295 (M.D. Ala.), *vacated on other grnds*, 831 F.2d 246 (11th Cir. 1986), *reaff'd*, 679 F. Supp. 1546 (M.D. Ala. 1988) ("the evidence reflects that racially polarized voting in Calhoun, Lawrence, and Pickens Counties is severe and persistent, and that this bloc voting has severely impaired the ability of blacks in the three counties to elect representatives of their choice."); *Clark v. Marengo County*, 623 F. Supp. 33, 37 (S.D. Ala. 1985); *Brown v. Board of School Comm'rs of Mobile County*, 542 F. Supp. 1078, 1091 (S.D. Ala. 1982), *aff'd*, 706 F.2d 1103 (11th Cir.), *aff'd*, 464 U.S. 1005 (1983); *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1076-77 (S.D. Ala. 1982).

<sup>98</sup> Section 5 objection letter, Bill Lann Lee to J. Frank Head (Aug. 16, 2000) (City of Alabaster); Section 5 objection letter, Bill Lann Lee to E. Paul Jones (Feb. 6, 1998) (Tallapoosa County); Section 5 objection letter, James P. Turner to Lynda K. Oswald (Nov. 16, 1993) (Tuscaloosa County); Section 5 objection letter, John R. Dunne to Nicholas H. Cobbs, Jr. (Dec.

at the county and municipal levels in Alabama. Federal courts in Alabama have acknowledged the causal connection between racial bloc voting and the history of *de jure* segregation. "Racial bloc voting by whites is attributable in part to past discrimination, and the past history of segregation and discrimination affects the choices of voters at the polls."<sup>99</sup>

An expert analysis of the 2004 general election for the seven members of the Chilton County Commission, who, pursuant to a 1987 consent decree, are elected at large using cumulative voting rules, provides dramatic evidence of how white voters in Alabama remain unwilling to vote for African-American candidates. Commissioner Bobby Agee, an African American, has served continuously on the commission since 1988 and has earned the respect of his fellow commissioners. But even the power of incumbency and familiarity has earned him no support from the white electorate:

The [expert's] tables reveal that Mr. Agee, a long time incumbent on the county commission, is the overwhelming choice of the African American voters. His support among African American voters in the county ranges, across the analyses, from an estimated 5.2 votes per voter to 5.6. He is the first choice of African American voters to represent them on the commission in every analysis. In contrast, his support among the non-African American voters is minimal. The estimates of their support for Mr. Agee based on the ecological inference and regression analyses range from 0.1 to 0.2 votes per voter, and he finishes last in this election in the votes cast by non-African Americans in each type of analysis. The correlation coefficient between the racial composition of the precincts and the votes per voter in them for Mr. Agee, as noted above, is a statistically significant .991. This is much higher than those for any of the non-African American

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4, 1992) (Hale County); Section 5 objection letter, John R. Dunne to Philip Henry Pitts (Nov. 12, 1992) (city of Selma); Section 5 objection letter, John R. Dunne to John E. Pilcher (May 1, 1992) (Dallas County); Section 5 objection letter, John R. Dunne to David R. Boyd (Dec. 23, 1991) (Jefferson County); Section 5 objection letter, John R. Dunne to David R. Boyd (Nov. 8, 1991) (Houston and Henry Counties); Section 5 objection letter, John R. Dunne to Dorman Walker (Dec. 3, 1990) (Perry County); Section 5 objection letter, William Bradford Reynolds to Gladys D. Prentice (May 4, 1987) (city of Leeds); Section 5 objection letter, William Bradford Reynolds to Charles E. Bailey (Dec. 1, 1986) (Alexander City); Section 5 objection letter, William Bradford Reynolds to John C. Jay., Jr. (Oct. 21, 1985) (city of Greensboro); Section 5 objection letter, William Bradford Reynolds to David F. Steele (Feb. 17, 1984) (Monroe County); Section 5 objection letter, William Bradford Reynolds to E. Paul Jones (May 10, 1983) (Tallapoosa County); Section 5 objection letter, William Bradford Reynolds to Robert G. Kendall (July 26, 1982) (Conecuh County); Section 5 objection letter, William Bradford Reynolds to Calvin Steindorff (July 19, 1982) (Butler County).

<sup>99</sup> *Brown v. Board of School Comm'rs of Mobile County*, 542 F. Supp. 1078, 1094 (S.D. Ala. 1982), *aff'd*, 706 F.2d 1103 (11th Cir.), *aff'd*, 464 U.S. 1005 (1983).

candidates in this election.<sup>100</sup>

The scatterplot of the election returns for Agee by precinct taken from the expert's report<sup>101</sup> provides a pictorial display of this stark racially polarized voting in Chilton County (copy attached).

Because of white bloc voting against black candidates, only two African Americans have been elected to statewide office in the entire history of Alabama. The late Oscar Adams was appointed to a place on the Alabama Supreme Court in 1980; he won re-election in 1982 and 1988.<sup>102</sup> When Justice Adams retired in 1993, the governor appointed another African American, Ralph Cook, to replace him. Justice Cook was re-elected in 1994. Subsequently, a second African American, John England, was appointed to the Alabama Supreme Court, but both Cook and England were defeated by white challengers when they stood for re-election in 2000. Currently no African American holds a statewide elected office. There are 27 African Americans serving in the Alabama House of Representatives and eight African Americans in the Alabama Senate. All but one have been elected from majority-black districts. The sole exception is House District 85, which is 47.8 percent black, and in which the incumbent African-American member was re-elected in 2002.<sup>103</sup>

On November 2, 2004, voters in Alabama defeated proposed amendments to the 1901 Alabama Constitution that would have removed language requiring the racial segregation of schools, struck language inserted in 1956 as part of Alabama's official campaign of massive resistance to federally imposed desegregation, and repealed the poll tax provisions.<sup>104</sup> Federal and state court

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<sup>100</sup> Supplemental report of Richard L. Engstrom, PhD., Dillard Trial Exhibit 1, *Dillard v. Chilton County Commission*, CA No. 2:87-1179-T (M.D. Ala.) (Doc.148), at 7.

<sup>101</sup> *Id.* at 6.

<sup>102</sup> *SCLC v. Sessions*, 56 F.3d 1281, 1288 (11<sup>th</sup> Cir. 1995).

<sup>103</sup> See generally,  
<http://www.legislature.state.al.us/house/housemaps2001/Act%20No.%202001-729%20Letter.pdf>  
 and  
<http://www.legislature.state.al.us/senate/senatemaps2001/Act%20No.%202001-727%20Preclearance%20Letter.pdf>.

<sup>104</sup> Ala. Act No. 2003-203; Referendum results certified Dec. 17, 2004,  
<http://www.sos.state.al.us/downloads/dl3.cfm?trgturl=election/2004/general/statecert-amendment2-recount-12-17-2004.pdf&trgtfile=statecert-amendment2-recount-12-17-2004.pdf>.

decrees over the years have made all these segregationist provisions unenforceable<sup>105</sup>, and the business, civic and education leaders of the state, backed by Alabama's Republican Governor, urged the electorate to remove these relics of official white supremacy as a sign to the world that Alabamians were ready to put their racist past behind them. Their plan backfired when, in the racially polarized referendum election, the majority-white electorate refused to go along.

In the campaign leading up to the November 2, 2004, vote on what was called "Amendment Two," white religious conservatives told voters that striking the 1956 segregationist amendments, which took away the right of all children to a public education, would open the door for courts to order an increase in taxes.<sup>106</sup> The opponents of Amendment Two contended that education was not a right but a gift. "Every child in the state of Alabama has the gift [of education] given to them at taxpayers' expense. . . ."<sup>107</sup> This was the same message that had rallied Alabama's electorate a year earlier to defeat Governor Riley's proposed amendments to the Alabama Constitution relaxing some of the racially inspired provisions that prevent state and local government from raising property taxes, which in Alabama are by far the lowest in all fifty states.<sup>108</sup> In the 2003 referendum election on "Amendment One," only thirteen predominately black counties had voted to amend the property tax restrictions.<sup>109</sup>

Later in 2004, a federal district court made findings of fact that Alabama's antiquated 1901 Constitution, which disfranchised African Americans and retained Reconstruction era tax restrictions, was directly linked with the Voting Rights Act of 1965 and the continuing underfunding of public education in Alabama:

The convergence in one year, 1971, of four federal mandates requiring re-enfranchisement of African-Americans, reapportionment of the Alabama

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<sup>105</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954); *Opinion of the Justices No. 333*, 624 So.2d 107 (1993); *Knight v. Alabama*, 787 F. Supp. 1030, 1104 (N.D. Ala. 1991), *aff'd in relevant part*, 14 F.3d 1534 (11<sup>th</sup> Cir. 1994); *United States v. Alabama*, 252 F. Supp. 95 (M.D. Ala. 1966).

<sup>106</sup> *E.g.*, Phillip Rawls, "50 years after Brown, Alabama votes on segregation language," AP, Oct. 9, 2004 (online edition).

<sup>107</sup> Taylor Bright, "Language stems from 1956 session," BIRMINGHAM POST-HERALD, Nov. 27, 2004 (online edition).

<sup>108</sup> Jeffrey Gettleman, "A Tax Increase? \$1.2 Billion? Alabamians, It Seems, Say No," THE NEW YORK TIMES, Sept. 6, 2003 (online edition).

<sup>109</sup> Glenn Feldman, *The Status Quo Society, The Rope of Religion, and the New Racism*, in GLENN FELDMAN (ED.), *POLITICS AND RELIGION IN THE WHITE SOUTH* 287, 335 (Lexington, KY: University of Kentucky Press, 2004).

legislature, fair reassessment of all property subject to taxes, and school desegregation, had thus created a “perfect storm” that threatened the historical constitutional scheme whites had designed to shield their property from taxation by officials elected by black voters for the benefit of black students.<sup>110</sup>

Enforcement of the Voting Rights Act in Alabama thus placed increased demands on the 1901 Constitution to block state and local governments, now subject to black voter influence or control, from using the democratic process to improve public education and other public services. The federal court found:

There is a direct line of continuity between the property tax provisions of the 1875 Constitution, the 1901 Constitution, and the amendments up to 1978. . . . The historical fears of white property owners, particularly those residing in the Black Belt, that black majorities in their counties would eventually become fully enfranchised and raise their property taxes motivated the property tax provisions in the 1901 Constitution and the amendments to it in 1971 and 1978.

. . . Indeed, Black Belt and urban industrial interests successfully used the argument that it is unfair for white property owners to pay for the education of blacks to produce all the state constitutional barriers to property taxes from 1875 to the present, including the 1971 and 1978 Lid Bill amendments.<sup>111</sup>

Thus, the defeat in 2003 of some of the racially discriminatory property tax provisions in the Alabama Constitution and the defeat in 2004 of constitutional amendments that would have removed segregation era provisions demonstrate the stranglehold Alabama’s history of discrimination still has on its electorate. The state Superintendent of Education complained that demagogues had convinced voters that state government could not be trusted with their money, and historians at Alabama universities said the vote “had clear racial meaning.”<sup>112</sup> State

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<sup>110</sup> *Knight v. Alabama*, CA No. 2:83-cv-1676-HLM (N.D. Ala., Oct. 5, 2004) (Doc. 3294) manu. op. at 44, *appeal pending*, No. 05-11527-BB (11th Cir.) (citations omitted). See [http://www.knightsims.com/pdf/05\\_03\\_08/DC%20Opinion%2010-5-04%20entire.pdf](http://www.knightsims.com/pdf/05_03_08/DC%20Opinion%2010-5-04%20entire.pdf).

<sup>111</sup> *Id.* at 47-49.

<sup>112</sup> Glenn Feldman, *The Status Quo Society, The Rope of Religion, and the New Racism*, in GLENN FELDMAN (ED.), *POLITICS AND RELIGION IN THE WHITE SOUTH* 287, 335 (Lexington, KY: University of Kentucky Press, 2004). Auburn historian Wayne Flynt said the 1956 amendment the voters refused to strike from the state constitution was “right at the core of the whole racist defense. In many ways it is the centerpiece of the whole racist defense of segregation.” Taylor Bright, “Language stems from 1956 session,” *BIRMINGHAM POST-HERALD*, Nov. 27, 2004 (online edition).

legislators did not try to pass another bill to remove the racist constitutional provisions in the 2006 regular session, because 2006 is an election year and “[e]veryone is scared to do anything.”<sup>113</sup>

#### CONCLUSION

The overall lesson to be taken from Alabama’s experience with the Voting Rights Act since 1982 is clear. The preclearance provisions of Section 5 have become the most important guarantors of equal political and electoral power for African Americans in Alabama—first, in their recurring negotiations with white officials and, second, in their ability to restrain the efforts of white elected officials, reacting to their majority-white constituents, to reverse the progress in voting rights and restore the old, discriminatory practices.

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<sup>113</sup> AP, “Legislators: segregation language likely won’t be issue in 2006,” MONTGOMERY ADVERTISER, Dec. 12, 2005 (online edition) (quoting Rep. John Rogers).

Rep. James Buskey, D-Mobile, who pushed for the 2004 constitutional amendment, said he’s afraid groups would hyperpoliticize the issue during a year when the Legislature, governor and many other state offices are up for election. “It needs to come up, but based on the climate that’s out there now it would not do any good for the state of Alabama to suffer a second defeat on that amendment,” Buskey said.

*Id.* See also Editorial, “‘Tis the season (for politics),” BIRMINGHAM NEWS, Dec. 17, 2005 (online edition); Editorial, “Time to do their duty,” HUNTSVILLE TIMES, Dec. 9, 2005 (online edition). The Speaker of the House agrees: “What the state can ill afford is another failed effort to remove the racist language,” House Speaker Seth Hammett, D-Andalusia, said. “I don’t want us to announce around the world that we are doing this unless we know this time that we can get it done.” Phillip Rawls, “Constitution wording may wait,” MONTGOMERY ADVERTISER, Jan. 23, 2006 (online edition).

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JOHN DILLARD, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	2: 85cv1332-MHT
CRENSHAW COUNTY, etc., et al.,	)	
	)	
Defendants.	)	

**LIST OF LOCAL JURISDICTIONS INCLUDED IN DEFENDANT CLASS**

In 1987 most of the defendant class members received separate civil action numbers, ranging from 87cv1150 to 87cv1316.

Legend for types of election systems:

- |     |   |
|-----|---|
| SMD | single-member districts                     |
| MMD | multi-member districts                      |
| LV  | limited voting (each voter casts one vote)  |
| LV2 | limited voting (each voter casts two votes) |
| CV  | cumulative voting                           |
| PAL | plurality at-large voting (no runoff)       |
| A   | no change ordered (claim still pending)     |

## All Dillard county commissions

JURISDICTION	CA Number	TYPE	SEATS	FINAL JUDG
Baldwin	87-T-1159-N	SMD	7	09/03/02
Bibb	87-T-1162-N	SMD	5	
Butler	92-T-243-N	SMD	5	
Calhoun	85-T-1332-N	SMD	5	
Chilton	87-T-1179-N	CV	7	
Coffee	85-T-1332-N	SMD	7	
Colbert	87-T-1186-N	SMD	6	12/09/05
Covington	85-T-1332-N	A	5	
Crenshaw	85-T-1332-N	SMD	5	
Escambia	85-T-1332-N	SMD	5	?
Etowah	85-T-1332-N	SMD	6	
Fayette	87-T-1208-N	SMD	6	
Geneva	85-T-1332-N	A		
Lawrence	85-T-1332-N	SMD	5	
Lee	85-T-1332-N	SMD	5	
Morgan	85-T-1332-N	A		
Pickens	85-T-1332-N	SMD	5	
Shelby	85-T-1332-N	SMD	9	
St. Clair	85-T-1332-N	A		
Talladega	85-T-1332-N	SMD	5	

## Dillard v. Crenshaw county boards of education

JURISDICTION	Jurisdiction	TYPE	SEATS
Baldwin	Baldwin	SMD	7
Bibb	Bibb	SMD	5
Calhoun	Calhoun	SMD	5
Chilton	Chilton	CV	7
Coffee	Coffee	SMD	7
Colbert	Colbert	SMD	6
Covington	Covington	SMD	7
Crenshaw	Crenshaw	SMD	5
Elmore	Elmore	SMD	7
Escambia	Escambia	SMD	7
Fayette	Fayette	SMD	6
Geneva	Geneva	A	
Hale	Hale	SMD	5
Houston	Houston	SMD	7
Jefferson	Jefferson	A	
Lamar	Lamar	SMD	7
Lee	Lee	SMD	7
Limestone	Limestone	SMD	7
Montgomery	Montgomery	SMD	6
Pickens	Pickens	SMD	5
Pike	Pike	SMD	6
Randolph	Randolph	SMD	7
Shelby	Shelby	A	
St. Clair	St. Clair	A	
Talladega	Talladega	SMD	5
Tallapoosa	Tallapoosa	SMD	5
Tuscaloosa	Tuscaloosa	SMD	7
Washington	Washington	SMD	5

## Dillard v. Crenshaw Municipalities

JURISDICTION	COUNTY	TYPE	SEATS
Abbeville	Henry	SMD	5
Alex City	Tallapoosa	SMD	6
Aliceville	Pickens	SMD	5
Ariton	Dale	LV	5
Ashland	Clay	SMD	5
Athens	Limestone	SMD	5
Atmore	Escambia	SMD	5
Autaugaville	Autauga	MMD	5
Bay Minette	Baldwin	SMD	5
Boligee	Greene	MMD	5
Brantley	Crenshaw	MMD	5
Brent	Brent	SMD	5
Brewton	Escambia	SMD	5
Calera	Shelby	SMD	5
Camden	Wilcox	SMD	5
Carbon Hill	Walker	SMD	7
Carrollton	Pickens	SMD	5
Castleberry	Conecuh	MMD	5
Cedar Bluff	Cherokee	SMD	5
Centre	Cherokee	CV	7
Centreville	Bibb	SMD	5
Cherokee	Colbert	SMD	5
Childersburg	Talladega	SMD	5
Citronelle	Mobile	SMD	5
Clayton	Barbour	SMD	5
Clio	Barbour	SMD	5
Coffeetown	Clarke	MMD	5
Collinsville	Dekalb	SMD	5
Columbia	Houston	SMD	5
Columbiana	Shelby	SMD	5
Cottonwood	Houston	SMD	5
Courtland	Lawrence	SMD	5
Cuba	Sumter	LV	5
Dadeville	Tallapoosa	SMD	5
Daleville	Dale	PAL	5
Daviston	Tallapoosa	SMD	5
Decatur	Morgan	SMD	5
Detroit	Lamar	SMD	5
Dora	Walker	LV	7
Dozier	Crenshaw	MMD	6
Elba	Coffee	SMD	5
Eufaula	Barbour	SMD	5
Faunsdale	Marengo	CV	5
Fayette	Fayette	SMD	5
Five Points	Chambers	MMD	5
Flomaton	Escambia	SMD	5
Florala	Covington	SMD	5
Florence	Lauderdale	SMD	6
Foley	Baldwin	SMD	5
Fort Deposit	Lowndes	SMD	5
Frisco City	Monroe	SMD	5
Fulton	Clarke	LV2	5
Geneva	Geneva	SMD	7
Georgiana	Butler	SMD	5
Glenwood	Crenshaw	MMD	5
Gordo	Pickens	SMD	5

## Dillard v. Crenshaw Municipalities

Goshen	Pike	LV	5
Graysville	Jefferson	SMD	5
Greensboro	Hale	SMD	5
Grove Hill	Clarke	SMD	5
Guin	Marion	CV	7
Guntersville	Marshall	SMD	7
Harpersville	Shelby	MMD	5
Hartford	Geneva	SMD	5
Hayneville	Lowndes	MMD	5
Headland	Henry	SMD	5
Heath	Covington	CV	5
Heflin	Cleburne	SMD	5
Helena	Shelby	A	
Hueytown	Jefferson	SMD	5
Irondale	Jefferson	SMD	7
Jemison	Chilton	SMD	5
Kinsey	Houston	LV	7
Leeds	Jefferson	SMD	5
Lincoln	Talladega	SMD	5
Linden	Marengo	SMD	5
Lineville	Clay	SMD	5
Lipscomb	Jefferson	SMD	5
Livingston	Sumter	SMD	5
Loachapoaka	Lee	LV	5
Louisville	Barbour	SMD	5
Lowndesboro	Lowndes	LV	5
Luverne	Crenshaw	SMD	5
Madison	Madison	SMD	7
Madrid	Houston	LV	5
Maplesville	Chilton	SMD	5
Margaret	St. Clair	MMD	5
McKenzie	Butler	SMD	5
Midland City	Dale	SMD	5
Millport	Lamar	SMD	5
Millry	Washington	MMD	5
Monroeville	Monroe	SMD	6
Moulton	Lawrence	SMD	5
Moundville	Hale	SMD	5
Mount Vernon	Mobile	SMD	5
Muscle Shoals	Colbert	A	
Myrtlewood	Marengo	CV	5
New Brockton	Coffee	SMD	5
Newton	Dale	SMD	5
Newville	Henry		5
North Johns	Jefferson	SMD	5
Notasulga	Macon	SMD	5
Opp	Covington	SMD	5
Orrville	Dallas	LV	5
Parrish	Walker	SMD	5
Pell City	St. Clair	SMD	5
Pennington	Choctaw	LV	5
Pickensville	Pickens	LV	5
Piedmont	Calhoun	SMD	7
Pinckard	Dale	SMD	5
Pine Apple	Wilcox	LV	5
Pine Hill	Wilcox	A	
Prattville	Autauga	SMD	7

## Dillard v. Crenshaw Municipalities

Providence	Marengo	LV	5
Ragland	St. Clair	SMD	5
Reform	Pickens	SMD	5
River Falls	Covington	MMD	5
Riverside	St. Clair	SMD	5
Rockford	Coosa	MMD	5
Russellville	Franklin	SMD	5
Rutledge	Crenshaw	LV	5
Sheffield	Colbert	SMD	5
Silas	Choctaw	LV	5
Springville	St. Clair	SMD	7
Sulligent	Lamar	SMD	5
Tallassee	Elmore	SMD	7
Tarrant	Jefferson	SMD	5
Thomaston	Marengo	SMD	5
Thomasville	Clarke	SMD	5
Town Creek	Lawrence	SMD	5
Toxey	Choctaw	LV	5
Tuscumbia	Colbert	SMD	5
Valley	Chambers	A	
Vincent	Shelby	SMD	5
Wadley	Randolph	SMD	5
Waldo	Talladega	LV	5
Warrior	Jefferson	SMD	5
Waverly	Chambers	LV	5
Webb	Houston	LV	5
Wedowee	Randolph	SMD	5
West Blocton	Bibb	SMD	5
Wetumpka	Elmore	SMD	5
Wilsonville	Shelby	PAL	7
Wilton	Shelby	SMD	5

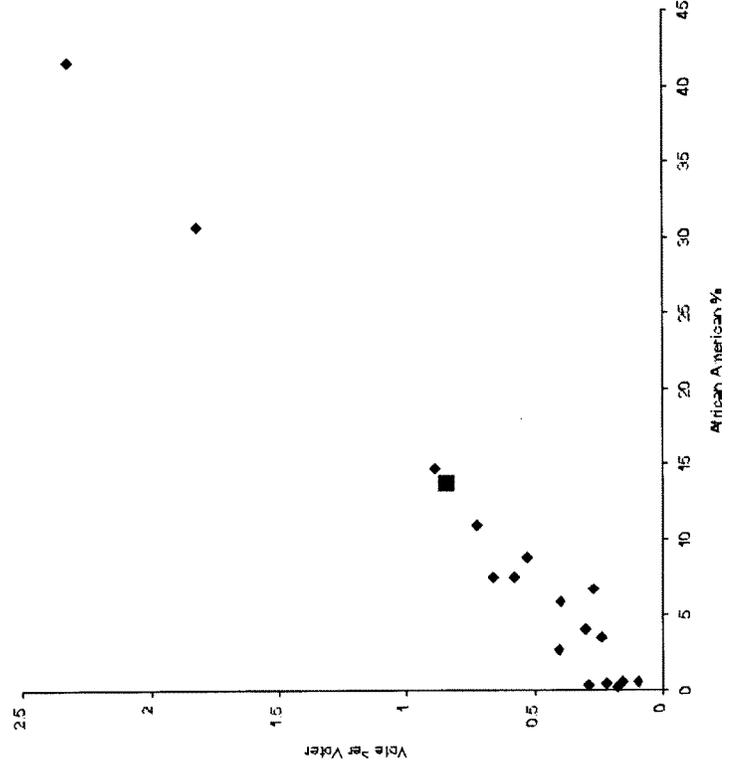
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

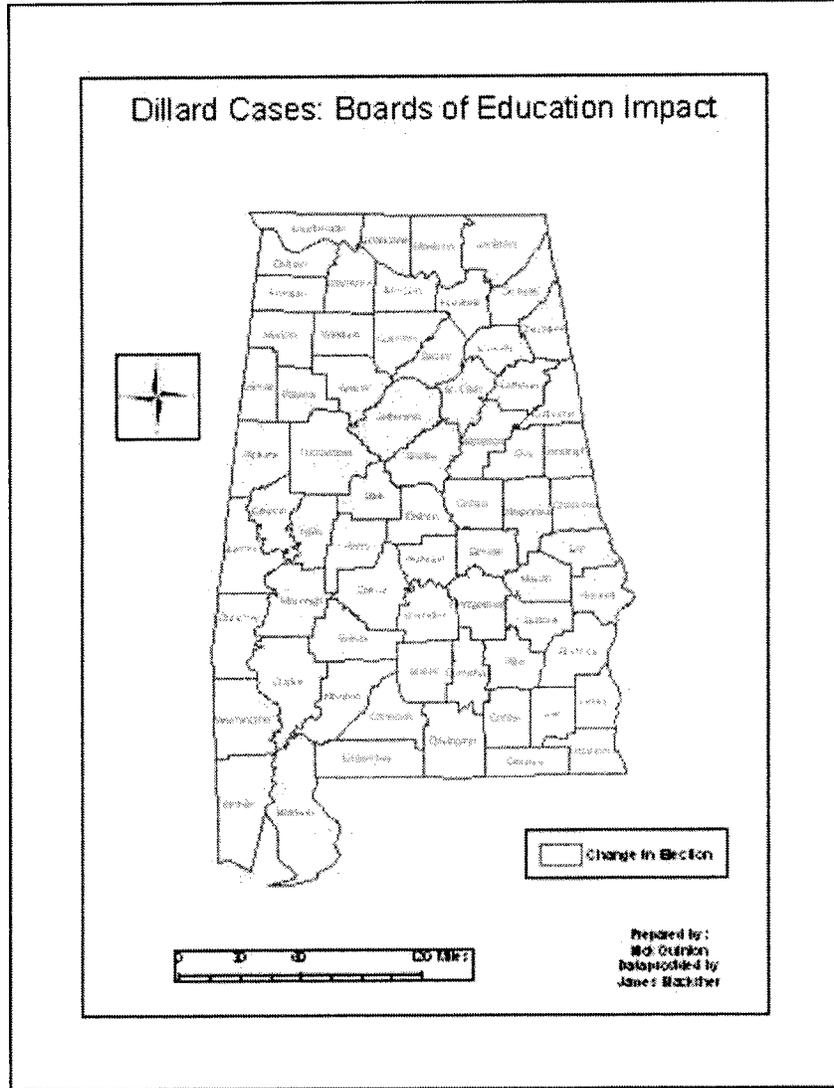
JOHN DILLARD, et al.,	)
	)
Plaintiffs,	)
	)
ROBERT R. BINION and JOHN WRIGHT,	)
	)
Plaintiffs-Intervenors,	)
	)
GILBERT GREEN and CALVIN JONES,	)
JR.,	)
	)
Plaintiffs-Intervenors	)
	)
v.	) CIVIL ACTION NO.
	) 2:87-1179-T
CHILTON COUNTY COMMISSION, and	)
PROBATE JUDGE ROBERT B. MARTIN, in	)
his official capacity,	)
	)
Defendants.	)

**DILLARD AND BINION PLAINTIFFS' TRIAL BRIEF  
EXHIBIT B**

**Scatterplot from Dillard Trial Exhibit 1  
Supplemental Report of Dr. Richard L. Engstrom**

FIGURE 1  
Agee Vote by % African American

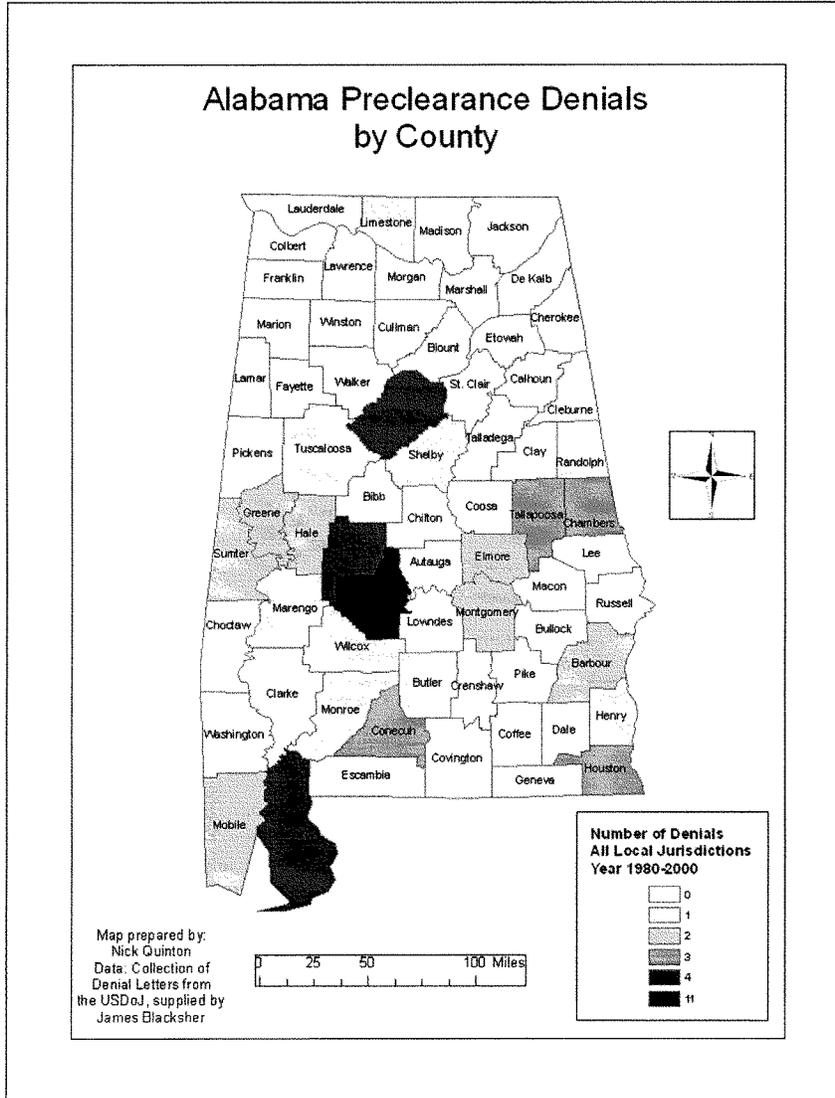




### Dillard Impact: County Commissions



Map prepared by:  
Nick Quinton  
Data provided by:  
James Blaksher





**OFFICE OF THE COUNTY ATTORNEY**  
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(540) 245-5096 (Fax)

Steven L. Rosenberg  
County Attorney  
srosenberg@co.augusta.va.us

June 19, 2006

The Honorable Arlen Specter  
United States Senate  
Chairman, Senate Judiciary Committee  
711 Hart Building  
Washington, DC 20510

The Honorable Patrick J. Leahy  
United States Senate  
Ranking Democratic Member,  
Senate Judiciary Committee  
433 Russell Senate Office Building  
Washington, D.C. 20510

Re: Voting Rights Act of 1965

Dear Senators Specter and Leahy:

I understand that the Senate Judiciary Committee is presently considering the extension of the provisions of Section 5 of the Voting Rights Act of 1965 (the "Act"), which will otherwise expire in 2007. I further understand that the committee's consideration of Section 5 also includes a review of those provisions of Section 4 of the Act which allow covered jurisdictions to obtain a termination of coverage or "bailout" from the requirements of Section 5. To assist the committee in its deliberations, I would like to share with you Augusta County, Virginia's recent experience with the bailout process.

The Board of Supervisors of Augusta County, Virginia first determined to seek a bailout in March 2004. For this purpose, the board authorized this office to engage outside counsel knowledgeable in election law to assist with the county's efforts. Those efforts commenced in earnest in March 2005. The county obtained its bailout in November 2005, when a Consent Judgment and Decree was entered by the United States District Court for the District of Columbia.

The Honorable Arlen Specter  
The Honorable Patrick J. Leahy  
June 19, 2006  
Page 2

In seeking a bailout, the county desired to eliminate the costs of repeated preclearance submissions to the Attorney General and to obtain more flexibility for the registrar's office in its voter outreach efforts. As importantly, the members of the Board of Supervisors welcomed the opportunity to demonstrate the county's past compliance with the Act—a condition of the bailout.

On the whole, the process was a positive one for the county. Initially, the county furnished county records to the Department of Justice for review. Thereafter, on several occasions during the Spring of 2005, a team of attorneys from the Voting Section visited the county to conduct interviews with county residents and officials, and to further review county records. The team conducted its activities efficiently and productively, working with county staff and the county's outside counsel to complete a thorough examination of the county's record of compliance with the Act. While the team identified two minor changes the county had not submitted for preclearance, the county was permitted to make preclearance submissions for those changes in conjunction with the bailout process, and the submissions were approved.

As required by Section 4, the county also posted notices of its intention to seek a bailout at multiple locations in the county and conducted a public hearing on March 9, 2005.

In conclusion, Augusta County was able to achieve a bailout at a reasonable cost, with a benefit that will continue indefinitely. Based on the county's experience, the bailout provisions of Section 4 establish a workable mechanism for covered jurisdictions to terminate coverage under Section 5.

I would be pleased to furnish any additional information you, other members of the committee or the committee's staff may desire.

Very truly yours,



Steven L. Rosenberg

cc: The Honorable Chairman and Members  
of the Board of Supervisors of Augusta  
County, Virginia

Patrick J. Coffield  
County Administrator

Susan Miller  
Registrar of Voters

June 30, 2006

Senator Arlen Specter  
Chair, Senate Judiciary Committee  
711 Hart Building  
Washington, D.C. 20510

Dear Senator Specter:

I am writing to urge the renewal of the Voting Rights Act. I am an assistant professor of Political Science at the University of Rochester. I have published in the areas of legislative politics, minority politics, and minority political participation. My research demonstrates the significant gains that minority citizens have made in political representation since the institution of the Voting Rights Act and particularly since its extension in 1982.

The ability of racial, ethnic, and language minority communities to elect a candidate of choice preserves a fundamental right of representation envisioned by the Framers more than two hundred year ago: that citizens elect agents who act on their behalf with vigor and intensity. The Framers, aware of various and competing interests within the polity, certainly did not expect that farmers would only elect farmers to represent them. However, they did recognize the importance of having farm interests represented in the legislature itself. Likewise, in the careful tailoring of the 1982 extension of the Voting Rights Act the empowering of minority citizens to elect a candidate of choice did not predetermine the race of the candidate elected. Drawing districts with majority-minority populations created the opportunity for quality minority candidates to credibly compete for office and once elected to credibly speak on behalf of their constituency.

Political representation encompasses much more than how a senator or representative votes on a policy. This limited measure, roll call voting, is the basis of what some researchers refer to as "substantive representation." Because much of the decision-making about which bills come to the floor for vote is beyond the control or influence of most individual legislators, how a member votes is arguably among the least important indicators of which issues a legislator or constituents find important. This is, of course, not to say that voting is unimportant. My point is that representation embodies much more than voting, including introducing and crafting policies that reflect the interests of various citizens and groups, advocating for issues in floor speeches and debates, and helping shape legislation in committees so that policies are reflective of many different American perspectives. My research, and that of others, demonstrates that the ability of minority citizens to elect candidates of their choice, oftentimes but not necessarily from their own racial or ethnic group, enhances their representation throughout the legislative

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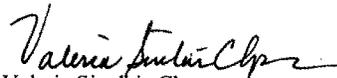
process because these legislators advocate racial and ethnic concerns more intensely than other non-minority legislators in bill introductions, floor speeches, and on committees.

The benefits of the Voting Rights Act go beyond the individual representational relationship between minority voters and those that actively represent them. My research shows that increased racial and ethnic diversity within the legislature itself results in a legislative agenda that is more inclusive and representative of broader swaths of American citizenry. Measured in terms of bill sponsorship, a more diverse legislature has discursive benefits. That is to say, the national discussion of issues of special concern to minority citizens such as civil rights, commemorative issues related to historical achievements and the like, is enhanced and crosses party lines. Simply put, in the arena of agenda setting, the increased presence of minority legislators over time has had the effect of encouraging non-minority legislators to take concerns of racial and ethnic minorities more seriously and to offer a wider array of policy proposals from across the political spectrum to address them.

Section 5 of the Voting Rights Act has been indispensable in protecting the right of minority voters to elect representatives who are responsive to their concerns by acting as credible advocates. While the ability of minority voters to elect a candidate of choice does not guarantee a "safe seat" to any particular set of candidates or incumbents; it does, however, enhance voters' ability to hold representatives accountable—a fundamental feature of representation. Without Section 5, many minority voters in southern states would not have ever seen the day when the votes they cast were part of the winning coalition that determined which candidate, among many, won election. An additional consequence of the Voting Rights Act has been the emergence of a more accessible and inclusive national legislature. This, in turn, has been essential in expanding the national dialogue to include perspectives reflecting the preferences of minority voters. On this basis, I urge that the retrogression standard in Section 5 be returned to the original intent of legislators set forth in the 1982 amendment.

I am available for additional assistance if you have questions about the importance of the Voting Rights Act to minority representation.

Respectfully,



Valeria Sinclair-Chapman  
Assistant Professor of Political Science

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TESTIMONY OF

**ABIGAIL THERNSTROM**

SENIOR FELLOW,

THE MANHATTAN INSTITUTE

AND

VICE-CHAIR,

U.S. COMMISSION ON CIVIL RIGHTS

BEFORE THE

COMMITTEE ON THE JUDICIARY

Subcommittee on the Constitution, Civil Rights and Property Rights

U.S. SENATE

Dirksen Senate Office Building Room 226

HEARING ON

**“Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options  
after LULAC v. Perry”**

July 13, 2006

2:00 PM

1445 Massachusetts Avenue  
Lexington, MA 02420  
781-861-7634  
thernstr@fas.harvard.edu

Mr. Chairman and distinguished Committee members, thank you for the opportunity to testify this morning.

My name is Abigail Thernstrom. I am a senior fellow at the Manhattan Institute, a public policy think tank, and the vice chair of the U.S. Commission on Civil Rights. By training I am a political scientist, having received my Ph.D. from the Department of Government, Harvard University, in 1975. I have been writing on race-related issues my entire professional career. My first book, *Whose Votes Count? Affirmative Action and Minority Voting Rights*, published by Harvard University Press in 1987, won four awards, including one of the American Bar Association's two book prizes. After an absence of two decades, I have returned to the topic of voting rights with a book in progress tentatively titled *Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Elections*.

I have been asked to speak to the implications of the Supreme Court's recent decision in *LULAC v. Perry* (June 28, 2006) for the shape of the reauthorization legislation now under consideration. And indeed the decision does contain important messages pertinent to the current debate. Moreover, it reinforces a conviction I have had for some months: the House bill as it currently stands will have unintended and unwelcome consequences.

The *LULAC* decision makes several points clear.

The Voting Rights Act, which in theory protects minority voters from disfranchisement, has become an instrument for partisan gerrymandering. And while the Republicans have found that distortion of the law very much to their liking in the past,

that era is over. On the other hand, Democrats too have already learned the cost of murky legal standards that allow preclearance judgments with which they profoundly disagree.

The House bill explicitly protects “the ability of [minority] citizens to elect their preferred candidates of choice.” But who qualifies as a “candidate of choice”? And what does an “opportunity” district look like? Neither the Supreme Court nor anyone else has a good answer to these questions, which are at the center of the proposed statutory amendments.

For instance, Martin Frost’s old District 24 was drawn by whites to elect a white Democrat, as Rep. Eddie Bernice Johnson testified at the trial. Nevertheless, appellants in *LULAC* argued that this was a district in which black voters could predictably elect the “candidate of their choice,” which is how they described Mr. Frost. It was, they said, a black “opportunity-to-elect” district, protected by the Voting Rights Act, even though it was only 25 percent black and had elected a white congressman. Justice Kennedy, writing for the Court in *LULAC*, didn’t buy the argument. The district “was formed for partisan reasons,” he wrote. “The fact that African Americans preferred Frost to some others does not . . . make him their candidate of choice.”

But only the Chief Justice and Justice Alito joined Justice Kennedy’s reasoning. (Justices Scalia and Thomas were silent on the issue.) And suppose District 24 was not 25 percent but 35 percent black—still majority white, but not to the same degree. Would that have made it a clear black “opportunity to elect” district if a white Democrat were elected with the aid of black voters? Is there a magic number that defines a district to which minority (and Democratic) voters are entitled under the Voting Rights Act—a district that

contains enough black and Hispanic voters to ensure they can elect “their preferred candidates of choice”? Is there a rational process we can use to determine what that number would be? The answer is clearly no.

Justice Department staff attorneys had hoped the 2003 Texas redistricting plan would not be precleared, and when their views were overridden, they leaked the memo making their case. They argued that Gene Green, the white incumbent in the majority-Hispanic District 29, had been called “basically Hispanic himself,” and thus that Democratic district could not be altered. It was protected by the Voting Rights Act as a district that had “performed” for Hispanic voters. District 25 was also represented by a white Democrat deemed “responsive” to minority interests, and was thus regarded as untouchable by the staff attorneys. But redrawn, the state predicted, the district would elect a black to Congress—as indeed turned out to be the case.

In the *LULAC* decision, as well, it was not only the discussion of Martin Frost’s district that raises unanswered questions about the sanctity of particular lines drawn for partisan reasons (even though the Court, in theory, is staying away from partisan gerrymandering issues). Civil rights groups had argued that while Mr. Frost counted as a “black” representative, the Republican incumbent, Henry Bonilla, could not speak for Hispanic interests because his party label was “R.” And this, in fact, was an argument to which Justice Kennedy in *LULAC* was sympathetic. “Latinos could have had an opportunity district in District 23 had its lines not been altered and . . . they do not have one now.” In other words, the state took too many Democrats out of the district (which remained majority-Hispanic), and thus deprived minority (Democratic) voters of their electoral “opportunity.”

Here again, is the question of what these “opportunity” districts—protected by the Voting Rights Act—look like. At the oral argument, the Chief Justice asked Nina Perales (representing the Mexican American Legal Defense and Educational Fund) seven times, in several different ways: What number of minority voters is enough to make a district qualify as “Hispanic-opportunity,” rather than one masquerading as such? Her unhelpful answer: an “Hispanic-opportunity” district is one in which Hispanics have electoral opportunity. By which she clearly meant Hispanics and Democrats, the two being one and the same in her view.

Blacks may be reliable Democrats, and thus white Democrats arguably represent their interests, as Justice Sandra Day O’Connor suggested in *Georgia v. Ashcroft*, the Court’s 2003 decision that revisited the section 5 standards. “No party,” she said, “contests that a substantial majority of black voters in Georgia vote Democratic” and thus any increase in the number of Democratic state senators, even if they were white, would boost minority representation. So, in reviewing districting maps for preclearance, the Justice Department can assume that what’s good for Democrats is good for blacks, the Court found, in effect. But will the same point hold into the indefinite future for Hispanics? And when even a slight majority of Hispanics in a district vote Republican, will that now be a Hispanic- and Republican-opportunity district that will remain protected by the Voting Rights Act? Down the road, both parties can play definitional games that further partisan interests, and the Sensenbrenner bill encourages such gamesmanship.

Such games have long been integral to the Department of Justice enforcement process. The administrations of Presidents George H.W. Bush and Bill Clinton, for

different political reasons, worked with the same assumptions in interpreting the preclearance provision. But the current Justice Department has broken ranks with the career attorneys in the voting section, as noted above. In the wake of the Attorney General's decision to approve the Texas redistricting plan, Democrats, civil rights spokesmen, and their allies in the scholarly community and in the media were outraged by the "bias" that had allegedly crept into the preclearance process. The charge (leaving the question of its validity aside) is quite amusing. In the 1980s and 1990s, the Justice Department used the Voting Rights Act to pursue an ideologically driven agenda in direct conflict with the Supreme Court's interpretation of the statutory language.

Thus, throughout the 1980s, the department all but ignored the Court's 1976 holding in *Beer v. United States*, which established the retrogression (backsliding) test to measure the discriminatory "effect" of a districting plan or other electoral change. Plans that were not "fairly drawn" were called "retrogressive." And "fairly drawn" meant safe black seats in proportion to the minority population. Districting maps were expected to "fairly reflect" black voting strength. Jurisdictions that resisted this amendment of the law through the process of enforcement were said to be engaged in intentional discrimination.

In the 1990s, the charge of intentional discrimination became the chief means by which the Justice Department forced jurisdictions to draw the maximum number of possible majority-minority districts. Voting section attorneys worked hand in glove with the ACLU, the NAACP, and other advocacy groups, frequently insisting that jurisdictions adopt the plans drawn by them even when black elected officials in state legislatures had different priorities and objected. A good peek at that story is provided in the Supreme

Court's 1995 decision in *Miller v. Johnson* (and in the district court decision that preceded it).

This history is relevant to the Sensenbrenner bill. The proposed amendments to the statute would allow objections to electoral changes on suspicion of “any discriminatory purpose,” thus overturning *Bossier Parish II*, which held that preclearance could only be denied when there was suspicion of *retrogressive* purpose. In overturning the Court's 2000 decision, the proposed statutory change would reinstate the power of the Justice Department to play with charges of illegal purpose (an undefined term) in order to reject districting plans that are not to its liking for partisan or other unstated reasons. And it would allow the department to ignore the retrogression test entirely, since that more confining test insists that the legitimacy of new districting lines be measured against the political power afforded minority voters under the previously precleared plan.

To turn the retrogression test into an irrelevancy is to ignore the core purpose of the preclearance provision, which was to make sure the effect of the other enfranchising provisions of the Voting Rights Act was not undermined by inventive new devices that robbed black voters of the gains they had made. Section 5 was designed as a prophylactic measure—a means of guarding against renewed disfranchisement. And its design relegated to Justice Department attorneys a limited, and thus manageable, task—assessing blacksliding.

Had the original 1965 Voting Rights Act included a broader definition of either discriminatory effect or purpose in section 5, it would have asked Justice Department attorneys to settle broad questions of electoral equality that are inappropriate in a process of swift administrative review. The resolution of such questions requires the specific,

detailed, idiosyncratic knowledge of race and politics in local jurisdictions that only a local federal district court can obtain in the course of a trial. Such expansive definitions would have invited, in short, precisely that ideologically driven, creative disregard of the statute that has characterized the enforcement of section 5, but which *Bossier Parish II* partially stopped. If the old, open-ended definition of “purpose” is resurrected, as the House bill proposes, then the term can be used for whatever partisan goals the Department of Justice (today and in the future) wishes to set. Moreover, that resurrection is unnecessary: Plaintiffs who suspect intentional discrimination can always bring suit on Fourteenth Amendment grounds.

The *LULAC* decision left many questions unanswered and left open the door to continuing subjectivity in assessing black and Hispanic electoral opportunity and who counts as a minority “representative.” But at least it did adhere to the tighter definition of purpose contained in *Bossier Parish II*—a definition that squares with the backsliding principle that informs the entire structure of section 5.

The proposed language for section 5 cannot be administered like a highway bill. Enforcement depends on unacknowledged normative assumptions. The murky language of section 2 already has courts immersed in what Justice Thomas (echoing Justice Frankfurter) has called “a hopeless project of weighing questions of political theory.” But at least the project is one in which judges, disciplined by the structure of trials and appeals, are engaged. Not so with section 5. The opaque language of the proposed House bill would further empower Justice Department attorneys—which in practice most often means those in career positions, along with equal opportunity specialists and paralegals. In preclearance decisions, Justice has pretty much the last word, and that word will

almost inevitably be driven by normative and partisan convictions, which may vary from one administration to the next.

The core provisions of the Voting Rights Act are permanent. Basic Fifteenth Amendment rights are secure. The issue today is the reauthorization of the emergency provisions that were constitutionally radical and thus initially expected to last only five years. What, precisely, is needed forty-one years later? Congress has time to take great care in answering that question.

**Appendix to Testimony of Abigail Thernstrom, senior fellow, The Manhattan Institute, and Vice-Chair, U.S. Commission on Civil Rights, before the Senate Judiciary Committee, hearing on "Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after LULAC v. Perry " July 13, 2006 2:00 PM**

**Wall Street Journal, June 29, 2006, A14.**

**Divvying Up**

**By ABIGAIL THERNSTROM**

WASHINGTON -- Former House Majority Leader Tom DeLay may be down, but he's not out. Yes, he's out of Congress, but the Texas congressional districting plan for which he is given substantial political credit mostly lives on, thanks to yesterday's Supreme Court decision upholding it.

The plan was attacked, in legal briefs, as "one of the most notorious partisan power grabs in our history." Indeed, "the only reason that this law was even considered, let alone passed, was to help one political party gain more seats in the Congress at the expense of the other," one attorney for minority appellants complained when the case was argued on March 1. "Wow. That's a surprise," Justice Scalia replied. Imagine that: politics driving the redistricting process.

It's true that the Texas legislature was not obligated to take the matter up, since a federal court had drawn a map in 2001 when the elected body was deadlocked. But Republicans viewed the court's lines as giving unfair advantage to Democrats, who were no longer the political majority in the state. And thus in 2003, following a highly entertaining political brawl in which the Republicans prevailed, the legislature drew new districting lines.

For a scandal-loving media, the weighty hand of Mr. DeLay gave particular credence to the charge of illegal political gerrymandering. But in 2003, the Supreme Court had refused to strike down a Pennsylvania partisan gerrymander, and in the oral argument in the Texas case, the court basically yawned, suggesting it was an issue going nowhere. As in fact turned out to be the case.

\* \* \*

Of more interest to the justices was the claim that, in violation of the Voting Rights Act, Martin Frost's old legislative district had been redrawn; a bunch of Hispanic Democrats had been removed from Republican Rep. Henry Bonilla's district to ensure his re-election; and in South and West Texas where majority-Hispanic districts had been created, one of the districts was far from geographically compact.

Martin Frost, the former dean of the Texas delegation, is a white Democrat. His district (as black Rep. Eddie Bernice Johnson testified at the trial) was drawn by whites to elect a white Democrat. Nevertheless, minority plaintiffs argued that this was a district in which black voters could predictably elect the "candidate of their choice," which is how they described Mr. Frost. It was, they said, a black "opportunity-to-elect" district, protected by the Voting Rights Act, even though it was only 25% black and had elected a white congressman. The Supreme Court didn't buy it. The district "was formed for partisan

reasons," Justice Anthony Kennedy wrote in his majority opinion. "The fact that African Americans preferred Frost to some others does not . . . make him their candidate of choice."

The court found Rep. Bonilla's district a different story, however. Rep. Bonilla would seem to be unmistakably Hispanic, his name redolent of old Castile -- but "*No!*" the civil rights groups had argued. While (in their view) the white Democrat, Mr. Frost, counted as a "black" representative, Mr. Bonilla cannot speak for Hispanic interests because his party label is "R."

In the redrawn map, Rep. Bonilla's district was still majority-Hispanic -- but just barely. The state had illegally used race to make the district look good for Voting Rights Act purposes (by having *just enough* Hispanic voters), while removing Hispanics to protect an incumbent, Nina Perales, an attorney from the Mexican American Legal Defense and Educational Fund, stated in oral argument. The point occasioned a near-comic exchange between Chief Justice John Roberts and Ms. Perales, as the chief justice plumbed the Goldilocks formula of racial gerrymandering. *What number of minority voters is just right to make a district qualify as "Hispanic-opportunity," rather than one masquerading as such?* he asked Ms. Perales seven times, in several different ways.

"That number would be the number that shows Latinos have the opportunity to elect their candidate of choice," was the best answer she could give. Minority voters are entitled to a maximum number of "opportunity-to-elect" districts, which have, in fact, nothing to do with "opportunity" and everything to do with the right racial, ethnic -- and partisan -- results. Alas, it's a notion that the majority on the court embraced -- and not for the first time. Its bottom line: "Latinos could have had an opportunity district in District 23 had its lines not been altered and . . . they do not have one now."

Texas had argued that, in altering the boundaries of Rep. Bonilla's district, it nevertheless met its obligations under the Voting Rights Act by creating a new majority-Hispanic district. But the court didn't like its looks. The district was not compact and Hispanics that were clustered hundreds of miles apart in "different communities of interest" had been illegally grouped together for purposes of representation, Justice Kennedy concluded. "The practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals," he wrote.

\* \* \*

What political goals, precisely, are protected by the statute? Here is the most interesting point in the decision. Compactness is in the eye of the beholder, the court comes close to admitting. But the Hispanics who lived in the Austin area (at one end of the district) had quite a different socioeconomic profile from those who resided near the Mexican border (at the other end). Does the court really mean to say that poor and more affluent Hispanics each get their own districts? Is it now discovering *new* identity groups that have protected zones of interest?

Perhaps, but Justice Kennedy also signed on to the novel, breakthrough notion that not all Hispanics are alike. Who knows, maybe, down the road, the court will come to believe that blacks aren't all alike either. And if so, much of the structure of Voting Rights Act

enforcement -- enforcement that has badly distorted the act -- is likely to come tumbling down.

American law contains important messages about our basic values, and race-driven legislative maps (demanded by the Voting Rights Act, the court has long said) send the wrong message. Race-based districting has become equated with minority electoral opportunity, with the message that blacks are different from whites; it's okay for the state to label them as such; and statements that say, in effect, "blacks are . . . x," or "blacks believe . . . y" pose no problem.

"It's a sordid business, this divvying us up by race," the chief justice wrote in a separate opinion. Indeed. And of course the point extends to the "divvying up" that characterizes employment, contracting and education policies as well. Is Justice Kennedy's opinion perhaps one tiny step towards the beginning of the end of such racial sorting?

***Ms. Thernstrom, vice-chair of the U.S. Commission on Civil Rights, is a senior fellow at the Manhattan Institute and the author of "Whose Votes Count? Affirmative Action and Minority Voting Rights" (Harvard University Press, 1989).***

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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA UAW

RON GETTELFINGER, President

ELIZABETH BUNN, Secretary-Treasurer

VICE PRESIDENTS

GERALD D. BANTOM • NATE GOODEN • BOB KING • CAL RAPSON • RICHARD SHOEMAKER



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May 4, 2006

Dear Representative / Senator:

The UAW strongly supports the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (H.R. 9; S. 2703). The Voting Rights Act (VRA) is considered the most effective civil rights law in American history. Congress is clearly justified under Section 2 of the 15<sup>th</sup> Amendment in using all remedies at its disposal to preserve and protect the most fundamental constitutional right of Americans, the right to vote. Accordingly, the UAW urges you to cosponsor and support the speedy enactment of this important civil rights legislation.

Congress enacted the VRA in 1965 in direct response to our nation's sad history of discrimination in voting. The VRA has been renewed five times by bipartisan majorities in the U.S. House and Senate, and signed into law by both Republican and Democratic presidents. In the 40 years since its initial passage, the VRA has empowered racial, ethnic and language minority citizens by eliminating discriminatory voting practices and desegregating legislative bodies at all levels of government.

Nevertheless, oversight hearings have revealed that a second generation of discrimination has emerged that serves to abridge or deny minorities equal voting rights. Jurisdictions continue to attempt to implement election law procedures, such as at-large-elections, annexations, poll-place changes, and redistricting, with the purpose and or the effect of denying minorities equal access to the voting process. Likewise, the oversight hearings demonstrated that citizens who are non-native English speakers and in need of language assistance in communities across America are frequently denied access to the assistance mandated by the VRA.

H.R. 9; S. 2703 responds to this evidence of discrimination by renewing the VRA's temporary provisions for 25 years. In addition, this bill reauthorizes and restores Section 5 of the VRA to the original Congressional intent that has been undermined by the Supreme Court's decisions in Reno v. Bossier Parish II and Georgia v. Ashcroft. The Bossier fix prohibits implementation of any voting change motivated by a discriminatory purpose. The Georgia fix clarifies that Section 5 is intended to protect the ability of minority citizens to elect their candidates of choice.

This legislation also renews Section 203 of the VRA to continue to provide language minority citizens with equal access to voting without language barriers, using coverage determinations based on the more accurate American Community Survey Census data. Furthermore, it keeps the federal observer provisions in place and authorizes recovery of expert witness fees in lawsuits brought to enforce the VRA.

The right to vote is the foundation of our democracy and the Voting Rights Act provides the legal basis to protect that right. For this reason, the UAW strongly urges you to support timely Congressional action to renew and restore this vital law. The UAW urges you to cosponsor and support prompt enactment of the Fannie Lou Hamer, Rosa Parks, Coretta Scott King Voting Rights Act Reauthorization and Amendment Act of 2006 (H.R. 9; S. 2703). Thank you for you considering our views on this critically important legislation.

Sincerely,



Alan Reuther  
Legislative Director

AR:lb  
opeiu494  
L8067

Ivan Seidenberg  
Chairman & CEO



140 West Street  
New York, NY 10007  
ivan@verizon.com

July 11, 2006

The Honorable J. Dennis Hastert  
Speaker of the House  
232 Capitol Building  
Washington, DC 20515-6501

The Honorable John Boehner  
Majority Leader of the House  
107 Capitol Building  
Washington, DC 20515-6501

The Honorable Bill Frist  
Majority Leader of the Senate  
230 Capitol Building  
Washington, DC 20510-7010

The Honorable Nancy Pelosi  
Democratic Leader of the House  
204 Capitol Building  
Washington, DC 20515-6537

The Honorable Harry Reid  
Democratic Leader of the Senate  
221 Capitol Building  
Washington, DC 20510-7020

Dear Leaders:

Verizon congratulates each of you on your extraordinary leadership in advancing the Reauthorization of the Voting Rights Act. I urge you to move promptly to pass this bi-partisan, important legislation which guarantees every American the right to vote. This legislation is vital to the continuation of our free and open democracy.

As you know, the Voting Rights Act of 1965 is hailed as one of the most important pieces of Civil Rights legislation in the history of our country. By guaranteeing that no person shall be denied the right to vote because of race or color, the Act has broadened the participation of African-American, Hispanic and language-minority citizens in the democratic process and helped increase the numbers of elected minority representatives across all regions of the United States.

As a communications company, Verizon thrives on the robust, rich diversity of our communities. Our networks are the platforms for personal, commercial and social connectivity, and our investments stimulate entrepreneurial growth and innovation across all our markets. What makes the information economy such a powerful growth engine for America is the freedom of opportunity and expression afforded by this country's open, democratic institutions – the cornerstone of which is the right to vote.

Verizon stands with committed members of the Congress, civil rights leaders, business and community leaders, and the majority of Americans in supporting swift reauthorization of the Voting Rights Act (H.R. 9 – "The Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006)."

Sincerely,

A handwritten signature in black ink that reads "Ivan Seidenberg".

# WAL-MART

WAL-MART STORES, INC.  
702 S.W. 8TH STREET  
BENTONVILLE, AR 72716  
PHONE: 479-273-4112  
FAX: 479-273-4329

**LEE SCOTT**  
*President & CEO*

July 10, 2006

Dear Member of Congress:

On behalf of Wal-Mart Stores, Inc. and our 1.3 million associates in the United States, I am writing to urge you to support and vote for H.R. 9, legislation to reauthorize the Voting Rights Act of 1965. This measure should be considered by the full House in the near future.

Wal-Mart is the largest private employer of African-Americans and Hispanics and we, therefore, have a particular interest in this issue. On behalf of them as well as our millions of customers whose lives are touched by this landmark statute, we believe it is important to move forward expeditiously and enact the reauthorization of the Voting Rights Act.

After meeting with Members of the Congressional Black Caucus and others, our company went on the record in support of this legislation. In June 2005, I sent a letter to President George W. Bush urging him to fully support and reauthorize the Voting Rights Act. We have been pleased by the statements that the President has made endorsing the principle that the Voting Rights Act should be reauthorized, and we were further encouraged when the Senate and House leadership announced in May of this year that a bipartisan agreement on reauthorization had been reached and that swift action would follow. Although the measure had become stalled over the last few weeks, we applaud the congressional leadership for its commitment to reauthorization of the Voting Rights Act by bringing this measure to the House floor for a vote.

We appreciate your consideration of our thoughts on this legislation. Again, we respectfully encourage you to vote for H.R. 9, legislation to reauthorize the Voting Rights Act.

Sincerely,



H. Lee Scott  
President and CEO

**J.C. Watts, Jr.**

June 21, 2006

F. James Sensenbrenner, Jr.  
Chairman  
Judiciary Committee  
U.S. House of Representatives  
2138 Rayburn House Office Building  
Washington, DC 20515

John Conyers, Jr.  
Ranking Member  
Judiciary Committee  
U.S. House of Representatives  
2142 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Sensenbrenner and Ranking Member Conyers,

I write today to express my strong support for a clean reauthorization of the Voting Rights Act. I urge you to oppose both amendments that will be offered to the bill on the floor today. Those amendments would weaken the Voting Rights Act and take it away from its original purpose and intent.

This bill, appropriately named to honor civil rights legends Fannie Lou Hamer, Rosa Parks and Coretta Scott King, is a powerful statement of America's continuing resolve to put racial discrimination on the ash heap of history.

The Voting Rights Act is a national treasure. It is the cornerstone of civil rights legislation. This law has been, historically, the product of broad bipartisan support. You deserve to be commended for once again facilitating broad consensus through hard work, research of the facts, and a spirit of unity.

It is vital that the bipartisan consensus achieved by the Judiciary Committee be preserved as this legislation is considered in the House today. I strongly urge all Members to support the work of the Committee and this carefully crafted, bipartisan bill.

Sincerely,



J.C. Watts, Jr.



**Roger Williams**  
SECRETARY OF STATE  
State of Texas

July 12, 2006

The Honorable John Cornyn  
U.S. Senate  
517 Hart Senate Office Building  
Washington, DC 20510

Dear Senator Cornyn:

It has come to my attention that the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Property Rights will be conducting a hearing tomorrow over the Voting Rights Act and *LULAC v. Perry*<sup>1</sup>. As you are aware, the Secretary of State serves as the Chief Election Officer for the State of Texas. In that capacity, the office is responsible for ensuring the integrity of the states elections. In this light, and due to the subject of the hearing tomorrow, I would like to convey some concerns that might impact the discussion tomorrow in the wake of the recent U.S. Supreme Court decision.

The decision of the Supreme Court of the United States to invalidate Texas Congressional District 23 (CD 23) and the requirement that Texas reconfigured CD 23 – and quite possibly impact other congressional districts - prior to the November 2006 General Election has placed the ability of my agency to hold an election, in compliance with the Help America Vote Act of 2002 and the Uniformed and Overseas Citizens Absentee Voting Act, in question. The principle difficulties in adopting a reconfiguration of the November 2006 General Election congressional districts – at this point in the election cycle – stem from two governing federal statutes: the Help America Vote Act of 2002 (HAVA)<sup>2</sup> and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).<sup>3</sup> Additionally, as a practical matter, adjustments to the current voting districts will likely increase voter confusion, create substantial fiscal hardship, and could potentially lead to somewhat meaningless runoff elections due to low voter participation.

**Federal Help America Vote Act of 2002.** HAVA took effect on January 1, 2006, and is applicable to the November 2006 General Election. Due to the recent Supreme Court decision under the Voting Rights Act, two areas of state compliance with HAVA are in jeopardy, upon any new adjustment to the existing district lines: (1) availability and use of disabled accessible voting machines; and (2) implementation of statewide voter registration database.

<sup>1</sup> --- S.Ct. ----, 2006 WL 1749637 (U.S. Tex. 2006).

<sup>2</sup> 42 U.S.C. §§15301-15545.

<sup>3</sup> 42 U.S.C. §1973 ff.

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HAVA requires every precinct in the country to have at least one disability accessible voting machine available for use during voting hours.<sup>4</sup> The federal government provided Texas with more than \$181,000,000 to purchase compliant voting machines and comport with other HAVA mandates. Consequently, Texas now has at least one machine in every precinct in full compliance with the federal statute. However, because each county in the state selected from a list of certified electronic voting systems, there is no uniform vendor or statewide electronic voting system.

HAVA-compliant voting machines require an enormous amount of coding and programming to ensure machine security, reliability, and accuracy prior to deployment to the voting precincts. The coding generally takes a minimum of two months, which is why the Texas Election Code was amended in 2005 to allow for sixty-two days prior to the election for certification of the official ballot.<sup>5</sup> Without the necessary coding and programming, the machines are literally useless and Texas would be considered in non-compliance with HAVA. Additionally, counties would be forced to produce paper ballots, which, due to recent system upgrades, would likely require manual hand counting and thus could delay the finalization of election results.

Currently, the three state-certified electronic voting machine vendors are preparing the coding and programming for the November 2006 General Election. This preparation is taking place in the face of high immediate demands on their limited resources prior to the November elections; namely, service to their customers in Texas and the other forty-nine states. While the vendors could potentially overcome an adjustment to district lines that would yield their current work-product meaningless, it is highly unlikely. As a historical example of the likelihood that adjustments cannot be overcome, a mere 18-day delay in the state statutory timeline for preparing for the primary election back in March 2006 caused Texas to operate under an emergency ballot directive from the Secretary of State.

A second HAVA concern centers on the federal requirement that all states "...implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the state level that contains the name and registration information of every legally registered voter in the state and assigns a unique identifier to each legally registered voter...."<sup>6</sup> This is a significant departure from the prior practice of individual counties maintaining individual registration lists. Additionally, the Office of the Secretary of State, through a federally funded contract with IBM, is currently in the final stages of development and deployment of a new system that each county will interactively use, the Texas Election Administration Management (TEAM) System.

The TEAM System has been in development for two years and will be fully deployed throughout the state for the November 2006 General Election. Every county in the state has

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<sup>4</sup> 42 U.S.C. §15481(a)(3).

<sup>5</sup> Tex. Elec. Code §161.008.

<sup>6</sup> 42 U.S.C. §15483(a)(1)(A).

received training on how the new on-line system operates and what data entry elements are necessary on the county level for the system to function properly.

One of the critical elements of the TEAM System is the district and precinct information regarding each county. The adjustment of district and precinct lines at this point seriously jeopardizes the deployment and use of the TEAM System. This is primarily a factor of asking counties who have never used a system to make a major overhaul to the system during the initial familiarization and testing period with a hope that no glitches occur prior to the election.

**Federal Uniformed and Overseas Citizens Absentee Voting Act.** Adjustments to the existing congressional district lines present potential non-compliance with the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). Specifically, UOCAVA mandates that a voter under the act be allowed a minimum of 30 days to vote and return their ballot.<sup>7</sup> However, Texas has adopted a best practices recommendation of the U.S. Elections Assistance Commission (EAC)<sup>8</sup> for implementation of this requirement and statutorily mandated a 45-day timeframe for transmission and voting of military and overseas ballots.<sup>9</sup>

The recent *In Re Francis*, -- S.W.3d --, 2006 WL 197976 (Tex. 2006), decision by a divided Supreme Court of Texas caused a considerable delay in coding and programming of ballots and necessitated the Secretary of State issuing a directive for emergency ballots to be prepared. Additionally, once the emergency ballots were printed – a task that is somewhat dependent of the coding process – the Secretary of State was forced to issue a directive moving the deadline for which military and overseas ballots could be received and counted. The adjustment to the deadline occurred under direct threat of litigation from the U.S. Departments of Justice and Defense.

Unfortunately, at this point in the election cycle, a similar delay in coding will likely occur if the Court implements new districts for the November 2006 General Election. This will, in turn, necessitate a delay in ballot printing and mailing and will force yet another directive delaying state statutory deadlines to insure that military and overseas voters are afforded their statutorily mandated voting period.

**Increased Costs for Counties – Unfunded Mandate.** As a practical matter, the Office of the Secretary of State is concerned about the increased costs to the counties and districts affected by the *LULAC v. Perry* decision and the potential for open seat elections. This concern arises because the counties will, in effect, have to hold two elections and, in some cases, need double the voting machines.<sup>10</sup> However, in all cases, the affected counties will need twice the coding and programming.

The certified machines differ so greatly that it would be difficult to outline in detail how each machine is coded for an election. Generally speaking however, some machines are capable

<sup>7</sup> 42 U.S.C. §1973 ff-1(a)(2).

<sup>8</sup> Information about the EAC is available at its website at [www.eac.gov](http://www.eac.gov).

<sup>9</sup> Tex. Elec. Code §86.004(b).

<sup>10</sup> You will recall that counties in Texas are responsible for general election costs. While the State reimburses counties for appropriate costs incurred related to the State primary elections.

of holding election information for two elections on one machine and others are not. In the case where the machine cannot handle two elections, a second machine will be needed to manage the separate ballots and neither the state nor the counties are prepared for such a one-time capital expenditure. Moreover, it is questionable as to whether the vendors actually have the build on demand equipment in inventory for purchase given current difficulties meeting their purchase orders in other states.

In every case where an open seat run for a congressional district is contemplated for any newly-adopted districts, the counties will have to pay for additional coding and programming costs. Each open seat run will not allow for straight party voting and will therefore need to be coded as a separate election to avoid voter confusion and error. A second election means another round of ballot coding which, in most cases, has a fixed cost regardless of the size of the ballot. Again, this is a cost that neither the state nor the counties are prepared to undertake at this time.

In addition to the increased programming costs, affected counties would face additional costs to redraw county election precinct lines to comply with the new districts and will, in an effort to avoid voter confusion, likely need to send voters corrected registration certificates. Newly created precincts will require a new polling location to be established and will need to be staffed with additional poll workers.

Finally, assuming the court orders some form of open run for any newly designated congressional districts, the Texas Election Code requires that no election, including a run-off election be conducted within 30 days before or after a general election.<sup>11</sup> Given that the Texas Election Code does not contemplate a post general election run-off, the Office of the Secretary of State would prescribe that a run-off occur on a Tuesday, for consistency with other elections conducted within the state. Therefore, the earliest possible date for a run-off, assuming the coding could be completed within 30 days, would be December 12, 2006. The additional coding for the run-off would put another financial burden on the counties and the actual run-off election would likely yield little voter participation in the electoral process given the proximity to the Christmas Holiday.

Redrawing congressional districts at this late date will negatively impact the ability of the Texas to conduct the November 2006 General Election in compliance with federal and state law and will cause the affected counties to incur additional and unfunded costs through no fault of their own. Overall, a change now would wreak havoc on the orderly conduct of the November election and will ultimately lead to increased voter confusion and significantly lower voter participation in the process.

In short, it is extremely cumbersome on the election officials in Texas to have to balance compliance with the wide array of federal election laws designed to ensure that every person has a timely, confidential, and secure method of voting with the ever-evolving judicial interpretations of the Voting Rights Act. Therefore, because of the potential for disenfranchisement of military and overseas voters, and the inability to program HAVA compliant voting machines, at this point in the election cycle I am strongly advocating that Texas be allowed to conduct the November

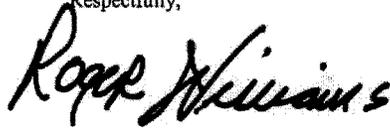
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<sup>11</sup> Tex. Elec. Code §14.001(c).

2006 General Election under the current legislatively approved map and allow the Legislature to reconfigure the districts during the 2007 Regular Session.

As always, I am available at any time to discuss this or any other election related matters with you.

Respectfully,

A handwritten signature in black ink that reads "Roger Williams". The signature is written in a cursive style with a large initial "R".

Roger Williams  
Secretary of State

## THE YALE LAW JOURNAL

ALVARO BEDOYA

### The Unforeseen Effects of *Georgia v. Ashcroft* on the Latino Community

**ABSTRACT.** In *Georgia v. Ashcroft*, the Supreme Court weakened the protections afforded to minority voters in jurisdictions covered by the section 5 preclearance provisions of the Voting Rights Act (VRA). This Note highlights the fact that *Georgia v. Ashcroft*—a decision applicable to all minority voters—was based on selective statistical evidence drawn solely from the African-American community, ignoring consistent data indicating that Hispanics still need the robust protections originally afforded by the section 5 preclearance standard. With the reauthorization of the VRA fast approaching, the Note presents two strategies—one for Congress, one for courts—to remedy the problems that *Georgia v. Ashcroft* has created.

**AUTHOR.** Yale Law School, J.D. expected 2007; Harvard College, A.B. 2003. Thanks to Jocelyn Benson, Juan Cartagena, Owen Fiss, Yoon-Ho Alex Lee, Eduardo Peñalver, and Stephen Townley for their invaluable assistance in editing and developing this Note. I am particularly indebted to Debo Adegbile for encouraging me to explore the excessively intricate yet unfailingly fascinating world of voting rights. *Y por supuesto, gracias a mi familia y a mis patas, quienes siempre me han apoyado en todas mis aventuras.*



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## INTRODUCTION

Despite their status as the largest minority group in the United States, Hispanics remain dramatically underrepresented in elected office. The U.S. Census estimates that over 41.3 million Latinos live in the United States,<sup>1</sup> making up 14% of the nation's population.<sup>2</sup> Nevertheless, of the 535 members of Congress, only 28 (5%) are Hispanic.<sup>3</sup> This pattern of underrepresentation extends to the state level.<sup>4</sup> In California and Texas—the two states with the largest Latino populations<sup>5</sup>—Hispanics amount to approximately one-third of the state population, but hold only 5.2% and 7.3% of state offices, respectively.<sup>6</sup>

This level of representation marks a high point for the Latino community; until the early 1980s, Hispanic representation in Congress lingered in the single digits.<sup>7</sup> The gains in Hispanic office-holding during the 1980s and 1990s can be attributed in part to the passage and implementation of the Voting Rights Act (VRA). The VRA facilitated the establishment of numerous majority-minority districts, in which minority voters constitute a majority of the relevant population, be it total population, voting-age population (VAP), or citizen voting-age population (CVAP).<sup>8</sup> The electoral benefits of majority-

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1. Press Release, U.S. Census Bureau, Hispanic Population Passes 40 Million, Census Bureau Reports (June 9, 2005), <http://www.census.gov/Press-Release/www/releases/archives/population/005164.html>.
  2. See U.S. Census Bureau, Annual Estimates of the Population by Race Alone and Hispanic or Latino Origin for the United States and States: July 1, 2004 (Aug. 11, 2005), <http://www.census.gov/popest/states/asrh/SC-EST2004-04.xls>.
  3. There are twenty-five Hispanics in the House of Representatives and three in the Senate.
  4. David Lublin, Percent Hispanic Legislators in States Greater Than Ten Percent Hispanic, <http://www.american.edu/dlublin/redistricting/tab5.html> (last visited Apr. 13, 2006). These figures are up-to-date through the last election held in each seat prior to 2006. *Id.*
  5. See U.S. Census Bureau, *supra* note 2.
  6. Louis DeSipio, *Latino Voters: Lessons Learned and Misunderstood*, in *THE UNFINISHED AGENDA OF THE SELMA-MONTGOMERY VOTING RIGHTS MARCH 135*, 139 (Editors of *Black Issues in Higher Education* & Dara N. Byrne eds., 2005).
  7. DAVID LUBLIN, *THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS* 25 (1997).
  8. When this Note refers to a majority-minority district, it refers to those districts in which minority voters constitute a majority of the total population. Many, if not most, scholars have acknowledged that the creation of majority-minority districts was essential to Hispanic and African-American electoral gains at the end of the twentieth century. See, e.g., Lisa Handley et al., *Electing Minority-Preferred Candidates to Legislative Office: The Relationship Between Minority Percentages in Districts and the Election of Minority-Preferred Candidates*, in *RACE AND REDISTRICTING IN THE 1990S* 13, 37 (Bernard Grofman ed., 1998) (explaining that gains in black and Hispanic representation “were due to the increase in the number of

THE UNFORESEEN EFFECTS OF *GEORGIA V. ASHCROFT*

minority districts became evident after the 1990 round of redistricting. State legislatures constructed ten new majority-Latino districts, and shortly thereafter seven Hispanic freshmen joined the House of Representatives.<sup>9</sup>

Two provisions of the VRA were crucial to the creation and maintenance of majority-minority districts: section 2 and section 5. Section 2 prohibits any policy or practice that has the effect of giving racial minorities “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>10</sup> Under section 5, a state or subdivision seeking to change a law or practice affecting voting must first preclear such a change, either by submission to the Attorney General, or by filing for a declaratory judgment in the United States District Court for the District of Columbia. Regardless of the method employed, the jurisdiction in question must demonstrate that the proposed change does “not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color” or membership in a language minority group.<sup>11</sup> In contrast to section 2, which applies throughout the United States, the protections of section 5 of the VRA only apply to jurisdictions that have met a particular set of threshold criteria known as a “triggering formula.”<sup>12</sup>

The Supreme Court specified what section 5 required in *Beer v. United States*,<sup>13</sup> in which the Court interpreted section 5 to prohibit only those changes that would have a retrogressive effect on a minority community’s “effective exercise of the electoral franchise.”<sup>14</sup> Until recently, courts considered any

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majority minority districts” and “were not the result of additional minority representatives being elected from majority white districts”); see also LUBLIN, *supra* note 7, at 23 (“The growth in the number of black and Latino representatives closely tracks the rise in the number of black and Latino majority districts.”).

9. LUBLIN, *supra* note 7, at 25.
10. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 42 U.S.C. § 1973(b) (2000)).
11. *Id.* § 5 (codified as amended at 42 U.S.C. § 1973c (2000)).
12. Initially, section 5 applied to jurisdictions that, as of November 1964, used voter literacy tests and had a participation rate of less than 50% for eligible voters; this formula was later extended to cover districts meeting these criteria in the 1968 and 1972 elections. PAST AND PROLOGUE: NATIONAL CONFERENCE COMMEMORATING THE 40TH ANNIVERSARY OF THE VOTING RIGHTS ACT OF 1965 § 3, at 2 (2005). In 1975, the triggering formula was further broadened to include those jurisdictions conducting English-only elections, under the reasoning that such elections constituted a prohibited “test or device” within the meaning of section 4(c) of the VRA. Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT’L BLACK L.J. 201, 210-11 (2004).
13. 425 U.S. 130 (1976).
14. *Id.* at 141.

diminution in the ability of minority communities to elect candidates of their choice to be retrogressive; this Note will refer to this as the “ability to elect” standard.<sup>15</sup> For proposed redistricting plans, the number of majority-minority districts was critical evidence for assessing “ability to elect,” such that a proposed reduction in the number of such districts was persuasive evidence of retrogression and hence of a section 5 violation.<sup>16</sup>

The reigning ability to elect standard was dethroned in 2003, when the Supreme Court decided *Georgia v. Ashcroft*.<sup>17</sup> Justice O’Connor’s opinion, joined by Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Thomas, made two major changes to the section 5 preclearance doctrine. First, Justice O’Connor expanded the ability to elect standard so that it would take into account both districts where it is “highly likely” that a minority community will be able to elect its candidate of choice, and other districts where “it is likely—although perhaps not quite as likely” that minority communities will succeed in electing their chosen candidate.<sup>18</sup> Second, Justice O’Connor restructured the section 5 inquiry such that ability to elect was merely one prong in a larger “totality of the circumstances” test.<sup>19</sup> After *Georgia v. Ashcroft* covered jurisdictions could secure preclearance even if they had “unpacked” majority-minority districts to create “coalitional districts,” where minority groups depend on coalitions with other voters to elect their candidates of choice,<sup>20</sup> or “influence districts,” where minority voters are not able to elect

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15. Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 30 (2004).
16. Jocelyn Benson, Note, *Turning Lemons into Lemonade: Making Georgia v. Ashcroft the Mobile v. Bolden of 2007*, 39 HARV. C.R.-C.L. L. REV. 485, 488 (2004) (“[A] redistricting effort that reduced the overall number of majority-minority districts in a covered area, particularly where voting was racially polarized, was found to have a retrogressive effect on minority voters.”); see also Tim Mellett et al., Dep’t of Justice, Section 5 Recommendation Memorandum 25-26 (Dec. 12, 2003), available at <http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf> (“In the past . . . the level of minority voting strength protected under Section 5 consisted only of those districts in which minority voters could reasonably be expected to elect their candidates of choice.”).
17. 539 U.S. 461 (2003).
18. *Id.* at 480.
19. *Id.* at 484.
20. In theory, the term “coalitional district” can be used to describe any district—even a majority-minority district—in which minority voters require the support of white or other minority voters to elect their candidate of choice. In practice, however, the term is typically used to describe districts in which a minority group constitutes less than 50% of the relevant population, be it total population, VAP, CVAP, or registered voters. See Richard H. Pildes, *Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1539 (2002) (defining coalitional districts as districts where black

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their candidates of choice, but could be swing voters in an election. Prior to *Georgia v. Ashcroft*, preclearance for those jurisdictions would have been highly unlikely.

Justice O'Connor defended this radical change in section 5 jurisprudence by citing five sociological studies that she claimed suggested that "the most effective way to maximize minority voting strength may be to create more influence or coalitional districts."<sup>21</sup> In part, these studies argued that increased white support for black candidates—known as white "crossover voting"—meant that black communities no longer needed majority-minority districts in order to elect their candidates of choice;<sup>22</sup> this would make less-concentrated coalitional districts a viable alternative to majority-minority ones. The studies further posited that the concentration of black voters in majority-minority districts had led to the election of more conservative candidates in surrounding districts, resulting in the decreased effectiveness of black representatives in legislative bodies;<sup>23</sup> this tendency would call for the elimination of majority-minority districts in favor of influence and coalitional districts.

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registered voters are less than 50% of all registered voters and the remainder of the registered voter population is non-Hispanic white). Most importantly, this appears to be the definition favored by the Supreme Court in *Georgia v. Ashcroft*, which spoke of coalitional districts as "communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, *having no need to be a majority* within a single district in order to elect candidates of their choice." 539 U.S. at 481 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) (emphasis added)). This Note will use the term to refer to districts where minorities are less than 50% of the total population.

21. *Georgia*, 539 U.S. at 482. The five studies cited were: CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS* 193-234 (1995); Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?* 90 AM. POL. SCI. REV. 794, 808 (1996); Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383 (2001); David Lublin, *Racial Redistricting and African-American Representation: A Critique of "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?"* 93 AM. POL. SCI. REV. 183, 185 (1999); Pildes, *supra* note 20, at 1517.
22. See, e.g., Cameron et al., *supra* note 21, at 808 ("[D]istricts that are a bit less than majority-minority give black representatives a substantial chance of winning office . . . while supporting minority influence in other districts."); Pildes, *supra* note 20, at 1522 (noting the rise of a "significant percentage of white voters . . . who regularly cast votes for black candidates running against white competitors"). The qualifier "in part" is used because portions of these studies are critical of this proposition. See Grofman et al., *supra* note 21, at 1423 (warning that white support for a black incumbent would not necessarily carry over to black candidates running for open seats); Lublin, *supra* note 21, at 183 (cautioning that Cameron, Epstein, and O'Halloran's study "underestimate[s] severely the percentage of blacks needed to assure the probable election of an African American").
23. Again, not all five studies concur on this point. See Lublin, *supra* note 21, at 185 (suggesting that such an effect should be limited to the South); see also Cameron et al., *supra* note 21, at

*Georgia v. Ashcroft* triggered a strong response from a number of scholars, who countered that the purported benefits of coalitional or influence districts were poor substitutes for the proven gains of majority-minority districts.<sup>24</sup> As Juan Cartagena has observed, however, because the facts of the case involved the black community in Georgia, the most forceful critiques of *Georgia v. Ashcroft* have focused on the decision's impact on black voters.<sup>25</sup> Thus, a critical gap in Justice O'Connor's reasoning has gone unnoticed: Even though *Georgia v. Ashcroft* applies to all minority groups, not one of the studies cited by Justice O'Connor deals at any significant length with the effectiveness of coalitional or influence districts in Hispanic—rather than black—communities. Given that jurisdictions covered by section 5 are home to almost as many Hispanics as African-Americans, this is a particularly glaring oversight.<sup>26</sup>

This Note asks the questions that Justice O'Connor did not consider: Is there reliable evidence that the best way to maximize *Hispanic* voting strength is to create more Hispanic coalitional and influence districts? If not, what impact will *Georgia v. Ashcroft* have on the Hispanic community? To date, only a handful of scholars have addressed these issues at any length.<sup>27</sup> None, however, has identified the evidentiary gap at the core of Justice O'Connor's holding, nor has anyone accounted for the demographic and electoral attributes uniquely salient in the Latino community and considered whether—in light of those characteristics—the premises of *Georgia v. Ashcroft* are equally applicable to Latinos.

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807-809 (providing empirical findings to support this hypothesis); *id.* at 794 (“[Concentrated minority districts] dilute minority influence in surrounding areas, which may then elect representatives unsympathetic to minority concerns.”).

24. See, e.g., Benson, *supra* note 16; Karlan, *supra* note 15; Bernard Grofman, A Citizen's Dissent: Potential Long-Term Problems with the Approach to Section 5 taken in *Georgia v. Ashcroft* (May 25, 2004) (unpublished manuscript, on file with author).

25. Cartagena, *supra* note 12, at 217.

26. Figures from the 2000 census show that 11,353,045 individuals identified as Hispanic and 13,906,777 individuals identified as non-Hispanic black reside in jurisdictions covered by section 5. See *infra* tbl. 1.

27. While their analyses were more limited in scope—Grofman's consisting of a single footnote—the three scholars who have addressed *Georgia's* impact on Hispanics have cautioned that moving away from majority-minority districts and toward coalitional or influence districts may be premature in the Latino context. Benson, *supra* note 16, at 495-96 (citing evidence that “majority-minority districts are important for Black candidates but are even more crucial to the success of Latino and Asian American candidates”); Cartagena, *supra* note 12, at 222 & n.135; Grofman et al., *supra* note 21, at 12 n.13 (“A legal climate that discourages the creation of new majority-minority districts will have its greatest impact on Hispanic representation.”).

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This Note finds that coalitional and influence districts are poorly suited to enable Latino voters to elect their candidates of choice, and indeed do little to empower Latino voters in general. Instead, majority-minority districts remain the primary means through which Hispanic communities can elect their preferred candidates. In light of these findings, this Note goes on to discuss two strategies—one for Congress, one for courts—to repair the deficiencies of *Georgia v. Ashcroft* and prevent the unwarranted elimination of Hispanic-majority districts.

This Note proceeds in three Parts. Part I examines the evidentiary foundations of Justice O'Connor's opinion. Part II "fills in the gap," creating a profile of the Hispanic electorate to assess the effectiveness of coalitional and influence districts in the Hispanic context, and hence evaluating *Georgia v. Ashcroft's* likely impact on the Hispanic community. Part III presents two strategies to avoid possible damage caused by the opinion. Finally, the Conclusion offers some broader observations on the administration of section 5 and the VRA in "other" minority contexts.

## I. MISSING HALF OF THE STORY

Despite the fact that *Georgia v. Ashcroft* applies to all minority voters,<sup>28</sup> its holding was predicated on selective evidence drawn solely from the African-American community. Justice O'Connor missed half of the story.

In this Part, I briefly describe the redistricting process that sparked *Georgia v. Ashcroft* and explain the mechanics of the opinion itself. I then explore the foundations of Justice O'Connor's opinion, elaborating on the critiques of majority-minority districts that Justice O'Connor used to justify her emphasis on coalitional and influence districts. Finally, I show how these critiques—and the opinion itself—did not consider the experiences of the Latino community.

A. *The Mechanics of the Decision*

The legal dispute that led to *Georgia v. Ashcroft* originated in the post-2000 redistricting of the Georgia State Senate. At the start of the redistricting cycle in 2000, Georgia's districting plan included thirteen senate districts in which blacks constituted a majority of the total population, twelve of which had a majority black voting-age population (BVAP). The goal of the Democratic leadership in preparing for the redistricting process was to maintain the number of black majority-minority districts—thus avoiding a section 5

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28. See, e.g., *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003).

objection—and simultaneously to increase the overall number of seats held by Democrats. Senate Democrats sought to accomplish this goal by unpacking the most heavily concentrated black-majority districts and allocating the unpacked black voters to surrounding districts. The plan that Democrats in the Georgia Assembly ultimately passed maintained thirteen black-majority districts, drawing those districts such that every one would have a majority BVAP. Five of those districts, however, had been significantly unpacked such that they now included less than 60% BVAP.<sup>29</sup>

The State of Georgia, a jurisdiction covered by section 5, filed an action in the District Court for the District of Columbia seeking a declaratory judgment that the State Senate plan did not violate the VRA. The Department of Justice objected, arguing that changes to three specific districts impermissibly diluted the ability of black voters to elect their candidates of choice; previously ranging from 55% to 63%, the BVAP of the districts in question would be reduced to just over 50% under the proposed state senate plan.<sup>30</sup> Although the plan was eventually revised and precleared with black voters added to all three districts, Georgia appealed to the Supreme Court to have its original plan reinstated.<sup>31</sup>

Justice O'Connor's majority opinion radically altered the section 5 preclearance standard, and remanded the original state senate plan for consideration under this new standard.<sup>32</sup> First, *Georgia v. Ashcroft* expanded the ability to elect test, stating that a redistricting plan that reduced the number of majority-minority districts could offset this reduction in ability to elect by creating coalitional districts where minority voters would make up less than 50% of a district, but could possibly elect their candidates of choice by forming coalitions with voters from other racial or ethnic groups.<sup>33</sup>

Second, Justice O'Connor made the more drastic argument that the validity of a plan under section 5 should not turn entirely on the plan's effect on minority voters' "ability to elect," but rather on the "totality of the

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29. *Id.* at 469-71.

30. *Id.* at 472-73.

31. *Id.* at 475. Note that section 5 cases are brought exclusively before three-judge panels in the District Court for the District of Columbia, with appeals directly to the Supreme Court. 42 U.S.C. § 1973c (2000).

32. As explained above, the preclearance process had previously focused on a determination of the proposed plan's effect on minority voters' ability to elect their candidate of choice. This meant that in section 5 redistricting cases, a decrease in the number of majority-minority districts would likely have been deemed "retrogressive" and resulted in the denial of preclearance. See *supra* notes 13-16 and accompanying text.

33. *Georgia*, 539 U.S. at 481-83.

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circumstances,<sup>34</sup> including the plan's effect on minority voters' "opportunity to participate in the political process," and "the feasibility of creating a nonretrogressive plan."<sup>35</sup> Under this totality of the circumstances test, a decrease in the number of majority-minority districts (and presumably the number of coalitional districts) could be offset by the creation of so-called influence districts where "minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process."<sup>36</sup> This is because these districts would purportedly increase minorities' "opportunity to participate in the political process."<sup>37</sup> In simpler terms, ability to elect—previously the cornerstone of section 5 preclearance analysis—was both (1) expanded and (2) made merely one prong in a three-part totality of the circumstances test.

*B. Justice O'Connor's Evidentiary Foundations*

Justice O'Connor grounded these radical changes by asserting that "the most effective way to maximize minority voting strength may be to create more influence or coalitional districts."<sup>38</sup> She cited five studies in support of this proposition. While not exclusively supportive of Justice O'Connor's stance,<sup>39</sup> taken as a whole these studies aptly summarized the two academic critiques of majority-minority districts prior to *Georgia v. Ashcroft*: the "perverse effects" theory and the "crossover effects" theory. The former justified the use of influence districts; the latter supported the creation of coalitional districts.

*1. The Alleged Harms of Majority-Minority Districts*

Prior to *Georgia v. Ashcroft*, critics of majority-minority districts claimed that by concentrating minority voters into a small set of districts, majority-minority districting plans "bleached" surrounding districts and thus

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34. *Id.* at 484 ("[A] court or the Department of Justice should assess the totality of circumstances in determining retrogression under § 5.").

35. *Id.* at 479.

36. *Id.* at 482. Justice O'Connor also suggested that such a decrease in minority voters' ability to elect could be offset by "[m]aintaining or increasing legislative positions of power for minority voters' representatives of choice." *Id.* at 484.

37. *Id.* at 482.

38. *Id.* at 482.

39. See *supra* notes 22-23.

guaranteed the election of officials unsympathetic to minority interests.<sup>40</sup> These critics usually cited the experience of the African-American community, arguing that the isolation of black Democrats in concentrated majority-black districts had led to white Republican victories in neighboring areas and Republican-dominated legislatures unsympathetic to black interests.<sup>41</sup> Hence, they posited that the black “descriptive” representation brought about by majority-minority districting—the presence of black officials in legislatures—inevitably led to losses in “substantive” representation—the ability of legislators to pass legislation favorable to African-Americans.<sup>42</sup> Much of the literature critiquing majority-minority districting attempted to corroborate this alleged trade-off between descriptive and substantive representation, identifying Democratic seats apparently lost due to majority-minority districting,<sup>43</sup> and looking at floor votes to prove that such districting led to policy outcomes unfavorable to black voters.<sup>44</sup> This theory of the inadvertent

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40. See *supra* note 23 and accompanying text.

41. See, e.g., SWAIN, *supra* note 21, at 205 (“To the extent that the black Democrats are concentrated in legislative districts, it is easier for Republican candidates to win more seats overall. . . . The more ‘lily-white’ the districts so drained become, the easier it is for Republicans to win them.”); Cameron et al., *supra* note 21, at 808 (arguing that “substantive minority representation” is hurt by majority-minority districting); Pildes, *supra* note 20, at 1558 (“Concentrating black voters into safe majorities tends to hurt the Democratic Party across a state as a whole because too many of the party’s most loyal voters have been safely confined to one district.”); see also LUBLIN, *supra* note 7, at 97 (“In the South, racial redistricting packs black liberal voters into districts and makes the surrounding districts more white and conservative.”). Note that the Cameron study bases its conclusions on quantitative data drawn solely from black-white contests. Cameron et al., *supra* note 21, at 808.

42. Cameron et al., *supra* note 21, at 794 (“[M]ajority-minority districts may increase the number of minority legislators but decrease the number of votes in support of minority legislation. . . . [T]here may be a trade-off between descriptive and substantive representation.”); see also SWAIN, *supra* note 21, at 210 (“Black faces in political office do not guarantee the substantive representation of the policy preferences of the majority of African Americans.”).

43. David Lublin calculated that majority-black districts cost Democrats eleven seats in the 1992 and 1994 congressional elections. Lublin, *supra* note 21, at 185. Carol Swain, writing in 1993, estimated that the loss of seventeen Democratic seats can be “directly attributed to the creation of majority-black districts” in the post-1990 redistricting process. SWAIN, *supra* note 21, at 227.

44. See Cameron et al., *supra* note 21, at 810 (“[P]ast a certain point, an increase in the number of minority representatives comes at the cost of votes in favor of minority-sponsored legislation.”); Lublin, *supra* note 21, at 185 (arguing that Democratic losses in 1992 and 1994 made the House of Representatives less likely to adopt initiatives supported by blacks).

harms of majority-minority districting is known as the perverse effects hypothesis.<sup>45</sup>

By definition, an influence district is highly unlikely to elect a minority community's chosen candidate.<sup>46</sup> Nevertheless, using the perverse effects theory, Justice O'Connor's totality of the circumstances test presents these districts as viable alternatives to majority-minority districts. Admitting that influence districts would not generally allow the election of minority groups' candidates of choice—and hence have no positive impact on minority voters' ability to elect—Justice O'Connor reasoned that influence districts would “[increase] the number of representatives sympathetic to the interests of minority voters,” hence improving minority voters' ability to participate in the political process.<sup>47</sup>

## 2. *The Reduced Need for Majority-Minority Districts*

The second prong of the critique of majority-minority districts posited that they were no longer necessary in light of allegedly declining levels of racially polarized voting. Critics of majority-minority districts typically argued that black candidates increasingly received the support of white “crossover” votes and that, therefore, black voters no longer needed majority-black districts to elect their candidates of choice.<sup>48</sup> The critics thus alleged that the redistricting provisions of the VRA that protected majority-minority districts had served their purpose, and that today they could be obstacles to greater substantive representation, or to the formation of valuable interracial coalitions.<sup>49</sup> Hence

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45. See Delia Grigg & Jonathan N. Katz, *The Impact of Majority-Minority Districts on Congressional Elections 1* (Apr. 4, 2005) (unpublished manuscript, on file with author). *But see id.* at 9, 13 (presenting evidence refuting this hypothesis).

46. *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003) (“[A] court must examine whether a new plan adds or subtracts ‘influence districts’—where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process.”).

47. *Id.* at 483.

48. See, e.g., Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1253 (1999) (“As long as white crossover rates outpace black crossovers, and black and white registration rates are roughly equal, African-Americans will not need majority-black districts to win.”); Pildes, *supra* note 20, at 1529 (noting that some have argued that a drop in racially polarized voting “permits a meaningful level of white-black coalitional politics,” enabling black candidates to get elected from non-majority-black districts); see also *supra* note 22 and accompanying text.

49. See Cameron et al., *supra* note 21, at 798 (arguing that majority-black districts may actually “hinder the formation of the biracial liberal coalitions that were the impetus behind the original civil rights campaign”); Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a*

Professor Richard Pildes's provocative question: "Is voting rights law now at war with itself?"<sup>50</sup>

The crossover effects hypothesis provided the basis for Justice O'Connor's broadening of the ability to elect prong to allow for the creation of coalitional districts in lieu of majority-minority ones; the underlying premise of coalitional districts is that such coalitions are possible in the first place. Thus, Justice O'Connor tellingly quoted from *Johnson v. De Grandy*, in which the Court found that "there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice."<sup>51</sup>

### C. *The Absence of Latinos in Georgia v. Ashcroft*

Justice O'Connor's reliance on the five studies—and the critique of majority-minority districts that they present—is notable for two reasons. First, while these studies draw heavily on data from black communities, particularly those in the South,<sup>52</sup> Justice O'Connor ignored a large body of contradictory evidence suggesting that it is extremely difficult for black candidates to get elected outside of majority-minority districts, and that coalitional districts are relatively ineffective for African-Americans.<sup>53</sup>

More surprising, however, is Justice O'Connor's complete disregard for Hispanic communities. Not one of the studies cited by Justice O'Connor deals at any significant length with the effectiveness of coalitional and influence

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*Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1731 (2004) ("The emerging conclusion is that section 5 has served its purposes and may now be impeding the type of political developments that could have been only a distant aspiration when the VRA was passed in 1965.")

50. Pildes, *supra* note 20, at 1517.

51. 512 U.S. 997, 1020 (1994) (quoted in *Georgia v. Ashcroft*, 539 U.S. 461, 481 (2003)).

52. The Grofman, Lublin, and Pildes studies were primarily based upon evidence from black-white electoral contests in the South. Grofman et al., *supra* note 21, at 1394 (focusing on black districts in the South in the 1990s); Lublin, *supra* note 21, at 184 ("Since all but one of the new black districts created during the 1990 redistricting round were in the South, I will focus primarily on the results for this region."); Pildes, *supra* note 20, at 1522 ("The 1990s saw the real emergence of a robust, genuine two-party political system across most contests in the South . . .").

53. See, e.g., LUBLIN, *supra* note 7, at 45 ("The election of an African American from a non-majority-minority district is an incredibly unlikely event."); Handley et al., *supra* note 8, at 37 ("[W]e have found no evidence to indicate that majority minority districts are no longer necessary to ensure African-American and Hispanics fair representation in our legislative bodies.").

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districts in the Hispanic—rather than black—context. Two of the studies make little or no reference to Latinos: Cameron, Epstein and O'Halloran's essay never once uses the words "Latino" or "Hispanic";<sup>54</sup> those same terms appear a total of five times in the body of Professor Pildes' fifty-seven page article.<sup>55</sup> Carol Swain and David Lublin do make brief mentions of Hispanics,<sup>56</sup> but both do so exclusively in the context of the electoral experience of African-Americans.<sup>57</sup> The one study that briefly addresses the effectiveness of coalitional districts in the Hispanic context explicitly cautions that such districts may be insufficient to provide Hispanic voters an opportunity to elect their candidates of choice.<sup>58</sup>

The absence of Latinos in these studies—which provide the factual and theoretical basis for Justice O'Connor's holding—is highly problematic. While section 5 jurisprudence is typically thought of as a "black issue,"<sup>59</sup> figures from the 2000 census show that covered jurisdictions are home to almost as many Hispanics as African-Americans.<sup>60</sup> Justice O'Connor's holding in *Georgia v. Ashcroft* may affect 13.9 million African-Americans, but it also affects well over 11 million Hispanics.<sup>61</sup> Nevertheless, Justice O'Connor did not weigh or

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54. See Cameron et al., *supra* note 21.

55. See Pildes, *supra* note 20. Two of the occurrences of "Hispanic" come in the phrase "non-Hispanic white." *Id.* at 1539, 1568.

56. SWAIN, *supra* note 21, at 226-34; Lublin, *supra* note 21, at 183-84, 186.

57. Lublin, for example, does mention Hispanics, but only to discuss the beneficial effect of Hispanic communities on African-American candidates running in minority-black districts. See Lublin, *supra* note 21, at 183-84.

58. See Grofman et al., *supra* note 21, at 1391 (citing evidence that "due primarily to lower citizen voting age eligibility rates among Hispanics, Hispanic population percentages well above 50% may be needed to provide Hispanic voters with an equal opportunity to elect candidates of choice").

59. Cartagena, *supra* note 12, at 202.

60. See *infra* tbl. 1.

61. *Id.* Given the VRA's historical roots in the black civil rights movement, some would argue that Justice O'Connor's emphasis on the African-American community was understandable. While the VRA was primarily conceived as a means to empower the African-American community, one should not underestimate the role of Hispanics in the establishment and development of the VRA. Juan Cartagena has meticulously shown that in 1965, Puerto Rican politicians and voting rights advocates successfully pushed for a provision in the VRA—section 4(e)—that guaranteed that Puerto Rican voters educated in Spanish-language schools would be allowed to vote in American English-only elections. Cartagena has also documented how lawyers from the Mexican American Legal Defense Fund used this provision and the precedents arising out of it to successfully lobby for the expansion of section 5 to jurisdictions conducting English-only elections. See Cartagena, *supra* note 12, at 204-12. This expansion of the VRA in 1975 led to the section 5 coverage of Texas, today the

consider their experiences. The following Part will show why this was a critical mistake.

## II. FILLING IN THE GAP

This Part considers whether Justice O'Connor's assertion—that “the best way to maximize minority voting strength may be to create more influence or coalitional districts”<sup>62</sup>—holds in the Latino context. This inquiry is divided into several parts. Section III.A provides a profile of the Hispanic electorate, identifying salient demographic and behavioral differences between the black and Hispanic electorates. The following two Sections use that profile to assess whether coalitional and influence districts actually maximize the voting strength of the Latino electorate. This Part concludes that coalitional and influence districts are highly ineffective for Latinos, both in terms of electing Latino candidates and in allowing Latinos to participate in electoral politics. Instead, the Hispanic population's unique combination of demographic characteristics creates a situation in which robust majority-minority districts constitute their primary—if not their only—avenue for electoral success. In light of these findings, the final Section discusses why *Georgia v. Ashcroft* may be particularly damaging to the Latino electorate.

### A. A Comparative Profile of the Hispanic Electorate

There are at least four characteristics of the Hispanic electorate that may cause Hispanics to be particularly reliant on majority-minority districts and highly prejudiced by their elimination—perhaps even more so than their black counterparts.

First, the Hispanic population is crippled by high levels of voter ineligibility, at rates unseen among whites or African-Americans. In a recent report, the Pew Hispanic Center found that only 39% of Latinos are eligible to vote, compared to 65% of blacks and 76% of whites.<sup>63</sup> As the Hispanic population is disproportionately young, the size of the Latino electorate is

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most populous jurisdiction subject to section 5. See *infra* tbl. 1. Cartagena concluded: “The truth is that the Voting Rights Act . . . was initially and deservedly aimed at restoring the dignity of African-American voters, but even in 1965, it was never just black and white.” Cartagena, *supra* note 12, at 201.

62. *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003).

63. ROBERTO SURO ET AL., PEW HISPANIC CTR., HISPANICS AND THE 2004 ELECTION: POPULATION, ELECTORATE AND VOTERS 5 (2005), available at <http://pewhispanic.org/files/reports/48.pdf>.

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reduced by age-based ineligibility. Thirty-four percent of the Hispanic population cannot vote due to age alone.<sup>64</sup> The remaining 27% are disqualified from voting due to noncitizenship.<sup>65</sup>

Table 1.  
HISPANIC AND BLACK POPULATIONS IN JURISDICTIONS COVERED BY SECTION 5<sup>66</sup>

JURISDICTION	HISPANIC	BLACK	TOTAL
<b>Fully Covered States</b>			
Alabama	75,830	1,162,180	1,238,010
Alaska	25,852	25,733	51,585
Arizona	1,493,637	170,191	1,663,828
Georgia	435,227	2,369,427	2,804,654
Louisiana	197,738	1,457,805	1,655,543
Mississippi	39,569	1,035,627	1,075,196
South Carolina	95,079	1,192,592	1,287,671
Texas	6,669,666	2,429,966	9,099,632

64. *Id.* at 5. Thirty-one percent of non-Hispanic blacks and 22% of non-Hispanic whites were ineligible to vote due to age. *Id.* at 6.
65. *Id.* at 5. Only 4% of non-Hispanic blacks and 2% of non-Hispanic whites are disqualified from voting due to noncitizenship. *Id.* at 6. While noncitizens are unable to vote, they are counted for redistricting purposes. Section 2 of the Fourteenth Amendment requires Congress to apportion representatives by “counting the whole number of persons in each State,” making no mention of citizenship status. U.S. CONST. amend. XIV, § 2; see also U.S. Census Bureau, Questions and Answers on Apportionment, <http://www.census.gov/population/www/censusdata/apportionment/faq.html#Q2> (last visited Apr. 14, 2006) (“The apportionment calculation is based upon the total resident population (citizens and non-citizens) of the 50 states.”).
66. I generated a customized table using data from “Census 2000 Summary File 1 (SF 1) 100-Percent Data,” which is available at U.S. Census Bureau, United States—Data Sets—American FactFinder, [http://factfinder.census.gov/home/saff/main.html?\\_lang=en](http://factfinder.census.gov/home/saff/main.html?_lang=en) (follow “get data” hyperlink under “Decennial Census” heading) (last visited Apr. 17, 2006). VRA-covered jurisdictions are listed at U.S. Department of Justice Civil Rights Division, Section 5 Covered Jurisdictions, [http://www.usdoj.gov/crt/voting/sec\\_5/covered.htm](http://www.usdoj.gov/crt/voting/sec_5/covered.htm) (last visited Apr. 17, 2006). Black population figures include all non-Hispanic individuals identifying as black alone or as black in combination with another race.

JURISDICTION	HISPANIC	BLACK	TOTAL
<b>Partially Covered States</b>			
California	350,345	37,837	801,996
Florida	265,488	174,774	1,393,062
Michigan	1,564	5,820	12,427
New Hampshire	130	114	16,167
New York	1,550,409	1,654,764	5,335,171
North Carolina	124,730	884,313	2,916,502
South Dakota	315	34	21,516
Virginia	315,499	1,405,591	6,698,349
<b>Total</b>	<b>11,353,045</b>	<b>13,906,777</b>	<b>67,763,768</b>

Second, the Latino population suffers from participation rates lower than those of non-Hispanic black and white populations, in terms of both voter registration and election day turnout. While turnout rates among Hispanics are lower than those among whites and blacks,<sup>67</sup> low registration rates among eligible voters pose the biggest problem. Only 58% of eligible Latino voters were registered to vote in 2004, compared to 75% of whites and 69% of blacks.<sup>68</sup> Experts attribute these low participation rates to the fact that, like African-Americans, Hispanics are disproportionately young, less educated, and less affluent—all attributes that traditionally dampen political participation.<sup>69</sup> For Hispanics, these factors are exacerbated by language barriers. The combined effect of low voter eligibility and participation is devastating: Only

67. SURO ET AL., *supra* note 63, at 6-7.

68. *Id.* at 6.

69. See Louis DeSipio & Rodolfo O. de la Garza, *Between Symbolism and Influence: Latinos and the 2000 Elections*, in MUTED VOICES: LATINOS AND THE 2000 ELECTIONS 13, 21-22 (Rodolfo O. de la Garza & Louis DeSipio eds., 2005) (discussing the impact of youth, education, and poverty on Latino participation rates); Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Twenty Years of Voting Rights Act Coverage*, in PURSUING POWER: LATINOS AND THE POLITICAL SYSTEM 72, 103-07 (F. Chris Garcia ed., 1997) [hereinafter de la Garza & DeSipio, *Save the Baby*] (same).

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18% of all Hispanics voted in 2004, compared to 51% of whites and 39% of blacks, and Hispanics only contributed 6% of all the ballots cast on election day.<sup>70</sup>

Third, Hispanic voters are not as politically cohesive as African-American voters. Hispanics may predominantly identify as Democrats (among registered voters, self-identified Democrats outnumber Republicans two to one<sup>71</sup>), but Latinos do not exhibit the same degree of support for Democratic candidates as African-Americans. In the 2004 elections, for example, Senator John Kerry garnered an impressive 88% of the African-American vote, but only gained the support of slightly more than half (53%) of Hispanic voters.<sup>72</sup> While these particular figures<sup>73</sup> and the results of this particular election<sup>74</sup> are not to be overemphasized, few can contest that Latinos are less politically cohesive than African-Americans.

Fourth and finally, the Hispanic population has experienced a pattern of growth distinct from that of the African-American population, and indeed most other populations in the United States. The Hispanic population has undergone a dramatic increase in the past few decades, more than doubling in size between 1980 and 2000.<sup>75</sup> Over 20 million Latinos were added to census rolls in those two decades, compared to 14 million non-Hispanic whites, and 7.5 million non-Hispanic blacks.<sup>76</sup> Additionally, instead of settling in concentrated Latino enclaves, census figures suggest that Hispanics are more likely to live in areas where they do not constitute a majority of the

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70. SURO ET AL., *supra* note 63, at 6, 8.

71. PEW HISPANIC CTR. & KAISER FAMILY FOUND., THE 2004 NATIONAL SURVEY OF LATINOS: POLITICS AND CIVIC PARTICIPATION 2 (2004), available at <http://pewhispanic.org/files/reports/33.pdf>.

72. CNN.com, Election 2004, <http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.o.html> (last visited Feb. 22, 2006).

73. See Memorandum from the Nat'l Council of La Raza to Interested Parties, How Did Latinos Really Vote in 2004? (Nov. 16, 2004), available at <http://nclr.org/content/publications/download/28218> (critiquing evidence from the National Election Pool exit poll that CNN and other news sources relied upon).

74. See Louis DeSipio & Rodolfo O. de la Garza, *Forever Seen as New: Latino Participation in American Elections*, in *LATINOS: REMAKING AMERICA* 398, 402-03 (Marcelo M. Suarez-Orozco ed., 2002) (noting that Latino support for Republican politicians like George W. Bush and John McCain is generally an exception to the rule of Latino Democratic partisanship).

75. PEW HISPANIC CTR., *HISPANICS: A PEOPLE IN MOTION* 4 (2005), available at <http://pewhispanic.org/files/reports/40.pdf>.

76. *Id.*

population.<sup>77</sup> While this trend may eventually reverse, Latinos at the current moment are more residentially dispersed than African-Americans.<sup>78</sup>

### B. Implications for Districting in the Hispanic Context

Latinos' demographic and electoral attributes affect the voting strength that coalitional, influence, and majority-minority districts can provide. Standing alone, these characteristics render Latino coalitional and influence districts highly ineffective. Speaking comparatively, this profile suggests that even if coalitional and influence districts actually maximize African-American voting strength—an unwarranted assumption—the same will not necessarily be true of Latinos.

#### 1. The Failure of Hispanic Coalitional Districts

Evaluating the voting strength provided by coalitional districts is straightforward. The *Georgia v. Ashcroft* Court sanctioned the creation of coalitional districts in lieu of majority-minority districts by expanding the ability to elect prong. Hence, a coalitional district increases a minority group's voting strength insofar as it enhances a minority group's ability to elect its candidate of choice. This can be measured in two ways: (1) levels of crossover support for Hispanics, and (2) the success rates of Hispanic candidates in Hispanic coalitional districts. This Subsection will evaluate each in turn.

Sufficient levels of crossover support are difficult to attain for Hispanics. Due to high rates of ineligibility and disengagement, Hispanics in a Hispanic coalitional district would need massive levels of crossover support from non-Hispanic whites and blacks. Based on average ineligibility rates,<sup>79</sup> a coalitional district with a 40% Latino total population and a 60% white population translates into a district with a 25% Latino citizen voting age population (CVAP) and a 75% white CVAP. In fact, since Hispanics have higher ineligibility rates and lower participation rates than blacks, assuming a generalized increase in crossover support for minority candidates, Latinos in a Latino coalition district would need to receive more crossover support than

77. ROBERTO SURO & SONYA TAFOYA, PEW HISPANIC CTR., *DISPERSAL AND CONCENTRATION: PATTERNS OF LATINO RESIDENTIAL SETTLEMENT* 1 (2004), available at <http://pewhispanic.org/files/reports/36.pdf>.

78. *Id.* at 2; Robert R. Brischetto, *Latino Voters and Redistricting in the New Millennium*, in *REDISTRICTING AND MINORITY REPRESENTATION* 43, 56 (David A. Bositis ed., 1998).

79. See *supra* notes 63-64 and accompanying text.

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their black counterparts in a similarly apportioned black coalition district to enjoy the same likelihood of electing their candidate of choice. This level of crossover support seems intuitively unlikely.

While there is admittedly little aggregate data on precise levels of white crossover support for Hispanic candidates in Hispanic coalitional districts,<sup>80</sup> the existing data does not reflect significant levels of crossover support for Hispanics, let alone levels that would offset the differences in the eligibility and participation rates between Hispanics and blacks.<sup>81</sup> There is one putative exception to this rule. Several studies suggest that in California, Latino candidates may benefit from high levels of crossover support.<sup>82</sup> Nevertheless, these studies primarily rely on anecdotal evidence,<sup>83</sup> and must be weighed against convincing econometric findings reaching the opposite conclusion.<sup>84</sup> In

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80. Bruce Cain and Kenneth Miller have explained that as a quickly growing “other minority” group, Hispanics have often not inhabited a jurisdiction sufficiently long enough such that it is possible to develop a clear record of voting discrimination. Bruce E. Cain & Kenneth P. Miller, *Voting Rights Mismatch: The Challenge of Applying the Voting Rights Act to “Other Minorities,”* in *VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES* 141, 146-47 (Mark E. Rush ed., 1998).
81. See Brischetto, *supra* note 78, at 50 (“[T]here seems to be no trend toward lessening of polarized voting [against Latinos] during the [past] three decades.”). Indeed, racially polarized voting—the opposite of crossover support—remains rampant and well-documented in places like Texas. See Symposium, *Drawing Lines in the Sand: The Texas Latino Community and Redistricting 2001*, 6 *TEX. HISP. J.L. & POL’Y* 1, 50-51 (2001). For a discussion of the “Republican Primary Curse” in Texas, a euphemistic term to describe the consistent defeat of promising—and even GOP-backed—Hispanic candidates by underfunded, almost clearly inferior white Republican opponents, see Rodolfo Rosales et al., Report on San Antonio Hearings Related to the Extension and/or Expansion of the Federal Voting Rights Act 21-22 (Feb. 2006) (unpublished manuscript, on file with author).
82. Leo F. Estrada, *Making the Voting Rights Act Relevant to the New Demographics of America: A Response to Farrell and Johnson*, 79 *N.C. L. REV.* 1283, 1289 (2001) (“Latinos . . . have demonstrated their ability to win elections in non-Latino districts more so than other ethnic groups.”). Another scholar has implied the same without directly stating so. See J. Morgan Kousser, *Beyond Gingles: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 *U.S.F. L. REV.* 551, 566-67 (1993) (citing Latino congressional and State Assembly victories in California districts where Latinos constituted a minority of registered voters); see also *Cano v. Davis*, 211 F. Supp. 2d 1208, 1247 (C.D. Cal. 2002) (concluding that California’s electoral system is “far from closed to Latinos”). The court in *Cano* also found extensive evidence of substantial white crossover voting in favor of Latinos in two regions in California. *Id.* at 1243.
83. See Estrada, *supra* note 82, at 1289 n.30 (listing successful Latina candidates from non-Latino-majority districts in California); Kousser, *supra* note 82, at 566-67 (same).
84. See Yishaiya Absoch et al., *An Assessment of Racially Polarized Voting for and Against Latino Candidates* 28-30 (Feb. 9, 2006) (unpublished manuscript, on file with author)

any event, scholars generally regard California as an exception to the rule in terms of redistricting.<sup>85</sup> Overall, then, while there has been scattered evidence of increased white crossover support for black voters' candidates of choice<sup>86</sup> – evidence that has been criticized by voting rights scholars<sup>87</sup> – there has been no reliable evidence of comparable gains for Hispanic voters.

The general ineffectiveness of coalitional districts is underscored by evidence from electoral contests in Hispanic coalitional districts. David Lublin found that of 5,190 congressional races between 1972 and 1994, Latinos only won 29 races (0.6%) outside of majority-Latino districts.<sup>88</sup> Moreover, all except one of the Hispanic candidates who won in Latino-minority districts ran in majority-minority districts made up of a mix of minority groups within which Latinos constituted a prominent plurality of voters.<sup>89</sup>

There is little evidence that coalitional districts work to maximize Hispanic voting strength: Crossover support for Hispanics has proven insufficient, and Latinos are rarely, if ever, elected from supposedly “coalitional” Latino districts.

## 2. *The Empty Promise of Hispanic Influence Districts*

It is more difficult to evaluate the voting strength provided by Hispanic influence districts. Influence districts never result in the election of a minority

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(finding that “non-Latinos voted substantially against the Latino preferred candidate or issue” in thirteen elections in Los Angeles County from 1994 to 2003).

85. See, e.g., Cartagena, *supra* note 12, at 220; Bernard Grofman & Lisa Handley, *Preconditions for Black and Hispanic Congressional Success*, in UNITED STATES ELECTORAL SYSTEMS: THEIR IMPACT ON WOMEN AND MINORITIES 31, 37 (Wilma Rule & Joseph F. Zimmerman eds., 1992) (“Hispanics generally are not elected to Congress from districts that are less than 64 percent combined minority except in California and New Mexico.”).
86. See *supra* notes 22, 48 and accompanying text.
87. See, e.g., Benson, *supra* note 16, at 496-97 (critiquing Richard Pildes’s use of ambiguous data on racially polarized voting).
88. LUBLIN, *supra* note 7, at 48. Lublin made comparable, though slightly more favorable, findings for African-Americans. *Id.* at 41 (finding that African-Americans won 72 out of 5,079 races (1.4%) held outside of majority-black districts).
89. *Id.* at 49. The support of black voters can partially explain the initial success of Latino officials like Senator Robert Menendez of New Jersey, who first ran for Congress in a district with a 42% Hispanic population and a 14% African-American population. See *Page v. Bartels*, 144 F. Supp. 2d 346, 356 (D.N.J. 2001). One scholar attributes Senator Menendez’s subsequent success – prior to being appointed to the Senate, Menendez served seven terms in the House of Representatives and was elected chairman of the House Democratic Caucus – to the power of incumbency. Juan Cartagena, *New Jersey’s Multi-Member Legislative Districts and Latino Political Power*, 7 RUTGERS RACE & L. REV. (forthcoming 2006).

group's candidate of choice, and so cannot be understood to maximize a minority group's voting strength, traditionally defined. This is why Justice O'Connor placed influence districts under the opportunity to participate" prong of the totality of the circumstances test, and not the ability to elect prong.<sup>90</sup> Instead, the benefits afforded by influence districts are grounded in the perverse effects hypothesis, the idea that majority-minority districts harm minority groups' substantive representation (their ability to pass bills that support their agenda)<sup>91</sup> and thus should be dismantled.<sup>92</sup> In a sense, then, the voting strength provided by Hispanic influence districts turns on the validity of the perverse effects theory in the Hispanic context.

At first glance, the perverse effects theory appears self-evident. It seems reasonable that by packing progressive minority voters into a small set of districts, a greater number of conservative officials will be elected in surrounding districts. In reality, however, the dual propositions central to the perverse effects theory—(1) that concentrating minority voters into majority-minority districts will harm those minority voters' overall substantive representation, and (2) that unpacking those districts to create influence districts will benefit that substantive representation by making minority voters a viable "swing" constituency—are highly contingent upon two specific factors.

First, concentrating minority voters into majority-minority districts will only harm those voters' substantive interests if the minority voters are sufficiently Democratic, and the neighboring nonminority voters sufficiently Republican,<sup>93</sup> such that the concentration of minority voters into majority-minority districts—and hence their separation from neighboring nonminority voters—will result in the election of more conservative officials in the surrounding districts. This specific set of circumstances may hold in some regions, but not in others. Indeed, David Lublin has pointed out—in an article that Justice O'Connor cited<sup>94</sup>—that while the concentration of black voters in Southern states may result in conservative electoral outcomes in surrounding districts, such concentrations will not necessarily have the same effect in the

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90. See *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003) (stating that influence districts provide minority groups an opportunity to "play a substantial, if not decisive, role in the electoral process").

91. See *supra* notes 45-48 for a more extended discussion of substantive representation.

92. See *supra* note 47 and accompanying text.

93. I acknowledge that the default labeling of minorities as Democrats and nonminorities as Republicans can be misleading. These assumptions are made here for the sake of simplicity, and in recognition of the fact that African-Americans and Hispanics do in fact tend to vote Democratic. See *supra* notes 71-72 and accompanying text.

94. *Georgia*, 539 U.S. at 482 (citing Lublin, *supra* note 21).

North, where black voters are often surrounded by liberal—yet non-African-American—Jewish and Latino voters.<sup>95</sup>

Second, any substantive benefit that a minority group may gain from being unpacked and placed in an influence district is highly contingent upon the responsiveness of the nonminority legislators representing (or candidates vying to represent) the district. As Pamela Karlan has asserted, the dynamics of an influence district will not necessarily make minority voters a coveted swing constituency: In a race between a white Democrat and a white Republican, for example, if the Republican candidate is highly undesirable to black voters, his Democratic opponent could easily take black support for granted.<sup>96</sup>

The perverse effects theory's underlying logic reveals it to be critically dependent upon two empirical factors: (1) the political distance between voters, or whether nonminority voters are considerably more conservative than minority voters, and (2) the political distance between candidates, which affects the responsiveness of nonminority legislators to their minority constituents. Since the perverse effects theory is an empirical proposition—not a logical certainty—a review of the literature on the subject can reveal the validity of its application to minority communities.

This literature is split on the validity of the perverse effects theory in the African-American context. While there are several studies suggesting that African-Americans have lost substantive representation as a result of their concentration in majority-minority districts,<sup>97</sup> there is a growing body of evidence suggesting that the descriptive gains precipitated by majority-black districts do not lead to subsequent losses in substantive representation, and that in fact the best means to maximize black substantive representation is to maximize the number of black elected officials.<sup>98</sup>

There is less ambiguity in the Latino context. While no study has yet put forward affirmative evidence that the perverse effects theory holds true for Latinos, Delia Grigg and Jonathan Katz have concluded that gains in descriptive representation do not come at the expense of losses in substantive

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95. LUBLIN, *supra* note 7, at 91-96; Lublin, *supra* note 21, at 185.

96. Karlan, *supra* note 15, at 32.

97. See *supra* notes 41-44 and accompanying text.

98. See Grigg & Katz, *supra* note 45, at 9, 13 (finding that the perverse effects hypothesis was not supported by data from the 1972-2000 House of Representatives elections); Christian R. Grose, Black-Majority Districts or Black Influence Districts?: Evaluating the Effect of Descriptive Representation on the Substantive Representation of African-Americans in Black-Majority and Black Influence Districts in the Wake of *Georgia v. Ashcroft* 28-29 (Feb. 9, 2006) (unpublished manuscript, on file with author).

representation,<sup>99</sup> specifically finding that the presence of majority-Hispanic (and majority-black) districts in a redistricting plan does not create a pro-Republican bias in the overall area undergoing redistricting.<sup>100</sup>

Although this lack of affirmative evidence is not dispositive, there are independent reasons to believe that majority-Latino districts are not harmful to Latino substantive representation. The Hispanic electorate is generally less politically cohesive—specifically, less uniformly Democratic—than the black electorate. This means that the placement of Hispanic voters in majority-Hispanic districts—and hence their separation from neighboring non-Hispanic voters—will have a less polarizing effect on subsequent elections in surrounding districts.<sup>101</sup> For example, if there are one hundred minority voters in a hypothetical thousand-person district, the removal of those voters from that district will cause less of a rightward swing if those hundred minority voters vote merely 55% Democratic (as Latinos roughly do), and not 80% Democratic (the approximate rate for African-Americans). On the other hand, if Hispanics are more moderate than African-Americans, Hispanics in an influence district may stand a greater chance of being critical swing voters; it is less likely that they will be so dissatisfied with a Republican candidate that they will automatically vote for a Democrat.

More research is needed to determine the harms and benefits of Latino influence districts. At this point, however, given that there is no guarantee that Latino influence districts will create a coveted class of Latino swing voters, and no evidence that such districts will avoid any substantive harms brought by majority-Latino districts, it is hard to identify any increase in voting strength brought about by Latino influence districts. Therefore, there is little justification for using Latino influence districts in lieu of Latino-majority districts.

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99. Grigg & Katz, *supra* note 45, at 13.

100. *Id.* at 2. Notably, the study that has most closely examined the parallel districting experiences of both African-Americans and Latinos—*The Paradox of Representation* by David Lublin—concludes that the perverse effects theory holds for African-Americans (at least in the South), but remains silent on the topic for Latinos. LUBLIN, *supra* note 7, at 91-96.

101. This hypothesis is strengthened when one considers that Hispanics in covered jurisdictions are slightly more likely to live in so-called blue states than African-Americans. This means that the political distance between Hispanics and their non-Hispanic neighbors will, on average, be smaller than that for African-Americans. Just under 17% of Hispanics living in covered jurisdictions live in California, Michigan, New Hampshire, and New York—states that went to Senator John Kerry in 2004—compared to 12.5% of African-Americans. See *supra* tbl. 1; Michael Gastner et al., Maps and Cartograms of the 2004 US Presidential Election Results, <http://www-personal.umich.edu/~mejn/election> (last visited Apr. 6, 2006).

### 3. *The Continuing Need for Hispanic-Majority Districts*

In contrast to the unsubstantiated benefits of Hispanic coalitional and influence districts, Hispanic-majority districts are critical to Latino voting strength. Hispanic candidates are rarely elected outside of Latino-majority districts,<sup>102</sup> and they enjoy a high rate of success within them.<sup>103</sup> The demographic characteristics of the Hispanic population do more than necessitate the use of majority-minority districts, however. High rates of ineligibility and low participation rates require that the majority-Hispanic districts constructed be more than simply 50% Hispanic.<sup>104</sup> Some scholars have placed the average population threshold necessary for Hispanics to have the ability to elect their candidate of choice between 55% and 60% Latino.<sup>105</sup>

<sup>102</sup> My tabulations of 2000 census figures show that only 20% of the current Hispanic members of the House of Representatives hail from districts that are less than half Hispanic in total population. Similar proportions exist in state legislatures. See David Lublin, *Percent of Hispanic Legislators Elected in Hispanic-Majority, Black + Hispanic-Majority, and Other Districts*, <http://www.american.edu/dlublin/redistricting/tab7.html> (last visited Apr. 14, 2006) (showing that approximately 80% of Hispanic state legislators are elected from majority-Hispanic districts). Note that figures are up to date for the last election held in each seat prior to 2006. *Id.* This is not a recent development; the vast majority of Hispanics elected to Congress in the twentieth century were elected from majority-minority congressional districts. Walter C. Farrell, Jr. & James H. Johnson, Jr., *Minority Political Participation in the New Millennium: The New Demographics and the Voting Rights Act*, 79 N.C. L. REV. 1215, 1231 (2001).

<sup>103</sup> David Lublin's historical analysis found that Latinos won 82 of the 105 elections held in Latino-majority districts. See LUBLIN, *supra* note 7, at 48.

<sup>104</sup> My tabulations of 2000 census data show that over two-thirds of the current Hispanic members of the House of Representatives come from districts where Latinos make up over 60% of the total population.

<sup>105</sup> See Brischetto, *supra* note 78, at 49 (“[T]he threshold for likely success of Latinos is 58 percent Latino.”); Kim Geron & James S. Lai, *Beyond Symbolic Representation: A Comparison of the Electoral Pathways and Policy Priorities of Asian American and Latino Elected Officials*, 9 ASIAN L.J. 41, 78 (2002) (reporting that Latino elected officials surveyed had an average of 56% Latino population in their districts). Geron and Lai concluded that the “concentration of Latinos into relatively compact electoral districts remains the primary means that Latinos will be elected to office.” Geron & Lai, *supra*, at 78.

Some earlier studies estimated the necessary population threshold to be even higher. James Loewen, for example, used data from 1980s city and national races in New York City to calculate that in three white-Latino boroughs Latinos would need to constitute between 66% and 79% (or a “super-majority”) of a district’s population in order for there to be a “tossup” between another candidate and their candidate of choice. James W. Loewen, *Levels of Political Mobilization and Racial Bloc Voting Among Latinos, Anglos, and African Americans in New York City*, 13 CHICANO-LATINO L. REV. 38, 67-70 (1993). In 1988, Kimball Brace warned that because of high noncitizenship rates, Hispanics might need to constitute “well above 65%” of a district’s population in order to serve as an effective majority in the district.

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Like Hispanics, African-Americans depend on majority-black districts to elect their candidates of choice.<sup>106</sup> Due to Hispanics' eligibility and participation rates, however, Hispanics need stronger majority-minority districts than African-Americans.<sup>107</sup> Bruce Cain and Kenneth Miller explain this phenomenon:

[W]hereas the African-American population is often at a disadvantage with respect to the ratio of voters to population when it is grouped together with Anglo voters, it is often advantaged as compared to Latinos (who in addition to sharing similar problems in terms of levels of education and socioeconomic disadvantage suffer the burdens of noncitizenship and higher levels of age ineligibility).<sup>108</sup>

This disadvantage is such that the average Hispanic-majority district is less likely to elect a Hispanic than a black-majority district a black candidate.<sup>109</sup>

Justice O'Connor made a mistake when she ignored powerful evidence showing that African-American voters still need majority-minority districts to elect their candidates of choice. Her most grievous error, however, was

Kimball Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 *LAW & POL'Y* 43, 61 n.8 (1988).

One study that deviated from this earlier trend was conducted by Bernard Grofman and Lisa Handley, who found that Latinos only needed a clear plurality to have a realistic opportunity to elect their candidate to Congress, but only if the district had a combined minority population of 55%. They also admitted that Hispanics "generally are not elected" in cities with less than a 64% combined minority population. Grofman and Handley, *supra* note 85, at 37-38.

- <sup>106</sup> David Lublin found that while African-Americans consistently lost in black coalitional districts, they consistently succeeded in majority-black districts. See LUBLIN, *supra* note 7, at 41; see also Handley et al., *supra* note 8, at 37 ("[W]e have found no evidence to indicate that majority minority districts are no longer necessary to ensure African-Americans and Hispanics fair representation in our legislative bodies."); Benson, *supra* note 16, at 494; Grigg & Katz, *supra* note 45, at 13 ("The evidence shows that the presence of [majority-minority districts] in a state substantially increases the election of [black and Latino] members to Congress.").
- <sup>107</sup> See Brischetto, *supra* note 78, at 50 ("Compared to African Americans, Latinos usually must comprise a greater proportion of the population if the district is to be 'safe.'").
- <sup>108</sup> See Cain & Miller, *supra* note 80, at 146.
- <sup>109</sup> See Handley et al., *supra* note 8, at 25-26; see also LUBLIN, *supra* note 7, at 54 (showing that black-majority districts are slightly more effective than Latino-majority districts in electing a minority representative). Lublin further explained that Hispanic-majority districts are even less effective when the proportion of long-term residents in the district drops to or below 80%. *Id.* at 51. Likewise, Hispanic coalitional districts are, on average, slightly less effective than black coalitional districts. Compare LUBLIN, *supra* note 7, at 48 (finding that Latinos only won 29 out of 5190 congressional races held outside of majority-Latino districts), with *id.* at 41 (finding that African-Americans won 72 out of 5079 races held outside of majority-black districts).

ignoring an entire body of literature that uniformly established that Hispanics are poorly served by coalitional and influence districts, and that they continue to rely on robust majority-minority districts—even more so than their black counterparts.<sup>110</sup>

C. *The Threat of Georgia v. Ashcroft to the Hispanic Community*

The evidence above reveals the markedly detrimental impact that *Georgia v. Ashcroft* will have on the Hispanic community. While Hispanics are acutely

no. The few studies that question the benefits or necessity of majority-Hispanic districts are either outdated or based on a relatively narrow field of statistical evidence. Rodolfo de la Garza and Louis DeSipio argued that the creation of majority-minority districts through the VRA has lowered turnout and hence “reduced electoral competition in high-concentration Latino areas.” See de la Garza & DeSipio, *Save the Baby*, *supra* note 69, at 102. They recommended the creation of influence districts to “assure that there is active competition for Latino votes and mobilization of new voters.” *Id.* at 116.

First, de la Garza and DeSipio themselves admitted that majority-minority districting could be a minor cause of low turnout when compared to the depressive effects of other socioeconomic factors. *Id.* at 113. Second, the authors only cited a single study to support their central contention that majority-minority districts do, in fact, lower turnout; the study in question analyzed elections in only five cities. *Id.* at 112, 122 n.12. Finally, these findings are contradicted by at least three studies suggesting that majority-minority districts in fact work to boost Latino turnout. See Matt A. Barreto et al., *The Mobilizing Effect of Majority-Minority Districts on Latino Turnout*, 98 AM. POL. SCI. REV. 65, 74 (2004) (“Latinos vote more when in a majority-Latino district, contrary to the expectations of those who expected or feared minority demobilization.”); Loewen, *supra* note 105, at 67 (“[D]rawing districts with higher proportions of Latino voters may prompt political mobilization.”); Gary M. Segura & Nathan D. Woods, *Majority-Minority Districts, Co-Ethnic Candidates, and Mobilization Effects* 11-12 (Feb. 9, 2006) (unpublished manuscript, on file with author) (finding that the concentration of Hispanic voters in electoral districts has a uniformly mobilizing effect in California, and a net positive effect in New York, once the Hispanic percentage of a district reaches 40% to 55%); see also Benson, *supra* note 16, at 498 (“[M]inority voter turnout decreases when the concentration of minority voters in a district falls below a certain point.”).

Leo Estrada made the distinct argument that majority-minority districts are, in fact, unnecessary for Latinos’ electoral success. First, he claimed that “Latinos . . . have demonstrated their ability to win elections in non-Latino districts more so than other ethnic groups.” Estrada, *supra* note 82, at 1289. Second, he argued in favor of influence districts, stating that “Latinos . . . are capable of winning strong influence districts without having majority CVAP districts.” *Id.* at 1293. Again, however, Estrada’s information is questionable and limited in its applicability. He cited no comprehensive econometric studies; rather, he supported both claims with purely anecdotal evidence—for example, lists of successful Latino candidates from non-Latino districts—that appears to be entirely drawn from California. See *id.* at 1289 n.30. Indeed, while there has been limited anecdotal evidence that Latinos in California enjoy substantial crossover support, these findings must be weighed against contradictory econometric evidence. In any event, California is regarded by some experts to be an exception to the rule in the redistricting context. See *supra* note 85.

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dependent on Hispanic-majority districts, *Georgia v. Ashcroft* allows those districts to be unpacked in favor of coalitional or influence districts that do little to build Hispanic voting strength, however it is defined. This process has already begun in Texas, where the Department of Justice precleared<sup>111</sup> a 2003 congressional redistricting plan that its own analysts determined would not “maintain districts where Hispanic voters previously elected their candidates of choice.”<sup>112</sup> Specifically, they found that the proposed plan reduced by one the number of districts where Hispanics could safely elect their candidates of choice, and only added a Hispanic coalitional district to make up the difference.<sup>113</sup>

There is one final consideration that makes *Georgia v. Ashcroft* particularly damning for Hispanics: Majority-Hispanic districts are more difficult to create than majority-black districts. Even though Hispanics are more reliant on majority-minority districts than African-Americans, Hispanics’ geographic dispersion and the recent nature of their population growth have made drawing (and maintaining) majority-Hispanic districts relatively more difficult. To begin with, Hispanics’ geographic dispersion makes it difficult for Hispanics to successfully bring a section 2 vote dilution suit, which might prompt the creation of a majority-Hispanic district. Since *Thornburg v. Gingles*<sup>114</sup>—a foundational section 2 case—the Supreme Court has required vote dilution plaintiffs to prove that the minority group in question is sufficiently compact to form a single-member district. This compactness requirement is more difficult for Hispanics to meet, given that they are more residentially dispersed than African-Americans.<sup>115</sup> One group of scholars cited the relative dispersion of Hispanics to explain the fact that fewer majority-Hispanic districts were created relative to population than majority-black districts during the post-1990 redistricting process.<sup>116</sup>

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111. Dan Eggen, *Justice Staff Saw Texas Districting as Illegal: Voting Rights Finding on Map Pushed by DeLay Was Overruled*, WASH. POST, Dec. 2, 2005, at A1 (documenting that senior Justice Department officials approved the districting plan).

112. Mellett et al., *supra* note 16, at 68.

113. *Id.*

114. 478 U.S. 30 (1986).

115. *Id.* at 50.

116. Handley et al., *supra* note 8, at 25; *see also* Brischetto, *supra* note 78, at 55 (citing residential isolation as one factor making “effective districts” for Latinos particularly difficult to create); Geron & Lai, *supra* note 105, at 46 (confirming that districts favorable to Hispanics are more difficult to draw due to greater residential dispersion).

Hispanics' geographic dispersion also makes it more difficult for majority-Hispanic districts to survive legal challenges. In 1993, *Shaw v. Reno*<sup>117</sup> established that districts that appeared to rely overwhelmingly on race could be deemed invalid under the Equal Protection clause.<sup>118</sup> This is particularly threatening for Hispanics, who, because of their relative residential dispersion, often cannot be joined into one district without creatively shaped district boundaries. Hence, a widely dispersed Hispanic community seeking to create a majority-Hispanic district faces the double burden of being unable to demand the construction of a majority-Hispanic district due to *Gingles*, and, conversely, having their district deemed invalid under *Shaw*.<sup>119</sup>

Hispanics' recent population growth has only added to these difficulties. Because the Latino population boom has only taken shape in the last several decades,<sup>120</sup> there have been few districting cycles in which Hispanic-majority districts could have been drawn. Bernard Grofman extrapolates from this factor to conclude that Hispanics will be the group most harmed by the legacy of *Georgia v. Ashcroft*:

In Congress, and in state legislatures, most of the black majority (or near majority) districts that could have been created are already in place, and blacks are a declining portion of the total electorate (except in a handful of states) so we should not expect to see new black majority seats created. For Hispanics (the fastest growing minority in the U.S.) in covered jurisdictions, such as Texas, that is not true. A legal climate that discourages the creation of new majority-minority districts will have its greatest impact on Hispanic representation.<sup>121</sup>

Perversely, then, *Georgia v. Ashcroft* creates all the wrong incentives. Hispanics face exceptional difficulties in establishing and maintaining majority-Hispanic districts. Nevertheless, *Georgia v. Ashcroft* will facilitate the elimination of those precious few majority-Hispanic districts that have already been created—in spite of the fact that today, the evidence suggests that Hispanics may need them the most.

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117. 509 U.S. 630 (1993).

118. *Id.* at 649.

119. Cain & Miller, *supra* note 80, at 161 ("Since Latino and Asian communities are usually less compact than those of African Americans, these groups will face an even harder task creating districts that meet the first *Gingles* precondition while still complying with *Shaw*.").

120. See *supra* note 77 and accompanying text.

121. Grofman, *supra* note 24, at 12 n.13.

### III. REPAIRING THE DAMAGE OF *GEORGIA V. ASHCROFT*

The Supreme Court's opinion in *Georgia v. Ashcroft* is written in a way that invites the erosion of electoral gains in Latino communities covered by section 5. In broadening the ability to elect standard and subsuming that standard within a totality of the circumstances test, Justice O'Connor markedly deemphasized the role of racially polarized voting in the section 5 preclearance calculus.<sup>122</sup> It is easy to envision the Department of Justice or the courts preclearing redistricting plans that unpack majority-Latino districts in favor of Latino coalitional districts without recognizing that "coalitions" are not actually possible.

This Part discusses two strategies—one for Congress, one for courts—to prevent the unwarranted elimination of majority-minority districts that may be occasioned by *Georgia v. Ashcroft*. The first strategy centers around the reauthorization of section 5 of the VRA, which is currently due to expire in 2007. The second strategy is to advance a novel legal argument should the first strategy—currently pursued by the NAACP Legal Defense Fund and other civil rights groups—not succeed.

#### A. *The Georgia v. Ashcroft Legislative "Fix"*

In 2005, hearings began in the Judiciary Committee of the House of Representatives to discuss the reauthorization of section 5 and several other VRA provisions set to expire in 2007. Voting rights advocates hope to convince legislators to amend section 5 during the reauthorization process to undo the changes of *Georgia v. Ashcroft*; this legislative fix would add language to section 5 that would make ability to elect the cornerstone of section 5 preclearance analysis. This would not result in a return to the pre-*Georgia v. Ashcroft* standard; rather, this would make ability to elect the first among equals of the factors of the totality of the circumstances test.

Such an amendment would prohibit the unpacking of majority-minority districts in the absence of a specific set of circumstances. Professor Jocelyn Benson has proposed a ban on reductions below 55% of covered minority populations in any currently majority-minority district, unless the jurisdiction

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<sup>122</sup> In fact, racially polarized voting makes a single appearance in Justice O'Connor's opinion, in a sentence in which she states that "evidence of racial polarization is one of many factors relevant in assessing whether a minority group is able to elect a candidate of choice or to exert a significant influence in a particular district." *Georgia v. Ashcroft*, 539 U.S. 461, 485 (2003); see Karlan, *supra* note 15, at 34 (noting *Georgia's* one-sentence treatment of racially polarized voting).

can present convincing evidence that racially polarized voting is nonexistent or that minority voters' participation rates will remain unaffected.<sup>123</sup> A more tempered approach would avoid a specific numerical cutoff, and would allow the unpacking of majority-minority districts only upon a showing of historically consistent levels of crossover support sufficient to enable the minority community in question to enjoy the same ability to elect as it had experienced before.

Neither formulation would allow for the substitution of influence districts for majority-minority districts: By definition, the substitution of influence districts for majority-minority districts diminishes a minority group's "ability to elect." These strategies would, however, allow for the substitution of coalitional districts for majority-minority districts—but only upon a showing that the coalitional district would have enough crossover voters to actually work.

There are two reasons to think that a legislative fix could actually work. First of all, such a strategy has succeeded before: During the 1982 reauthorization of the VRA, advocates successfully lobbied for the amendment of section 2 to prohibit all voting changes with a discriminatory effect, overturning the holding in *Mobile v. Bolden*, a case that held that only those changes with discriminatory intent would be prohibited.<sup>124</sup>

Second, a flexible section 5 standard that allows for the unpacking of majority-minority districts only upon the satisfaction of a specific set of conditions actually appears to be what Richard Pildes—one of Justice O'Connor's cited authorities and arguably the most vehement critic of section 5—originally envisioned. Professor Pildes called for the adoption of a "functional approach" to section 5 under which "there is no impermissible 'retrogression' under section 5 of the VRA if a jurisdiction recasts a safe district of the 1990s into a coalitional district in the 2000s, as long as the evidence shows that the coalitional district will afford an equal opportunity to elect."<sup>125</sup> In fact, Professor Pildes has recognized that in redistricting cases, the level of racially polarized voting in a jurisdiction is "[t]he critical legal question" that courts must consider.<sup>126</sup> The benefit of a flexible but reformed section 5 standard is that it would both recognize that coalitional districts are sometimes effective—accepting the mantra of various conservative voting rights

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<sup>123</sup> Benson, *supra* note 16, at 509.

<sup>124</sup> 446 U.S. 55, 62, 74 (1980); see Benson, *supra* note 16, at 501-505 (explaining how the holding in *Mobile* was successfully neutralized during the 1982 reauthorization process).

<sup>125</sup> Pildes, *supra* note 20, at 1568.

<sup>126</sup> *Id.* at 1518.

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scholars<sup>127</sup>—and simultaneously prevent the substitution of such districts for majority-minority districts where this would have a negative net impact on the minority group’s ability to elect.

*B. Reinvigorating the Totality of the Circumstances Test*

In the event that voting rights advocates are unable to convince Congress to amend section 5 during the reauthorization process, these advocates could pursue a litigation strategy to persuade the Court to achieve the same result—the restoration of ability to elect as the cornerstone of section 5 analysis.

Specifically, litigants should seize upon Justice O’Connor use of the totality of circumstances test employed in section 2 vote dilution suits in the section 5 context.<sup>128</sup> This move was critical to the holding in *Georgia v. Ashcroft*: Only by adopting this broad test was O’Connor able to argue that the section 5 preclearance inquiry should not be limited to an evaluation of a plan’s effect on a minority group’s ability to elect, but that it should also include a consideration of the plan’s impact on a minority group’s “opportunity to participate in the political process”<sup>129</sup>—no previous section 5 case allowed opportunity to participate to enter the preclearance calculus. What Justice O’Connor did not consider, however, is that there is a body of precedent that informs when and how coalitional districts can be weighed in the section 2—and arguably now in the section 5—calculus.

In section 2 vote dilution suits, plaintiffs seek to establish that their overall electoral effectiveness has been diminished by the law, regulation, or activity in question. In the redistricting context, the few courts that have been asked to do so have generally considered the presence of coalitional districts to weigh against a finding of vote dilution. This has not been automatic, however: Rather, courts typically have only found coalitional districts unproblematic upon a showing that these districts would serve their stated purpose—the

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<sup>127</sup> See, e.g., Kousser, *supra* note 82, at 565 (arguing that the effectiveness of a district does not depend on the existence of a numerical majority of minority voters within it).

<sup>128</sup> *Georgia v. Ashcroft*, 539 U.S. 461, 484-85 (2003) (“As Justice Souter recognized for the Court in the § 2 context, a court or the Department of Justice should assess the totality of circumstances in determining retrogression under § 5.” (citing *Johnson v. De Grandy*, 512 U.S. 997, 1020-21 (1994))).

<sup>129</sup> See *id.* at 485. Note that *Johnson* is a section 2 vote dilution case and not a section 5 preclearance case. *Id.*

formation of biracial or multiracial coalitions. Three cases illustrate this dominant trend.<sup>130</sup>

Representatives of minority voters in section 5 covered jurisdictions should cite these precedents and demand, in the words of one district court judge, that “before the existence of [a coalitional] district is given significant weight in the balance, the evidence must reveal that minority voters in the district have in fact joined with other voters to elect representatives of their choice.”<sup>131</sup> Thus, such unpacking should occur only if minority groups maintain their ability to elect candidates of their choice. Under these same precedents, advocates could categorically oppose the unpacking of majority-minority districts in favor of influence districts, given that this would necessarily result in a diminution of ability to elect.

This strategy is promising, but by no means guaranteed. In spite of her adoption of the section 2 totality of the circumstances standard in the section 5 context,<sup>132</sup> Justice O’Connor inexplicably emphasized that section 2 and section 5 “combat different evils and, accordingly . . . impose very different duties upon the States.”<sup>133</sup> More troubling, however, is that in the section 2 vote dilution cases, even courts requiring evidence of crossover voting inevitably

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130. See *Uno v. City of Holyoke*, 72 F.3d 973, 991 n.13 (1st Cir. 1995) (cautioning that for an influence district to weigh against a finding of vote dilution under section 2, evidence of crossover voting must be presented). Note that Judge Selya used the term “influence district” to refer to coalitional districts. *Id.*; see also *Page v. Bartels*, 248 F.3d 175, 197 (3d Cir. 2001) (remanding a section 2 vote dilution case with the warning that “[e]vidence establishing the factual existence of [crossover] voting behavior will be absolutely vital”); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1323-24 (S.D. Fla. 2002) (eschewing distinctions between majority-minority, coalitional, and influence districts in favor of the simple question of whether a district would actually result in the election of a minority candidate). *But see Rural W. Tenn. Afr.-Am. Affairs Council, Inc. v. McWherter*, 877 F. Supp. 1096, 1104 (W.D. Tenn. 1995) (using a standard rule that any district with 25%-55% minority population would be considered a coalitional district for the purposes of the vote dilution analysis, regardless of the level of racially polarized voting in the district in question.). Note that the court in *McWherter* did not distinguish between influence districts and coalitional districts, using the former term to refer to both. Nevertheless, the language of the opinion, particularly its discussion of “the actual ability of minority voters to build coalitions within a district,” strongly suggests that these passages addressed coalitional districts. *Id.* at 1104.

131. *Uno*, 72 F.3d at 991 n.13. As clarified above, Judge Selya of the First Circuit mistakenly used the term “influence” district to refer to a coalitional district. This is evidenced by his referral to the formation of coalitions between minority and other voters. See *supra* note 130.

132. See *supra* notes 128-129 and accompanying text.

133. *Georgia*, 539 U.S. at 478 (citing *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997)).

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found that such crossover support was present.<sup>134</sup> This suggests that the crossover voting requirement was not sufficiently rigorous.

The fact remains, however, that *Georgia v. Ashcroft* is a crucial precedent on surprisingly tenuous footing, having lost two members of its 5-4 majority—Chief Justice Rehnquist and Justice O'Connor herself—within one year. In the 2010 redistricting cycle, assuming Congress has reauthorized section 5 without implementing a legislative fix, the Roberts Court will undoubtedly reexamine the reasoning in *Georgia v. Ashcroft*. In this precarious situation, a line of precedents preventing the elimination of majority-minority districts in the absence of evidence of crossover voting could provide valuable guidance in reevaluating a radical new judicial standard.

**CONCLUSION**

Professor Pildes pointed out that “[l]aw and social science are perhaps nowhere more mutually dependent than in the voting-rights field”<sup>135</sup> and that the validity of much of voting rights law depends on a “decade-by-decade updating of the law’s application based on the most current social-scientific findings.”<sup>136</sup> Today, more than forty years after the enactment of the VRA, the nature of that updating must itself be updated. The demographics and voting patterns of Latinos are sufficiently different from those of African-Americans that courts considering section 5 cases—and indeed, much of voting rights laws and precedents—should be wary of assuming that the possible attributes of one group extend to another.

Evidence from “minority communities,” “minority groups,” or “minorities” should not be presented as such unless the data cited is indeed drawn from all of the minority groups affected by the measure at hand. Furthermore, courts should account for the relevant differences between minority groups in drafting their opinions by leaving in place the factual triggers—for example, rates of ineligibility and levels of crossover support—that are necessary to

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134. *Uno*, 72 F.3d at 991 (finding that the presence of a 28% Hispanic district in an aldermanic districting plan should be considered in the district court’s vote dilution inquiry); *Martinez*, 234 F. Supp. 2d at 1323-24 (finding that the minority-black districts in question would likely “perform for black voters” and hence not finding vote dilution); *Bartels*, 144 F. Supp. 2d at 364-66 (finding that reliable crossover voting existed such that the districting plan that unpacked a majority African-American district into a 27% African-American coalitional district would actually “enhance and expand” opportunities for blacks and Hispanics to participate in the political process).

135. Pildes, *supra* note 20, at 1518.

136. *Id.* at 1519.

differentiate between the electoral experiences of different minority communities.

Such caution is entirely absent from *Georgia v. Ashcroft*. Instead, the decision highlights information derived entirely from a certain group of African-American communities—selective and controversial data in its own right—and uses it to justify a radical change in section 5 that will apply to African-Americans and Hispanics alike. This Note has shown this conflation to be unjustified. There is no evidence that coalitional or influence districts will bolster the voting strength of most Hispanic communities; instead, robust majority-minority districts remain the primary avenue to electoral success for the Hispanic communities' candidates of choice. While there is also strong evidence that African-Americans continue to rely on majority-minority districts—evidence that was itself unjustifiably sidestepped by Justice O'Connor—this pattern is almost undeniable in the Hispanic community.

It is too late to ask what would have happened if Justice O'Connor had examined studies pertaining to Hispanics as well as African-Americans, or if she had considered all of the evidence available from the African-American community. It is not too late, however, for voting rights advocates to take action to correct the Court's mistakes—for the benefit of Hispanics and other minority groups alike. The reauthorization process provides an ideal opportunity to right the wrongs of *Georgia v. Ashcroft*; if that effort fails, however, voting rights advocates can still make strong legal arguments to prevent the dissolution of majority-minority districts in those minority communities that may now need them the most.

**Senate Committee on the Judiciary Hearings on  
The Voting Rights Act Reauthorization  
APPENDIX**

**Senate Committee on the Judiciary Hearing on  
"An Introduction to the Expiring Provisions of the Voting Rights Act  
and Legal Issues Relating to Reauthorization"  
Tuesday, May 9, 2006**

- **Chandler Davidson's written answers**

*Appendix B: A Small Sample of Reported Section 2 Cases Decided Favorably to Minority Plaintiffs, 1996 or Later*

*Comparison of Objections with Five-Variable Sum of Federal VRA-related Activities, All States, 1966-2004*

*Comparison of Objections with Five-Variable Sum of Federal VRA-related Activities, All States, 1966-2005*

*Figure 2: FRAGA and OCAMPO Data*

*Letter to Joseph P. Rapisarda. 23 Aug. 2001. U.S. Department of Justice, Civil Rights Division.*

*Objections and MIR Outcomes by Year*

*Rich, Joseph D. Letter to Anne M. Byrom. 24 July 2000. U.S. Department of Justice, Civil Rights Division.*

**Senate Committee on the Judiciary Hearing on  
"Modern Enforcement of the Voting Right Act"  
Wednesday, May 10, 2006**

- **Robert McDuff's written answers**

*Image: "Elect Samac Richardson"*

*Image: "Graves: Supreme Court"*

**Senate Committee on the Judiciary Hearing on  
“The Continuing Need for Section 5 Pre-Clearance”  
Tuesday, May 16, 2006**

• **Ted Arrington - Attachment to Written Testimony**

The United States of America vs. Charleston County, SC, vs. Charleston County Council, 2003; Case Numbers 2:01-0155023, 2:01-562-23; United States Court, D. South Carolina, Charleston Division.

The United States of America vs. Charleston County, SC vs. Charleston County Council, 2004; Case Numbers 03-2111, 03-2112, United States Court of Appeals, Fourth Circuit.

• **Anita Earls – Attachments to Written Answers**

*Photocopy: Overton, Spencer. Stealing Democracy: The New Politics of Voter Suppression. New York: W. W. Norton & Company, 2006: 118-119, 206.*

*Minority Voters Affected by Section 5 Objections Jan. 2000—May 2006*

*Section 5 Objections since 2000—a notes on methodology*

*Minority Voters Affected by Withdrawn Submissions, 2000 to 2005*

*Withdrawn Submissions: Note on methodology.*

• **Pam Karlan – Attachments to Prepared Statement**

Karlan Pamela S. “Georgia v. Ashcroft and the Retrogression of Retrogression.” Election Law Journal 2004, Vol. 3, No. 1: 21-36.

Karlan, Pamela S. “Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores.” William and Mary Law Review 1998, Vol. 39:725: 725-741.

**Senate Committee on the Judiciary Hearing on  
“Understanding the Benefits and Costs of Section 5 Pre-Clearance”  
Wednesday, May 17, 2006**

• **Armand Derfner – Attachments to Prepared Statement**

*Acosta, R. Alexander. Letter to C. Havird Jones, Jr. 26 Feb. 2004. U.S. Department of Justice, Civil Rights Division.*

McCrary, Peyton. "How the Voting Rights Act Works: Implementation of a Civil Rights Policy, 1965-2005." *South Carolina Law Review* Summer 2006: 785-825.

*Photocopy: "Chris Merrill: Honesty". Political Advertisement. 4 Nov. 1990. The News and Courier/The Evening Post, Charleston, S.C.*

*South Carolina. General Assembly of the State of South Carolina. An Act to Amend Act 340 of 1967, As Amended, Relating to the Creation of the Charleston County School District, So As to Provide For The Election of School Trustees in Partisan Instead of Nonpartisan Elections Beginning in 2004 and for the Nomination, Terms, and Election Procedures of Candidates for these Offices.*

**Senate Committee on the Judiciary Hearing on  
"Continuing Need for Section 203's Provisions for  
Limited English Proficient Voters"  
Tuesday, June 13, 2006**

- **Senator Kennedy Submission for the Record (mentioned in opening statement)**

Tucker, Dr. James Thomas. "Minority Language Assistance Practices in Public Elections: Executive Summary." Arizona State University. 7 Mar 2006.

- **John Trasvina - Attachment to Written Answers**

Perales, Nina, Luis Figueroa, and Criselda Rivas. "Voting Rights in Texas 1982-2006." Mexican American legal Defense and Education Fund. Jun. 2006.

Tucker, James. "The Continuing Need for and Constitutionality of Section 203 of the Voting Rights Act." NALEO Education Fund. Memorandum. 30 Jun. 2005.

Henderson, Ana. "English Language Naturalization Requirements and the Bilingual Assistance Provisions of the Voting Rights Act." Voting Rights Fellow, UC Berkeley Law School.

*Texas absentee ballot request form.*

- **Margaret Fung – Attachment to Statement**

Fung, Margaret, Phillip Olaya, Glenn Magpantay, and Nancy Yu. "Asian Americans and the Voting Rights Act: The Case for Reauthorization." Asian American Legal Defense Fund. May 2006.

**Senate Committee on the Judiciary Hearing on  
“Reauthorization of the Voting Rights Act: Policy Perspectives and  
Views from the Field”  
Wednesday, June 21, 2006**

Patricia Lombard and Carol Krafka. “2003-2004 District Court Case-Weighting Study”: Final Report to the Subcommittee on Judiciary Statistics of the Committee on Judicial Resources of the Judicial Conference of the United States.” Federal Judicial Center. 2005.

**Senate Committee on the Judiciary Hearing on  
“Continuing Need for Federal Examiners and Observers  
to Ensure Electoral Integrity”  
Monday, July 10, 2006**

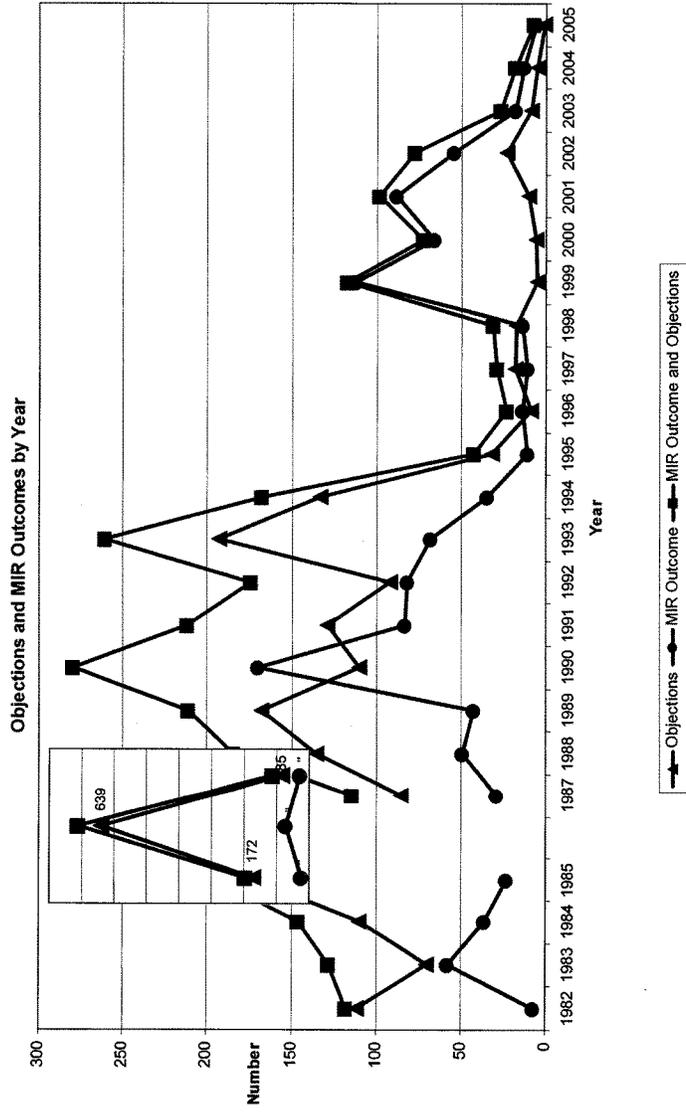
- **James Tucker – Attachment to Statement**

The United States of America vs. Osceola Country, FL and Donna Bryant; Case Number 6:05-cv-1053-Orl-31DAB, United States District Court, Middle District of Florida, Orlando Division.

FIGURE 1. Comparison of Objections with Five-Variable Sum of Federal VRA-related  
Activities, All States, 1966-2005

(Hard Copy Only)

Figure 2: FRAGA AND OCAMPO DATA



**Appendix B****A Small Sample of Reported Section 2 Cases Decided****Favorably to Minority Plaintiffs, 1996 or Later****Alabama**

Sec. 2 Violations:  
1996 State of Ala.: challenging appellate judicial  
elections statewide

**California**

*Other Successful Outcome:*  
*2002 Counties of Los Angeles, San Diego, San Bernardino,*  
*Sacramento, Alameda,*  
*Mendocino, Santa Clara, Shasta, and Solano (due to their*  
*use of punch-card*  
*systems in 2000)*

**Colorado**

Sec. 2 Violations:  
1998 Montezuma-Cortez School District, Montezuma County  
(including Ute Mountain  
reservation)  
1996 South Central Colorado affected by District H.D. 60  
(including Counties of

Saguache, Alamosa, Conejos, Costilla, Mineral and Rio Grande in the San Luis Valley)

## **Georgia**

Sec. 2 Violation:

1997 City of LaGrange - mayor and city council

*Other Successful Outcomes:*

2005 State law requiring voter identification preliminary injunction granted, suit in progress.

## **Hawaii**

Sec. 2 Violation:

2002 State of Hawaii: Trustees of the Office of Hawaiian Affairs

## **Illinois**

Sec. 2 Violations:

1998 Aldermanic wards, City of Chicago

1997 City of Chicago Heights, Chicago Heights Park District

*Other Successful Outcomes:*

2000 Town of Cicero

## **Louisiana**

Sec. 2 Violations:

2002 St. Bernard Parish School Board (New Orleans)

*Other Successful Outcomes:*

2004 Tangipahoa Parish Council

1998 St. Francisville Board of Aldermen

## **Massachusetts**

Sec. 2 Violation:

2004 Massachusetts State House of Representatives, Suffolk County

## **Mississippi**

### Sec. 2 Violations:

1998 City Council of Quitman

1998 Lafayette County Board of Supervisors

1997 Chickasaw County Justice Court Judge and Constable

1996 Attala County Board of Supervisors, Attala County Constables

1996 Calhoun County supervisors, election commissioners, board of education

### *Other Successful Outcomes:*

1998 Greenville City Council

## **Missouri**

### Sec. 2 Violations:

2002 St. Louis County Council

## **Montana**

### Sec. 2 Violations:

2004 Blaine County Board of Commissioners

## **Nebraska**

### Sec. 2 Violation:

1997 Stabler County Board of Supervisors

## **New York**

### Sec. 2 Violations:

2003 Albany County Legislature

2003 New Rochelle City Council

1999 Town Board of the Town of Hempstead, NY

## **North Carolina**

### Sec. 2 Violations:

2004 Beaufort County Board of Commissioners

## **Pennsylvania**

Sec. 2 Violations:  
2003 Berks County Election Commission

### **South Carolina**

Sec. 2 Violations:  
2004 Charleston County Council

### **South Dakota**

Sec. 2 Violation:  
2004 South Dakota House of Representatives and Senate,  
legislative district 26, Todd  
County  
*Other Successful Outcome - In Progress*  
2006 City of Martin ward districting lines - racial bloc  
voting found, suit in progress.

### **Tennessee**

Sec. 2 Violations:  
2000 State House districts in rural west Tennessee, which  
includes Madison, Haywood,  
Hardeman, Tipton, Fayette, and Lauderdale counties

### **Virginia**

Sec. 2 Violations:  
1998 Richmond County Board of Supervisors  
SOURCE: "List of Successful Section 2 Lawsuits Reported  
Since 1982," in Ellen Katz and the Voting Rights  
Initiative, *Documenting Discrimination in Voting Under  
Section 2 of the Voting Rights Act*, Voting Rights  
Initiative Database (2005), <http://www.votingreport.org>, 39  
UNIV. OF MICH. J. LAW REFORM (forthcoming 2006). For more  
information, contact Professor Ellen Katz,  
University of Michigan Law School, (734) 647-6241,  
[votingrights@umich.edu](mailto:votingrights@umich.edu).)

**Appendix B**

**Samples of More Information Letters**



## U.S. Department of Justice

Civil Rights Division

JDR:TFM:NG:nj  
DJ 166-012-3  
2000-2137

Voting Section  
P.O. Box 66128  
Washington, DC 20035-6128

July 24, 2000

Ms. Anne M. Byrom  
City Clerk  
P.O. Box 170220  
Tarrant, Alabama 35217-0220

Dear Ms. Byrom:

This refers to two annexations (Ordinance Nos. 915 and 916 (2000)) to the City of Tarrant in Jefferson County, Alabama, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on May 23, 2000.

Our analysis indicates that the information sent is insufficient to enable us to determine that the proposed changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, as required under Section 5. The following information is necessary so that we may complete our review of your submission:

1. We understand that the city has designated the areas annexed pursuant to Ordinance Nos. 915 and 916 (2000) to District 1. Please indicate whether this information is correct, and explain the basis for the choice of councilmember district.
2. A detailed chronological description of the process leading to adoption of the annexations and their designation to District 1. Include a description of all of the events, meetings, hearings, debates, or discussions, whether formal or informal, involving any city official or city employee regarding the relative merits and demerits of the annexations and their designation to District 1, and the anticipated impact on the ability of minorities to elect persons of their choice to the

-2-

city council in District 1. Also, please include an explanation for the rejection of alternative district designations or redistricting plans, to the extent such alternatives were raised with the council.

3. Copies of all documents, including any correspondence, notes, minutes, tapes, and transcripts of all discussions, meetings and hearings, whether formal or informal, newspaper articles, editorials, letters to the editor, and advertisements, as well as any other publicity relating to the proposed annexations, their designation to District 1 and any alternatives suggested.

4. Copies of any reports, studies, analyses, summaries, or other documents or publications used by the city in determining (a) whether the annexations would have any impact on the minority electorate; (b) whether an alternative designation of the annexed land to District 5 was possible; and (c) whether, rather than designating the annexed areas to a particular district, it was possible to redraw the boundaries of the councilmember districts so as to include the newly annexed areas and fairly recognize minority voting strength in the expanded city.

5. A detailed description of any input or request made by any member of the minority community regarding the proposed annexations and their designation to District 1. Provide the name and daytime telephone number of any minority person or organization commenting on the proposed annexations, the substance of the comments or suggestions, the action taken by the city in response, and the reasons for the city's action.

6. A map (preferably a 1990 Census map) showing the current city limits, the district lines for the city councilmember districts, and the newly annexed areas.

7. Election returns from each voting precinct located in the City of Tarrant for all state, county, school district, and municipal elections for offices from 1990 to the present in which a black candidate participated. For each such election, indicate the position sought (indicate the incumbent(s), if any, and whether incumbency was by election or appointment); the number of positions to be filled; the name and race of each candidate; the number of votes each candidate received, by precinct; and the number of registered voters, by race and precinct, at the time of each election. If such registration data are unavailable, provide an estimate of the black population percentages by precinct at the time of the election and explain the basis for the estimate.

-3-

8. Voter registration data by race for the City of Tarrant for each year since 1996, and current voter registration statistics by race for each councilmember district.

In addition, concerns have been raised that the designation of the areas annexed pursuant to Ordinance Nos. 915 and 916 to District 1 may worsen the opportunity of minority voters to elect a candidate of choice to the city council from this district. Your response to these concerns will be of assistance in our review of your submission.

The Attorney General has sixty days to consider a completed submission pursuant to Section 5. This sixty-day review period will begin when we receive the information specified above. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.37). However, if no response is received within sixty days of this request, the Attorney General may object to the proposed change consistent with the burden of proof placed upon the submitting authority. See 28 C.F.R. 51.40 and 51.52(a) and (c). Changes which affect voting are legally unenforceable unless Section 5 preclearance has been obtained (*i.e.* the residents of annexed areas are not entitled to vote in city elections until the annexations have been precleared). *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10. Therefore, please inform us of the action the City of Tarrant plans to take to comply with this request.

If you have any questions concerning this letter or if we can assist you in obtaining the requested information, you should call Ms. Natalie Govan (202-307-2242) of our staff. Refer to File No. 2000-2137 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

  
Joseph D. Rich  
Acting Chief  
Voting Section



## U.S. Department of Justice

Civil Rights Division

JDR:JR:SL:nj  
2001-1838  
2001-2137  
2001-2217

Voting Section  
P.O. Box 66128  
Washington, DC 20035-6128

August 23, 2001

Joseph P. Rapisarda, Jr., Esq.  
County Attorney  
P.O. Box 27032  
Richmond, Virginia 23273-7032

Dear Mr. Rapisarda:

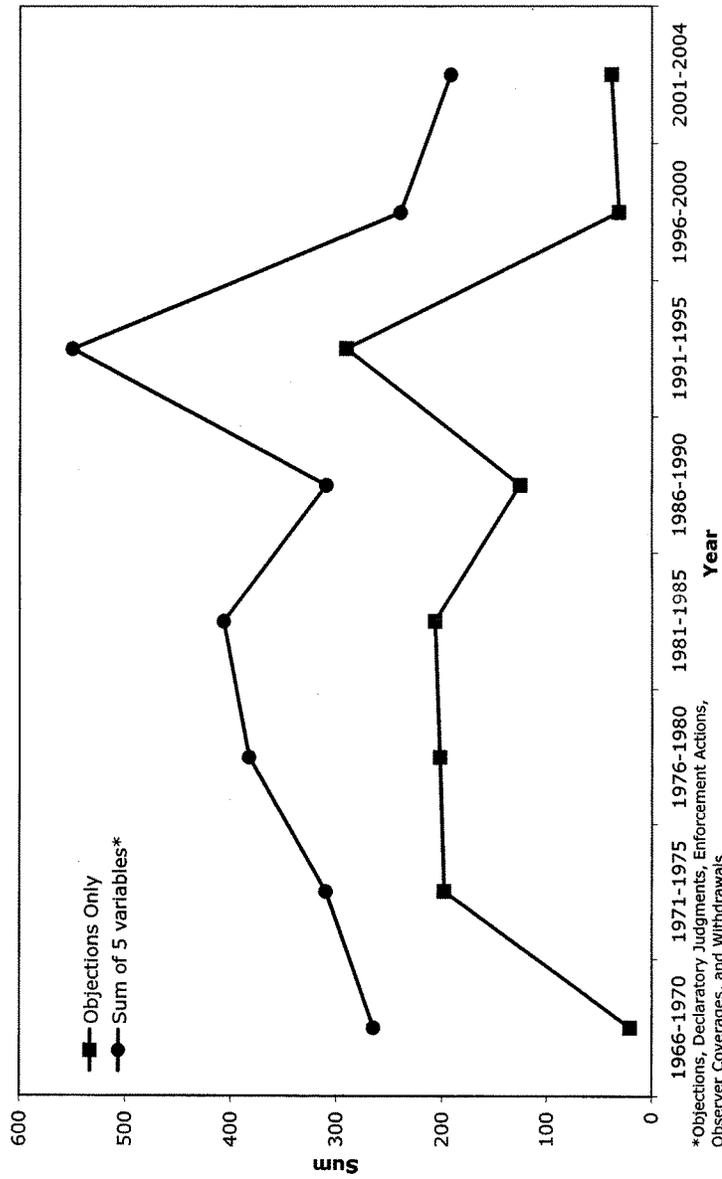
This refers to the 2001 redistricting plan for the Henrico County School District; and the 2001 redistricting plan for the board of supervisors, the creation, elimination, and realignment of voting precincts, and the polling place changes for Henrico County, Virginia submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submissions on July 2 and 26, 2001.

With the exception of the polling place change in the Cedar Fork Precinct, the Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

With regard to the polling place change in the Cedar Fork Precinct, our analysis indicates that the information sent is insufficient to enable us to determine that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, as required under Section 5. The following information is necessary so that we may complete our review of your submission:



**Comparison of Objections with Five-Variable Sum of  
Federal VRA-Related Activities  
All States, 1966-2004**

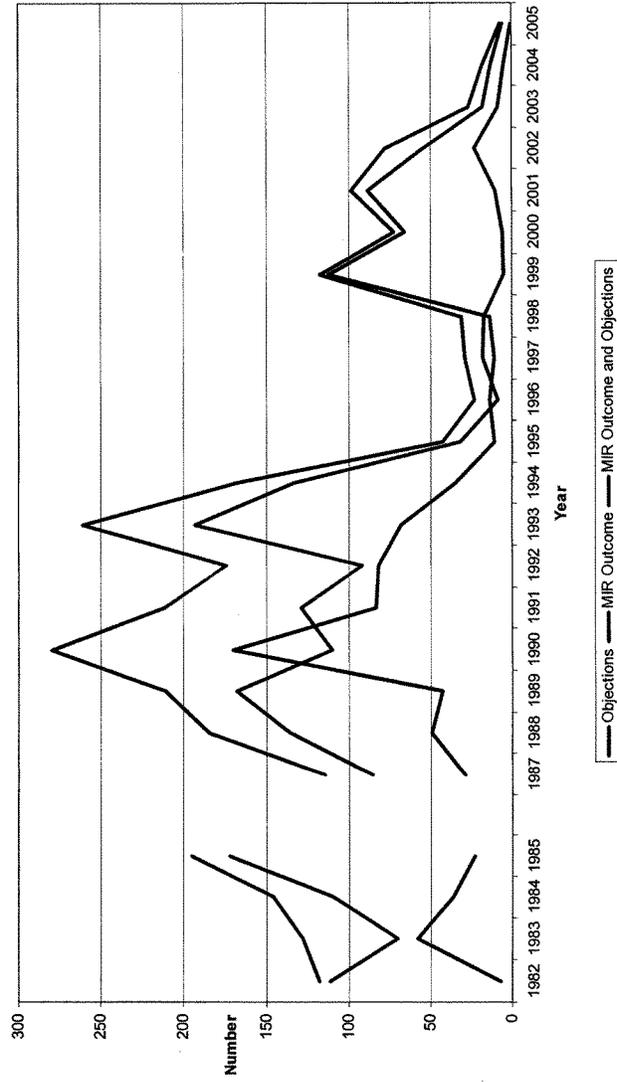


\*Objections, Declaratory Judgments, Enforcement Actions, Observer Coverages, and Withdrawals (the latter data available only from August 1982)

Figure 2 (From Fraga and Ocampo)

2

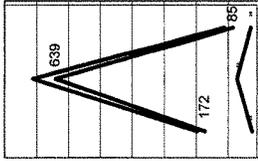
Objections and MIR Outcomes by Year

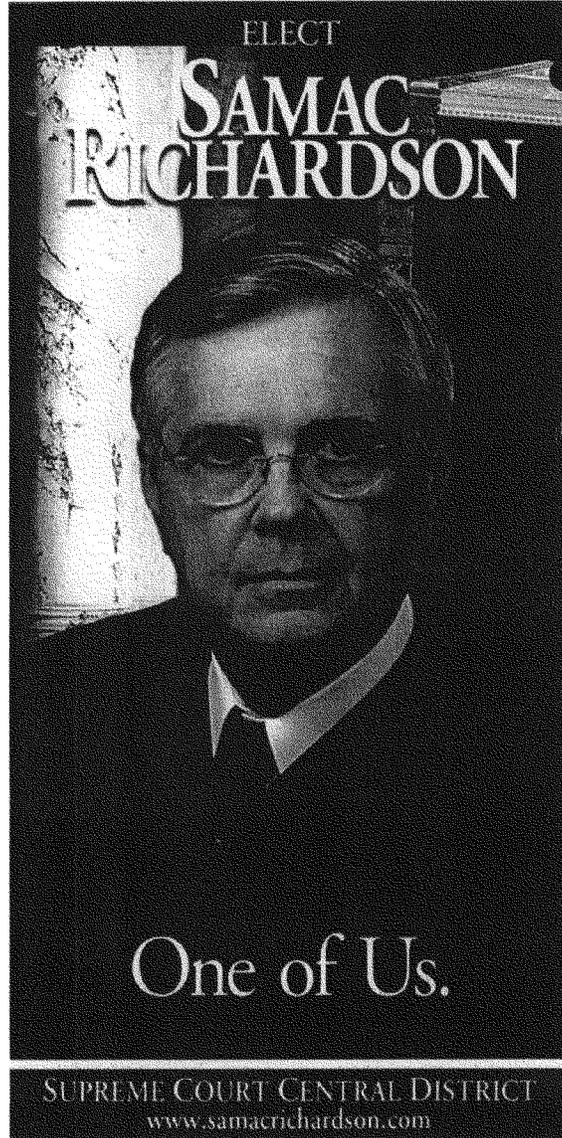


**Fragr and Ocampo**

**More Information Requests**

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NOVEMBER 2004

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# STEALING DEMOCRACY

THE NEW POLITICS  
OF VOTER SUPPRESSION

SPENCER OVERTON



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## INDICATORS OF POLITICAL EXCLUSION\*

1. Most Voting Rights Act objections and claims per capita: *South Carolina, Louisiana, Mississippi, Montana, North Dakota, South Dakota, Georgia, Virginia, New Mexico, Texas, North Carolina, Alabama, Arizona, New Jersey, and Massachusetts.*
2. Most federal observers sent to monitor elections per capita: *Mississippi, New Mexico, Arizona, New Jersey, Utah, Alabama, Michigan, Washington, Indiana, California, Louisiana, South Carolina, New York, Pennsylvania, and Illinois.*
3. Largest disparities between citizens of color and statewide elected officials of color: *Mississippi, Maryland, Louisiana, New York, California, South Carolina, Texas, Florida, Alabama, Virginia, Georgia, North Carolina, Delaware, Arizona, and Arkansas.*
4. Largest disparities between citizens of color and officials of color in all elected positions: *Texas, New York, California, Maryland, New Jersey, Florida, Mississippi, Delaware, Georgia, Nevada, Virginia, Louisiana, Illinois, South Carolina, and Connecticut.*
5. Least party competition for voters of color: *Mississippi, Louisiana, Maryland, Illinois, Georgia, Tennessee, Alabama, New York, Arkansas, Florida, Michigan, Pennsylvania, South Carolina, North Carolina, and Delaware.*
6. Largest racial disparities in voter turnout: *Nevada, California, Arizona, Colorado, Texas, Connecticut, Massachusetts, New Mexico, Florida, New York, Delaware, Oklahoma, Virginia, New Jersey, and Indiana.*
7. Largest minority group: *Hawaii, New Mexico, Mississippi, Louisiana, South Carolina, Georgia, Maryland, Alabama.*

*Section 3 currently applies to all or parts of the states listed in italics.*

*California, North Carolina, Virginia, Delaware, Arizona, and Arkansas.*

5. **Largest low-English-proficient populations:** *New Mexico, Arizona, Hawaii, Alaska, Texas, Connecticut, California, New Jersey, Massachusetts, Rhode Island, Colorado, Florida, Nevada, New York, and Idaho.*<sup>25</sup>

While the lists help us identify places that should remain covered, there are other important variables. The lists fail to consider intangibles that evade objective measurement. For example, within the past ten years, politicians in Mississippi, Georgia, and South Carolina have used Confederate-flag debates to polarize voters along racial lines. Politicians in California, Texas, and other states have shown their willingness to manipulate district lines to protect incumbents or give an advantage to one party. But quantifying such variables as the Confederate flag or the willingness of politicians to manipulate election rules is difficult, at least in ranking states. Similarly, voters' tendency to cast ballots along racial lines is a relevant factor, but we don't have a comprehensive database on racially polarized voting in every political contest in the nation that allows a comparative analysis among states (although the dearth of statewide elected officials of color and the lack of party competition for voters of color are rough proxies for racially polarized voting). Startling reports about recent voting discrimination against American Indians in South Dakota have also emerged, so perhaps parts of that state should remain covered.

We should also limit preclearance coverage to areas that have a significant percentage of people of color. In such areas, discrimination may be more rampant because voters of color likely carry more political weight. If we were to exclude states that lack a single minority group that makes up at least 5 percent of the population, we would release New Hampshire from current coverage. We also

20. U.S. Department of Justice, Civil Rights Division, Litigation Brought by the Voting Section, [www.usdoj.gov/crt/voting/litigation/caselist.htm](http://www.usdoj.gov/crt/voting/litigation/caselist.htm); U.S. Department of Justice, Civil Rights Division, Section 5 Objection Determinations, [www.usdoj.gov/crt/voting/sec\\_5/obj\\_activ.htm](http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm); U.S. Department of Justice, Civil Rights Division, About Federal Examiners and Federal Observers, [www.usdoj.gov/crt/voting/examine/activ\\_exami.htm](http://www.usdoj.gov/crt/voting/examine/activ_exami.htm); U.S. Department of Justice, "Justice Department to Dispatch Federal Election Monitors to Alabama, California, and New Mexico," press release, June 1, 1998, [www.usdoj.gov/opa/pr/1998/June/247cr.htm.html](http://www.usdoj.gov/opa/pr/1998/June/247cr.htm.html); U.S. Department of Justice, "Federal Observers and Justice Department Personnel to Monitor General Elections in States Across the Nation," press release, November 4, 2002, [www.usdoj.gov/opa/pr/2002/November/02\\_crt\\_640.htm](http://www.usdoj.gov/opa/pr/2002/November/02_crt_640.htm); U.S. Department of Justice, "Department of Justice Announces Federal Observers to Monitor General Election in States Across the Country," press release, October 28, 2004, [www.usdoj.gov/opa/pr/2004/October/04\\_crt\\_725.htm](http://www.usdoj.gov/opa/pr/2004/October/04_crt_725.htm); U.S. Census Bureau, "Table 4a. Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2004," [www.census.gov/population/socdemo/voting/cps2004/tab04a.xls](http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls); Ethnic Majority, African, Hispanic (Latino), and Asian American Members of Congress: State and Local Government on the Net; "Encyclopedia: List of United States Governors"; CNN.com, Election Results: U.S. President, [www.cnn.com/ELECTION/2004/2004/pages/results/states/AL/P/00/epolls.o.html](http://www.cnn.com/ELECTION/2004/2004/pages/results/states/AL/P/00/epolls.o.html) (accessed on June 11, 2005); Michael Bocian, e-mail message to author, July 13, 2005; U.S. Census Bureau, "Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States," [www.census.gov/population/www/socdemo/voting/p20-542](http://www.census.gov/population/www/socdemo/voting/p20-542); U.S. Census Bureau, "Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States," [www.census.gov/population/www/socdemo/voting/past-voting.htm](http://www.census.gov/population/www/socdemo/voting/past-voting.htm); U.S. Census Bureau, State and Country QuickFacts, <http://quickfacts.census.gov/qfd>; U.S. Department of Justice, "The Attorney General's Language Minority Guidelines: 28 C.F.R. Part 55: Appendix to Part 55—Jurisdictions Covered Under Section 203(c) of the Voting Rights Act of 1965, as Amended," [www.usdoj.gov/crt/voting/28cfr/55/28cfr55.htm](http://www.usdoj.gov/crt/voting/28cfr/55/28cfr55.htm); FairData, Socio-Economic Contrast Charts—Census 2000 Profiles, [www.fairdata2000.com/SF3/contrast\\_charts/index.html](http://www.fairdata2000.com/SF3/contrast_charts/index.html).
21. Laughlin McDonald, "The Voting Rights Act in Indian Country: South Dakota, A Case Study," *American Indian Law Review* 29 (2004): 43; [http://factfinder.census.gov/servlet/SAFFPeople?\\_sse=on](http://factfinder.census.gov/servlet/SAFFPeople?_sse=on).

**Minority Voters Affected by Section 5 Objections  
Jan. 2000 - May 2006**

State:	Date:	Locality:	Type:	Description:	Voters:	Minority:
AL	16-Aug-00	City of Alabaster	Annexation	City wanted to annex section that contained 179 registered white voters and 2 black voters, decreasing registered minority from 51.2% to 45.7%.	1580	African-American
AZ	20-May-02	Arizona	Statewide redistricting	Redistricting would likely take number of Hispanic reps from 8 to 5.	162,067	Hispanic
AZ	4-Feb-03	Coconino Association for Vocations, Industry, and Technology	Local Redistricting	Default provided for 5 equal school districts, electing one board member each. They switched to 4 districts and 1 at large member. Evidence shows that under default, 2/5 would be Native, under their system, 1/5 would be.	1,548	American Indian
CA	29-Mar-02	Monterey County	Voting Method	Attempt to switch back to an at large voting method for school board that showed evidence of being retrogressive to Hispanic voters (who are actually majority).	1,260	Hispanic
GA	11-Jan-00	Webster County (98-1663)	local redistricting	school board redistricting plan diminished percentage of minority voters	470	African-American
GA	17-Mar-00	Tignall (99-2122)	voting method	city council election method changed from plurality vote and individual council races	208	African-American
GA	1-Oct-01	Ashburn(94-4606)	voting method	city council election method changed to numbered posts and majority vote	1167	African-American

State:	Date:	Locality:	Type:	Description:	Voters:	Minority:
GA	9-Aug-02	Putnam County (2002-2987)	local redistricting	local redistricting reduced the number of majority black districts for the county commission from 2 to 1	1866	African- American
GA	9-Aug-02	Putnam County (2002-2987)	local redistricting	local redistricting reduced the number of majority black districts for the board of education from 2 to 1	1866	African- American
GA	23-Sep-02	Albany (2001-1955)	local redistricting	redistricting of a minority ward continuously reduced the percentage of minority voters for the city board of commissioners	4391	African- American
GA	15-Oct-02	Marion County (2002-2643)	local redistricting	redistricting of the school board reduced minority influence	550	African- American
LA	13-May-02	Richland Parish (2002-3400)	local redistricting	school district redistricting reduced minority ability to elect their candidates	794	African- American
LA	2-Jul-02	Minden (2002-1011)	local redistricting	council redistricting reduced minority influence in one district	900	African- American
LA	4-Oct-02	Ponte Coupee Parish (2002-2717)	local redistricting	school district redistricting reduced minority ability to elect their candidates	962	African- American
LA	31-Dec-02	DeSoto Parish (2002-2926)	local redistricting	school district redistricting reduced minority ability to elect their candidates	788	African- American
LA	4-Jun-03	Ville Platte (2003-4549)	local redistricting		298	African- American
LA	6-Oct-03	Tangipahoa (2002-3135)	local redistricting		3405	African- American
LA	12-Dec-03	Plaquemine (2003-1711)	local redistricting		400	African- American
LA	25-Apr-05	Delhi (2003-3795)	local redistricting		219	African- American

State:	Date:	Locality:	Type:	Description:	Voters:	Minority:
MS	12/11/2001	Town of Kilmichael	Change of Date	Before 2001 election, only one alderman (5 elected every 4 years) had been elected since 1965, and only one black person had ever run for mayor. This election, 4 of the 10 who qualified for alderman were black, and one of the 3 mayoral candidates. The board then cancelled the election.	291	African-American
NC	23-Jul-02	Harnett County	Local Redistricting	Redistricting would likely take number of AA BOE member from 1 to 0 (out of 5).	6,378	African-American
NC	23-Jul-02	Harnett County	Local Redistricting	Redistricting would likely take number of AA BO Commissioners from 1 to 0 (out of 5).	6,378	African-American
SC	12-Oct-01	Charleston	Local Redistricting	12 council members elected from 12 districts, new plan would reduce minority-majority population from 6 to 5.	3,193	African-American
SC	2-Nov-01	Greer	Local Redistricting	Redistricting generally favored white voters over black, and most likely made black voters unable to elect legislators in any one district	977	African-American
SC	27-Jun-02	Sumter County	Local Redistricting	City council would've moved from 4 maj. AA districts to 3 (7 total).	6,004	African-American
SC	3-Sep-02	Union County	Local Redistricting	School Board elects 9...2 from majority AA. Reduce them by 4% and 7% respectively.	2,390	African-American
SC	9-Dec-02	City of Clinton	Local Redistricting	Redistricting weakened ward 1 below majority AA status	544	African-American
SC	16-Jun-03	Cherokee County School District #1	Local Redistricting	School Board wanted to move from 9 board members (2 elected from majority AA) to 7 board members (1 elected from majority AA).	1808	African-American

State:	Date:	Locality:	Type:	Description:	Voters:	Minority:
SC	9/16/2003	North	Annexation	Town was trying to annex white voters while denying black voters requests (specifically 2 white voters in this case).	269	African-American
SC	26-Feb-04	Charleston County School District	Voting Method	County School Board tried to switch from plurality to majority voting, making it very difficult for minority candidates.	73,343	African-American
SC	25-Jun-04	Richland-Lexington School District	Voting Method	County School Board tried to switch from plurality to majority vote and "numbered posts"	7,615	African-American
TX	5-Jun-00	Sealy Independent School District	voting method	school board went to numbered posts	1381	African-American/Hispanic
TX	24-Sep-01	Haskell Consolidated Independent School District	voting method		881	African-American/Hispanic
TX	16-Nov-01	Entire State (2001-2430)	Statewide redistricting	accounting for the 3 districts lost	138,614	African-American/Hispanic
TX	21-Jun-02	Waller county (2001-3951)	local redistricting	lost the ability to elect a candidate of choice in a district for county commission	2473	African-American/Hispanic
TX	12-Aug-02	Freeport (2002-1725)	voting method	change to at large voting for city council	1223	African-American/Hispanic
TX	5-May-06	North Harris and Montgomery Community College District (2006-2240)	voting method	changed polling places for 1000 square mile district from 84 to 12, serving considerably different racial compositions	215,406	African-American/Hispanic
VA	28-Sep-01	Northhampton County (2001-1495)	Voting Method	county commission went from six single-member districts with half minority representation to three two-member districts with none	2201	African-American/Hispanic

State:	Date:	Locality:	Type:	Description:	Voters:	Minority:
VA	29-Apr-02	Pittsylvania County (2001-2026)	local redistricting	school board and county commission redistricting keep minorities from being able to elect the candidate of their choice	3341	African-American
VA	9-Jul-02	Cumberland County (2001-2374)	local redistricting	they would lose a seat in a redistricting plan	727	African-American
VA	19-May-03	Northampton County (2002-5693)	local redistricting	2002 redistricting plan insufficient	2495	African-American/Hispanic
VA	21-Oct-03	Northampton County (2003-3010)	local redistricting	2003 redistricting plan insufficient	832	African-American/Hispanic
				<b>Total Number of Minority Voters Affected by Section 5 Objections</b>	<b>663503</b>	

Section 5 Objections since 2000 – a note on methodology

**Estimating number of affected minority voters when the Department of Justice objected to a redistricting plan:**

Section 5 objections letters since 2000 are posted the DOJ's website and frequently contain substantial information about the jurisdiction and the change at issue. For example, a redistricting in Putnam County, GA ([http://www.usdoj.gov/crt/voting/sec\\_5/pdfs/l\\_080902.pdf](http://www.usdoj.gov/crt/voting/sec_5/pdfs/l_080902.pdf)) was objected to by the DOJ because they determined that one district would go from 73.3% African American to 39.0% African American, eliminating the ability of the minority voters in this district to elect a candidate of choice. The DOJ's information also specified that there are five total districts for the county. Census data was obtained from the objection letter if it was included and from the census bureau if it was not.

Our calculation went as follows:

$\frac{\text{Number of Lost Districts}}{\text{Total number of Districts}} * \text{Total population} * \text{Minority's Majority (assumed 51\% if unknown)} * \frac{\text{Minority VAP}}{\text{Total Min. Population}}$

$$\frac{1}{5} * 18,812 * 73.3\% * \frac{3,804}{5,622} = 1,866.0$$

Our estimated number of minority voters affected for Putnam County was 1,866.

**Minority Voters Affected by Withdrawn Submissions, 2000 to 2005**

State:	Date:	Locality:	Type:	Description: (case file reference)	Voters:	Minority:
AL	8-May-02	Escambia County School District	Redist. (2001)	2001-3995	2443	African-American
AL	27-Mar-02	Henry County	Redist. (2001)	2001-3937	1162	African-American
AL	20-Oct-00	Tarrant	Annex (2)	2000-2137	881	African-American
AZ	28-Oct-03	Mohave County	Voter Reg. Procedures	2003-2434	10,428	Hispanic
AZ	16-Feb-00	Arizona (30 districts)	Redist. Procedure	1999-1532	54,022	Hispanic
AZ	25-Jan-00	Dysart Unified School District #89	Annex	2000-4146	8,002	Hispanic
GA	4-Sep-03	Albany	Redist., Precinct Realignment	2003-2161	4388	African-American
GA	23-Jul-03	Bibb County	Redist.	2002-3517	10,447	African-American
GA	3-Jun-03	Pulaski County	Precinct Consolidation, Poll Place (consolidation)	2002-4663	2,433	African-American
GA	30-Jan-03	Jones County School District	Redist., Stag Terms, Impl. Sched.	2002-3550	2202	African-American
GA	10-Sep-02	Atkinson County	Redist.	2002-2645	440	African-American
GA	1-Aug-02	Dodge County School District	Redist.	1996-1934	944	African-American
GA	7-Jan-02	Griffin	Redist.	2001-1854	1097	African-American
GA	1-Oct-01	Stapleton	Num Posts	2001-1350	63	African-American
LA	21-May-03	Arcadia	Redist.	2002-5734	204	African-American
LA	17-Mar-03	Concordia Parish	Poll Place (changed)	2002-4481	5,097	African-American
LA	17-Dec-02	Arcadia	Redist.	2002-3488	204	African-American
LA	22-Oct-02	Webster Parish	Redist.	2002-3586	1196	African-American
LA	22-Oct-02	Webster Parish School District	Redist.	2002-3587	1203	African-American

State:	Date:	Locality:	Type:	Description: (case file reference)	Voters:	Minority:
LA	8-Oct-02	West Carroll Parish School District	Redist.	2002-3401	639	African-American
LA	26-Jul-02	Alexandria	Redist.	2002-1032	2580	African-American
LA	9-Jul-02	Haynesville	Redist.	2002-1024	176	African-American
LA	25-Jun-02	Webster Parish	Redist.	2002-0249	1196	African-American
LA	25-Jun-02	Webster Parish School District	Redist.	2002-0264	1203	African-American
MI	18-Jul-02	Buena Vista	Election Admin. (2)	2002-1913	3,853	African-American
MI	18-Jul-02	Clyde	Election Admin. (2)	2002-1912	372	Hispanic
MS	17-Jul-03	Greenville	Redist.	2003-0085	2254	African-American
MS	6-Feb-03	Chickasaw County	Redist. (2)	2002-4939	1284	African-American
MS	3-Feb-03	Forrest County	Redist. (2), Poll Place (consolidation), Precinct Added, Precinct Consolidation, Poll Place (added)	2002-5346	4963	African-American
MS	20-Jul-01	Flora	Redist.	2001-0242	94	African-American
MS	19-Oct-00	Hernando	Redist.	2000-0350	464	African-American
MS	10-Oct-00	Hernando	Annex	1998-0992	980	African-American
NC	30-Jul-02	Craven County	Election method / Redist.	2001-3957	16,269	African-American
NC	16-Apr-02	Beaufort County School District	Redist.	2001-4063	1470	African-American
NC	19-Dec-01	Tarboro	Redist.	2001-1474	493	African-American
NC	9-May-01	Rowland	Maj Vote	2000-0815	550	African-American
NC	20-Jun-00	Stoneville	Stag Terms, Term Office, Impl. Sched.	1999-3975	148	African-American
NY	22-Nov-02	New York	Poll Place (loc deleted) (47)	2001-2034	?	
SC	23-Oct-03	Blacksburg	Redist.	2002-5580	?	African-American

State:	Date:	Locality:	Type:	Description: (case file reference)	Voters:	Minority:
SC	19-Oct-01	Richland County	Poll Place (changed)	2001-2612	130,577	African-American
TX	30-Dec-03	Vidor City	Billing Pro, Annex	2003-1313	241	Hispanic
TX	30-Apr-03	Huntsville Independent School District	Poll Place (changed) (2)	2003-0804	11,355	African-American
TX	12-Dec-02	Northside Independent School District	Redist.	2002-4959	171,132	Hispanic
TX	4-Dec-02	Azle	Billing Pro	2002-3221	299	Hispanic
TX	5-Nov-02	Killeen	Poll Place (loc estd.) (11)	2002-4906	20,055	African-American
TX	5-Sep-02	Marlin Independent School District	Poll Place (changed)	2002-0246	2,753	African-American
TX	8-Jul-02	Marlin Independent School District	Redist.	2001-4042	511	African-American
TX	14-May-02	Schleicher County	Redist., Term Office, MOE	2002-0173	132	Hispanic
TX	17-Apr-02	Hays Consolidated Independent School District	Redist.	2002-0019	1352	Hispanic
TX	1-Apr-02	Seguin	Redist., Precinct Realignment	2002-0076	911	Hispanic
TX	28-Mar-02	East Central Independent School District	Redist., Term Office	2002-0020	1406	Hispanic
TX	19-Feb-02	Castro County	Precinct Realignment, Poll Place	2001-3708	2,545	Hispanic
TX	14-Feb-02	Jefferson County	Redist. (2), Precinct Consolidation (2), Precinct Realignment	2001-3785	11028	African-American
TX	28-Jan-02	Reagan County Independent School District	Redist., Meth Stag Term, Impl. Schedule	2001-3175	143	Hispanic
TX	26-Dec-01	Spur	Num Posts, MOE, Number of Officials	1998-3647	217	Hispanic

State:	Date:	Locality:	Type:	Description: (case file reference)	Voters:	Minority:
TX	2-Feb-00	Klein Independent School District	Maj Vote	1999-3378	13,389	Hispanic
VA	28-Aug-01	Henrico County	Poll Place (changed)	2001-1838	18506	African-American
<b>Total number of minority voters aided by withdrawn submissions to the Attorney General:</b>					<b>532396</b>	

Withdrawn Submissions: Note on methodology.

We relied on the list of withdrawn submissions identified by the staff for the National Commission on the Voting Rights Act. They make the following caution regarding their data:

The method employed for identifying withdrawn submissions also undercounts the actual number of them. The data were obtained through a Freedom of Information Act request for a list of all voting changes since 1982 where the Department had sent jurisdictions a letter requesting more information before deciding whether to preclear. All submissions containing the word "Withdraw" after a "more information" letter had been submitted were tallied to arrive at the total number of withdrawals used in the accompanying maps and charts. It was later discovered that the Department sometimes used another notation ("ND/wd") to indicate a withdrawn submission. Unfortunately, there was insufficient time to go through the submissions yet again to count the additional ones containing the latter notation.

National Commission on the Voting Rights Act & Lawyers' Committee for Civil Rights Under Law, Protecting Minority Rights: The Voting Rights Act at Work 1982-2005, at page 115, n.198 (Feb. 2006).

**Estimating affected minority voters when a redistricting submission was withdrawn:**

Information received from the DOJ on withdrawals tells us the following information for each withdrawal that we catalogued:

**MISSISSIPPI**  
**Subjurisdiction:** GREENVILLE  
**County:** WASHINGTON  
**Action Date:** 01/13/2003  
Redistricting plan (Council)  
Submission received  
**Submission Number:** 2003-0085

After reviewing this information, we visited [factfinder.census.gov](http://factfinder.census.gov) and found the total population of the area, the minority voting age population, and the total minority population. In this case, the total population was 41,633, the African American voting age population was 18,529, and the total African American population was 29,093.

Next, we searched the local government in question for the number of districts from which they elect board members. In this case, we discovered that six council members are elected by ward in Greenville (<http://www.greenvilleareachamber.com/greenville.htm>).

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To ensure that our numbers were conservative, we assumed that the withdrawal would have affected just one of the districts. Since Section 5 now only applies to cases of retrogression in minority voting strength (*Bossier II*), we assumed that the withdrawn submission would have affected a district with a minority-majority status. The calculation went as follows:

$$\frac{\text{Number of Lost Districts}}{\text{Total number of Districts}} * \text{Total population} * \text{Minority's Majority (assumed 51\% if unknown)} * \frac{\text{Minority VAP}}{\text{Total Min. Population}}$$

Therefore, in our example, the numbers would plug in as follows:

$$\frac{1}{6} * 41,633 * 51\% * \frac{18,529}{29,093} = 2253.8$$

Are estimated number of affected minority voters for this case was 2254.

PAID POLITICAL



# Chris Merrill

HONESTY

Republican for Probate Judge



FIELDING

"His qualifications, honesty and integrity along with his superior administrative abilities make him the best choice for Probate Judge."

— Thomas J. Masi, LUTCF

"After viewing his court, a lack of administrative ability is evident."

— Thomas J. Masi, LUTCF

"As an elected official, I understand fiscal responsibility. Chris Merrill will spend your dollars wisely in Probate Court."

— Larry D. Shirley  
City Councilman

"His job as Therapeutic Judge pays almost \$70,000 per year, yet he continues to operate a part-time law firm and funeral home."

— Larry D. Shirley  
City Councilman

"Chris Merrill exhibits outstanding ability and the judicial temperament so critical to the job of Probate Judge."

— Robert W. Haines, Attorney

"His experience as Therapeutic Judge is not directly related to the duties and responsibilities of the Probate Judge."

— Robert W. Haines, Attorney

**S\*0010 (Rat #0088, Act #0128 of 2003) General Bill, By Ravenel, Mascher and Grooms**

Similar(S 646, H 3565)

AN ACT TO AMEND ACT 340 OF 1967, AS AMENDED, RELATING TO THE CREATION OF THE CHARLESTON COUNTY SCHOOL DISTRICT, SO AS TO PROVIDE FOR THE ELECTION OF SCHOOL TRUSTEES IN PARTISAN INSTEAD OF NONPARTISAN ELECTIONS BEGINNING IN 2004 AND FOR THE NOMINATION, TERMS, AND ELECTION PROCEDURES OF CANDIDATES FOR THESE OFFICES. - ratified title

12/04/02 Senate Prefiled  
 12/04/02 Senate Placed on Local and Uncontested Calendar  
 01/14/03 Senate Intd. & placed on local & uncontested cal. w/o reference SJ-25  
 02/20/03 Senate Read second time SJ-12  
 02/20/03 Senate Ordered to third reading with notice of amendments SJ-12  
 04/16/03 Senate Read third time and sent to House SJ-34  
 04/22/03 House Introduced and read first time HJ-16  
 04/22/03 House Referred to Charleston Delegation HJ-16  
 05/20/03 House Delegation report: Favorable Charleston Delegation HJ-4  
 05/22/03 House Rejected HJ-16  
 05/22/03 House Roll call Yeas-7 Nays-7 HJ-17  
 05/22/03 House Reconsidered HJ-19  
 05/22/03 House Read second time HJ-19  
 05/22/03 House Roll call Yeas-7 Nays-6 HJ-19  
 05/27/03 House Read third time and enrolled HJ-12  
 05/28/03 Ratified R 88  
 06/04/03 Became law without Governor's signature  
 06/23/03 Copies available  
 06/23/03 Effective date 06/04/03  
 10/23/03 Act No. 128

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S. 10

(A128, R88, S10)

**AN ACT TO AMEND ACT 340 OF 1967, AS AMENDED, RELATING TO THE CREATION OF THE CHARLESTON COUNTY SCHOOL DISTRICT, SO AS TO PROVIDE FOR THE ELECTION OF SCHOOL TRUSTEES IN PARTISAN INSTEAD OF NONPARTISAN ELECTIONS BEGINNING IN 2004 AND FOR THE NOMINATION, TERMS, AND ELECTION PROCEDURES OF CANDIDATES FOR THESE OFFICES.**

Be it enacted by the General Assembly of the State of South Carolina:

**Partisan elections**

SECTION 1. Section 2 A. of Act 340 of 1967, as last amended by Act 936 of 1970, is further amended to read:

"Section 2 A. The election of the members of the board of trustees must be by partisan election beginning in 2004. Successors to members of the board whose terms expire in 2004 and thereafter shall be elected on a partisan basis as provided herein for terms of four years each. Beginning in 2004,

candidates may be nominated for office in the manner provided by law, and candidates must be elected at the general election and the primary election, respectively, according to the provisions of Title 7 of the 1976 Code, mutatis mutandis.

All other provisions of law relating to election of these school trustees including areas from which members must be elected by the qualified electors of the county shall continue to apply except for provisions of law relating to the nonpartisan election of such trustees. Present members of the board elected on a nonpartisan basis whose terms expire after 2004 shall continue to serve in office but shall declare their political affiliation by affidavit filed with the Charleston County Election Commission. Nothing herein prevents a current trustee elected on a nonpartisan basis from offering and being elected as a partisan candidate."

**Time effective**

**SECTION 2.** This act takes effect upon approval by the Governor.

Ratified the 28th day of May, 2003.

Became law without the signature of the Governor -- 6/4/03.



## U. S. Department of Justice

Civil Rights Division

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*Office of the Assistant Attorney General**Washington, D.C. 20035*

February 26, 2004

C. Havird Jones, Jr., Esq.  
Senior Assistant Attorney General  
P.O. Box 11549  
Columbia, South Carolina 29211-1549

Dear Mr. Jones:

I am writing in regards to Act R.88 (2003), which changes the method of electing the Board of Trustees for the Charleston County School District from nonpartisan to partisan elections, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our August 12 request for additional information on December 31, 2003.

We have carefully considered the information you provided, census data, information in our files, and comments from other interested persons, as well as the federal district court's findings in *United States v. Charleston County*, No. 2:01-0155-23 (D.S.C. March 6, 2003). In light of the considerations discussed below, I cannot conclude that your burden under Section 5 of the Voting Rights Act has been sustained. Therefore, on behalf of the Attorney General, I am compelled to object to Act R.88 (2003).

The Voting Rights Act requires a jurisdiction seeking to implement a proposed change affecting voting to establish that, under the totality of the circumstances, the change does not "lead to a retrogression" in the position of minority voters with respect to the "effective exercise of the electoral franchise." *Georgia v. Ashcroft*, 123 S.Ct. 2498, 2511 (2003); *Beer v. United States*, 425 U.S. 130, 141 (1976). Whether a change is retrogressive "depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect a candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." *Georgia*, 123 S.Ct. at 2511. In addition, the jurisdiction must establish that the change was not adopted with an intent to retrogress. *Reno v. Bossier Parish School Board*, 528 U.S. 320, 340 (2000).

Our review of the electoral impact of the proposed change, the views of elected officials at

both the local and state level, including the expressed views of the legislation's sponsors, and the detailed factual findings in *United States v. Charleston County*, demonstrate that the Act is retrogressive. The proposed change would significantly impair the present ability of minority voters to elect candidates of choice to the school board and to participate fully in the political process. In addition, it was enacted despite the existence of a nonretrogressive alternative.

The proposed change would likely eliminate the possibility of plurality victories by requiring head-to-head contests with the winner needing a majority of votes. The *Charleston County* court concluded that partisan, at-large elections in Charleston County impose a "de facto majority vote requirement" that "makes it more difficult for the African-American community to employ \* \* \* bullet voting in order to improve their chances of electing candidates of their choosing." *Slip. op.* at 43-44.

In contrast, the court noted that because Charleston school board elections are non-partisan, they can result in numerous candidates running, thus creating the opportunity for single-shot voting and a plurality win by minority-preferred candidates despite the at-large method of election and the prevalence of racially polarized voting. *Id.* at 20-21. The proposed change will impose a *de facto* majority-vote requirement that will make it extremely difficult for minority-preferred candidates to win.

Another significant factor in our determination is the lack of support for the proposed change from minority-preferred elected officials. *See Georgia*, 123 S.Ct. at 2513. Our investigation reveals that every black member of the Charleston County delegation voted against the proposed change, some specifically citing the retrogressive nature of the change. Our investigation also reveals that the retrogressive nature of this change is not only recognized by black members of the delegation, but is recognized by other citizens in Charleston County, both elected and unelected.

In evaluating the submission, we have considered the feasibility of creating a non-retrogressive alternative. *Georgia*, 123 S.Ct. at 2511. The governmental interest in implementing partisan elections can be achieved by non-retrogressive means. A switch to partisan elections would not represent a retrogression of minority voting strength if accompanied by a concomitant shift from at-large elections to a fairly drawn single-member districting plan. Indeed, such a non-retrogressive alternative was considered and adopted by the State Senate, but was not taken up by the State House.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *Georgia v. United States*, 411 U.S. 526 (1973); *see also* "Procedures for the Administration of Section 5" (28 C.F.R. 51.52). In light of the considerations discussed above, I cannot conclude that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to Act R.88.

We note that under Section 5 you have the right to seek a declaratory judgment from the

United States District Court for the District of Columbia that the proposed change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. *See* 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. *See* 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, Act R.88 continues to be legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the Charleston County School District plans to take concerning this matter. If you have any questions, you should call Mr. Mike Pitts (202-514-8201), an attorney in the Voting Section.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Alexander Acosta', written over a horizontal line.

R. Alexander Acosta  
Assistant Attorney General

**APPLICATION FOR BALLOT BY MAIL: COMPLETE ALL INFORMATION, READ INSTRUCTIONS VERY CAREFULLY, PRINT OR TYPE  
VOTER REGISTRATION INFORMATION**

Name

Residence Address Where Registered to Vote, Include City, State, and Zip (if you will not have your ballot mailed to you at this address, see instructions at end of this form)

County Election Precinct Number\*  
\*Optional

Voter Registration Number\*  
\*Optional

Year of Birth\*  
\*Optional

Type and Date of Election

Check here for ballots for both the main election and runoff if applicable

Party Preference  
(Primary Election Only)

MAIL MY BALLOT TO (if not residence address) (include street address, P.O. Box number, apartment number as applicable, city, state, and zip)

1.  65 years of age or older

2.  Disability

3.  Confinement in jail

4.  Expected absence from the county.

In order to check #4 as the reason for voting by mail, you must expect to be absent from the county on election day and during the period of early voting by personal appearance or for the remainder of the period after you submit your application. YOUR BALLOT MUST BE MAILED TO AN ADDRESS OUTSIDE THE COUNTY. GIVE DATE YOU CAN RECEIVE MAIL AT THE ADDRESS GIVEN.

Date: \_\_\_\_\_ If an application is submitted AFTER early voting in person has begun, this application MUST be submitted to your early voting clerk from an address or by fax machine from outside of the county.

**SPECIAL INSTRUCTIONS FOR HAVING YOUR BALLOT MAILED TO YOU**

If you checked 65 years of age or older or disability as the reason to vote by mail, and you are requesting that the ballot be mailed to an address other than your permanent residence, indicate the type of address to which the ballot will be mailed from the list below:

1. \_\_\_\_\_ Mailing address as listed on my voter registration certificate
2. \_\_\_\_\_ Hospital
3. \_\_\_\_\_ Nursing home or long-term care facility
4. \_\_\_\_\_ Retirement center
5. \_\_\_\_\_ Relative, Indicate relationship \_\_\_\_\_
6. \_\_\_\_\_ Address of the jail
7. \_\_\_\_\_ Address outside the county

**FOR WITNESS and/or ASSISTANT:**

Applicant, if unable to sign, shall make mark in presence of witness, if applicant is unable to make mark, the witness shall check here   
Failure to complete this information if signature was witnessed or applicant was assisted in completing the application is a Class A misdemeanor.

Signature of Witness/Assistant \_\_\_\_\_ Print Full Name of Witness/Assistant

Residence Address of Witness/Assistant or Title of Witness/Assistant If an Election Official

*See Instructions for Clarification*

Relationship to Applicant of Witness/Assistant (Check one:  parent,  grandparent,  spouse,  child,  sibling,  other,  reside at same address as applicant)

**"I CERTIFY THAT THE INFORMATION GIVEN IN THIS APPLICATION IS TRUE, AND I UNDERSTAND THAT GIVING FALSE INFORMATION IN THIS APPLICATION IS A CRIME."**

**SIGN HERE** ▶

**SIGNATURE OF APPLICANT**

**INSTRUCTIONS FOR APPLICATION FOR  
BALLOT BY MAIL**

1. **Name-** Print name as you are registered to vote.
2. **Residence Address-** Give full address as shown on your voter registration certificate. If you have moved but not yet changed your voter registration address with the voter registrar, indicate your new residence address.
3. **Instructions for having your ballot mailed:** Balloting materials must be mailed to your residence address or the mailing address indicated on your voter registration application. Exceptions to this general rule include:
  - Voting by reason of 65 years of age or older or disability, the mailing address may be a hospital, nursing home or long-term care facility or retirement center, or the address of a person related to you by the 2nd degree by affinity or 3rd degree by consanguinity, if you are temporarily living at that address. Relatives include: parent, child, brother, sister, grandparent, grandchild, great-grandchild, great-grandparent, uncle, aunt, nephew, niece, spouse, spouse's parent, son-in-law, daughter-in-law, brother's spouse, sister's spouse, spouse's brother, spouse's sister, spouse's grandparent.
  - Voter has moved, but failed to change address with the voter registrar and is having a ballot mailed to the new residence. The early voting clerk will mail you a ballot and a statement of residence if your new address is still within the same county and political subdivision holding the election. You are required to return the statement with your ballot. The residence address or mailing address on the statement of residence must match the mailing address on the application for ballot by mail. If these two addresses do not match, your ballot will not be counted.
  - If the reason for applying to vote by mail is confinement in jail, the address to mail your ballot must be either the jail or a relative as stated above.
4. **You may return your application in person\*, by mail, common or contract carrier or fax** (if fax is available in the clerk's office). If you use common or contract carrier, it must be a business for profit carrier and the primary business of which is transporting or delivering property for compensation. To be eligible to submit an application by fax, you must fax the application from outside the county. Improper delivery will cause the application for a mail ballot to be rejected.
 

\* If early voting in person has begun, you cannot submit your application by personal delivery to the clerk.
5. **SIGN YOUR APPLICATION-** If you cannot sign, you must have a person witness your mark. If a person helped you fill out this application, he/she must give their name and address in the box for witness and/or assistant.
 

In any single election, it is a Class B misdemeanor for any person to sign a ballot application as a witness for more than one applicant. A person may sign more than one application as a witness if the second and subsequent applications are related to the witness as parent, spouse, child, sibling, or grandparent.
6. **Deadline-** Your application must be received by the early voting clerk not earlier than the 60th day and not later than the 7th day before election day. If the 7th day is a weekend or holiday, the deadline is the first preceding business day.



For additional information call the Secretary of State at 1-800-252-8683 or the local early voting clerk.  
 Para más información, llame al Secretario de Estado al 1-800-252-8683 o comuníquese con la Oficina de  
 Venación Postal de la Secretaría de Condado en su localidad.



**FROM:** \_\_\_\_\_  
 Name  
 \_\_\_\_\_  
 Address  
 \_\_\_\_\_  
 City State Zip

510



**TO:** \_\_\_\_\_  
 \_\_\_\_\_  
 Address  
 \_\_\_\_\_  
 City State Zip



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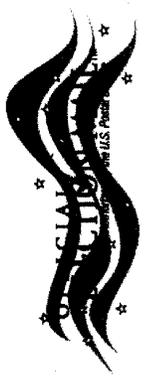


(Perforated - tear off on this line before mailing)  
(Perforado - Separe en esta línea antes de echar al correo)

FROM: \_\_\_\_\_  
Name

\_\_\_\_\_  
Address

\_\_\_\_\_  
City State Zip



AFFIX FIRST CLASS  
POSTAGE  
(PEGUE SELLO  
DE CORREO DE  
PRIMERA CLASE)



511



TO: EARLY VOTING CLERK

\_\_\_\_\_  
Address

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City State Zip

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