VOTING RIGHTS ACT: EVIDENCE OF CONTINUED NEED

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

MARCH 8, 2006

Serial No. 109–103

Volume I

Printed for the use of the Committee on the Judiciary

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VOTING RIGHTS ACT: EVIDENCE OF CONTINUED NEED

WEDNESDAY, MARCH 8, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 4:32 p.m., in Room 2141, Rayburn House Office Building, the Honorable Steve Chabot (Chairman of the Subcommittee) presiding.

Mr. CHABOT. The Committee will come to order. I'm Steve Chabot, the Chairman of the Subcommittee on the Constitution. I want to welcome everyone here this afternoon. I also want to apologize for starting a half-hour after the scheduled time. This Committee prides itself in starting almost exactly on time, or very close thereto. Unfortunately, we had a series of votes on the floor of the House and had to make those votes, so we apologize for keeping everyone waiting a little bit longer.

I'd like to take a moment before we start today to recognize that yesterday was the 41st anniversary of "Bloody Sunday." It was on March 7, 1965, that many of our citizens shed blood to ensure that the most sacred and fundamental right in this country, the right to vote, was extended to all citizens. Colleagues such as John Lewis, who I believe will be joining us here shortly, stood up to injustice and forced this country to acknowledge that not all of its citizens were afforded the full rights of citizenship.

The results of their efforts are reflected in the act that we are discussing today, the Voting Rights Act. If not for the courage and conviction of these individuals, we would not be holding this hearing today, so I want to commend them for their years of commitment to the civil rights movement in this country, and particularly John Lewis, although there are many others, as well, but he, I believe, will be joining us here shortly.

I'd also like to thank everyone else for joining us here this afternoon. This is the Subcommittee on the Constitution, as I mentioned before, and this afternoon, the Subcommittee will be holding its tenth hearing examining the Voting Rights Act of 1965 and the temporary provisions that are to expire. They're set to expire in 2007 unless we reauthorize by Congress, which I think most of us anticipate will occur.

Last fall, the Subcommittee examined each of the expiring provisions in great detail. This afternoon, we pick up where we left off by examining the evidence of continued discrimination against racial and language minority citizens since 1982 that have been com-

piled by a number of non-governmental organizations who will be testifying here this afternoon.

I'd like to take a brief moment to thank these organizations for the time and effort that they have put into completing these reports and in making sure that this Committee and Congress has before it a complete and accurate record of discrimination over the last 25 years, which was the last time that the Voting Rights Act was reauthorized to any considerable extent.

The hearing this afternoon is an important one as the Committee continues to review and develop its own record for reauthorizing the temporary provisions.

In 1966, the Supreme Court in *South Carolina v. Katzenbach* upheld the constitutionality of the extraordinary measures taken by Congress to end the Nation's sad history of discrimination in voting because of the record it had established. Recognizing that the temporary provisions, quote, "may have been an uncommon exercise of Congressional power, the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

In continuing to reauthorize the temporary provisions, Congress, on four separate occasions, examined the extent to which discrimination continued to exist by analyzing information, such as enforcement statistics, minority voter registration rates, minority voter turnout, and litigation pursued to protect minority voting rights. Federal agencies, such as the United States Commission on Civil Rights, were instrumental in investigating, analyzing, and reporting back to Congress on the state of minority voting during each consideration. Each time, Congress concluded, based upon the evidence presented, that the exceptional conditions which existed in 1966 continued to exist in 1970, 1975, 1982, and in 1992, when it was last reauthorized.

This afternoon, the Committee continues to examine whether the exceptional conditions warranting the extension of the temporary provisions continue to exist in 2006. As in preceding years, we will look for assistance. A number of non-government organizations, including those before us today, have thoroughly investigated, analyzed, and reported on the state of minority voting in those jurisdictions covered by the Voting Rights Act since 1982. These reports play a crucial role in giving Congress a first-hand account of the continued efforts to discriminate against minority citizens in voting. The evidence contained in the reports will greatly assist this Committee and Congress in fulfilling its duties to determine whether the exceptional conditions still exist.

At this time, I would ask for unanimous consent that these reports be recognized as official reports to Congress so that the reports are given the appropriate weight in any future consideration of the Voting Rights Act. Without objection, so noted.

And I want to thank again the witnesses for being here this afternoon and for their testimony. I would yield back the balance of my time and would recognize the gentleman from New York, Mr. Nadler, for the purpose of making an opening statement.

Mr. NADLER. Thank you, Mr. Chairman. Mr. Chairman, I want to thank you and Chairman Sensenbrenner for continuing this Subcommittee's careful review of the Voting Rights Act, its record

since the last reauthorization, and furthering the effort to ensure that any reauthorization and any modifications will be based on the facts and the documented need, that is, the documented need for any modifications. That careful fact finding will enable this Committee and this Congress to craft appropriate legislation. Any remedies in the reauthorizing act must be based on the actual documented need and be appropriately tailored to that need.

The Supreme Court has made clear how we must go about reviewing the act. I believe this Committee has made a good start in fulfilling its obligation in the preparation of legislation that will be upheld, and I hope correctly applied by the Justice Department and by the United States Supreme Court.

Our witnesses today are here to present important studies that are the product of extensive fact finding hearings and the experience of many talented individuals who have been deeply involved in protecting the right to vote, to cast a meaningful vote, and to have that vote counted. Your reports, that is the reports the witnesses are presenting to us today, will substantially aid in Congress' fact finding work and will inform our efforts to craft legislation appropriate to the needs and circumstances of the present day.

The right to vote is the foundation of the basis of all other rights. We have too much experience as a Nation with the terrible and destructive legacies of disenfranchisement. Whether for reasons of bigotry or simply to protect political power, no American should be robbed of the right to cast a meaningful and effective vote.

Mr. Chairman, I join you in welcoming our witnesses and I look forward to their testimony.

Mr. CHABOT. Thank you very much. The gentleman's time has expired.

The gentleman from Michigan, the distinguished gentleman who is the Ranking Member of the full Judiciary Committee, Mr. Conyers, is recognized for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman. I hope that I won't take that much time.

You know, it occurs to me as I review this great amount of study and preparation that has gone into this, and I am looking now at "Protecting Minority Voters: The Voting Rights Act At Work, 1982-2005," may I suggest that one of our hearings shortly should be on how we deal with the voting in the wake of Katrina and the hurricanes, because without that, we are doing some great history making here, ladies and gentlemen, but we are overlooking an incredibly challenging problem that apparently doesn't compare to the situation in December when our country provided Iraqi immigrants in America the opportunity to vote in Iraq's elections. We provided satellite polling places across the United States where they could vote just the same as if they were in Baghdad. Is it asking too much that we try to extend the same courtesy to our own citizens that suffered devastating losses and were dispersed across the country following Hurricane Katrina? We cannot leave these hearings without examining what we are doing in the immediate present.

What is happening in New Orleans is that special elections are scheduled to be held on April the 22nd, and apparently have been planned with no notice that the Voting Rights Act of 1965 applies

to the covered State of Louisiana. And so according to section 5 of the Voting Rights Act, any proposed changes to voting dates or precinct locations must be precleared by the Department of Justice, and this so far has not yet happened. In fact, 300 of the 442 precincts are unavailable for voting because of the hurricane damage and most of these are in African-American neighborhoods.

Yet the State has pushed for early elections on April the 22nd when suitable conditions apparently in no way can exist for free and fair elections. Voter confusion and disenfranchisement is a clear consequence of the April 22 New Orleans planned municipal elections. The sad fact is that the State of Louisiana is apparently about to conduct an illegal election.

When we passed legislation addressing the possibility, for example, that a terrorist attack on the United States Congress, as unthinkable as that is, could require special elections to reconstitute Congress, even those remarkable circumstances, it was held that the Voting Rights Act was inviolable. There is no circumstance for which the Voting Rights Act is too cumbersome to uphold and I hope that this Committee and our witnesses who have worked far beyond their preparation for this hearing will help us figure a way out of this very current dilemma, and I thank the Chairman for this time.

Mr. CHABOT. I thank the gentleman. I would just note that I would hope that the State and city would recognize their obligations under section 5 of the Voting Rights Act, and if not and if individuals are concerned that they have not done that, then it would be the Justice Department's responsibility, and I would hope and trust that the Justice Department, if there is something, a violation of the Voting Rights Act found, then they would use their enforcement and authority to take appropriate action, whether that would be enjoining the election or putting it off to another date or whatever would be the appropriate thing to do, but it would initially be up to the local State and city officials to comply with the Voting Rights Act, and if not, then it would be up to the Justice Department to act appropriately. But I thank the gentleman for raising the issue.

Mr. NADLER. Mr. Chairman?

Mr. CHABOT. Yes, the gentleman from New York.

Mr. NADLER. Mr. Chairman, since the Justice Department in some recent cases has not shown attendant solicitude for the Voting Rights Act and has overruled their own professional staff, might there be something this Committee could do? I mean, I've just read the letter of a former colleague of ours, now a State Senator in Louisiana, Mr. Cleo Fields, who makes a very, very strong prima facie case that this election is being conducted in clear violation of section 5 and probably section 2 of the Voting Rights Act and I suggest that this Committee might want to take a hard look at that and maybe prod the Justice Department, certainly before the date of this election, which is scheduled for April 22.

Mr. CHABOT. Okay. I would thank the gentleman for raising that. I would also——

Mr. CONYERS. Mr. Chairman?

Mr. CHABOT. Yes, Mr. Conyers?

Mr. CONYERS. I think your point is well taken, but it is clear to me that they're already in violation, and it is also clear to me that the Department of Justice hasn't said a word about this. So I am—my faith in waiting for them to come to and decide something, it seems to me that, ironically, the Committee that is considering extending the Voter Rights Act in certain places may have the additional responsibility, as you have indicated, to examine what is actually going on here. I think a hearing of that sort, I would like to discuss with you further.

Mr. CHABOT. Thank you. I would be happy to do that. I want to thank the gentleman for calling me a couple hours ago and letting me know that this was an issue and giving me a copy of Reverend Jackson's letter and this issue, so we want to—thank you for letting us know about this. I would hope that the Justice Department is reviewing this as we speak. I don't know for a fact that they are. But I would be pleased to follow up with you and also inform the Chairman of the full Committee, Mr. Sensenbrenner, also of the situation. I would hope this is one where we could work together if there is action that needs to be taken. Thank you very much.

The gentleman from Virginia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT OF VIRGINIA. Thank you, Mr. Chairman. Mr. Chairman, in the past years, Congress has recognized the tenacious grip of discrimination on voting, and over the years, we've continued to reauthorize several crucial sections of the Voting Rights Act set to expire in 2007, including section 5, protecting voters by requiring that States with a documented history of discrimination in voting practices submit planned changes of their election laws and procedures to Federal officials or judges for prior approval. Section 203 provides important tools to ensure fundamental fairness in voting process for language minority groups whose proficiency in English has been limited. And sections 6 through 9 give the U.S. Attorney General the authority to send Federal observers to monitor elections.

Since the initial passage of the Voting Rights Act of 1965, Congress has relied on an extensive record of discrimination in voting to justify the need for the remedies imposed by these expiring provisions.

Now, the Supreme Court has cited the Congressional record of the Voting Rights Act as a model in recent cases where it actually struck down other civil rights laws after finding that Congress had not established a record of discrimination to support its remedial action. These decisions have made clear that reauthorization of expiring provisions of the Voting Rights Act must be supported by a record showing discrimination in voting since its last reauthorization in order to survive a constitutional challenge.

So in October of last year, we began the task of building that record to justify the ongoing need for these provisions. It's my hope that through these hearings we've conducted here in the Subcommittee, as well as field hearings conducted by many of the groups represented here today, it is my hope that we have done just that, build a record to justify the need to reauthorize the expiring provisions.

Mr. Chairman, I think it's appropriate to recognize the diligent work of those organizations. The information they've gathered will be essential to our deliberations and the work that they did was not easy. Many of the hearings were held at points all over the country, hearing hundreds of witnesses, and they will be providing—they have provided our Committee with the benefits of all that good work, and that good work will be part, as I indicated, of our deliberations.

At a time when America has staked much of its international reputation on the need to spread democracy around the world, we must ensure its vitality here at home, and so, Mr. Chairman, I thank you for convening the hearing and look forward to the testimony of our witnesses. I yield back.

Mr. CHABOT. Thank you very much. The gentleman's time has expired.

The gentleman from North Carolina, Mr. Watt, is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. Let me, if I can, deviate just a second from my prepared comments just to join in expressing my concern about the issue that Mr. Conyers has raised. We should recognize that the potential exists for the largest disenfranchisement of people since the passage of the Voting Rights Act. That potential is there if some steps are not taken to assure the voting rights of people in the Gulf area, not only Louisiana but throughout the Gulf.

I do want to assure Mr. Conyers that we met today about that as the Congressional Black Caucus and are planning to meet with former Representative Cleo Fields at our next Wednesday meeting to deal with that in a more aggressive way, so I just wanted to kind of set him somewhat at ease, although there's plenty of work to be done before that issue can be resolved.

On the Voting Rights Act for which we are here to have a hearing today, I want to start simply by thanking Chairman Chabot and Ranking Member Nadler for the whole series of hearings. This is the tenth hearing that we've had on this and it is this Subcommittee that has really done the grunt work of building the record for the full Judiciary Committee as a context for extension of the Voting Rights Act and this provision. And I want to express my thanks to Chairman Sensenbrenner and Ranking Member Conyers for ensuring that the time necessary for us to schedule and conduct these important hearings has been made available.

It's also fitting, Mr. Chairman, that as you noted, that this hearing comes 1 day after the 41st anniversary of Bloody Sunday, a day that our colleague, Mr. Lewis—who may show up here but I got an e-mail from him just a few minutes ago saying that he has been held up, we still hope he will get here—he will certainly remember that day because he was there on that bloody Sunday. On that Sunday in 1965, some 600 civil rights marchers headed out of Selma, Alabama, on U.S. Route 80 toward the State capital in Montgomery. They made it about six blocks to the Edmund Pettus Bridge when they were met by State and local law enforcement officers who attacked them with billy clubs and tear gas.

Two days later, Martin Luther King, Jr., defiantly led a symbolic march back to the Edmund Pettus Bridge, but it was two addi-

tional weeks before the civil rights leaders launched a full-scale march from Selma to Montgomery on Sunday, March 21. That march began with about 3,200 marchers. By the time they reached the capital 4 days later, they were 25,000 strong. Less than 5 months later, President Lyndon Johnson signed the original Voting Rights Act of 1965.

Mr. Chairman, I believe this history is particularly relevant to our hearing today because today we have before us a bipartisan panel of civil rights leaders whose work has produced a body of evidence from the field, a body of evidence which, like Bloody Sunday, provides a factual predicate for the continued need for the protections afforded by the Voting Rights Act.

The work of the National Commission on the Voting Rights Act, co-Chaired by former Congressman Charles Mathias and former Attorney General Bill Lann Lee, who is here with us today, gives voice to the stories of over 100 witnesses from across the country who continue to confront obstacles to voting. The Leadership Council on Civil Rights, which has been on the forefront of fighting discrimination for decades, has done extensive research on the implementation and effect of the Voting Rights Act in several States covered by its provisions. And the ACLU, with its impressive voting rights docket, has assembled examples from its 200-plus cases of discriminatory techniques and tactics that have deliberately or inadvertently undermined the effectiveness of citizens from various racial and language minority groups to cast their votes, have that vote counted, and have that vote count.

Mr. CHABOT. The gentleman's time has expired. Would the gentleman like some additional time?

Mr. WATT. Give me one additional minute.

Mr. CHABOT. The gentleman is granted an additional minute.

Mr. WATT. But the news isn't all bad. Days like March 7, 1965, are truly behind us, we hope, at least, that there has been a tremendous amount of progress as a direct result of the Voting Rights Act. Voter registration of racial and language minorities has increased in some of the covered jurisdictions. There have been inroads against racially-polarized voting.

We fear, however, that the sacrifices of John Lewis, who is the human face of all American citizens represented in the stories we will hear about today, will be for naught if we celebrate our successes too quickly or too completely by ending the protections of the Voting Rights Act prematurely and by not asking to restore and strengthen them.

Speaking about the right to vote in 1965, President Lyndon Johnson said to Congress, quote, "Many of the issues of civil rights are very complex and most difficult, but about this there can and should be no argument. Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to ensure that right."

I would dare to say that were this 1965, President Bush would be making much the same statement, and he has, in fact, reaffirmed and made that statement with respect to Iraq and other countries around the world and we need to recognize it right here on our own shores in the United States of America.

This tenth hearing, Mr. Chairman, I think may be the most important one because we really can't do this work by ourselves in this Committee and these organizations have conducted hearings throughout our country to document that there is continuing discrimination, intentional, sometimes inadvertent, that is preventing the full exercise of the right to vote in our country, and against that predicate, we need to reauthorize and strengthen and renew the Voting Rights Act.

I yield back and thank the gentleman for the additional time.

Mr. CHABOT. Thank you. The gentleman's time has expired.

We have also been joined by three of our colleagues who are not actually Members of this Subcommittee, but two of the three of whom are Members of the full Judiciary Committee, Mr. Van Hollen of Maryland, Ms. Sánchez of California, and Mr. Scott of Georgia. The rules of the Committee are that Members can be seated up here, but not actually participate. However, because of the importance of this hearing, what we have been doing in the previous hearings was to give each of the Members 5 minutes—I apologize for that. Mr. Van Hollen, you are a Member of this Subcommittee. I apologize. I stand corrected. The gentleman is recognized for 5 minutes.

Mr. VAN HOLLEN. Mr. Chairman, if I could defer first to Ms. Sánchez, who was here before me.

Mr. CHABOT. What we have been doing is giving 5 minutes to the non-Members of the Committee and allowing them to either use it for the purpose of making an opening statement or to ask questions at their discretion, whichever one they wanted to use it for, so I don't know that she wants to use it for an opening statement or not.

Ms. SÁNCHEZ. I would.

Mr. CHABOT. She would. Okay. Then the gentlelady is recognized for 5 minutes, and again, I apologize to the gentleman from Maryland.

Ms. SÁNCHEZ. Thank you, Mr. Chairman, and to the gentleman from Maryland for yielding. I do have an opening statement. It is rather brief, so it won't take up the full 5 minutes.

But I want to thank the Chairman and Ranking Member now for convening this hearing on the evidence of continued need of the Voting Rights Act, and I also want to thank the witnesses and their respective organizations for the extensive reports that they have prepared on the importance of reauthorizing the Voting Rights Act and the need for preserving the safeguards therein.

In a recent article, Judiciary Committee Chairman Sensenbrenner was quoted as having said during the 1982 VRA reauthorization hearings that, quote, "the testimony amply demonstrated that the ingenuity of the human mind is limitless when it comes to devising ways to rig election systems to favor certain candidates or points of view," and I believe the Chairman's comments would be equally appropriate today.

The need to reauthorize the Voting Rights Act, especially the language assistance provisions in section 203 and the preclearance provisions in section 5, is as great today as it was when Chairman Sensenbrenner made his remarks back in 1982.

The testimony we heard during the VRA hearings last fall and the conclusions found by the Lawyers' Committee for Civil Rights Under Law and the American Civil Liberties Union's reports provide undeniable evidence that the Voting Rights Act is still required to prevent voter suppression and to ensure that everyone has an equal opportunity to cast their vote.

As a Member of Congress representing a Congressional district with a substantial Latino and Asian population, I have firsthand knowledge of the power of the Voting Rights Act. My district has been covered by section 203 since the year 2000 and I can tell you, the Lawyers' Committee and ACLU reports confirmed what I have been seeing in my precinct for years. The language assistance provisions are still needed to protect many citizens' voting rights. The Lawyers' Committee and ACLU reports also confirm that Latino voters continue to suffer from discriminatory voting obstacles. In fact, as recently as last June, the Department of Justice sued the City of Boston for discouraging Hispanics from voting. Additionally, there are confirmed cases nationwide of election officials in jurisdictions covered by section 203 simply ignoring their legal requirement to provide language assistance, and that's not only wrong, but it's against the law.

I strongly believe that the testimony and reports submitted in favor of reauthorizing the Voting Rights Act are compelling. They prove beyond a doubt that the VRA not only needs to be reauthorized, but strengthened, and I again appreciate Chairman Chabot and Ranking Member Nadler's courtesy in allowing me to join the Constitution Subcommittee today and I will yield back the remainder of my time.

Mr. CHABOT. Thank you. The gentlelady's time has expired.

The gentleman from Maryland is recognized for 5 minutes.

Mr. VAN HOLLEN. I thank you, Mr. Chairman. Let me begin by thanking you, Mr. Chabot and Ranking Member Nadler, for conducting this series of hearings and thank you, all the witnesses for being here today and for the work that you and your organizations have done in compiling the stories and the evidence that I think clearly supports the need to continue and reauthorize the Voting Rights Act and I look forward to hearing your testimony.

My friend and colleague, Mr. Watt, talked about Bloody Sunday and how it led to change the sort of conscience and view of the country and led to the enactment of the Voting Rights Act in August of that year after Bloody Sunday, and I have had the privilege of twice, actually, attending—going on a civil rights pilgrimage with our colleague, Congressman Lewis, and others here on the panel, and I think anyone who takes that trip both recognizes how far we've come as a Nation, but also as you listen to the people and stories, recognizes the need to remain vigilant and the need to make sure that we continue to protect the voting rights of every person in this country.

I think the stories that you're bringing to the Committee today are going to be powerful testimony to the fact that the need remains to make sure we protect the very important rights, the rights at the foundation of our democracy. So I thank you for the work that you've done and I look forward to your testimony.

Thank you, Mr. Chairman.

Mr. CHABOT. Thank you. The gentleman yields back. Mr. Scott, do you want to use your time now or as questioning?

Mr. SCOTT OF GEORGIA. If I may, Mr. Chairman, I'd like to use 2 minutes now and save 3 minutes for questions, if I could.

Mr. CHABOT. Fair enough. The gentleman is recognized for 2 minutes.

Mr. SCOTT OF GEORGIA. First, thank you, Mr. Chabot, and I want to thank Ranking Member Nadler and my good friend, the senior Member of this Committee, Mr. Conyers, for your courtesies in having me be a part of this.

I am so much interested in this because Georgia, my home State, is at the epicenter of this battle for the renewal of the Voting Rights Act on a number of fronts. First of all, since the last time we revisited this act in 1982, Georgia has led the Nation with 95 cases, 95 cases on the preclearance alone, and 142 cases of the voting rights cases altogether. That averages out over the months period to one every month, one case every month of violations of the Voting Rights Act for the State of Georgia.

The other reason is, of course, right now, Georgia is in battle with the voter I.D., which is the poster child for why we need the Voting Rights Act. As you recall, that act was ruled discriminatory. It came up here. It was gone through the process. The Justice Department attorneys ruled, rightly so, that it should never have been precleared. That should have been the end of the deal. But, oh no, political pressures came to bear. It said, too bad for the Voting Rights Act, violated it as if it didn't even exist, and they went on and cleared that anyway. And only by the grace of one judge, Judge Murphy in Georgia, were we saved.

Another reason is *Ashcroft v. Georgia.* That law, again from Georgia, is the one law that has minimized and tried to weaken the Voting Rights Act, and unfortunately, the leadership in this Congress at this point to dismantle this act comes from my fellow Georgian, from Georgia, my fellow Congressman from Georgia, Mr. Westmoreland.

Georgia is vitally interested in this. We are at the epicenter of it. We want to make sure that this act is not only renewed, but it is strengthened, and I appreciate the gentleman for allowing me an opportunity to be a part of this Committee to help see that happen. Thank you, sir.

Mr. CHABOT. Thank you very much. The gentleman's time has expired.

Without objection, all Members will have 5 legislative days to submit additional materials for the hearing record, and I'd now like to introduce our very distinguished panel here this afternoon.

Our first witness will be the Honorable Bill Lann Lee, Chair of the National Commission on the Voting Rights Act and the Former Assistant Attorney General of the Civil Rights Division of the Department of Justice under President Bill Clinton. Mr. Lee's tenure in the Department of Justice followed 23 years as a civil rights attorney for the NAACP Legal Defense and Educational Fund, the Center for Law and the Public Interest, and the Asian-American Legal Defense and Education Fund, and we welcome you here this afternoon, Mr. Lee.

Our second witness will be Ms. Nadine Strossen. Ms. Strossen is a professor of law at New York Law School, and since 1991 has served as President of the American Civil Liberties Union. She is the first woman to head this organization. The National Law Journal has twice named Professor Strossen one of the 100 most influential lawyers in America, and in 1999, Ladies' Home Journal included her in America's 100 most important women. We welcome you here this afternoon, Ms. Strossen.

Our third witness will be Mr. Wade Henderson. Mr. Henderson is the Executive Director of the Leadership Conference on Civil Rights and counsel to the Leadership Conference on Civil Rights Education Fund. Prior to his role with the Leadership Conference, Mr. Henderson was the Washington Bureau Director of the National Association for the Advancement of Colored People, NAACP. He was also the Associate Director of the Washington National Office of the American Civil Liberties Union. We welcome you here this afternoon, Mr. Henderson.

In addition, Mr. Henderson served as the Joseph L. Rauh, Jr., Professor of Public Interest Law at the David A. Clark School of Law at the University of the District of Columbia. He is the recipient of the 2003 Congressional Black Caucus Chairs Award and the District of Columbia's Bar's William J. Brennan Award for 2002, as well as many other awards, and again, we welcome you here.

Our fourth and final witness is the Honorable Joe Rogers. In 2003, Lieutenant Governor Rogers completed his term as the Lieutenant Governor of Colorado, where he held the distinction of serving as America's youngest Lieutenant Governor and only the fourth African-American in U.S. history ever elected as the State's number two executive. Now a practicing attorney in Colorado, he presently serves as a Commission on the National Commissioner on the Voting Rights Act.

In 2001, Lieutenant Governor Rogers received the prestigious Trumpet Award from Time-Warner's Turner Broadcasting System. The Trumpet Award is one of the Nation's highest honors bestowed in recognition of African-Americans who have made significant contributions and enhance the quality of life for all Americans. Joe Rogers has been profiled by the *New York Times*, *The Washington Post*, the *Washington Times*, and *Business Week*, *Ebony*, *Jet*, and *Teacher* magazines. *Ebony* called him a political trailblazer. Lieutenant Governor Rogers was present during our initial foray into the Voting Rights Act and it is fitting that he is back before us today closing our hearings on the Voting Rights Act. We welcome you back here, Lieutenant Governor Rogers.

For those who may not have testified before this Committee, let me explain our lighting system here. We have what is called the 5-minute rule, and everyone, including Members, are limited to 5 minutes. The green light will be on for 4 minutes. The yellow light comes on in the final minute. When you see the red light come on, that means that your time has expired and we'd appreciate it if you'd warp up as close to that as possible. We usually give a little flexibility, but not too much, so please try to keep within that as much as possible.

It's also the practice of this Committee to swear in all witnesses appearing before it, so if you would, we'd ask each of you to please stand and raise your right hand.

Do you swear that in the testimony that you're about to give, you will give the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. LEE. I do.

Ms. STROSSEN. I do.

Mr. HENDERSON. I do.

Mr. ROGERS. I do.

Mr. CHABOT. All witnesses have indicated in the affirmative and you can be seated.

We will now begin with our first witness, Mr. Lee, and you're recognized for 5 minutes.

TESTIMONY OF THE HONORABLE BILL LANN LEE, CHAIR, NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, AND FORMER ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. LEE. Good afternoon, Chairman Chabot and Members of the House Committee on the Constitution. I am here today in my capacity as Chairman of the National Commission on the Voting Rights Act.

Earlier, Mr. Chairman, you indicated that my fellow Commissioner, Mr. Rogers, attended the first meeting of the Subcommittee. At that time, he pointed out that the Commission's then-forthcoming report would be prepared, and so here we are today after the report has been prepared. The report is entitled, "Protecting Minority Voters: The Voting Rights Act At Work, 1982-2005," and there is also a supplement to the report, "Highlights of Hearings of the National Commission on the Voting Rights Act, 2005." The report and the supplement can be found on the Commission's website, www.votingrightsact.org. Pursuant to the written request of Chairman Sensenbrenner, the National Commission has provided the Judiciary Committee with its entire record of several thousand pages.

The National Commission was created by the Lawyers' Committee for Civil Rights Under Law, as several of the Members have noted. The National Commission is composed of a politically and ethnically diverse group of men and women, including former elected and appointed public officials, scholars, lawyers, and leaders. Along with Commissioner Rogers and myself, the Commissioners include Honorary Chair Charles Mathias, John Buchanan, Chandler Davidson, Dolores Huerta, Elsie Meeks, and Charles Ogletree.

The National Commission's charge was to evaluate discrimination in voting since Congress reauthorized the temporary provisions of the Voting Rights Act of 1982. The Chairman has described the temporary provisions and I'm not going to say too much about them other than the three principal ones have to do with Federal oversight of the election process changes, minority language assistance to citizens whose primary language is not English, and the Attorney General's ability to send observers and examiners to monitor elections. These provisions only apply to those areas of the country where Congress previously determined they were needed.

The National Commission obtained all the relevant qualitative and quantitative data it could on discrimination in voting, including data from the United States Department of Justice, Federal court cases and dockets, information from civil rights groups, voting rights lawyers, academics, and electoral experts who provided counsel and made their files available. Moreover, the National Commission, as has been pointed out, conducted ten field hearings throughout the country and heard from over 100 witnesses with experience in elections or voting rights issues, including, notably, local election administrators. The National Commission's report reflects the analysis of all that evidence.

Although this effort reflected the input of the entire Commission, I would be remiss in not failing to acknowledge that Commissioner Chandler Davidson is perhaps the Nation's most preeminent social scientist in the field of voting rights and he worked full time on this report for more than a year.

The report, in sum, presents evidence that demonstrates, unfortunately, that the persistence, degree, geographic breadth, and methods of voting discrimination are substantial and ongoing. Instances of the kinds of voting discrimination that Congress intended to eliminating by enacting and reauthorizing the Voting Rights Act have held steady. The temporary provisions of the act, in fact, have prevented and remedied much discrimination. They continue to do so to this day.

I will share some of the numerical findings set forth in the report and the report's tables, maps, and charts. My colleague, Commissioner Rogers, has the better job of explaining some of the anecdotal evidence that gives some life to the statistics I am about to embark on and he will testify last.

Regarding section 5 enforcement since 1982, which is the last time the Congress has acted, the District Court of the District of Columbia and the Justice Department together have declined to preclear over 1,100 voting changes contained in more than 650 section 5 submissions since 1982. In addition, as a result of the correspondence between the Justice Department and jurisdictions after submission, jurisdictions have withdrawn 200 submissions. These withdrawals have the same functional effect as an objection blocking a suspect voting change.

In addition, the act allows either the Justice Department or private citizens to bring section 5 enforcement actions to force officials to submit changes they have refused to submit. Our research shows that there have been a substantial number since 1982, numbering 105, in eight of the nine totally covered States plus North Carolina.

The Department of Justice has also sent observers to monitor elections in more than 600 jurisdictions since 1982. Two-thirds of all post-1982 observer coverages occurred in five States covered entirely by section 5—Louisiana, Alabama, Mississippi, Georgia, and South Carolina. Between 300 and 600 observers were sent out each year between 1984 and the year 2000.

Regarding language minorities, we note that there remains an enormous gap in political participation. According to the Census, in the 2000 election, 45 percent of Hispanic voting age citizens and 43 percent of Asian voting age citizens participated, as compared to 62

percent of non-Hispanic voting age citizens, and the number for African-Americans is 58 percent.

Section 2 is a permanent feature of the act that permits the United States or individuals to file suits alleging that a voting practice has a discriminatory purpose or effect.

Mr. CHABOT. Mr. Lee, if I could interrupt here, are you about at a point where you can wrap up, because your full statement will be admitted for the record.

Mr. LEE. Well, if——

Mr. CHABOT. And we can get into it with questions to follow up in addition, as well.

Mr. LEE. I can finish up in about a minute.

Mr. CHABOT. Okay. That's fine.

Mr. LEE. Section 2 is important because it provides a check on the Justice Department statistics, and what we found was that in eight States fully covered by section 5 and North Carolina, there were fully 635 cases concerning election changes in 825 counties.

The last point I would like to make has to do with racially-polarized voting. That is a phenomenon in which most voters, White voters, vote for different candidates than minority voters. That is a pattern that continues to this day, and those of us who have studied the Voting Rights Act, we were surprised to see that the persistence of racially-polarized voting. I have the numbers on that. I can provide it to you later.

The bottom line is that, unhappily, 40 years after the Voting Rights Act was enacted, we still have the persistence of the voting rights discrimination that this Committee—of the kind that this Committee analyzed and has found to be problematic and to constitute the exceptional circumstances and conditions that the Chairman referred to earlier.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Lee follows:]

PREPARED STATEMENT OF THE HONORABLE BILL LANN LEE

Testimony of Bill Lann Lee
Before the Subcommittee on the Constitution
United States House of Representatives
March 8, 2006

Good afternoon, Chairman Chabot and members of the House Subcommittee on the Constitution. I am Bill Lann Lee, a partner at the law firm of Lieff, Cabraser, Heimann & Bernstein, LLP and former Assistant Attorney General for Civil Rights. I am here today in my capacity as Chairman of the National Commission on the Voting Rights Act. On October 18, 2005, Commissioner Joe Rogers informed this Subcommittee in its first oversight hearing on the Voting Rights Act, about the National Commission's then-forthcoming Report.

Today, the Subcommittee has invited Commissioner Rogers and me to testify about the National Commission's Report, "*Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005,*" and the Supplement to the Report "*Highlights of Hearings of the National Commission on the Voting Rights Act, 2005.*" The Report and Supplement can be found on the Commission's website, www.votingrightsact.org. Pursuant to the written request of Chairman Sensenbrenner, the National Commission has provided to the Judiciary Committee its entire record of several thousand pages.

The National Commission was created by the Lawyers' Committee for Civil Rights Under Law, in conjunction with the civil rights community. The National Commission is composed of a politically and ethnically diverse group of men and women, including former elected and appointed public officials, scholars, lawyers, and leaders. Along with Commissioner Rogers and I, the Commissioners are Honorary Chair Charles Mathias, John Buchanan, Chandler Davidson, Dolores Huerta, Elsie Meeks, and Charles Ogletree.

The National Commission's charge was to evaluate discrimination in voting since Congress reauthorized the temporary provisions of the Voting Rights Act in 1982. These temporary provisions, which will expire on August 6, 2007, unless renewed, provide for federal oversight of election-process changes, contained in Section 5; minority language assistance to citizens whose primary language is not English, contained in Sections 4(f)(4) and 203; and authority for the Attorney General to send observers and examiners to monitor elections, contained in portions of Sections 6-9 and 13. These provisions only apply to those areas of the country where Congress previously determined they were needed.

The National Commission obtained all the relevant qualitative and quantitative data it could on discrimination in voting, including data from the U.S. Department of Justice; federal court cases and dockets; and information from numerous civil rights organizations, voting rights lawyers, academics and electoral experts who provided counsel or made their files available. Moreover, the National Commission conducted ten hearings throughout the country and heard from more than 100 witnesses with experience in elections or voting rights issues, including local election administrators. The National Commission's report reflects the analysis of all that evidence. Although this effort reflected the input of the entire Commission, I wish to acknowledge that Commissioner Davidson, perhaps the preeminent social scientist in the field of voting rights, worked fulltime for more than a year on this effort.

The evidence demonstrates unfortunately that the persistence, degree, geographic breadth, and methods of voting discrimination are substantial and ongoing. The voting discrimination that Congress intended to eliminate by enacting and reauthorizing the Voting Rights Act has held steady. The temporary provisions of the Act, in fact, have prevented and remedied such discrimination. They continue to do so to this day.

I will share some of the numerical findings set forth in the Report and the Report's tables, maps, and charts.

Regarding Section 5 enforcement since 1982, the District Court of the District of Columbia, and the Justice Department, together, refused to preclear over 1,100 voting changes contained in more than 650 Section 5 submissions since 1982. In addition, as a result of the correspondence between the Justice Department and a jurisdiction after a submission was made by that jurisdiction, more than 200 jurisdictions withdrew proposed changes before the Department made its determination to preclear or object. These withdrawals have the same functional effect as an objection blocking a suspect voting change. In addition, the Act allows either the Justice Department or private citizens to bring Section 5 enforcement actions to force officials to submit changes they have failed to submit. Our research revealed that in eight of the nine totally covered States, plus North Carolina, there were no less than 105 successful enforcement actions filed since 1982.

The Department of Justice has sent observers to monitor elections in more than 600 jurisdictions since 1982. Two-thirds of all post-1982 observer coverages occurred in five states, covered entirely by Section 5 since 1965: Louisiana, Alabama, Mississippi, Georgia and South Carolina. Between 300 and 600 observers were sent out each year between 1984 and 2000.

Regarding language minorities, we note that there remains an enormous gap in political participation. According to the Census, in the 2000 election, 45 percent of Hispanic voting age citizens and 43 percent of Asian voting age citizens participated, as compared to 62 percent of non-Hispanic white voting age citizens.

Section 2 is a permanent feature of the Act that permits the United States or affected voters to file suits alleging that a voting practice has a discriminatory purpose or result. By

tabulating the number of Section 2 suits resolved favorably to minority voters, it is possible to gain a better understanding of how common and how geographically widespread is minority vote discrimination. The Commission's analysis of both reported and unreported successful Section 2 cases in nine states alone, eight states fully covered by Section 5 and North Carolina, found 635 successful cases affecting election structures or procedures in 825 counties.

In many areas of the country, voting continues to be racially polarized – most whites vote for different candidates than minority voters. This overwhelming pattern means that minority voters usually cannot elect candidates of choice unless they are a majority or near majority of the electorate. Because of racially polarized voting, a new voting procedure that harms minority voters increases the likelihood that minority preferred candidates will lose. The Commission found 23 cases in 16 states since 1982 where courts found racially polarized voting in statewide redistricting cases. A study by the Voting Rights Initiative at the University of Michigan of reported Section 2 cases found that 91 federal courts found racially polarized voting in jurisdictions nationwide since 1982.

In his testimony, Commissioner Rogers will be providing examples that illustrate the statistics I just provided.

Mr. CHABOT. Ms. Strossen, you are recognized for 5 minutes.

TESTIMONY OF NADINE STROSSEN, PRESIDENT, AMERICAN CIVIL LIBERTIES UNION, AND PROFESSOR OF LAW, NEW YORK LAW SCHOOL

Ms. STROSSEN. Thank you so much, Chairman Chabot, Ranking Member——

Mr. CHABOT. Could you turn that mike on there? And you might want to pull that kind of close, too.

Ms. STROSSEN. I will pull myself closer, as well, and now my time is starting. Thank you, Chairman Chabot, Ranking Member Nadler, and distinguished Members of the Subcommittee. I am pleased to appear before you today to present the key findings of the most recent report by the ACLU's Voting Rights Project, "The Case for Extending and Amending the Voting Rights Act, Voting Rights Litigation, 1982-2006." I am also pleased to present policy recommendations from a second report prepared by our Washington legislative office, "Promises to Keep: The Impact of the Voting Rights Act in 2006," and I understand, Chairman Chabot, that these will be incorporated in the record. I appreciate that.

My brief oral comments will focus on the ACLU's litigation report, the big one. Since 1982, when the Voting Rights Act was last reauthorized, the ACLU's Voting Rights Project has brought or participated in 293 legal cases in 31 States challenging discrimination and failure to comply with Federal and State election laws. These cases clearly demonstrate the need to extend the act's expiring provisions because they extensively document ongoing voting discrimination problems in the covered jurisdictions.

In support of that conclusion, our litigation report prevents evidence substantiating five key findings. I am just going to list them now, and then, time permitting, add a few comments about each one.

First, section 5 has blocked implementation of discriminatory voting changes.

Two, there is a continuing pattern of blocked voting and racial polarization in the covered jurisdictions, as Mr. Lee alluded to.

Third, there is continuing hostility to minority political participation.

Four, there is a continued need for section 5, especially its deterrent effect.

Five, the courts routinely apply section 5 to protect minority voting rights.

So just a little bit of amplification. Section 5 has blocked implementation of discriminatory voting changes. Since 1982, the Department of Justice has filed more than 1,000 objections under section 5. These objections have protected millions of voters in thousands of elections. Our report documents numerous Department of Justice section 5 objections in those jurisdictions where the ACLU has been directly involved in voting rights litigation. Examples include objections to discriminatory State restrictions on registration and voting, discriminatory annexations in many locales, and discriminatory redistricting in many States.

Second, there is a continuing pattern of blocked voting and racial polarization in the covered jurisdictions. While much progress has

been made in minority registration and office holding, the persistence, the sad persistence of racial block voting shows that race remains a dynamic and corrosive factor, particularly in the covered jurisdictions. Our litigation report is replete with findings by courts and also by the Department of Justice of racial block voting in 12 States where the ACLU has filed voting rights cases.

Third, the continuing hostility to minority political participation. Our litigation report also documents that too many elected officials continue to manipulate the law in ways that disadvantage minority voters, just as the record showed in 1982 when Congress last reauthorized section 5. I'd like to simply list a few of the many types of discrimination of this type which are detailed in this extensive report: Discriminatory annexations and deannexations; pairing Black incumbents in redistricting plans; refusing to draw majority minority districts; refusing to appoint Blacks to public office; relocating polling places distant from the Black community; refusing to hold elections following a section 5 objection; failure to provide bilingual ballots and assistance in voting; packing Native American and African-American voters to dilute their influence; and discriminatory voter identification requirements, as Congressman Scott alluded to.

A fourth finding is that there is a continued need for section 5 especially in terms of its deterrent effects. The redistricting that follows each decennial census as well as other evidence clearly demonstrates the deterrent effect of section 5. As the report makes clear, in the absence of section 5, minority voters would become increasingly marginalized during the redistricting process and elected officials would be more inclined to adopt voting changes that disadvantage minority voters.

And our last finding, backed up by much experience, is that the courts are routinely applying section 5 to protect minority voting rights to prevent retrogression and to protect equal rights.

So in conclusion, each time the Voting Rights Act has been renewed, Congress has assessed the extent of current ongoing voting violations in the covered jurisdictions, and each time, Congress has concluded that these provisions must be extended. On every such past occasion, Congress has determined that its earlier attempts to remedy the evil of racial discrimination in voting had failed. Unfortunately, as the ACLU litigation report documents, those serious problems persist to the present day.

Thank you very much.

Mr. CHABOT. Thank you very much. I appreciate it.

[The prepared statement of Ms. Strossen follows:]

PREPARED STATEMENT OF NADINE STROSSEN

Statement of
Nadine Strossen
President, American Civil Liberties Union

Before the
Subcommittee on the Constitution
Committee on the Judiciary
United States House of Representatives

Concerning the
The Voting Rights Act: Evidence of Continued Need
March 8, 2006

Introductory Statement

Chairman Chabot, Ranking Member Nadler and distinguished members of the Subcommittee. I am pleased to appear before you today to present the key findings of the ACLU's latest report, The Case for Extending and Amending the Voting Rights Act. Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union, which provides significant evidence for the need to reauthorize the Voting Rights Act (VRA). We have also released a policy report, Promises to Keep: The Impact of the Voting Rights Act in 2006, which provides policy recommendations for renewing and restoring the VRA's vitality. While my comments will focus primarily on our litigation report, I would like to request that both reports, as well as my written statement, be formally entered into the hearing record.

Forty-one years ago yesterday, on March 7, 1965, more than 500 civil rights marchers were brutally assaulted by state troopers after crossing the Edmund Pettus Bridge in Selma, Alabama, for peacefully protesting the denial of their right to vote. Speaking of that fateful day, Dr. Martin Luther King, Jr. said that President Johnson's support of the Voting Rights Act had

helped transform the violence in Selma into a "shining moment in the conscience of man."[1]

The VRA has been one of the most effective civil rights laws in eliminating discrimination and granting access to the ballot box for minorities. Presidents Johnson, Nixon, Reagan, Ford, and George H.W. Bush have supported the enactment or reauthorization of key parts of the law. Most recently, President George W. Bush stated that "many active citizens struggled hard to convince Congress to pass civil rights legislation that ensured the rights of all – including the right to vote. That victory was a milestone in the history of civil rights. Congress must act to renew the Voting Rights Act of 1965."[2]

The Act has guaranteed millions of minority voters a chance to have their voices heard in federal, state, and local governments across the country. As discussed in our policy report, *Promises to Keep*, these increases in representation translate into vital and tangible benefits such as improved education, healthcare, and economic development for previously underserved communities. Prior to the Act's passage, many minorities had been denied resources and opportunities for many years; their issues were often ignored and discounted. Officials elected because of the equal voting opportunities afforded minority citizens have been more responsive to the needs of minority communities.

The continuing need for the VRA is best exemplified by the 293 legal cases brought, or participated in, by the Voting Rights Project of the American Civil Liberties Union challenging discrimination in voting and the failure to comply with federal and state election laws in 31 states.

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[1] Nick Kotz, JUDGMENT DAYS. LYNDON BAINES JOHNSON, MARTIN LUTHER KING, JR., AND THE LAWS THAT CHANGED AMERICA (Boston: Houghton Mifflin, 2005), p. 324.

[2] President George W. Bush, President Celebrates African American History Month at the White House (Feb. 22, 2006) (transcript available at http://www.whitehouse.gov/news/releases/2006/02/20060222-6.html).

Because these cases were brought - or continued – after the 1982 Voting Rights Act reauthorization, and because they substantively document the problem of ongoing voting discrimination in the covered jurisdictions, they clearly demonstrate the need for extension of the special provisions that are scheduled to expire in 2007: (1) Section 5 preclearance and the formula enumerated in Section 4(b) for determining which jurisdictions are subject to Section 5's provisions;[3] (2) the minority language assistance provisions of Section 203;[4] and (3) the federal observer provisions which deter and document intimidation of minority voters.[5]

The Senate Report that accompanied the 1982 extension of Section 5 warned that without the preclearance requirement, "many of the advances of the past decade could be wiped out overnight with new schemes and devices."[6]

The Case for Extending and Amending the Voting Rights Act

Our litigation report discusses the involvement of the ACLU Voting Rights Project in 293 cases brought in 31 states since June 1982, the date of the last extension of the special provisions of the Voting Rights Act.[7] The states and the number of cases brought were: Alabama (9); Arkansas (2); California (1); Colorado (1); Connecticut (1); Florida (15); Georgia (145); Illinois (1); Kansas (2); Louisiana (4); Maryland (4); Michigan (1); Minnesota (2);

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[3] 42 U.S.C. § 1973c and 42 U.S.C. § 1973b(b)

[4] 42 U.S.C. § 1973aa-1a(c)

[5] 42 U.S.C. § 1973f

[6] S.Rep. No. 97-417, 97th Cong., 2d Sess. 10(1982).

[7] The report discusses only those cases initiated, or participated in, by the ACLU Voting Rights Project, and does not include litigation brought independently by ACLU state affiliates, unless specifically noted. This report also discusses non-litigation interventions engaged in by the ACLU to protect the ability of minority voters to elect representatives of choice.

Mississippi (3); Missouri (2); Montana (6); Nebraska (2); New Jersey (1); New Mexico (1); New York (1); North Carolina (17); Ohio (1); Pennsylvania (1); Rhode Island (2); South Carolina (38); South Dakota (6); Tennessee (3); Texas (3); Virginia (15); Washington (2); and Wyoming (1).

I. Discriminatory Voting Changes Have Been Blocked as a Result of Section 5

The Department of Justice has filed more than 1,000 objections under Section 5 since 1982. These objections protected millions of voters in thousands of elections over the past two decades. A few examples from the cases discussed in this report will suffice to illustrate the continuing importance of Section 5.

The City of Albany, Georgia: 2002-2003

Following the 2000 census, the City of Albany, Georgia, adopted a new redistricting plan for its mayor and commission to replace an existing malapportioned plan, but it was rejected by the Department of Justice under Section 5. The department noted that, while the black population had steadily increased in Ward 4 over the past two decades, subsequent redistricting had decreased the black population "in order to forestall the creation of a majority black district." The letter of objection concluded it was "implicit" that "the proposed plan was designed with the purpose to limit and retrogress the increased black voting strength in Ward 4, as well as in the city as a whole."[8] A subsequent court-ordered plan remedied the vote dilution in Ward 4.[9] But in the absence of Section 5, elections would have gone forward under a plan with "implicit" purposeful discrimination, which could only have been challenged in time-consuming vote

[8] J. Michael Wiggins, Acting Assistant Attorney General, to Al Grieshaber Jr., September 23, 2002.

[9] Wright v. City of Albany, Georgia, 306 F. Supp. 2d 1228 (M.D. Ga. 2003).

dilution litigation under Section 2, where the minority plaintiffs would have borne the burden of proof and expense.

Charleston County, South Carolina: 2003-2004

In 2003, Charleston County, South Carolina enacted legislation adopting the identical election method for the board of trustees of the school district, which had earlier, in a case involving the county council, been found to dilute minority voting strength in violation of Section 2.[10] Under the previous system, school board elections were non-partisan, multi-seat contests decided by plurality vote, which allowed minority voters the opportunity to "bullet vote," or concentrate their votes on one or two candidates and elect them to office. The proposed new partisan system would have effectively eliminated that possibility.

In denying preclearance to the county, the Department of Justice concluded "[t]he 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." The department noted further 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.[11]

Section 5 thus prevented the state from implementing a new and retrogressive voting practice, one which everyone understood was adopted to dilute black voting strength and insure white control of the school board.

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[10] United States v. Charleston County and Moultrie v. Charleston County Council, 316 F. Supp. 2d 268 (D. S.C. 2003), aff'd 365 F.3d 341 (4th Cir. 2004), cert. den'd, 125 S. Ct. 606 (2004).

[11] R. Alexander Acosta, Assistant Attorney General, to C. Havird Jones, Jr., February 26, 2004.

Georgia Redistricting: 1982-1983

A three-judge court in the District of Columbia denied preclearance to Georgia's infamous 1980 congressional redistricting plan finding that it was adopted with "a discriminatory purpose in violation of Section 5."[12] The decision was affirmed by the Supreme Court.[13] Numerous other Section 5 objections are discussed in detail in the ACLU's report.

II. There Is a Continuing Pattern of Racial Bloc Voting in the Covered Jurisdictions

One of the most sobering facts to emerge from this report, as well as from the decisions in other cases, is the continuing presence of racially polarized voting. While much progress has been made in minority registration and office holding, the persistence of racial bloc voting shows that race remains an important factor in the political process, particularly in the covered jurisdictions. Racial bloc voting often occurs when members of the same racial group vote the same way to block minority candidates from being elected. The VRA has been instrumental in giving minority communities fair and responsive representation they would not otherwise have. Decades of experience strongly suggest that in racially polarized environments – common in the jurisdictions covered by the Voting Rights Act – minority communities that do not constitute a majority of the voting district can be more easily disregarded by officeholders who are hostile or indifferent to minority concerns.[14] In contrast, when minority communities are given the opportunity to elect candidates of their choice, those elected officials have been and are more

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[12] Busbee v. Smith, 549 F. Supp. 494, 517 (D. D.C. 1982).

[13] Busbee v. Smith, 549 U.S. 1166 (1983).

[14] *See* Written Testimony of Theodore M. Shaw, President and Director-Counsel of the NAACP Legal Defense and Education Fund, Inc., *Oversight Hearing on the Voting Rights Act: Section 5 Judicial Evolution of the Retrogression Standard Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 15 (Nov. 9, 2005), *available at* http://judiciary.house.gov/media/pdfs/shaw110905.pdf.

likely to be responsive to their constituencies. Indeed, evidence demonstrates that increased black representation has resulted in state legislatures giving greater priority to policy areas found to be important to black elected officials and their constituencies.[15]

Racially Polarized Voting in South Carolina: 1984-2004

In 1992, the three-judge court in Burton v. Sheheen relied upon the stipulation of the parties "that since 1984 there is evidence of racially polarized voting in South Carolina."[16] A subsequent three-judge court in Smith v. Beasley, decided in 1996, found that "[i]n South Carolina, voting has been, and still is, polarized by race. This voting pattern is general throughout the state."[17] In Colleton County Council v. McConnell, decided in 2002, the three-judge court made similar findings: "[v]oting in South Carolina continues to be racially polarized to a very high degree in all regions of the state and in both primary and general elections."[18] In 2004, the court of appeals affirmed the finding of a district court in South Carolina "that voting in Charleston County Council elections is severely and characteristically polarized along racial lines."[19]

Racially Polarized Voting in Indian Country: 1986-2004

In invalidating South Dakota's 2000 legislative redistricting plan for diluting Indian voting strength in the area of the Pine Ridge and Rosebud Sioux Indian Reservations, the U.S.

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[15] *See* Chris T. Owens, *Black Substantive Representation in State Legislatures from 1971-1994*, 86 SOCIAL SCI. 779, 780 (Dec. 2005) (documenting increased funding for both healthcare and welfare spending where the percentage of black state legislators examined increased).

[16] Burton v. Sheheen, 793 F. Supp. 1329, 1357-58 (D. S.C. 1992).

[17] Smith v. Beasley, 946 F. Supp. 1174, 1202 (D.S.C. 1996).

[18] Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 641 (D.S.C. 2002).

[19] Moultrie v. Charleston County Council, 365 F.3d 341, 350 (4th Cir. 2004).

District of South Dakota found "'legally significant' white bloc voting."[20] The court struck down at-large elections in Blaine County, Montana, finding that racially polarized voting "made it impossible for an American Indian to succeed in an at-large election."[21] In invalidating at-large elections in Big Horn County, the court made similar findings that "there is racial bloc voting," and "there is evidence that race is a factor in the minds of voters in making voting decisions."[22]

Racially Polarized Voting in Georgia: 2002

The District Court for the District of Columbia, in a Section 5 preclearance action involving Georgia's legislative redistricting plan, found there were areas of the state where "white voters consistently vote against the preferred candidates of African Americans."[23]

Racially Polarized Voting in Tennessee: 1993-1994

A three-judge court found that in West Tennessee there is "a high level of white bloc voting which usually enables the majority to defeat the black community's candidate of choice," and that racial polarization is so extreme that "black candidates cannot expect to succeed in majority-white districts."[24] Another court found in 1994 that "the level of racial bloc voting is increasing in Hamilton County making it more difficult than ever for a black to win a countywide judicial office."[25]

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[20] Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1017 (D.S.D. 2004).

[21] United States v. Blaine County, Montana, 363 F.3d 897, 914 (9th Cir. 2004), cert. den'd, Blaine County v. United States, 125 S. Ct. 1824 (2005).

[22] Windy Boy v. County of Big Horn, 647 F. Supp. 1002, 1013 D. Mont. 1986).

[23] Georgia v. Ashcroft, 195 F. Supp. 2d 25, 31 (D.D.C. 2002).

[24] RWTAAAC v. McWherter, 836 F. Supp. 453, 458, 462 (W.D. Tenn 1993).

[25] Cousin v. McWherter, 840 F. Supp. 1210, 1215 (E.D. Tenn. 1994).

III. Continuing Hostility to Minority Political Participation

Aside from patterns of polarized voting, the ACLU report and other evidence shows that the temptation to manipulate the law in ways that will disadvantage minority voters is as great and irresistible today as it was in 1982, when Congress last reauthorized Section 5. The recent Supreme Court brief filed by the State of Georgia in Georgia v. Ashcroft provides a vivid, present day example of the willingness of one of the states covered by Section 5 to manipulate the laws to diminish the protections afforded racial minorities. [26]

In its brief, the state resurrected the anti-Voting Rights Act rhetoric of prior years and argued that Section 5 "is an extraordinary transgression of the normal prerogatives of the states." State legislatures were "stripped of their authority to change electoral laws in any regard until they first obtain federal sanction." The statute was "extraordinarily harsh," and "intrudes upon basic principles of federalism." As construed by the lower court, the state argued, Section 5 was "unconstitutional."[27] But the arguments the state made about the districts at issue were far more hostile to minority voting rights than even its anti-Voting Rights Act rhetoric.

One of the state's arguments was that the retrogression standard of Section 5 should be abolished in favor of an "equal opportunity" to elect standard, which it defined as "a 50-50 chance of electing a candidate of choice."[28] A 50-50 chance to win is also a 50-50 chance to lose. Given the fact that blacks are elected primarily from majority black districts, if the state were allowed under Section 5 to adopt a plan providing minority voters with only a 50-50 chance of electing candidates of their choice in the majority black districts, the number of blacks elected

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[26] 539 U.S. 461 (2003).

[27] Brief of Appellant State of Georgia, pp. 28, 31, 40-1.

[28] Georgia v. Ashcroft, 195 F. Supp. 2d 25, 66 (D. D.C. 2002).

to the legislature could be reduced by half, or even more. The Supreme Court rejected the state's invitation to rewrite Section 5.

The state argued further that a district provided minority voters an equal opportunity to elect their candidates of choice when it contained only a 44% black voting age population. The adoption of that standard would have permitted the state to abolish all of its previously majority black districts. It would also have turned blacks into second class voters, with bloc voting white majorities controlling most, if not all, of the legislative districts.

Georgia further demonstrated its disregard for minority voting rights in Georgia v. Ashcroft by arguing that minorities should never be allowed to participate in the preclearance process. Thus, the very group for whose protection Section 5 was enacted would have no say on how a proposed change might impact the minority community. The Supreme Court, once again, rejected the state's argument, an argument which can charitably be described as irresponsible.

Restrictive Photo ID Requirements for Voting

More recently, the Georgia legislature, in a vote sharply divided on racial and partisan lines, passed a new voter identification bill that had the dubious distinction of being the most restrictive in the United States. To vote in person - but not by absentee ballot - a voter would have to present one of five specified forms of photo ID. Those without such an ID would have to purchase one for $25. Not only are there laws on the books that make voter fraud a crime, but there was no evidence of fraudulent in-person voting to justify the stringent photo ID requirement. The new requirement would also have an adverse impact upon minorities, the elderly, the disabled, and the poor. A challenge to the photo ID law was filed by a coalition of groups, including the ACLU, and on October 18, 2005, the federal court enjoined its use on the

grounds that it was in the nature of a poll tax, as well as a likely violation of the equal protection clause.[29]

States other than Georgia have also enacted new photo ID requirements for voting, and it has often been in response to the increased participation of a minority group in the electoral process. Following the 2002 elections in South Dakota, for example, which saw a surge in Indian political activity, the legislature passed laws that placed additional requirements for voting, including requiring photo identification at the polls. State Rep. Tom Van Norman, a member of the Cheyenne River Sioux Tribe, said the legislation retaliated against new Indian voters because they were a big factor in a close Senate race. During legislative debate on another bill which would have made it easier for Indians to vote, an opponent of the measure said, "I, in my heart, feel that this bill . . . will encourage those who we don't particularly want to have in the system." Alluding to Indian voters, he said "I'm not sure we want that sort of person in the polling place."[30]

Other Examples

Other examples of discrimination against minority voters discussed in the ACLU litigation report include: discriminatory annexations and deannexations;[31] challenges by white voters or elected officials to majority minority districts;[32] pairing black incumbents in

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[29] Common Cause/Georgia v. Billups, Civ. No. 4:05-CV-0201-HLM (N.D. Ga.).

[30] Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1026 (D.S.D. 2002).

[31] Adel, Ga., 1982; Ahoskie, N.C., 1989; Augusta, Ga., 1987; Clinton, S.C., 2002; College Park, Ga., 1979; Emporia, Va. 1987; Foley, Ala., 1989 & 1993; Hemingway, S.C., 1994; Laurinburg, N.C., 1994; Macon, Ga., 1987; Rocky Mount, N.C. , 1984; Sumter County, S.C., 1985 & 1986.

[32] Cocoa, Fla., 1994; Ga., congressional, house, and senate redistricting, 1990; Georgetown County, S.C., 1983; La., congressional redistricting, 1994; Mont., legislative redistricting, 2003; N.C., congressional redistricting, 1991-2001; Perry County, Miss. , 1993; Putnam County, Ga., 1997; S.C., house and senate redistricting, 1996; S.C. congressional redistricting, 1996 & 1998; St. Francisville, La., 1995; Telfair County, Ga., 1986; Union County, S.C., 2002; Va., congressional redistricting, 1995; S.D. redistricting, 1996).

redistricting plans;[33] refusing to draw majority minority districts;[34] refusing to appoint blacks to public office;[35] maintaining a racially exclusive sole commissioner form of county government;[36] refusing to designate satellite voter registration sites in the minority community;[37] refusing to accept "bundled" mail-in voter registration forms;[38] refusing to allow registration at county offices;[39] refusing to comply with Section 5 or Section 5 objections;[40] transferring duties to an appointed administrator following the election of blacks to office;[41] white opposition to restoring elections to a majority black town;[42] requiring candidates for office to have a high school diploma or its equivalent;[43] prohibiting "for sale" and other yard signs in a predominantly white municipality;[44] disqualifying black elected officials from holding office or participating in decision making;[45] relocating polling places distant from the black community;[46] refusing to hold

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[33] West Palm Beach, Fla., 1990.

[34] Bossier Parish, La., 1992; Ga., congressional redistricting, 1982.

[35] Ben Hill County, Ga., 1988; Johnson County, Ga., 1983.

[36] Bleckley County, Ga., 1985; Wheeler County, Ga., 1993.

[37] Columbus/Muscogee County, Ga., 1984.

[38] Ga., 2004.

[39] Fulton County, Ga., 1986.

[40] Ga., judicial elections, 1989; Charlton County, Ga., 1985; Ga., soil and water conservation elections, 2004; Douglasville, Ga., 1996; Greene County, Ga., 1985; Rochelle, Ga., 1984; La., 1995; S.D. , 1976-2002.

[41] Kingston, Ga., 1987.

[42] Keysville, Ga., 1990.

[43] Clay County, Ga., 1993; Augusta, Ga., 1987.

[44] Avondale Estates, Ga., 2000.

[45] Sumter County, Ga., 1998; Thomaston, Ga., 1986; Beaufort County, S.C., 1983).

[46] Millen, Ga., 1995; Wrightsville, Ga., 1992.

elections following a Section 5 objection;[47] maintaining an all white self-perpetuating board of education;[48] challenges to the constitutionality of the NVRA;[49] failure to provide bilingual ballots and assistance in voting;[50] county governance by state legislative delegation;[51] challenges to the constitutionality of the Voting Rights Act;[52] packing minority voters to dilute their influence;[53] and using discriminatory punch card voting systems.[54]

IV. The Continued Need for Section 5

Much progress has been made in minority voting rights and office holding in recent times, but it has been made in large measure because of the existence of Section 5 and the other provisions of the Voting Rights Act. One of the principal conclusions of Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990, was that the increase in minority office holding was the result of "the Voting Rights Act of 1965 and its 1982 amendments. Quite simply, had there been no federal intervention in the redistricting process in the South, it is unlikely that most southern states would have ceased their practice of diluting the black vote."[55]

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[47] Butler, Ga. 1995.

[48] Thomaston, Ga., 1981.

[49] La., 1995; Va., 1995; S.C., 1995.

[50] Michigan, Buena Vista and Clyde Townships, 1992; Bennett County, S.D., 2002.

[51] S.C., 1999 .

[52] Sumter County, S.C., 1982; Blaine County, Mont., 2005.

[53] Buffalo County, S.D., 2003; S.D., legislative redistricting, 2002.

[54] Ga., 2001; Fla., 2001; Calif., 2001; Ill., 2001; Oh. 2002.

[55] Lisa Handley and Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations," in Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990, Chandler Davidson and Bernard Grofman, eds. (Princeton; Princeton University Press, 1994), p. 336.

The fact that Section 5 has been so successful is one of the arguments in favor of its extension in 2007, not its demise.

The persistent, widespread patterns of racial bloc voting found by the courts underscore the need for extension of Section 5, as do the continuing, well documented efforts of elected officials to dilute minority voting strength and deter minority political participation. That is apparent from the findings of violations of Section 2 of the Voting Rights Act in cases discussed in this report, as well as the decisions of jurisdictions not to contest Section 2 claims and enter into consent decrees. The central role of Section 5 is further apparent from the redistricting that follows each decennial census. As the discussion of redistricting litigation in the ACLU report makes clear, in the absence of Section 5 minority voters would become increasingly marginalized during the redistricting process.

The right to vote is, indeed, "preservative of all rights."[56] As long as the tradition of racial discrimination in voting continues, the protection of Section 5 remains essential to the health of American democracy.

Section 5 Has an Important Deterrent Effect

Aside from blocking the implementation of discriminatory voting changes, Section 5 has a strong deterrent effect. In 2005, the Georgia legislature redrew its congressional districts, but before doing so it adopted resolutions providing that it must comply with the non-retrogression standard of Section 5. The plan it drew maintained the black voting age population in the two majority black districts (represented by John Lewis and Cynthia McKinney) at almost exactly their pre-existing levels, and it did the same for the two other districts (represented by Sanford

[56] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

Bishop and David Scott) that had elected black members of Congress.[57] There was no objection by the Department of Justice when the plan was submitted for preclearance. That does not mean, however, that Section 5 did not play a critical role in the redistricting process. Rather, it means Section 5 encouraged the legislature to ensure that any voting changes would not have a discriminatory effect on minority voters, and that it would not become embroiled in the preclearance process.

V. The Courts Routinely Apply the Voting Rights Act

Section 5 continues to play a critical role because it is routinely applied by the federal courts to prevent retrogression and protect the equal right of minority voters to participate in the political process.

South Carolina

The three-judge court in Colleton County Council v. McConnell, the litigation filed after the South Carolina governor and legislature deadlocked over redistricting in 2001, concluded that it was obligated to comply with Sections 2 and 5 of the Voting Rights Act and proceeded to draw plans that maintained the state's existing majority black congressional district and actually increased the number of majority black house and senate districts.[58]

Mississippi

In Mississippi, which lost a congressional seat as a result of the 2000 census, both the state court and the federal court became involved in the redistricting process and drew plans

[57] HB 499 (2005)

[58] Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 655-56, 661, 666 (D.S.D. 2002).

relying upon the non-retrogression standard of Section 5 that maintained one of the districts as majority black.[59]

Georgia

A three-judge court in Georgia appointed a special master to prepare court-ordered plans after the state failed to enact remedial plans for the house and senate. Under the special master's plan, nearly half of the black house members were paired, or placed in a house district with one or more other incumbents. A number of the paired black incumbents were chairs or officers of house committees, and some were also senior members of the house. Their loss would inevitably have adversely affected the representation of the black community in the state legislature.

The Georgia Legislative Black Caucus, represented by the ACLU, participated as amicus curiae. It argued that the pairing of black incumbents caused a retrogression in minority voting strength within the meaning of Section 5, and created a discriminatory result within the meaning of Section 2. The three-judge court agreed that court- ordered plans should "comply with the racial-fairness mandates of Section 2 of the Act, as well as the purpose-or-effect standards of Section 5," and instructed the special master to draw another plan taking into account the unnecessary pairing of incumbents. As the court found in adopting the new plan, there was no retrogression from the pre-existing benchmark plans.[60]

Also in Georgia, in implementing a court ordered plan for the City of Albany in 2003, the court emphasized that "[i]n drawing or adopting redistricting plans, the Court must also comply

[59] Smith v. Clark, 189 F. Supp. 2d 529, 535, 540 (S.D. Miss. 2002).

[60] Larios v. Cox, 314 F. Supp. 2d 1357, 1360, 1366 (N.D. Ga. 2004).

with Sections 2 and 5 of the Voting Rights Act."[61] Under the court-ordered plan, blacks were 50% of the population of Ward 4, and a substantial majority in four of the other wards.

South Dakota

The district court in South Dakota adopted a court-ordered plan for the house and senate in 2005 to cure a Section 2 violation in a vote dilution suit by Native Americans. In creating new majority Indian districts, the court held it had adhered to the state's "redistricting principles," which included "protection of minority voting rights consistent with the United States Constitution, the South Dakota constitution, and federal statutes."[62] The area in question included Todd and Shannon Counties, both of which are covered by Section 5.

POLICY RECOMMENDATIONS

I. Section 5 of the Voting Rights Act Should Be Extended for 25 Years

Section 5 should be extended for 25 years because there is still strong evidence of discrimination in voting, racially polarized voting, and manipulation of minority voters by covered jurisdictions. Section 5 has also blocked the implementation of numerous discriminatory voting changes, has a strong deterrent effect, and is routinely applied by the courts. Section 5 is still needed to protect the rights of minority voters.

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[61] Wright v. City of Albany, Georgia, 306 F. Supp. 2d 1228, 1235, 1238 (M.D. Ga. 2003), and Order of December 30, 2003.

[62] Bone Shirt v. Hazeltine, 387 F. Supp. 2d 1035, 1042 (D.S.D. 2005).

II. Section 5 Should Be Clarified to Provide that a Voting Practice Adopted with a Non-Retrogressive but Discriminatory Purpose Should Be Denied Preclearance

The Problem Created by Bossier II

Bossier Parish, Louisiana, adopted a redistricting plan for its 12-member school board in 1992. The parish was 20% black, but all of the districts were majority white, despite the fact that a plan could be drawn containing two majority black districts. No black person had ever been elected to the school board, and it was undisputed that the plan adopted by the parish split black communities purposefully to avoid creating a majority black district. One board member said he favored black representation on the board, but "a number of other board members opposed the idea." Another board member said "the Board was hostile to the creation of a majority-black district." The Attorney General concluded she was "not free to adopt a plan that unnecessarily limits the opportunity for minority voters to elect their candidates of choice."[63]

The District of Columbia court, however, precleared the parish's plan. It held the 1992 plan was no worse than the preexisting plan, in that neither contained any majority black districts, and thus there was no "retrogressive intent."[64] The Supreme Court affirmed in a decision known as Bossier II.[65] It held "in light of our longstanding interpretation of the 'effect' prong of Section 5 in its application to vote dilution claims, the language of Section 5 leads to the conclusion that the 'purpose' prong of Section 5 covers only retrogressive dilution."[66] Thus, an admittedly discriminatory plan, which was the product of intentional discrimination and had

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[63] This history is set out in Reno v. Bossier Parish School Bd., 528 U.S. 320, 324, 348 (2000) ("Bossier II").

[64] Reno v. Bossier Parish School Bd., 7 F. Supp. 2d 29, 31-2 (D. D.C. 1998).

[65] In Reno v. Bossier Parish School Bd., 520 U.S. 471 (1997), known as "Bossier I," the Court ruled that a voting practice could not be denied preclearance under Section 5 merely because it violated the results standard of Section 2, that a retrogressive effect was required.

[66] Bossier II, 528 U.S. at 328.

an undeniable discriminatory effect, was nonetheless granted preclearance under Section 5. The majority further held that denying preclearance to a voting change on the grounds that it was enacted with a discriminatory but nonretrogressive purpose "would also exacerbate the substantial' federalism costs that the preclearance procedure already exacts, . . . perhaps to the extent of raising concerns about Section 5's constitutionality."[67] The dissenters (Justices Souter, Stevens, Ginsburg and Breyer) concluded that:

> the full legislative history shows beyond any doubt just what the unqualified text of Section 5 provides. The statute contains no reservation in favor of customary abridgment grown familiar after years of relentless discrimination, and the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles.[68]

Had the Bossier II standard been in effect in 1982, the District of Columbia court would have been required to preclear Georgia's congressional redistricting plan, which was found by the court to be the product of purposeful discrimination. In that instance, the state had increased the black population in the Fifth District over the benchmark plan, but kept it as a district with a majority of white registered voters. The remaining nine congressional districts were all solidly majority white. As Joe Mack Wilson, the chief architect of redistricting in the house told his colleagues on numerous occasions, "I don't want to draw nigger districts."[69] He explained to one fellow house member, "I'm not going to draw a honky Republican district and I'm not going to draw a nigger district if I can help it."[70] Since the redrawn Fifth District did not make black voters worse off than they had been under the preexisting plan, and even though it was the

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[67] Id. at 336.

[68] Id. at 366.

[69] Busbee v. Smith, 549 F. Supp. 494, 501 (D. D.C. 1982).

[70] Id., Deposition of Bettye Lowe, p. 36.

product of intentional discrimination, the purpose was not technically retrogressive and so, under Bossier II, the plan would have been unobjectionable. Such a result would be a parody of what the Voting Rights Act stands for.

III. Section 5 Should Be Amended to Provide that Voting Practices that Diminish the Ability of Minority Voters to Elect Candidates of Choice Should Be Denied Preclearance

The Decision in Georgia v. Ashcroft

In Georgia v. Ashcroft, the Supreme Court vacated the decision of a three-judge court denying preclearance to three state senate districts contained in Georgia's 2000 redistricting plan because, in its view, the district court "did not engage in the correct retrogression analysis because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts."[71] Although blacks were a majority of the voting age population in all three districts, the district court held the state failed to carry its burden of proof that the reductions in black voting age population from the benchmark plan would not "decrease minority voters' opportunities to elect candidates of choice."[72] The Supreme Court held that while this factor "is an important one in the Section 5 retrogression inquiry," and "remains an integral feature in any Section 5 analysis," it "cannot be dispositive or exclusive."[73] The Court found that the three-judge court should have considered additional factors, including: "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;" and

[71] 539 U.S. 461, 490 (2003).

[72] Georgia v. Ashcroft, 195 F. Supp. 2d 25, 89 (D. D.C. 2002).

[73] Id., 539 U.S. at 480, 484, 486.

whether a plan achieves "greater overall representation of a minority group by increasing the number of representatives sympathetic to the interest of minority voters."[74]

The Supreme Court opined that "Georgia likely met its burden of showing nonretrogression," but concluded "[w]e leave it for the District Court to determine whether Georgia has indeed met its burden of proof."[75] But before the district court could reconsider and decide the case on remand, a local three-judge court invalidated the senate plan on one-person, one-vote grounds,[76] and implemented a court-ordered plan.[77] As a consequence, the preclearance of the three senate districts at issue in Georgia v. Ashcroft was rendered moot.

The dissent in Georgia v. Ashcroft (Justices Souter, Stevens, Ginsburg and Breyer) argued Section 5 had always meant "that changes must not leave minority voters with less chance to be effective in electing preferred candidates than they were before the change."[78] The dissenters also argued that the majority's "new understanding" of Section 5 failed "to identify or measure the degree of influence necessary to avoid the retrogression the Court nominally retains as the Section 5 touchstone."[79]

The Problems with Georgia v. Ashcroft

The majority opinion introduced new difficult to apply, and contradictory standards. According to the Court, the ability to elect is "important" and "integral," but a court must now also consider the ability to "influence" and elect "sympathetic" representatives. The Court took a

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[74] Id. at 482-83.

[75] Id. at 487, 489.

[76] Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), aff'd 124 S. Ct. 2806 (2004).

[77] Larios v. Cox, 314 F. Supp. 2d 1357 (N.D. Ga. 2004).

[78] Id. at 494.

[79] Id. at 495.

standard that focused on the ability to elect candidates of choice, easily understood and applied, and turned it into something subjective and complicated. The danger of the Court's opinion is that it may allow states to turn black and other minority voters into second class voters, who can "influence" the election of white candidates but cannot elect candidates of their choice or of their own race. That is a result Section 5 was enacted expressly to avoid. Georgia v. Ashcroft was decided in 2003, after most of the redistricting following the 2000 census had been completed, but at least one case decided prior to Ashcroft applied an "influence" theory to the serious detriment of minority voters.

The inherent fallacy of the notion that influence can be a substitute for the ability to elect is apparent from the Shaw v. Reno[80] line of cases, which were brought by whites who were redistricted into majority black districts. Rather than relish the fact that they could "play a substantial, if not decisive, role in the electoral process," and perhaps could achieve "greater overall representation . . . by increasing the number of representatives sympathetic to the[ir] interest," white voters argued that placing them in "influence" districts, i.e., majority black districts, was unconstitutional, and the Supreme Court agreed.[81] In addition, if "influence" were all that it is said to be, whites would be clamoring to be a minority in as many districts as possible. Most white voters would reject such a suggestion out of hand.

IV. Federal Observers Are Needed to Prevent Voter Harassment

The appointment of federal examiners to register voters has been extremely important over the years. For example, from 1964 to 1967, the percentage of African Americans registered

[80] 509 U.S. 630 (1993).

[81] See, e.g., Johnson v. Miller, 515 U.S. 900 (1995).

to vote in counties in Mississippi in which examiners were appointed increased from 8.1% to 70.9%.[82] While the examiner provisions have been superseded by state and federal laws, such as the National Voter Registration Act of 1993 (NVRA), the observer provision of the Act remains important to ensure that minorities are not discriminated against or intimidated while voting.[83] Since 1966, a total of 25,000 non-partisan, impartial observers have supervised elections to ensure that minorities can exercise their fundamental right to vote. Congress should now renew the observer provision of the act to ensure that minorities continue to be protected from harassment at the polls.

V. Voting Assistance for Language Minorities Is Still Needed

The Voting Rights Act requires election officials in certain cities, counties, and states to provide assistance to those U.S. citizens who have difficulty speaking or reading English. Under Section 203 of the act, in those jurisdictions where language minority voters make up a significant portion of the population, U.S. citizens who are speakers of Spanish, Native American languages, Asian languages, and Alaska Natives can get help voting.

As anyone who has voted can attest, there are sometimes complicated issues on the ballot, which can be difficult to understand, even for native speakers of English. The Voting Rights Act promotes fairness at the ballot box because it allows U.S. citizens with disabilities or difficulty speaking English the opportunity to get help at the polls. Congress should renew the expiring provisions of the act so all Americans have equal access to the ballot box.

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[82] U.S. Commission on Civil Rights, Political Participation (Washington: U.S. Government Printing Office, 1968), 247.

[83] 42 U.S.C. § 1973f.

VI. Recovery of Expert Fees Should Be Allowed in Voting Rights Cases

While the Department of Justice has an important role to enforce the Voting Rights Act, the vast majority of voting rights law suits have been brought by private lawyers and civil rights groups. Unfortunately, the Supreme Court has ruled that winning parties in civil rights cases cannot recover expert witness fees as part of the costs they are entitled to receive.[84] This decision has had a chilling effect on voting rights litigation because it requires lawyers and non-profit organizations to front tens of thousands of dollars in expert witness fees that can never be recovered. It also greatly undermines the purpose of fee awards in civil rights cases, which is to ensure that victims of discrimination can maintain access to the courts. Litigating voting rights cases is particularly expensive because expert witnesses are needed to present demographic evidence, analyze and present statistical evidence of racial bloc voting, and testify about the "totality of circumstances" surrounding racial discrimination in the jurisdiction. For all these reasons, Congress should amend the attorney's fee provision of the Voting Rights Act to permit the recovery of expert fees and expenses.

[84] West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991).

Mr. CHABOT. Mr. Henderson, you are recognized for 5 minutes.

TESTIMONY OF WADE HENDERSON, EXECUTIVE DIRECTOR, LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. HENDERSON. Thank you, Mr. Chairman, and thank you to the Members of the Subcommittee. I'm Wade Henderson, the Executive Director of the Leadership Conference on Civil Rights and counselor to the Leadership Conference on Civil Rights Education Fund. The Leadership Conference is the Nation's premier civil and human rights coalition. It consists of more than 190 national organizations and has coordinated the national legislative campaigns on behalf of every major civil rights law since 1957.

Mr. Chairman, as you so eloquently noted along with Mr. Watt, yesterday marked the 41st anniversary of Bloody Sunday. Bloody Sunday vaulted voting rights abuses into the political forefront and led to the passage of the Voting Rights Act of 1965.

The Voting Rights Act, including its temporary provisions, section 5, sections 6 through 9, and section 203, has been the pivotal force behind the Nation's progress toward protecting the right to vote. It has empowered large numbers of minority citizens to register and vote and to elect candidates of their choice to local, State, and Federal offices. The act has been successful in removing direct and indirect barriers to voting for African-Americans, Asian-Americans, Hispanic-Americans, and Native Americans.

As part of the Leadership Conference's role in assessing the effectiveness of the Voting Rights Act and its continuing need, our sister organization, the LCCR Education Fund, commissioned an educational and research collaborative, *renewtheVRA.org,* to draft a series of reports that have been requested by Congress examining the impact of the Voting Rights Act over the past 25 years. Beginning today and over the next month, *renewtheVRA.org* will release reports on the following States: Alabama, Alaska, Arizona, California, Florida, Georgia, Louisiana, Mississippi, New York, North Carolina, South Carolina, South Dakota, Texas, and Virginia. These States were chosen as a representative sampling geographically and demographically of jurisdictions covered in whole or in part by the expiring temporary provisions of the Voting Rights Act. I would ask that each of the reports previously submitted to the Committee, those that will be submitted, and my testimony in full be admitted as part of the record of these proceedings.

Mr. CHABOT. Without objection, so ordered.

Mr. HENDERSON. Today, I will highlight the trends and findings of many of these reports. Several consistent themes emerge in the State reports. Over the course of the last 25 years, the temporary provisions of the VRA have been employed often and have worked well to limit practices harmful to the full participation of racial and ethnic minority voters.

First, it is clear that the preclearance provision, the language minority protections, and the examiner and observer provisions of the Voting Rights Act have played significant roles in protecting the voting rights of minority citizens. These reports, however, also highlight a unifying theme. Discrimination still pervades the electoral process. The State reports chronicle why the expiring temporary provisions of the Voting Rights Act remain relevant and

necessary to stop both intentional discrimination and facially neutral proposals with potentially discriminatory effects.

The State reports are rich with data and compelling stories of how the Voting Rights Act has impacted minority voters and office holders. For example, Mississippi, the poorest State of the Union, has a population that is 36 percent Black, the highest of any of the 50 States. Despite bitter historical resistance to the civil rights movement, dramatic changes have occurred since 1965, thanks in large measure to the Voting Rights Act. Mississippi now has the highest number of Black elected officials in the country, and yet racially-polarized voting remains a pervasive problem.

The reports also highlight the recent history of discrimination in the 14 States, focusing on old and new methods of discrimination employed to abridge the Voting Rights Act and minority citizens. The reports examine current events that impact the right to vote and illuminate the nature of the political climate for minorities.

The Louisiana report indicates that apart from the extraordinary questions of voter disenfranchisement facing Louisiana in the wake of Hurricane Katrina, the Voting Rights Act has been instrumental in protecting the vote in that State. Since the Voting Rights Act was reauthorized in 1982, the Department of Justice has objected nearly 100 times to proposed changes that would have adversely impacted minority voters in Louisiana, particularly African-Americans. Sixty percent of the Department's total section 5 objections in Louisiana since the enactment of the VRA have come after the 1982 reauthorization.

Additionally, the language assistance provisions of the VRA have been particularly important in empowering language minority voters. In New York, for example, the report reveals that in recent elections, the New York Board of Elections failed to provide sufficient Chinese, Spanish, and Korean interpreters, ranging in a deficiency from 25 to 59 percent.

The Florida report, for example, documents particular Department of Justice actions against counties with high percentages of Latino voters, where one might have expected language assistance provisions to go into effect more openly.

The South Dakota report underscores how societal attitudes and a hostile climate led to practices that undermined the full participation of Native American voters. These tactics include voter intimidation, investigations of newly-registered voters, failure to provide polling places on reservations, discriminatory redistricting, and a failure to provide language assistance at the polls.

Now, despite progress made, barriers to full and equal minority voter participation remain. In the backdrop of many successes under the Voting Rights Act, a second generation of discrimination has emerged, more subtle and insidious than a half-century ago, but no less discriminatory. The Voting Rights Act remains a relevant, necessary tool to curb voting rights abuses and we believe, sir, that the reports certainly justify a Congressional reauthorization of the act. Thank you.

Mr. CHABOT. Thank you very much, Mr. Henderson.

[The prepared statement of Mr. Henderson follows:]

PREPARED STATEMENT OF WADE HENDERSON

TESTIMONY OF WADE HENDERSON, EXECUTIVE DIRECTOR
LEADERSHIP CONFERENCE ON CIVIL RIGHTS
HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION
OVERSIGHT HEARING ON THE
"VOTING RIGHTS ACT: EVIDENCE OF CONTINUED NEED"
MARCH 8, 2006

Good afternoon. My name is Wade Henderson and I am the executive director of the Leadership Conference on Civil Rights (LCCR) and counselor to the Leadership Conference on Civil Rights Education Fund (LCCREF). LCCR is the nation's premier civil rights coalition, and has coordinated the national legislative campaign on behalf of every major civil rights law since 1957. LCCR consists of more than 190 national organizations representing persons of color, women, children, organized labor, individuals with disabilities, older Americans, major religious groups, gays and lesbians, and civil liberties and human rights groups. It is a privilege to represent the civil rights community in addressing the Committee today.

Yesterday marked the 41st anniversary of Selma's "Bloody Sunday," a civil rights march in Alabama that left 50 marchers hospitalized after police used tear gas, whips, and clubs to beat them. A week after Bloody Sunday, President Lyndon Johnson addressed a joint session of Congress in a televised speech denouncing the brutal attacks, stating that, "There is no Negro problem; there is no Southern problem; there is no Northern problem; there is only an American problem." Two days later he sent the Voting Rights Act to the Congressional floor for a vote. In partnership with Rev. Dr. Martin Luther King, Jr. and other civil rights leaders, the historic Act was passed into law in 1965.

The Voting Rights Act of 1965 (VRA) is widely viewed as the nation's most effective civil rights legislation because it has allowed large numbers of minorities to register and vote, and has empowered minority communities to elect their candidates of choice to local, state and federal offices. The Act enforces the 15th Amendment's guarantee that "The rights 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," and has been successful in removing direct and indirect barriers to voting for African Americans, Asian Americans, Latino Americans, and Native Americans.

The movement to secure equality of voting rights for racial, ethnic, and language minorities has had a profound and positive effect on all Americans by helping to ensure a more fully functioning democracy. Today, the strength of our democracy depends on both equal access to the voting booth and the ability of all Americans to cast an effective and informed ballot. The Voting Rights Act has been instrumental is pressing for both. Able to address new and old challenges to the right to vote, the VRA and its temporary provisions have been the pivotal force behind the progress that we have made toward protecting the right to vote.

Despite the progress made during the last four decades in the registration of, and voting by, minorities, as well as efforts to increase participation of language minority citizens in the democratic process, there is no question that barriers to full and equal minority voter participation remain. During this time period, a second generation of discrimination has emerged. It is perhaps more insidious than it was a half century ago, but no less discriminatory. Whether it is an at-large election, an annexation, polling place change, or redistricting, changes in voting procedures and practices have resulted in discrimination against minority voters. Likewise, when language minorities in communities across America are denied the language assistance that they need in order to cast an informed vote, we know the right of minority citizens to cast an effective ballot is in jeopardy. Today, we know that there is much work left to be done. We **must** reauthorize and restore the temporary provisions of the Voting Rights Act.

Over the past year, as our nation celebrated the 40th anniversary of the Voting Rights Act, the Leadership Conference on Civil Rights Education Fund (LCCREF), the research and communications arm of the civil rights coalition, has been coordinating a diverse and extensive collaborative of national civil rights groups to examine the Voting Rights Act in the twenty-four years since its last full reauthorization. Many of the coalition members

have played significant roles in the implementation of the voting rights provisions through successful advocacy and extensive public education. The members of this collaborative effort, "RenewtheVRA.org," share a common vision: the critical importance of enabling every citizen to participate fully in the electoral process, ensuring the fundamental right to vote for a candidate of one's choosing. LCCREF charged RenewtheVRA.org with assessing states' compliance with the Voting Rights Act over the past 25 years, including but not limited to, voter access and the participation of minority communities in exercising their voting rights.

As part of LCCR's role in assessing the VRA and its continued need, LCCR commissioned a series of reports for the Congress to examine the impact of the VRA over the past 25 years to document how rights have been expanded and to look at where problems still exist. The result was a series of reports that constitute a critical state-by-state assessment of the status of voting rights across the country, focusing on 14 states covered by Section 5, Section 203, or both. This project was designed to be an update of "Quiet Revolution in the South," which contains state-by-state voting rights information from 1965 through 1990 for various states with significant minority populations. These reports are a continuation of the story that "Quiet Revolution in the South" began, with one important addition: a review of the availability of assistance to language minority groups in the various states.

Beginning today and over the next month, RenewtheVRA.org will be releasing reports on Alabama, Alaska, Arizona, California, Florida, Georgia, Louisiana, Mississippi, New York, North Carolina, South Carolina, South Dakota, Texas, and Virginia. Today, I will highlight the trends and findings of many of these reports.

I would ask that each of the reports previously submitted to the Committee, those that will be submitted in the coming days and weeks, and my testimony in full be included and admitted as part of the record of these proceedings.

STATE REPORTS:

Several consistent themes emerged in these state reports. The evidence shows that over the course of the last 25 years, these temporary provisions have been employed often and have worked well to stop practices harmful to the full participation of minority voters. First, it is clear that the preclearance provision, the language minority protections, and the examiner and observer provisions have made a dramatic difference in protecting the voting rights of minority citizens to ensure that they can elect candidates of their choice in local, state, and federal elections. What these reports also highlight, however, is a unifying theme that discrimination still pervades the electoral process. The reports contain clear and convincing evidence and examples of why the VRA remains relevant and necessary, documenting how these particular provisions of the VRA have been and would continue to be used effectively to stop both intentional discrimination and facially neutral practices that could have harmful discriminatory purposes or effects.

Each state report closely examines: Section 5 preclearance objections; litigation under Section 2 of the VRA; other voting rights litigation, including constitutional challenges to voting practices that impact minority voters; an analysis of the language minority experience in Section 203 and 4(f)(4) covered jurisdictions; where applicable, a discussion of the federal observers within the state since 1982; and demographic data detailing state minority office holders. These reports illuminate the discrimination that is still present in our society and undermines the right to vote, while also celebrating the important victories that minorities have achieved because of the VRA.

The state reports are rich with both data and anecdotal evidence and include compelling stories of how the VRA has impacted voters and minority office holders on the ground in each of the states. For example, Mississippi is the poorest state in the union. Its population is 36 percent black, the highest of any of the 50 states. Resistance to the civil rights movement was as bitter and violent there as anywhere. State and local officials frequently erected obstacles to prevent black people from voting, and those obstacles were a centerpiece of the evidence presented to Congress to support passage of the

Voting Rights Act of 1965. After the Act was passed, Mississippi's government worked hard to undermine it. In its 1966 session, the Mississippi legislature changed a number of the voting laws to limit the influence of the newly enfranchised black voters, and Mississippi officials refused to submit those changes for preclearance as required by Section 5 of the Act. Black citizens filed a court challenge to several of those provisions, leading to the United States Supreme Court's watershed 1969 decision in *Allen v. State Board of Elections*, holding that the state could not implement the provisions unless they were approved under Section 5.[1]

Dramatic changes have occurred since then. Mississippi has the highest number of black elected officials in the country. One of its four members in the United States House of Representatives is black. Twenty-seven percent of the members of the state legislature are black. Many of the county governing boards, city councils, and school boards in the state are integrated, and 31 percent of the members of the county governing boards (known as boards of supervisors) are black.

Additionally, the New York report recounts the long-overdue firsts that came about because of the 1982 VRA reauthorization: the first and only African-American mayor; the first and only Latino candidate for mayor; the first and only Asian American to win a city council seat; and the first and only African American to win a statewide office.

These changes, however, would not have occurred without the Voting Rights Act. Even after the Act was passed, many of them were a long time in the making, and most came about through Section 5 objections imposed by the United States Department of Justice and court orders obtained after extensive litigation.

The reports also highlight the recent history of discrimination in the 14 states, focusing on old and new methods of discrimination that have been employed to abridge the voting rights of minorities – everything from at-large elections, to annexations, redistricting and

1 393 U.S. 544 (1969).

changes in voting procedures. For example, the Georgia report focuses on the ninety-two objections lodged pursuant to Section 5 since 1982, noting the range of voting practices where objections are made including, method of election, redistricting, judicial elections, annexation, scheduling of elections, qualifications of candidates, registration procedures, polling place locations, and numerous other voting procedures.

Finally, the reports examine current events, attitudes and news stories in the states that have an impact on the right to vote and illuminate the nature of the political climate for minorities. The Louisiana report offers significant analysis and factual evidence regarding the future of Orleans Parish as a center of African-American political power following Hurricane Katrina, particularly in light of the historical record of the state's vote denial and dilution. The South Dakota report highlights how societal attitudes and a hostile climate led to practices that undermined the participation of American Indian voters. These tactics included voter intimidation, investigations of newly registered voters, failure to provide polling places on reservations, discriminatory redistricting, and failure to provide language assistance at the polls.

Today, I want to share with you the most significant findings contained in these reports. I will begin with highlights regarding the utilization of Section 5 of the VRA since 1982, its successes, as well as why it remains a relevant and necessary tool to curb voting rights abuses.

Section 5 of the Voting Rights Act:

As the Committee is aware, Section 5 of the Voting Rights Act requires certain covered jurisdictions, state, and local governments with a history of voting discrimination, to "preclear" proposed changes in voting or election procedures with either the United States Department of Justice or the United States District Court for the District of Columbia. What follow are examples of why Section 5 remains relevant and necessary.

Selected Excerpts from RenewtheVRA.org's Alabama Report

In Alabama, the non-retrogression and preclearance provisions of Section 5 have become the most important guarantors of equal political and electoral power for African Americans, first in their recurring negotiations with white officials, and, second, in their ability to restrain efforts of white elected officials to reverse the progress in voting rights and restore the old, discriminatory practices.

In 2003, the Chilton County Commission, under pressure from members of an all white group, Concerned Citizens of Chilton County, 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 official* chair; repealing cumulative voting; and thus ending any opportunity for African Americans to elect a candidate of their choice. The U.S. Attorney General refused to consider Chilton County's submission of the 2003 local act for preclearance. Without the protections of Section 5 of the VRA, white-majority state and local governments in Alabama ***just 3 years ago*** succumbed to pressure from their white constituents and were willing to 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, "We would have been at ground zero without Section 5." This case also highlighted the extent to which racially polarized voting exists in Alabama, and courts have recognized the synergy between racially polarized voting and previous racial discrimination in Alabama. "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."[2] Several recent federal court cases underscore that racially polarized voting remains a current problem in Alabama.

An expert analysis of the 2004 general election for Chilton County Commission provides "dramatic evidence of how white voters are unwilling to vote for African-American candidates." For example, the one African-American commissioner, Bobby Agee, has

2 *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).

served continuously since 1988. Despite his incumbency, he cannot garner support from the white electorate. He is the first choice of African-American voters to represent them on the commission; in contrast, he finishes last in terms of votes cast by non-African Americans in each type of electoral analysis undertaken by voting experts.

Additionally, in the city of Selma, site of 1965's infamous Bloody Sunday, Section 5 has been used as a vital tool in restraining efforts to "restore discriminatory practices." In 1991, utilizing a recent 1990 census, the Department of Justice refused to grant preclearance to two different redistricting plans submitted by the city of Selma. The Department of Justice concluded that the redistricting plans submitted by the city exhibited a purpose to prevent African Americans from electing candidates of their choice by fragmenting the black voting population. Amended plans were eventually precleared that provided black citizens with equal opportunity, resulting in the election of black candidates to the Selma city council.

Selected Excerpts from RenewtheVRA.org's Mississippi Report

Although the Act was passed in 1965, delays by Mississippi officials in complying with their obligations under Section 5 postponed for several years any meaningful review of voting changes. After the Supreme Court's decision in *Allen*, the state finally submitted the three 1966 laws that were the subject of that case, leading to the first Section 5 objection in the State. It came on May 21, 1969, when DOJ objected to all three of those laws: one changing the method of selecting county superintendents of education in eleven counties from election to appointment; one giving counties the right to elect their boards of supervisors at-large rather than by districts; and one adding burdensome new qualification requirements for independent candidates in general elections. This was the first of 169 objections to voting changes in Mississippi. Nearly two-thirds of those (112) came after Section 5 was reauthorized in 1982.

As mentioned earlier, Mississippi officials refused to comply with their obligations under Section 5 in the wake of the passage of the Voting Rights Act, leading to the Supreme Court's 1969 decision in *Allen*. Two years later, in its next major Section 5 enforcement

decision, *Perkins v. Matthews*, the Supreme Court held that the City of Canton, Mississippi violated Section 5 when it attempted to enforce a change from ward to at-large elections for the city council, a change in polling place locations, and an alteration of the city's voting population through annexation.[3] Unfortunately, these decisions did not end the problem of noncompliance. At times over the years, black voters had to return to the courts to force state and local officials to fulfill the basic requirement of submitting voting changes for Section 5 review. For example, the state failed to submit a number of laws passed over a period of several years adding new state trial court judgeships elected under a numbered post system. In 1986, the federal district court in *Kirksey v. Allain* was required to step in and enjoin further elections for those seats until preclearance was obtained.[4] State officials then submitted the changes to DOJ, which entered an objection to the numbered post requirement later that year.

The Supreme Court revisited the issue of Section 5 non-compliance in 1997 when state officials refused to submit for Section 5 review a number of changes in state law made to conform to the National Voter Registration Act. The Court unanimously held, in the case of *Young v. Fordice*, that the officials had violated Section 5 and could not go forward with the changes until preclearance was obtained.[5]

As recently as November, 2005, a three-judge federal court enjoined the city of McComb from enforcing a state court order it had obtained that removed a black member of that city's Board of Selectmen from his seat by changing the requirements for holding that office. As the three-judge court pointed out, the order clearly altered the pre-existing practice, yet the city had done nothing to preclear it. The court ordered the black selectman restored to his office and enjoined the city from enforcing the change unless preclearance was obtained.[6]

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3 400 U.S. 379 (1971).

4 635 F. Supp. 347 (S.D. Miss. 1986) (three-judge court).

5 520 U.S. 273 (1997).

6 *Myers v. City of McComb*, No. 3:05-cv-00481 (S.D. Miss. Nov. 23, 2005) (three-judge court) (unpublished order).

Thirty-six percent of Mississippi's population is black, the highest percentage of the fifty states. 33 percent of the voting age population is black. But no black person has been elected to a statewide office since Reconstruction. In 2001, the last year covered by its study of black elected officials, the Joint Center for Political and Economic Studies reported that Mississippi had 892 black elected officials. While this is the highest number of any of the fifty states, the Center's report states that this represents less than 19 percent of the state's elected officials. Nearly all of the black officials were elected from black majority districts, and most of those districts were created as a result of the Voting Rights Act.

Selected Excerpts from RenewtheVRA.org's Louisiana Report

The contemporary situation in Louisiana is placed in the broader context of the state's history of voting discrimination. The analysis shows that Louisiana has made progress in enforcing the voting rights of African Americans in the 24 years since the last reauthorization, but that this progress has been gradual and/or remains tenuous, in part, because many state and local officials continue to resist full compliance with the dictates of the VRA and principles of minority inclusion and equality that it embraces. By any measure it is clear, however, that the progress Louisiana has made in protecting minority voting rights is due in large part to the existence and vigorous enforcement of the VRA, and particularly, Section 5. In the absence of the expiring provisions, African Americans in Louisiana would likely experience erosion in the political access and representation gains that the VRA has made possible over the last four decades.

The recent national attention on New Orleans following Hurricane Katrina presents a new opportunity to evaluate the necessity of minority voter protections at the same time that it brings renewed focus to a city that has consistently seen efforts to weaken minority voting rights. In the years since the last renewal of the VRA in the 1982, but long before Hurricanes Katrina and Rita devastated New Orleans and the surrounding areas, African-American voters in that part of the state have relied upon the protections of the Act to turn back repeated efforts to dilute their voting strength. Sections 5 and 2 of the VRA are

again playing crucial, if limited, roles in shaping the legislative response to Katrina's voting related problems by providing important leverage in the courts and DOJ, not only for minority voting rights advocates but also for state officials who wish to protect minority voters in the face of countervailing political pressures. The immediate and potential long-term implications of Hurricane Katrina on Louisiana's African-American electorate provide a useful reminder of why the VRA[7] is essential if Louisiana is to continue its slow climb toward full political equality for its African-American citizens.

Hurricane Katrina may have caused the nation to reevaluate the extent of our progress in overcoming our history of entrenched racial discrimination, in much the same way that the "Bloody Sunday" march that led to the passage of the VRA did more than forty years ago. Although the short and long-term impact of the unprecedented mass displacement of New Orleans' African-American citizens on their access to political power is not yet known, it is appropriate to highlight the substantial obstacles that African-American voters faced in Orleans Parish long before Katrina struck last year prior to assessing any of the new minority voting challenges that Katrina has caused.

Accordingly, the concerns about the future of Orleans Parish as a center of African-American political power following Hurricane Katrina are very well placed in light of the historical record of the state's vote denial and dilution. Katrina displaced more than one million people from southern Louisiana alone.[8] Three hundred thousand of these citizens, the vast majority of whom are African-American, fled New Orleans,[9] where they formed a mobilized voting bloc in the only majority-minority congressional district in the state at

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7 42 U.S.C. § 1973c.

8 Jeremy Alford, *Population Loss Alters Louisiana Politics*, N.Y. TIMES, Oct. 4, 2005, at http://www.nytimes.com/2005/10/04/national/nationalspecial/04census.html?ex=1138683600&en=f097af0aa2b4a630&ei=5070.

9 Benjamin Greenberg, *Voter Disenfranchisement by Attrition*, IN THESE TIMES, Nov. 4, 2005, at http://www.inthesetimes.com/site/main/article/2400/.

the center of African-American political power.[10] The destruction of polling places, displacement of voters and candidates, and general loss of electoral infrastructure initially forced Louisiana officials to postpone the fall 2005 municipal elections in Orleans and Jefferson Parishes.[11] These circumstances present substantial questions about whether, how and by whom African-American communities will be rebuilt, when displaced residents may return, and perhaps as importantly, who gets to make these decisions. For example, will displaced voters be able to register, receive absentee ballots, and vote?[12] While there is considerable uncertainty about the future of Louisiana's African-American communities post-Katrina, the existence of VRA protections have provided some assurance to displaced African Americans that their interests cannot be ignored with impunity.

No fewer than a half dozen DOJ Section 5 objections made since 1982 were based, at least in part, on efforts by Louisiana officials to minimize African-American voting strength in Orleans Parish. The objections prevented dilution for elected legislative and various judicial seats. The persistence of the attempts to dilute minority voting strength in Orleans Parish, which has been the most concentrated area of African-American population in the state, is best illustrated through the decennial redistrictings for the Louisana House of Representatives. In 1982, DOJ explained Louisiana's failure to meet its obligations under Section 5 as follows:

> Overall the plan has the net effect of reducing the number of House districts with Black majorities. In Orleans Parish, for instance, the number of such districts is reduced from eleven to seven. While this reduction may be justified to some extent by the general loss of parish population in comparison to overall statewide population gain, the loss of so many black majority districts in that parish has not been satisfactorily explained, especially since the black percentage of the

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10 Alford, *supra* note 64, Kristen Clarke-Avery & M. David Gelfand, *Voting Rights Challenges in a Post-Katrina World*, FINDLAW, Oct. 11, 2005, at http://writ.news.findlaw.com/commentary/20051011_gelfand.html.

11 Mark Waller, *Fall Elections in Jefferson, N.O. Postponed*, NOLA.COM, Sept. 14, 2005, at http://www.nola.com/newslogs/tporleans/index.ssf?/mtlogs/nola_tporleans/archives/2005_09_14.html#079542.

12 LA. REV. STAT. ANN. § 18:562 (West 2005). *See also* Clarke-Avery & Gelfand, *supra* note.

population in Orleans Parish has increased from 45 to 55 percent over the past ten years.

Of particular concern in this regard is the uptown New Orleans area of the parish, where the configuration of the proposed Districts 90 and 91 appears to result in needless dilution of minority voting strength. While we understand that incumbency considerations may explain in part why District 90 spans three parish wards, including noncontiguous portions of ward 12, our analysis shows that there are other means of addressing that concern without adversely impacting minority voting strength in the area.

Another problem in New Orleans involves the Ninth Ward. Under the proposed plan, a black majority district in this ward is eliminated for no apparent justifiable reason, leaving only one majority black House district out of the five emanating from that 61 percent black ward.[13]

13 Letter from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Charles Emile Bruneau, Jr., Louisiana House of Representatives (June 1, 1982). In the very same objection letter, Reynolds also objected to dilution in East Baton Rouge, East Feliciana, West Feliciana, and St. Helena Parishes, and noted that the legislature had adopted the dilutive plan despite the existence of non-dilutive alternative plans that would have adhered more closely to the State's other redistricting criteria, such as compactness and least change.

The post-1990 round of redistricting was tainted by similar section 5 violations. In the Section 5 objection letter that was provided to the state, DOJ "examined the 1991 House redistricting choices in light of a pattern of racially polarized voting that appears to characterize elections at all levels in the state."[14] DOJ found that while most of the statewide plan comported with Section 5 requirements, "In seven areas, however, the proposed configuration of district boundary lines appears to minimize black voting strength, given the particular demography in those areas…"[15] Once again Orleans Parish was specifically identified. DOJ observed that:

> In general, it appears that in each of these areas the state does not propose to give effect of overall black voting strength, even though it seems that boundary line logically could be drawn to recognize black population concentrations in each area in a manner that would more effectively provide to black voters the opportunity to participate in the political process and to elect candidates of their choice…
>
> In addition, our analysis indicates that the state has not applied its own [redistricting] criteria, but it does appear that the decision to deviate from the criteria in each instance tended to result in the plan's not providing black voters with a district in which they can elect a candidate of their choice.[16]

The record shows that the need for Section 5 coverage of Louisiana has not declined since its last reauthorization in 1982. In fact, the average number of objections per year actually *increased* after 1982. By examining Louisiana's conduct in connection with its House of Representative redistricting plans from 1965 through the present, one can trace an unbroken pattern of voting discrimination. The record shows that President Johnson's

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14 Letter from John Dunne to Jimmy N. Dimos, Speaker of the House of Representatives (July 15, 1991). The Louisiana State Senate also sought to reduce African-American voting strength in its 1991 redistricting plan, cracking apart African-American majorities in the northeastern part of the state and around Lafayette, while preserving majority-white districts for every white incumbent. Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ., to Samuel B. Nunez, President of the Senate of the State of Louisiana (June 28, 1991). Assistant Attorney General John R. Dunne found that the Lafayette-area plan was "intended, at least in part, to suppress the African-American proportion to a level considered acceptable to a white incumbent." *Id.* at 2.

15 *Id.*

16 *Id.*

1965 challenge — to change the attitudes and structures from which voting discrimination arises — has not been met. Intransigent officials throughout the state, and at its highest levels of power, are commonplace and have persisted in discriminatory behavior through decades in order to dilute the African-American vote. The post-1982 renewal experience in Louisiana reveals that these officials cling tenaciously to old strategies of dilution even while they develop new ones, resist transparency, conceal public information, and attempt to shut African-American citizens out of decision-making processes. With the roots of discrimination still so firmly in place in Louisiana, Section 5 is as necessary now as it was in 1965, 1970, 1975, and in 1982 to avoid dramatic, unnecessary and, unfortunately, inevitable retrogression in African-American political opportunity in Louisiana.

Selected Excerpts from RenewtheVRA.org's Florida Report

Like the 1992 reapportionment process that preceded it, the 2002 reapportionment process in Florida was characterized by controversy, allegations of partisan gerrymandering and minority vote dilution, litigation and an objection by the Department of Justice under Section 5 of the Voting Rights Act. This time, the Department of Justice interposed an objection to the 2002 redistricting plan for the Florida House of Representatives, stating that the plan reduced "the ability of Collier County Hispanic voters to elect their candidate of choice [and] the drop in Hispanic population in the proposed district will make it impossible for these Hispanic voters to continue to do so."

As a result of the DOJ's Section 5 objection to the 2002 reapportionment plan, the Hispanic minority-majority district was preserved in Collier County and its existence is attributable solely to the Department of Justice's Section 5 review. Once again, the Section 5 process was essential to put the brakes on a controversial reapportionment process that was met with extreme suspicion in Florida's minority communities.

In addition to objecting to both of Florida's reapportionment plans since 1982, the Department of Justice has also twice interposed objections to election legislation that adversely affects minority voters.

One of these objections interposed by the Department of Justice to Florida election procedures was directed at three of thirty-seven changes proposed by Florida to the administration of absentee ballots in 1998. The changes were a part of a large Voter Fraud Act that made sweeping changes to Florida electoral systems in response to widespread voter fraud in the City of Miami. The three provisions to which DOJ objected placed heavy emphasis on literacy skills, ability to provide a Social Security number and a witness' signature. In reviewing these changes, DOJ had actual data showing that they disproportionately impacted minority voters. DOJ's analysis "revealed that during the limited time the State chose to implement the non-cleared absentee voting requirements… the votes of minority electors would have been more likely than white voters to be considered 'illegal' and thus not counted." Further, "minority voters were more likely to fail to meet one of the State's new requirements than were white voters." For example, in Hillsborough County, twice as many black absentee voters as white absentee voters failed to meet one of the State's new requirements. Without DOJ's Section 5 review of this statewide change to Florida election law, it is likely that access to the franchise for many vulnerable minority voters would have been jeopardized.

Selected Excerpts from RenewtheVRA.org's Georgia Report

In Georgia, there have been ninety-two Section 5 objections lodged since 1982. In many cases, the objected-to changes had been illegally implemented for years, or even decades, without Section 5 preclearance. This repeated failure to submit dilutive voting changes for Section 5 review is a strong indicator of a pattern of racially discriminatory conduct by local officials. Of the ninety-two objections, the areas covered included: at-large elections; majority vote requirement; numbered posts; at-large in combination with residency districts; majority vote requirement in combination with numbered posts and staggered terms; and redistricting.

For example, in September 2002, DOJ objected to a redistricting plan for the city of Albany (Dougherty County) that reduced the black population in one ward from 51 percent to 31 percent specifically created to forestall the creation of an additional

majority-black district. Census data indicated that blacks made up 60.2 percent of the voting age population in Albany in 2000 and 57.3 percent of the registered voters in the city at the time of the submission of the plan. In August of 1982, DOJ objected to the city of Brunswick's attempt to consolidate with Glynn County. At that time, the city was majority African-American and there was the possibility that they would elect a majority of the council members. DOJ found that the consolidation would have diluted the strength of African-American voters so that they would likely only be able to elect candidates of their choice for one of the seven seats in the consolidated jurisdiction. Additionally, in October 1992, DOJ objected to a polling place change for Johnson County in which the polling place for the Wrightsville precinct would be moved from the county courthouse to an American Legion Hall, which had a well-known reputation in the county for racial hostility and exclusion. Finally, a telling statistic is that objections to statewide redistricting plans have been raised in each of the redistricting cycles since 1982.

Selected Excerpts from RenewtheVRA.org's Texas Report

Since 1982, one hundred and seven Section 5 objections to preclearance have been interposed. According to the report's findings, racially discriminatory election changes have increased since 1982 and repeat offenses are common. For example, of the 72 counties experiencing challenges to elections changes, 28 have demonstrated a pattern of repeat offenses. Given the number of objections to preclearance interposed and what could therefore have been potential lawsuits, the expediency and effectiveness of Section 5 in averting expensive litigation is self-evident. Of the one hundred and ninety-six objections since 1975, fifty-nine have been related to the districting or redistricting plans proposed at various levels of government, including seven statewide redistricting plans. There have also been 12 DOJ objections interposed with regard to changes in voting procedure at the local level.

Additionally, forty-seven objections have been related to the method of elections, e.g., single member districts vs. at-large districts. For example, DOJ, in an August 12, 2002 objection letter to Freeport, TX (Brazoria County), which in 1992 had switched from an at-large voting system to single member districts, stated:

> Under the subsequent single-member district method of election, minority voters have demonstrated the ability to elect candidates of choice in at least two districts, wards A and D. The city now proposes to reinstitute the at-large method of election. Our analysis shows that the change will have a retrogressive effect on the ability of minority voters to elect a candidate of their choice.

Selected Excerpts from RenewtheVRA.org's Virginia Report

There have been numerous Section 5 objections in every decade since the last reauthorization of the VRA in 1982. They have been made in a wide range of areas including redistricting, voting procedures, and election schedules or structure of elected bodies.

For example, in the area of redistricting, in September 2001 and again in May 2003, Northampton County proposed collapsing six districts for the Board of Supervisors into three larger districts—three of the six benchmark districts were majority minority districts that regularly elected candidates of their choice. DOJ objected in September 2001 because the plan would have diluted minority-majorities; in May 2003, Northampton proposed a new six district plan that still had the same retrogressive effect of reducing all majority-minority districts. DOJ objected and provided a model, non-retrogressive plan, which has yet to be followed by the county.

Additionally, in July 1991, DOJ objected to the redistricting plan of the Virginia House of Delegates. They found the proposed configuration minimized black voting strength in Charles City County, James City County, and the Richmond/ Henrico County areas. Large concentrations of African Americans were placed in majority white districts. DOJ concluded that protection of incumbents, which was the commonwealth's defense, could not be done at the expense of minorities.

Several examples of non-compliance with the VRA have been in the area of voting procedure. For example, in October 1999, the Darvills Precinct for Dinwiddie County was forced to move the location of a polling center because the old location had burned down. Precinct voting was moved to the Cut Bank Hunt Club, a privately owned club with a large African-American membership. One hundred and five citizens submitted signatures to have the polling location moved to the Mansons United Methodist Church, three miles away, in order to have the polling location be in a "more central location." Subsequently, the Mansons Church withdrew its name, and a public hearing was held to find a new, centrally located location. On August 4, 1999, the board approved changing the polling place to the Bott Memorial Presbyterian Church, located on the extreme east end of the precinct. 1999 census data showed that a significant portion of the African-American population lived on the western end of the precinct. DOJ objected based on findings that the poll location was moved for discriminatory reasons.

A common myth about the VRA is that it is impossible to qualify for the "bailout provisions" that would remove the jurisdiction from Section 5 coverage. Although substantial discrimination still exists in Virginia, nine jurisdictions have bailed out since 1982. This illustrates that jurisdictions can meet the requirements under federal law and that many of those that have done so have been successful in bailing out of Section 5 preclearance coverage under the current formula.

Selected Excerpts from RenewtheVRA.org's South Carolina Report

Since 1982, the Department of Justice has objected to Section 5 preclearance on seventy-three occasions. The objected-to discriminatory practices have covered a wide variety of changes that affected nearly every aspect of black citizens' participation in South Carolina's electoral processes, including redistricting, annexations, voter assistance, changing county boundaries, eliminating offices, reducing the number of seats on a public body, majority vote requirements, changing to at-large elections, using numbered posts or residency requirements, staggering terms, scheduling of elections, changing from nonpartisan to partisan elections and limiting the ability of African-American citizens to

run for office. Objected-to practices have also covered all levels of government: General Assembly, counties, county boards of election, school districts, cities, and municipalities.

Additionally, racially polarized voting remains a widespread problem in South Carolina. For example, in *Colleton County Council v. McConnell*, an expert witness offered undisputed testimony that South Carolinians are still much divided in terms of where they live and that elections throughout South Carolina continue to be marked by very high levels of racial polarization in voting, further stating that racial polarization is highest in black-white elections. The Colleton County Council Court concluded that, "Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary elections and general elections. Statewide, black citizens generally are a highly politically cohesive group and whites engage in significant white-bloc voting. Indeed, this fact is not seriously in dispute."[17]

Sumter County Council had a long history of attempts to limit the ability of African-American citizens to fully participate in the political processes, including redistricting. In 1984, Sumter County sought a declaratory judgment from the District Court of the District of Columbia to preclear at-large elections in the Sumter County Council. The Court denied preclearance because only one African-American had been elected under the at-large system and 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."[18] The council followed single member districts after that time; yet again in 2001, they faced an objection over their redistricting plan because the DOJ found a pattern of racial polarized voting that would likely lead to a situation where "the black candidate of choice would lose or at best win by an extremely narrow margin."

Selected Excerpts from RenewtheVRA.org's New York Report

In New York, fourteen separate objections to preclearance under Section 5 of the VRA have been lodged since 1982. For example, in May 1994, DOJ found that the New York

17 *Colleton County Council*, 201 F.Supp.2d 618, 641 (D.S.C. 2002).

18 *County Council of Sumter County*, SC v. U.S., 596 F.Supp 35,37 (DDC 1984).

City Board of Elections' failure to translate candidates' names and machine operating instructions into Chinese because, as the board of elections had argued, there was not enough space on the voting machines for Chinese characters, was a violation of Section 5. In its letter, DOJ stated:

> Our analysis shows that a candidate's name is one of the most important items of information sought by a voter before casting his or her ballot for a particular candidate. . . For voters who need Chinese-language materials, the translation of candidates' names is important because Roman characters are completely different from Chinese characters. Consequently, it would be extremely difficult, if not impossible, for these voters to understand names written in English.

In June, 1992, an objection was filed arguing that the New York State Assembly's redistricting plan discriminated against Latino voters. DOJ found that New York knowingly fractured the Latino community with the intent and effect of reducing the community's ability to elect candidates of choice. In fact, DOJ found that the state was aware of that the consequences of their redistricting plan would minimize Hispanic voting strength. The objection helped Adriano Espaillat win election to the State Assembly in 1996, becoming the first Dominican ever elected to the NY Legislature.

Selected Excerpts from RenewtheVRA.org's South Dakota Report

South Dakota includes three counties covered by the Section 5 preclearance requirements: Todd, Shannon, and Washabaugh counties. South Dakota has submitted only one letter to the DOJ requesting review of proposed election procedures. DOJ objected to South Dakota's proposed changes regarding voter registration and driver's license applications; voter purging every four years; and changes in mail-in voter registration dates, citing a lack of evidence that they were not discriminatory in purpose against Native American voters.

Selected Excerpts from RenewtheVRA.org's Alaska Report

In Alaska, report findings indicate that Section 5 has prevented egregious vote dilution attempts and needs to be retained. A 1990 redistricting plan was harshly criticized on the

grounds that it diluted Native votes, disregarded differences between native groups, and had allegedly been prepared in secret. More pointedly, a coalition of Native interests accused the governor of being "anti-Native." The coalition of Native groups appealed to DOJ, imploring them not to preclear the plan and identified the retrogressive components of the proposed plan. DOJ stepped into the battle and sent a letter to the state requesting more information, subsequently, the trial court ultimately threw out the plan as unconstitutional.

Selected Excerpts from RenewtheVRA.org's North Carolina Report

North Carolina has experienced the benefits of Section 5's protections of minority voting rights. Section 5 has been used to protect against proposed dilutive proposals including staggered terms, residency requirements, annexation of predominately white areas, majority vote and runoff requirements, unfair drawing of districts, and the maintenance of at-large voting. Residency requirements-systems under which the entire county or city votes for each seat but the candidate is required to reside in a particular area–have been especially common proposals aimed at weakening black voter strength in North Carolina. Such requirements limit minority voters' ability to use single-shot voting to elect candidates of their choice. In just the six-year period from 1982 through 1987, Section 5 enabled the Attorney General to interpose objections to residency districts in Beaufort, Bertie, Camden, Edgecombe, Guilford, Martin, Onslow, and Pitt counties.

Section 203 of the Voting Rights Act:

Selected Excerpts from RenewtheVRA.org's Florida Report

The language minority protections are extremely important for Florida. The defining feature of the latter part of the twentieth century for Florida was the enormous increase in the state's new citizen population..

Many Florida jurisdictions have repeatedly ignored the language assistance needs of their constituents and disenfranchised language minorities in violation of Section 203. The U.S. Commission on Civil Rights (USCCR) found in its post-2000 study that "large

numbers of English-speaking Florida voters were denied this assistance at polling places all around Florida." The USCCR report also found that in central Florida, "Spanish-speaking voters did not receive bilingual assistance and some of these counties were subject to section 203 of the Voting Rights Act. This failure to provide proper language support led to widespread voter disenfranchisement of possible several thousand Spanish-speaking voters."

Another example of a significant Section 203 problem lies in Osceola County. Since 1980, the Hispanic population in Osceola County has increased from 2 percent of the total population to 29.4 percent of the total population. In 2002, DOJ filed suit against county officials, alleging that poll workers made hostile remarks to Spanish-speaking voters to discourage them from voting; poll workers failed to effectively communicate with Spanish-speaking voters; the County failed to staff polling places with bilingual poll workers; and failed to translate written materials. DOJ and the county resolved the case by a Consent Decree, requiring the county to undertake a number of remedial actions.

Given that almost one-third of the Hispanic population of Florida reported during the 2000 Census that they could not speak English "at all," or that they could not speak English well, coupled with the ongoing discriminatory climate, reauthorization of Section 203 is critical for Florida to ensure the voting rights of language minorities.

Selected Excerpts from RenewtheVRA.org's Texas Report

The provisions of Section 203 and 4(f)(4) performs an indispensable role ensuring the equitable access of Spanish-speaking Texans in participating in the democratic process. These provisions are particularly critical because the population of Texas is marked by a high number of individuals with limited English proficiency that is correlated to a significant education gap. The Census Bureau estimates that of the Spanish-speaking Latino population over the age of 5, approximately 29.3 percent speaks English "not well", "not at all" or speaks an alternative language. Although Latinos comprise of 44.7 percent of the overall student population, 60.8 percent of all school dropouts in grades 7-12 are Latino. Statistics on the Spanish-speaking Latino population indicate that because

of their deficiency in English language skills they are less likely to participate in the American electoral process.

While their language skills keep United States citizens of Mexican origin on the sidelines of our political process, they continue to grow to make up a larger proportion of our population nationwide, and particularly within Texas. As such, it becomes necessary to confront the issue of Latino political participation by providing Spanish language voting material and assistance until the gaps in educational attainment can be closed.

The Mexican American Legal Defense and Educational Fund (MALDEF) surveyed all 254 counties in Texas, requesting 31 pieces of voting related materials or election data relevant to the administration of Spanish language voting materials and assistance . Of the 254 requests – 73.6 percent failed to respond at any level to the inquiry. Only 67 counties responded, and of those, 47 were found to be "fundamentally non-compliant" with Section 203, resulting in their inability to provide Spanish-speaking voters with the fundamental materials required for them to cast their ballots. Only one Texas county was able to provide the vast majority of election materials requested.

Additionally, in August 2005, DOJ filed a claim against Ector County, Texas on grounds that the county had failed to provide a sufficient number of bilingual poll workers for its Spanish speaking population, and had failed to effectively publicize the availability of bilingual voting materials and services. The county admitted to wrongdoing and agreed to a consent decree and "required the immediate implementation of a Spanish language program for minority constituents, as well as the use of federal observers during election periods to monitor and ensure their compliance."

Disappointing trends in Latino political participation may be a reflection of the shortage and sometimes altogether absence of voting materials that cater to citizens who are not fluent in English and are native Spanish speakers. The growing Latino electorate in Texas necessitates reauthorization of Section 203 in keeping with providing for this ever-growing demographic.

Selected Excerpts from RenewtheVRA.org's New York Report

Language assistance has been a crucial component of New York elections since the passage of the Voting Rights Act. In fact, Section 4(e) of the Act was specifically aimed at preventing discriminatory practices against Puerto Ricans in New York City. Today, the importance of Section 203 cannot be over emphasized. Recent research conducted on six Section 203 covered New York counties points to the salutary effects of providing language assistance for both Latino and Asian American voters: namely the positive correlation that exists between providing Section 203 language assistance and increased voter registration. One such study for New York concludes that after controlling for other factors that affect registration (e.g., education levels, nativity, residential mobility, etc.), the use of ballots and registration materials in the covered language was significantly correlated to increased registration levels at both the city and county level and for both Spanish and Chinese speaking voters.

Despite its critical importance to ensuring participation of language minorities in the electoral system, the language assistance provisions of the VRA have never been fully implemented in New York City – and the problems with compliance have been especially detrimental to the Asian-American community. In 2006, the Asian American Legal Defense & Education Fund (AALDEF) filed one of the few Section 203 challenges in New York, on behalf of Chinese-language and Korean-language voters, in *Chinatown Voter Education Alliance v. Ravitz*,[19] currently pending in federal district court.

A glaring example of this widespread problem occurred in Queens County for the general election of 2000. In that election, the Democratic candidates for Congress, state senate and assembly, justices of the supreme court and judges for civil court were listed under erroneously translated party headings and misidentified as Republicans. Likewise, the Republican candidates were listed under the mistranslated heading as Democrats.

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19 06 Civ 913 (NRB), S.D.N.Y. 2006 (Reice Buchwald, J.). The case includes claims under Section 203 of the VRA and under Section 208 of the VRA (the assistor provision of the Act). The Complaint in this matter is attached as Appendix G.

Notifying the board of elections of this major error by 9:45 A.M., election officials from the central board would not arrive to correct the mistake until 4:00 P.M., 5:30 P.M., and in one case, 6:55 P.M. In addition, paper ballots for justices of the supreme court required translation for the phrase "vote for any three" which was erroneously translated as "vote for any five."

For the 2002 primary and general elections, of the more than 3,000 voters surveyed, 27 percent of Chinese voters and 30 percent of Korean voters reported having difficulty reading the ballot because of the small typeset used by the Board of Elections. Magnifying sheets issued by the Board of Elections ostensibly to solve this problem were not available in all sites and in Queens, one inspector was reported hiding the device to avoid its use. Transliteration of candidates' names surfaced as a problem again: "Mary O'Connor' was transliterated as "Mary O'Party;" and the Korean transliteration of John Liu's name was not what he submitted to the board or what he used in Korean media.

The unavailability of written materials in the appropriate Asian languages, or the deliberate efforts to avoid displaying them, has been consistently documented. For example, during the elections of 2002, survey results documented that 37 percent of Chinese voters and 43 percent of Korean voters needed the assistance of translated materials. Instead, written voter materials in Chinese and Korean were routinely unavailable or missing. In 2003, 49 percent of the Chinese voters surveyed, and 47 percent of the Korean voters surveyed require the assistance of translated written materials. Yet no ballots were translated for Chinese voters in PS 250 in Williamsburg, despite its designation as a targeted site by the board of elections. Voters were observed having difficulty voting as a result. Translated voter registration forms and affidavit ballot envelopes were frequently missing and once again, the requisite materials were found, unopened, in their original containers. Polling inspectors routinely would refuse to display the available materials, insisting that they were only required to do so if requested by a voter – with some remarking that they needed to keep their tables "clean" and others remarking that their manual required them to keep their tables free of "clutter."

The shortage of available interpreters is another constant problem in New York City, as is the efforts of some poll workers to impede the work of the interpreters who are available. In 2002, the reports noted that 33 percent percent of Chinese voters surveyed and 46 percent of Korean voters reported needing assistance of interpreters. Interpreters were in short supply in Queens and in Manhattan. In the 2003 elections, 36 percent of Chinese voters and 42 percent of Korean voters reported that they required the assistance of interpreters. Once again, the supply of interpreters could not meet the need. The monitoring revealed that, overall, one out of three interpreters assigned to the polling sites did not show up to work. And in 2004, slightly more than 7,200 Asian American voters were surveyed in New York City and reported that for Chinese voters in New York, Kings, and Queens counties, 37 percent needed an interpreter and 36 percent needed translated written materials to effectuate their right to vote.

The problems in complying with the language assistance guarantees of the VRA in New York City were not limited to Asian-American voters, however. After the 2000 general elections the New York State Attorney General investigated "serious" allegations regarding the failure of the City Board of Elections to provide appropriate language assistance to Latino voters. His office also investigated allegations that Latino voters were harassed, intimidated and intentionally misinformed about voter registration laws and procedures in the city. Documenting future complaints and evaluating "flaws in election administration that may affect voters on the basis of race or ethnicity" were among the recommendations made as a result. Major problems in securing oral assistance in Spanish at the polls continued to plague New York City elections. In 2001 the Board was short 3,371 poll inspectors – 15 percent of the total need. Yet it was short 33 percent of the total number of Spanish interpreters it needed for that election. Even considering the longevity of the Latino population in the City – especially its Puerto Rican community – the prevalence of Spanish language use at home and corresponding lower proficiency in English is clearly a continuing phenomenon in New York City.[20]

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20 New York City data reported in this paragraph comes from the 2000 Census as analyzed by the Queens College Department of Sociology. Nina Bernstein, "Proficiency in English Decreases

For Latinos nationally, the percentage of persons who speak English less than "very well" and who report that Spanish is spoken in their homes is 40.6 percent. In New York City, 51 percent of Latinos who speak Spanish at home report lower proficiency levels in English. It is important to note here that the measure of speaking English less than "very well" is the measure used by the Census Bureau, along with other indicia, to certify Section 203 coverage. Family literacy centers in New York City – indeed, all places where adults can try to learn English – are in very short supply with demand far exceeding supply. And as noted above, the inability to fully comply with Section 203 requirements for Latino voters resulted in the assignment of federal observers in a number of elections since the 1992 amendments to Section 203.

Of the multiple times federal observers were present, the following elections were identified specifically because of concerns over Latino voters and bilingual assistance: September 2001 (Kings and New York Counties); October 2001 (Bronx County); and September 2004 (Queens County).

New York City continues to be the city with the largest number of Puerto Rican residents. A sizeable force of more than 789,000, Puerto Ricans are the city's largest ethnic group and the largest national origin group among the City's 2.2 million Latino residents. The conditions that led to their ability to gain access to New York's political process, through Spanish-language assistance, including their strong ties to the Spanish language, the circular migration between Puerto Rico and New York City, and the juridical foundation of the unique relationship between the United States and Puerto Rico, has not undergone any appreciable change, thus making their need for language assistance in elections today as viable as it was in the 1960s and 1970s.

Section 203 compliance problems are not limited to the four covered counties in New York City. Westchester, Suffolk and Nassau counties are required to provide Spanish

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Over a Decade," The New York Times, January 2005. National data is derived from the Census Bureau: Roberto R. Ramirez, We the People: Hispanics in the United States. Census 2000 Special Reports, issued December 2004.

language assistance to Latino voters. On-site compliance monitoring in 2005 by Cornell University students revealed that in Nassau and Suffolk counties, there were failures in providing voter registration materials in Spanish. This research also evidenced less than full compliance in providing personnel capable of handling requests in Spanish. Compliance problems with Section 203 generally led to litigation against Suffolk and Westchester counties filed by the Department of Justice in 2004 and 2005, respectively.

Each of the suits resulted in settlements that improved the language assistance programs in each of the two covered counties. In *United States v. Suffolk County*[21] Suffolk County eventually agreed to a Consent Decree to create an improved Spanish-language assistance plan that would increase the number of Spanish-speaking election officials, increase the availability of Spanish-language written materials, improve the training of poll workers, and end the hostile treatment directed at Latino voters. The Consent Decree also allowed the Department of Justice to deploy federal observers in future elections. In *United States v. Westchester County, New York,*[22] the allegations similarly addressed the failure to provide adequate Spanish-language assistance to Latino voters including the county's failure to post Spanish-language information at targeted polling sites under both Section 203 and the Help America Vote Act. A Consent Decree was entered in 2005 that improved the county's language assistance program considerably. An additional Section 203 case was filed by the Department of Justice in Suffolk County against the Brentwood School District. *United States v. Brentwood Union Free District*.[23] The school district's failure to provide adequate oral and written language assistance in Spanish, including the failure to properly train personnel and the inability to curb hostilities against Latino voters, was the subject of a comprehensive Consent Decree that runs through January 2007.

Selected Excerpts from RenewtheVRA.org's Alaska Report

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21 No. 04-2698 (E.D.N.Y. 2004).

22 No. 05-0650 (S.D.N.Y. 2005).

23 See www.uddoj.gov/crt/voting/litigation/caselist.htm (last viewed on February 27, 2006).

Since its inclusion in the VRA in 1975, Alaska appears to have not complied with its obligation to provide bilingual voting assistance. While it provides intermittent oral assistance, it does not provide any written materials for the thousands of Alaska Natives. There are 20 different languages still spoken in Alaska: Aleut, Alutiiq, Iñupiaq, Central Yup'ik, Siberian Yup'ik, Tsimshian, Haida, Tlingit, Eyak, Ahtna, Dena'ina, Deg Hit'an, Holikachuk, Upper Kuskokwim, Koyukon, Tanana, Tanacross, Upper Tanana, Gwich'in, and Han. Siberian Yup'ik and Central Yup'ik are particularly important because they are still the primary language of many of the villages and the first language that children learn at home.

At least some part of the state has been continuously covered by Section 203 since 1975, yet many residents of rural Alaska indicate that there is no or only intermittent language assistance. In interviews conducted with Alaska Natives in October 2005, several residents located within one of the fourteen 203 covered jurisdictions in Alaska indicated that assistance was not available in their Native language. A ninety-one year-old woman, an Elder from Beaver, Alaska, was raised speaking Gwich'in. According to her, "Everybody when I was a child growing up [...] talk Gwich'in, nobody talk English." Now, however, she says the poll workers in Beaver only speak English. Similarly, Lillie Tritt, a seventy-four year-old from Venetie, said that no poll workers in her nearby village of Venetie speak Gwich'in. Sidney Huntington, a ninety year-old from Galena, indicated that the poll workers in Galena do not speak the Native language. Nick Jackson, an Elder from Gulkana, and Elmer Marshall from the Native Village of Tazlina, both of which are in the Valdez-Cordova Census Area, indicated that there was no one in Gakona, Glennallen, or Copper Center (the three nearest polling places to their villages) who spoke their Native language. Susanna Horn of St. Michael said the election supervisor in her polling place "doesn't know any Eskimo words" even though he is a Yup'ik Eskimo.

Surveys distributed to tribes throughout Alaska also showed that there is only intermittent language assistance readily available. Some local speakers of the Native language provide assistance to friends and family members who need help understanding the

ballot, which they call "self help." Some non-governmental organizations provide assistance in Native languages. The state, on the other hand, asserts that it does have oral assistance available at each polling place. No jurisdiction, however, reported posting any information at polling stations notifying the public that language assistance was available. Rather, they claim that information on language assistance is publicly available and well-known.

The state of Alaska offers intermittent oral language assistance and no written assistance for Alaska Natives under the language provisions of the VRA. It does, however, provide written election materials for the 2 percent of the Alaska population that is Filipino. Thus, it is arguably out of compliance with the VRA for the Native population and has been since the mandate was imposed on the state thirty years ago. As Congress contemplates reauthorization of the language provisions, it should take this non-compliance and the ongoing need for some assistance demonstrated here into account. Unfortunately, even today, the great majority of the new Alaska Native voters will have difficulty comprehending the English ballot. They will nonethless be subject to an English-only election, where no written materials, despite VRA's mandate, will be provided. Therefore, the language provisions should be renewed and Alaska should continue as a covered jurisdiction.

Selected Excerpts from RenewtheVRA.org's South Dakota Report

The eighteen counties of South Dakota covered by Section 203 of the VRA have a proportion of American Indian language speakers beyond the required 5 percent of the voting age population. Significant numbers of American Indians require assistance at the polling place with translation of ballots, voter assistance, and the publication of election materials in Lakota and Dakota. The renewal of the Voting Rights Act minority language provision is compelling, in view of the strong percentages of Lakota and Dakota language speakers in those counties covered and the extremely high rates of English illiteracy in covered jurisdictions of South Dakota.

Sections 6-9 of the Voting Rights Act:

Sections 6 through 9 of the VRA contain the federal examiner and observer provisions of the Act, which allow federal employees to observe polling place and vote counting activities in Section 5 jurisdictions. Although these provisions are permanent, the primary way these provisions are utilized is through the Section 5 preclearance formula, which is set to expire in August 2007.

Observers essentially serve as witnesses for what occurs in the polling place and during the counting of the vote. They document potential violations and are in contact on Election Day with Department of Justice attorneys, who can contact local election officials in the event of potential violations. After Election Day, if discriminatory actions are not ameliorated, the Department of Justice may file a civil action.

Access to the reports and/or recommendations of the federal observers is not available to the public. However, a review of the number of observers deployed in the states from 1982 onward provides strong evidence suggesting that the potential for discrimination continues to permeate Section 5 covered jurisdictions on Election Day.

Since the VRA's inception, almost 25,000 observers have been deployed in approximately 1,100 elections. Between 1982 and 2000, about 565 federal observers were deployed each year. While observer coverage in the early 1980s was almost exclusively designed to protect the rights of black voters in the South, in more recent years, there has been roughly a 50/50 split between election coverage for black voters and language minorities.

Selected Excerpts from RenewtheVRA.org's South Carolina Report

Federal observers have been assigned to 37 elections in South Carolina since 1966. Of those 37 elections, 23 occurred after 1982.

Most of the communities to which observers have been sent have repeatedly requested assistance under the Act to protect the ability of African-American voters fully to participate in the electoral process. Those include Bamberg County (1984, 1985);

Calhoun County (1984, 1988); Chester; (twice in 1990, twice in 1991, 1993 and 1996); Dorchester (1990, 1996 and 2001); Marion (1984 and 1996); and Williamsburg (1984, 1988 and twice in 1996).

Selected Excerpts from RenewtheVRA.org's Georgia Report

Federal observers have been assigned to 87 elections from 1966 to 2004. Of those 87 elections, 57 occurred after 1982. Eleven of the twenty-eight counties that had elections covered by federal observers post-1982 had not previously been covered; nine had elections covered both before and after 1982; and eight had elections covered only before 1982.

Selected Excerpts from RenewtheVRA.org's New York Report

Federal observers have been assigned to 41 elections from 1966 to 2004, all of which were assigned after 1982. Eight hundred and fourteen observers were deployed in the 41 elections to which the Attorney General dispatched federal observers. Although data on the deployment of federal observers does not include findings or final observations made by the Department of Justice, on limited occasions the reasons underlying federal observer deployment are described in advance. A review of such information shows the rise in Department of Justice concerns about Section 203 compliance since the early 1980s.

Of the multiple times federal observers were present, the following elections were identified specifically because of concerns over Latino voters and bilingual assistance: September 2001 (Kings and New York Counties); October 2001 (Bronx County); September 2004 (Queens County).

Deployment of Observers in Additional States

Alabama

Federal observers were assigned to 174 elections between 1966 and 2004; 67 of those elections occurred after 1982.

Arizona

Federal observers were assigned to 40 elections between 1966 and 2004; all 40 of those elections occurred after 1982.

California

Federal observers were assigned to 9 elections between 1966 and 2004; seven of those elections occurred after 1982.

Louisiana

Federal observers were assigned to 67 elections between 1966 and 2004; 15 of those elections occurred after 1982.

Mississippi

Federal observers were assigned to 548 elections between 1966 and 2004; 250 of those elections occurred after 1982.

North Carolina

Federal observers were assigned to 6 elections between 1966 and 2004; all six of those elections occurred after 1982.

Texas

Federal observers were assigned to 22 elections between 1966 and 2004; 10 of those elections occurred after 1982.

Section 2 and Constitutional Voting Rights Litigation:

While the standards of proof are different in Section 2 and constitutional litigation than they are in Section 5 litigation, the evidence of voter discrimination presented in Section 2 and constitutional cases is valuable in assessing voting rights in the states and the persistence of discrimination in many of the areas covered by the Voting Rights Act's temporary provisions.

Selected Excerpts from RenewtheVRA.org's Louisiana Report

Section 2 of the VRA has played an important role in protecting African-American voters in Orleans. After the last reauthorization of the VRA in 1982, there was a major Section 2 case filed in federal court in Louisiana, *Major v. Treen,*[24] challenging the 1981

24 Major v. Green, 574 F. Supp. 325 (E.D. La. 1983)

reapportionment of congressional districts. Plaintiffs, a class certified as all African-American registered voters in the state, alleged that the reapportionment plan ("Act 20") was designed and had the effect of diluting minority voting strength by dispersing an African-American population majority in a parish into two congressional districts. They filed claims under the Thirteenth, Fourteenth and Fifteenth Amendments to the federal constitution, as well as Section 2 of VRA.

According to the testimony in that case, based on the results of the 1980 census, Orleans Parish had a slight decline in overall population, but a marked increase in African-American population from the 1970s to 1980, such that African-Americans were 55 percent of the total population, 48.9 percent of voting age population and 44.9 percent of registered voters.[25] Moreover, the African-American population was highly concentrated.

Governor Treen submitted three districting proposals -- none of which contemplated a majority African-American district. In fact, Treen publicly expressed his opposition to the concept of a majority black district, stating that "districting schemes motivated by racial considerations, however benign, smacked of racism, and in any case were not constitutionally required."[26] Conversely, the state Senate staff prepared more than 50 plans and was directed to formulate a plan containing an Orleans Parish-dominated district, which would necessarily have a black majority population.[27] The state legislature passed one of the two plans with one African-American majority district in Orleans Parish and seven white majority districts. However, Governor Treen threatened to veto the plan and a number of legislators changed their position in response to the threatened veto.

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25 Major v. Treen, 574 F. Supp. 325, 330 (E.D. La. 1983).

26 Major v. Treen, 574 F. Supp. 325, 331. (E.D. La. 1983).

27 Only two plans out of the 50 made it out of the committee – both with one majority African-American and seven majority white districts. One plan had one majority African-American district with 54% African-Americans and 43% African-American registered voters. The Louisiana Black Caucus supported this plan. The other plan had one majority African-American district with 50.2% African-Americans and 44% African-American registered voters.

The court found that Treen's opposition to the plan initially approved by the legislature was predicated in significant part on its delineation of a majority African-American district centered in Orleans Parish.[28] The Governor then proposed another plan, again with all eight white majority districts, which the Senate rejected. African-American legislators were then excluded from subsequent legislative sessions to develop a plan, which ultimately concluded with the participants determining that the African-American minority interest in obtaining a predominantly African-American district would have to be sacrificed in order to satisfy both the governor and the Jefferson Parish legislators. The resulting Act 20, accepted by Governor Treen and signed into law, left African-American population concentrations within Orleans Parish wards disrupted, whereas white concentrations remained intact.

The court accepted the plaintiffs' expert testimony showing racially polarized voting and that such voting played a significant role in the electoral process. It also found that "Louisiana's history of racial discrimination, both *de jure* and *de facto*, continue[ed] to have an adverse effect on the ability of its black residents to participate fully in the electoral process."[29]

The court granted the plaintiffs' declaratory judgment that Act 20 violated Section 2 of VRA by diluting black voting strength; enjoined the state of Louisiana from conducting elections with Act 20 districts; and gave the legislature the opportunity to redraw the districts. The resulting district led to the election of Louisiana's first African-American Congressman since reconstruction.

Selected Excerpts from RenewtheVRA.org's Alabama Report

In *Dillard v. Crenshaw County*,[30] the court affirmed that racial discrimination was widespread throughout the Alabama electoral system, noting the prevalence of at-large

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28 Major v. Treen, 574 F. Supp. 325, 334 (Ed. La. 1983)

29 Major v. Treen, 574 F. Supp. 325, 339-40 (Ed. La. 1983).

30 640 F. Supp. 1347, 1356-60 (M.D. AL 1986).

elections and a high degree of racially polarized voting. The federal district court found that a desire to dilute black voting strength provided the impetus for statewide election laws that Alabama passed in the 1950s and 1960s.

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." Based on these findings, the district court expanded the *Dillard v. Crenshaw* litigation to include a defendant class of 17 county commissions, 28 county school boards, and 144 municipalities who were then employing at-large election systems tainted by the racially motivated general laws.

Selected Excerpts from RenewtheVRA.org's Florida Report

In *Nipper v. Smith*,[31] the court held that:

> Despite the removal of overt badges of segregation, the district court nonetheless found that "black citizens in Florida still suffer in some ways from the effects of Florida's history of purposeful discrimination," particularly in terms of socio-economic disparities, such as family income and high school graduation rates. *Id.* at 1536. Black citizens in the region covered by the Fourth Circuit are more likely to be unemployed and to fall below the poverty line. In addition, the limited evidence presented at trial (reflected in a consensus among the experts) suggested that, although little disparity exists in voter registration, black voter turnout appears to be slightly lower than white turnout. And the "rolloff" effect—which measures the number of voters who sign in at the polls but fail to cast a vote for a particular election on the ballot—is greater among black voters than white voter.

The court in this case also found that "the record reveals that sufficient racial bloc voting exists in Fourth Circuit and Duval County Court elections, such that the white majority usually defeats the minority's candidate of choice."

Selected Excerpts from RenewtheVRA.org's Georgia Report

31 39 F.3d 1494 (11th Cir. 1994) (en banc).

Common Cause of Georgia v. Billups[32] is one of the more extraordinary and recent Section 2/constitutional cases that demonstrate continued racial discrimination in the states. In 2005, the Georgia legislature enacted Act No. 53, amending the State's election code to impose a photographic identification requirement for all persons voting in person in the State of Georgia. Under the statute, valid photographic I.D.s would cost between $20 and $35. The legislation was submitted for DOJ administrative review and it was precleared.

Private plaintiffs, including the Georgia Legislative Black Caucus, then filed suit in federal court for the Northern District of Georgia. The court issued a preliminary injunction, finding that the plaintiffs were likely to prevail on their claim that the photo I.D. requirement violated the Equal Protection Clause, was discriminatory, and constituted an unconstitutional poll tax.

Selected Excerpts from RenewtheVRA.org's New York Report

In New York, Section 2 cases have illustrated the continued discrimination experienced by language minority voters in the face of Section 203 noncompliance. In *Ashe v. Board of Elections of the City of NY*[33], a successful Section 2 challenge that was settled, the plaintiffs challenged the Board's failure to: train Poll Inspectors; process affidavit ballots correctly; assign Poll Coordinators; provide language assistance in Spanish and Chinese in the completion of voter registration forms; inspect and certify operable voting machines; and ensure that repairs of inoperable machines in Black and Latino communities were completed expeditiously. The settlement included increased training requirements for poll inspectors, translators and other personnel, requirements for the designation of poll coordinators and information clerks, signage requirements; outreach

32 (N.D. GA, 4:05-cv-00201-HLM; 11th Cir. 05-15784).

33 88 Civ. 1566 (E.D.N.Y. 1988)

to Black and Latino communities; modifications to the voter registration forms; and requirements for the use of certified voting machines.[34]

Selected Excerpts from RenewtheVRA.org's South Carolina Report

United States v. Charleston County.[35] involved a Section 2 challenge to Charleston County's at-large election method for its County Council County Election Commission. The Court found for the plaintiff, noting evidence presented in the trial court that voting in Charleston County Council elections was severely racially polarized. One of the expert witnesses, Theodore Arrington, PhD, found racially polarized voting in 94 percent of county Council elections between 1984 and 2000. Furthermore, expert witnesses presented evidence that a 1989 County referendum to switch the county's election system to single member districts was marked with significant racial bloc voting: at least 98 percent of minority voters approved the switch to single-member districts, whereas at least 75 percent of white voters wanted to retain at-large elections.

Selected Excerpts from RenewtheVRA.org's South Dakota Report

A number of the voting changes that South Dakota enacted after it became covered by Section 5 in 1975, but which it refused to submit for preclearance, had the potential for diluting American Indian voting strength, including and especially the state's 2001 legislative redistricting plan. In 2001, South Dakota enacted a law dividing the state into thirty-five legislative districts, each of which elected one senator and two members of the state house of representatives. In the 2001 plan, the boundaries of District 27, which included Shannon and Todd Counties, were altered so that Indians made up 90 percent of the district, while the district was one of the most overpopulated in the state. As was apparent, American Indians were "packed," or over-concentrated, in the new District 27. Had American Indians been "unpacked," they could have made up a majority in an additional, neighboring house district. Despite enacting these changes in voting, the state refused to submit the 2001 plan to the Justice Department for preclearance. In *Shirt v.*

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34 Ashe v. Board of Elections, 88 Civ. 1566 (CPS).

35 365 F.3d 341 (D.S.C. 2004).

Hazleton,[36] Alfred Bone Shirt and three other Indian residents from Districts 26 and 27, with the assistance of the ACLU, sued the state in December 2001 for its failure to submit its redistricting plan for preclearance. The plaintiffs also claimed that the plan unnecessarily packed American Indian voters in violation of Section 2 and deprived them of an equal opportunity to elect candidates of their choice. In 2004, the court invalidated the state's 2001 legislative plan because it discriminated against American Indian voters by packing American Indians into a single district in order to remove their ability to elect a candidate of choice to the state legislature. In its opinion, the court also found that there was "substantial evidence that South Dakota official excluded Indians from voting and holding office."

Conclusion:

On behalf of the Leadership Conference on Civil Rights and its coalition partners, I want to thank the Committee for the opportunity to testify today on the need to reauthorize and restore the Voting Rights Act, and in particular, the important temporary provisions that I have been discussing. As this Committee knows, these provisions are essential to ensure meaningful and fair representation as well as equal voting rights for all Americans. We are honored to be able to share with the Committee these state reports that have been prepared to document for Congress the persistence of discrimination in covered jurisdictions and the continuing relevance of these temporary provisions in preventing discrimination. I look forward to discussing with the Committee in more detail the methodology and preparation of these reports. I appreciate the Committee's desire to include this information in the legislative record and look forward to ongoing discussions about reauthorizing and strengthening the Voting Rights Act.

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36 336 F. Supp.2d 976 (D.S.D. Sep 15, 2004).

Mr. CHABOT. Lieutenant Governor Rogers, you are recognized for 5 minutes. Thank you.

TESTIMONY OF THE HONORABLE JOE ROGERS, COMMISSIONER, NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, AND FORMER LIEUTENANT GOVERNOR OF COLORADO

Mr. ROGERS. Thank you very much, Mr. Chairman. It's good to be with you and good to be before the Committee. I am delighted in particular to be back before you to discuss the National Commission's report and accompanying supplement. The report and supplement capture some of the most compelling testimony and facts culled from the ten hearings that the National Commission conducted throughout the United States.

Of note, our hearings and review of the record and data show dramatic gains having been made in terms of decreasing the instances of discrimination and intimidation of minority voters throughout the United States since the establishment of the Voting Rights Act. Plainly, we have come a long way on our way toward racial equality and full access to the ballot for all of our citizens.

However, with that said, the journey toward a color blind society in which discrimination against minority voters no longer exists is simply not yet complete. Whether the animus is hatred or power—I will state that once again, whether the animus is hatred or power—and whether the conduct is engaged by Democrats or Republicans, the end result, discrimination against minority voters, is the same. It is this result that is the aim and protection of the Voting Rights Act.

As my fellow Commissioner Bill Lann Lee pointed out in particular, I would like to state and present to you several examples of the facts that we discovered regarding voting discrimination and instances where the Voting Rights Act has either prevented or remedied discrimination in our Nation between 1982 and 2005.

I would like to begin with an example in particular from Mississippi, illustrating how section 5 of the act maintains gains resulting from section 2 litigation and an example in particular from California showing its impact in preventing vote dilution.

Second, I would like to address the effectiveness and the efficiency of section 5.

And third, I would like to point out the significance of the minority language provisions.

Finally, I would like to note the persistence of practices of discrimination in jurisdictions throughout the Nation.

Up through 1987, Mississippi in particular had a dual-registration system whereby people had to register separately in both the city and the county in order to vote in all elections, Federal, State, and local. This practice was found to be racially discriminatory under section 2 of the Voting Rights Act and Mississippi was forced to stop this practice. When Congress enacted the National Voter Registration Act, motor-voter, in 1993, Mississippi tried to revive its dual-registration system by passing legislation that restricted motor-voter registrants to voting only in Federal elections. Mississippi refused to submit its dual-registration system for section 5 preclearance until it was sued by the Department of Justice in a section 5 enforcement action and the United States Supreme Court

ultimately unanimously ordered Mississippi to submit the changes for preclearance. When Mississippi ultimately complied with the court order and submitted its dual-registration system to the Department of Justice, the Department objected in 1998 and Mississippi was prevented from reinstituting the discriminatory registration system.

Moreover, the Commission received testimony about how section 5 has blocked electoral changes whose effect was to dilute minority voting strength. Specifically, for example, the Chular Union Elementary School District in Monterey County, California, tried to change its method of election from single-Member districts to at-large elections. The Department of Justice objected under section 5 because the measure was, quote, "motivated, at least in part, by discriminatory animus" against Latino voters and because it would have a retrogressive impact upon Latino voting strength.

The Commission also found several examples of how the mere existence of section 5, in fact, had a deterrent effect upon stopping jurisdictions from enacting discriminatory changes.

With regard to the minority language provisions, the National Commission received testimony from several election administrators who testified about the need for minority language voters to have language assistance in order to vote. Conny McCormack in particular, the County Clerk and Recorder for Los Angeles County, testified that from January to August 2005, she received some 135,000 multilingual voter requests. Shirlee Smith, the Voting Rights Act Coordinator for Bernalillo County, New Mexico, stated that because of section 203, her position was created and elderly Indian voters were able to vote for the first time because they were able to receive assistance in the language that they speak.

There was also significant testimony about, frankly, the failures of providing language assistance at the polls in violation in particular of section 203.

Moreover, we heard about the impact of the Voting Rights Act's observer coverage provisions. Alabama Senator Bobby Singleton is from Hale County, Alabama, where the Department of Justice has sent observers on some 20 separate occasions. Senator Singleton stated that when the Department of Justice was not present at an election, Whites closed predominately Black polling places early. As a result, the Department of Justice intervention on multiple occasions in Hale County and Voting Rights Act enforcement measures, Blacks are now a majority of the elected officials within Hale County.

Finally, and unfortunately, the Commission record contains examples of instances of disparate treatment, voter dilution schemes, and unfortunately, examples of conduct designed to intimidate or otherwise suppress minority voters throughout the country.

In sum, these facts reveal that although our country has made, yes, significant progress, we have a long way to go. Racially-polarized voting remains a fact of life in many areas of our country. In States like Florida, Georgia, South Carolina, Texas, Federal courts in this decade have found that racially-polarizing voting exists.

In 2000, I was one of 38 African-Americans elected Statewide in the United States out of the nearly 900 such officials in the country. Our election, and indeed, elections of people like myself, rep-

resent progress, but is far from full emancipation of opportunity. In 2006, it still remains the case that most minority Members of this body, Mr. Chairman, most minority Members of the United States House of Representatives and State legislatures are elected in particular from majority-minority districts.

These examples of the data that we received throughout the United States indicate that neither the act nor the problems it was designed to combat, unfortunately, cannot be simply dismissed as relics of the past. On the contrary, they indicate what appears to be both a present and future need for its continuing protections. Thank you.

Mr. CHABOT. Thank you very much, Lieutenant Governor Rogers.

[The prepared statement of Mr. Rogers follows:]

PREPARED STATEMENT OF THE HONORABLE JOE ROGERS

Testimony of Joe Rogers
Before the Subcommittee on the Constitution
United States House of Representatives
March 8, 2006

Good afternoon, Chairman Chabot and members of the House Subcommittee on the Constitution. My name is Joe Rogers and I am the former Lieutenant Governor of Colorado. I am testifying here for the second time as a Commissioner on the National Commission on the Voting Rights Act. I'm honored to be back before you to discuss the National Commission's Report and accompanying Supplement. The supplement captures some of the most compelling testimony and facts culled from the ten hearings that the National Commission conducted throughout the United States.

Of note, our hearings and review of the records and data show dramatic gains made in decreasing the instances of discrimination and intimidation of minority voters throughout the United States since the establishment of the Voting Rights Act. Plainly, we have come a long way on our road toward racial equality and full access to the ballot for all of our citizens. However, with that said, the journey toward a colorblind society in which discrimination against minority voters no longer exists, is not yet complete. Whether the animus is hatred or power and whether the conduct is engaged by democrats or republicans, the end result – discrimination against minority voters – is the same. It is this result that is the aim and protection of the Voting Rights Act.

As my fellow Commissioner Bill Lann Lee stated, I would like to present several examples of the facts we discovered regarding voting discrimination and instances where the Voting Rights Act has either prevented or remedied discrimination in our nation between 1982 and 2005.

I'd like to begin with an example from Mississippi illustrating how Section 5 of the Act maintains gains resulting from Section 2 litigation, and an example from California showing its impact in preventing vote dilution. Second I would like to address the effectiveness and efficiency of Section 5. Third, I'd like to point out the significance of the minority language provisions. Finally I'd like to note the persistence of practices of discrimination in jurisdictions throughout the nation.

Up through 1987, Mississippi had a dual registration system where people had to register separately with both the city and the county in order to vote in all elections (Federal, State and Local). This practice was found to be racially discriminatory under Section 2 of the Voting Rights Act and Mississippi was forced to stop this practice. When Congress enacted the National Voter Registration Act in 1993, Mississippi tried to revive the dual registration system by passing legislation that restricted NVRA-registrants to voting only in federal elections. Mississippi refused to submit its new dual registration system for Section 5 preclearance until it was sued by the Department of Justice in a Section 5 enforcement action and the United States Supreme Court unanimously ordered Mississippi to submit the changes for preclearance. When Mississippi complied with the Court order and ultimately submitted its dual registration system to the Department of Justice, the department objected in 1998 and Mississippi was prevented from reinstituting the discriminatory registration system.

Moreover, the Commission received testimony about how Section 5 has blocked electoral changes whose effect was to dilute minority voting strength. Specifically, for example, when the Chualar Union Elementary School District in Monterey County, California tried to change its method of election from single-member districts to at-large elections, the Department of Justice objected under Section 5 because the measure "was motivated, at least in part, by discriminatory

animus" against Latino voters and because it would have a retrogressive impact on Latino voting strength.

The Commission also found several examples of how the mere existence of Section 5 had the "deterrent" effect of stopping jurisdictions from enacting discriminatory changes. For example, Alaska's post-1990 redistricting plans for its state house and senate were found to violate Section 5 because they reduced the voting strength of Alaska Natives. However, in the post-2000 redistricting cycle, Alaska took specific measures to ensure that it did not reduce Alaska Native voting strength in districts where Alaska Natives had a reasonable opportunity to elect candidates of their choice.

In a similar vein, in Fredericksburg, Virginia, the city council was preparing to dismantle its only majority African American district until the city attorney simply "warned" the council that doing so would violate Section 5.

With regard to the minority language provisions, the National Commission received testimony from several election administrators who testified about the need of minority language voters to have language assistance in order to vote. Conny McCormack, the County Clerk/Recorder for Los Angeles County, testified that from January to August 2005, she had received more than 135,000 multilingual voter requests. Shirlee Smith, the Voting Rights Act coordinator for Bernalillo County, New Mexico stated that because of Section 203, her position was created, and elderly Indian voters were able to vote for the first time because they were able to receive assistance in the language they speak.

The National Commission also heard examples of how the provision of language assistance enabled language minorities to elect their candidates of choice. For example, in Passaic, New Jersey, a Latino mayor was elected after a Department of Justice lawsuit compelled

Passaic County to provide language assistance to Spanish-speaking voters, and Hispanic turnout dramatically increased as a result.

There was also significant testimony about failures in providing language assistance at the polls in violation of Section 203. For example, in New York City in 2000, Chinese voters were presented with a ballot where Democratic candidates were labeled as Republicans and Republicans were labeled as Democrats. In South Dakota, a tribal official personally witnessed a situation where a husband who could not read was not allowed to get help from his wife and the election officials could not help him because they did not speak Lakota. As a result, the husband ripped his ballot in half and threw it in the trash. The unavailability of assistance violated Section 203 and the refusal to let his wife help violated Section 208.

Moreover, we heard about the impact of the Voting Rights Act's observer coverage provisions. Alabama State Senator Bobby Singleton is from Hale County, Alabama, where the Department of Justice has sent observers on more than 20 occasions. Senator Singleton stated that when the Department of Justice was not present at an election, "whites closed predominantly black polling places early." As a result of Department of Justice intervention on multiple occasions and other Voting Rights Act enforcement measures, blacks are now a majority of most elected bodies in Hale County. To this point, Joe Rich, Chief of the Voting Section of the Department of Justice from 1999-2005, testified about how the mere presence of observers usually calmed racial tensions concerning elections and served to decrease race based incidents.

Finally and unfortunately, the Commission record contains examples of instances of disparate treatment, voter dilution schemes and examples of conduct designed to intimidate and suppress the impact of minority voters. Of note, in Long and Atkinson Counties in Georgia, there were efforts to wrongfully challenge Latino voters *en masse* in the 2004 election cycle.

Similar efforts were invoked against Indian voters in Duluth, Minnesota. In recent years, racially offensive comments have been made by poll workers against Hispanic voters in Reading, Pennsylvania and against Asian voters in New York City. In 2000, poll workers required minority voters in Hamtramck, Michigan to show identification, even though identification was not required, and poll workers did not require the same of white voters.

In sum, these facts reveal that although our country has made significant progress, we have a long way to go. Racially polarized voting remains a fact of life in many areas of the country. In states like Florida, Georgia, South Carolina, and Texas, federal courts have found racially polarized voting in statewide redistricting cases in this decade. In 2000, I was one of 38 black federal or state officials elected statewide out of more than 900 such officials throughout the United States. This represents progress, but is far from the full emancipation of opportunity. In 2006, it still remains the case that most minority members of the U.S. House of Representatives and state legislatures are elected from majority-minority districts.

The examples I have mentioned today are but a few of the many facts contained in the National Commission's Report and Supplement. The data undeniably indicates that neither the Act nor the problems it was designed to combat can be dismissed as relics of the past. On the contrary, they indicate what appears to be a present and future need for its continuing protections. The testimony, records and data reveal that the temporary provisions of the Voting Rights Act have been and continue to be vital safeguards to equal access to the ballot for all Americans.

Mr. CHABOT. You may have seen us messing with our Blackberrys up here for a while, and I apologize if that was somewhat distracting, but we've been getting communications from the floor of the House indicating when votes might be upcoming and we're hearing that they may be relatively soon, so if, in fact, that occurs, they're going to go on for at least an hour. Therefore, what we've indicated that we've agreed to do is to go ahead with our questioning here. At the point that we have to leave for the floor, any other Members will have the opportunity to submit them in writing to the panel so that you don't have to wait for an hour to answer our questions. So that'll be the game plan at this point.

The Chair recognizes himself for 5 minutes at this point, and I'll begin with you, Mr. Lee, if I can. A large part of the report that you referred to is dedicated to analyzing the activity conducted by the Department of Justice under section 5. Would you talk about what types of discriminatory tactics continue to be employed by covered jurisdictions?

Mr. LEE. Well, what we saw, and I think Mr. Rogers has canvassed them, is a persistence of the kind of tactics you saw in the past that Congress relied on, that is redistricting, gerrymandering, racially sort of sensitive annexations, line drawings. We heard a lot of testimony about manipulation of starting times for voting booths. These are the kinds of activities that, when combined with racially-polarized voting, would constitute vote dilution. So it is very troubling because this is the same kind of problem that Congress sought to eliminate in 1965, and then when it saw that it had not been eliminated, reauthorized several times.

Mr. CHABOT. Thank you very much. Ms. Strossen, if I could go to you next, how important is section 5 to protecting minority voters in registering and turning out and casting ballots for candidates of their choice in local jurisdictions, such as counties and school boards and smaller cities, and where would minority citizens be without section 5, especially in these smaller jurisdictions?

Ms. STROSSEN. Chairman Chabot, in a word, incredibly important with respect to every single factor that you mentioned, including registration, voting, the opportunity to choose a candidate of one's choice. We have multiple examples throughout our litigation report, and as you indicate from your question, the local elections, which may perhaps receive less national attention, in some very real sense are even more important in terms of affecting people's daily lives. The opportunity to have input into who is elected for school board may make, with all due respect, even more of a dramatic impact on somebody's life than the opportunity to choose a Member of Congress of one's choice. We have many, many examples that really could go below the radar screen were it not for the preclearance mechanism of section 5 and the ability of organizations such as the ACLU representing private clients to bring enforcement actions.

Mr. CHABOT. Thank you very much. Mr. Henderson, if I could go to you next, collectively, what do the reports say about the security of minority voting rights in jurisdictions covered by the temporary provisions of the Voting Rights Act and would minority voters continue to progress without the temporary provisions?

Mr. HENDERSON. Thank you, Mr. Chairman. I think the 14 reports that are being submitted and will be submitted over the next month make several important points consistent with your question. First, progress has been made in this country, in large measure because of the Voting Rights Act and affording covered jurisdictions and minority citizens within those jurisdictions the opportunity to elect candidates of their choices, locally and State elections and also nationally.

And without those provisions, what we have found is that conditions of racially-polarized voting within those covered States, the inventiveness of election officials and State leaders, often in instances sometimes with malice, sometimes without, adopting provisions that have the effect of discriminating against voters is widespread and well documented. We have seen that certainly with respect to provisions covered by section 5. We have also seen that very much in the language assistance provisions of section 203.

And were those temporary provisions not reauthorized, I think it is reasonable to expect the kind of slippage of voter participation and electoral engagement on the part of minority citizens, particularly within those covered jurisdictions.

Mr. CHABOT. Thank you very much. And Lieutenant Governor Rogers, I will address my last question to you.

Mr. ROGERS. Yes.

Mr. CHABOT. When you were here last fall on the first panel, you had touched upon the presence of racially-polarized voting in the elections, and, of course, you've touched on that again today. What were the Commission's findings on the pervasiveness of racially-polarized voting and why is it significant and how does it impact the ability of minorities to elect candidates of their choice?

Mr. ROGERS. Mr. Chairman, we were both hopeful and at the same time discouraged when you looked at the numbers around the country. With the ten hearings that we conducted throughout the United States, it was clear that there are patterns of racially-polarized voting. Essentially, it is a world in which White folks vote for White folks, Blacks vote for Blacks, Hispanics vote for Hispanics, Asians may vote for Asians. And frankly, when you have circumstances where that exists and you don't have the ability or the interest of people in crossing over to vote for each other across ethnic lines, that represents the world of racially-polarized voting and we found that world in nearly every region of the country.

Mr. CHABOT. Okay. Thank you very much, and my time has expired.

The gentleman from New York, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman. Let me begin by thanking all the witnesses for their testimony in our continuing effort to establish a very adequate factual basis for the legislation that undoubtedly we are going to adopt this year, a basis that will satisfy the Court's requirements that have been laid down in the cases, that shouldn't be laid down, but that were laid down.

And let me also note—I neglected to do so before—I welcome Ms. Strossen in particular, who is a law professor in my district as well as the distinguished President of the ACLU.

Ms. STROSSEN. Thank you very much.

Mr. NADLER. With that, given the fact that we are going to have votes starting in about 5 minutes, I am going to defer my questioning and yield to the next—well, I defer the questioning. You can go on to the next——

Mr. CHABOT. You are yielding back?

Mr. NADLER. Yes, I will yield back.

Mr. CHABOT. The gentleman yields back. The gentleman from——

Mr. NADLER. No, no, no——

Mr. CHABOT. Oh, yields to Mr. Scott?

Mr. NADLER. Yes.

Mr. CHABOT. Okay. Mr. Scott is recognized for the balance of his time.

Mr. SCOTT OF VIRGINIA. Thank you, Mr. Chairman. Since we are developing a record on the need for section 5, I just wanted to get something on the record.

Mr. CHABOT. Just for the record, I gave you an entire 5 minutes here, Bobby, just so you know.

Mr. SCOTT OF VIRGINIA. Section 5 and the inadequacy of section 2, if someone—if we forced someone to—if a bill passed and you let it go into effect and somebody got elected, is section 2 an adequate remedy if someone is now enjoying the benefits of incumbency? Lieutenant Governor Rogers, you are an elected, former elected official and you have seen a lot of campaigns. Does that incumbent who achieved his seat by an illegal scheme, does he then enjoy an advantage in the next election as an incumbent?

Mr. ROGERS. Whether the incumbent achieved it by an illegal scheme, as you characterize it, or was simply elected to the position, the reality is that incumbents enjoy an advantage as it relates to opposition candidates. I mean, that has been proven clearly across the board in terms of the record of incumbency and the ability to hold on to offices.

Mr. SCOTT OF VIRGINIA. And that, therefore, is the magic of section 5. You don't let the illegal scheme go into effect. It has to be precleared for those with a history of discrimination.

Mr. ROGERS. There is no doubt, section 2 and section 5 clearly differ, and section 5 gives you the ability to, in effect, intervene, to stop the action from occurring or the discriminatory conduct from occurring in the first place, whereas section 2 allows it to—essentially, you're intervening to try to stop what is already in place after it's already been engaged.

Mr. SCOTT OF VIRGINIA. Now, there are other disadvantages of section 2. Under section 2, who bears the major cost of going forward?

Mr. ROGERS. Essentially, it's the plaintiff, whoever is bringing the action. So if you were challenging, if I made the decision as a private party to challenge something in my State of Colorado under a section 2 claim, then I'd bear that burden in terms of that cost.

Mr. SCOTT OF VIRGINIA. You mean the victim?

Mr. ROGERS. Yes.

Mr. SCOTT OF VIRGINIA. And who has the burden of proof in that case? Is it the victim again?

Mr. ROGERS. Yes.

Mr. SCOTT OF VIRGINIA. And we will be considering a *Bossier Parish* fix. What is wrong with—Mr. Lee, you were Assistant Attorney General. What's wrong with preclearing a plan that is a clear violation of section 2?

Mr. LEE. Well, you don't have—you're not fulfilling the prophylactic function of section 5. The law once was that section 5 and section 2 were compatible and now they're sort of somewhat out of sync. And so bringing the law back into sync would make section 5 a more effective prophylactic device and deal with the kinds of issues that you dealt with with Mr. Rogers, that is, section 2 is, after all, an after-the-fact remedy and section 5 is a forward-looking remedy.

Mr. SCOTT OF VIRGINIA. Thank you, Mr. Chairman. Mr. Chairman, I'll yield back.

Mr. CHABOT. The gentleman yields back.

The gentleman from Iowa, Mr. King, is recognized for 5 minutes.

Mr. KING. Thank you, Mr. Chairman, and I want to compliment the witnesses today. I think it is an exceptionally high-qualified, well-informed, well-prepared delivery on all your parts. As I read through this, I have just some levels of curiosity.

I think you've done a very good job of answering the issue that popped to me out of all of your testimony about racially-polarized voting and I believe it was Lieutenant Governor Rogers, perhaps, or maybe Mr. Henderson that addressed whether it is Black or whether it is White or what minority it may be, that that happens. Just my observation of human nature, having watched my own family polarize themselves by a unit of family, even cousins separate from each other because they always gravitate toward a like kind at the family reunion, there's a certain human nature to do just that, to gravitate toward a like kind.

But I wanted to pose a question. Are there examples out there that you have studied, that you've come across in your analysis that show where there is a minority majority district that has elected perhaps a non-minority to represent them, or vice-versa? Are there exceptions to these rules that you have all tended to testify to today, and if there are, can we learn from them?

Mr. LEE. There are, of course—go ahead.

Mr. ROGERS. Please.

Mr. LEE. I will yield to the Lieutenant Governor.

Mr. ROGERS. Thank you, Bill. I'd note, for example, if you look at California, if you looked at Oakland, for example, California, you have Jerry Brown who was elected as Mayor of Oakland, for example. It's a majority Black community, but he's elected to serve as mayor there. And there are examples of that in various portions of the country, where you have minorities essentially making a decision to elect somebody White to represent their interest and concern, and obviously the same is true, you do have circumstances where Whites will, in fact, vote for and support and otherwise endorse African-Americans or Latino candidates.

For example, if you look at the United States Senate, you have in Colorado Ken Salazar, who serves as a Senator from Colorado, United States Senate. Obviously, Mr. Martinez out of Florida. So you have examples throughout the United States where you have had clear measures of success, and to be frank with you, Congress-

man, I wouldn't be standing before you right now were it not for the hearts and minds of folks in our State willing to cross the lines of culture to say that, Joe, I think you can fight for my interests and my concerns even though you don't happen to look just like me, and that represents great progress in the Nation.

I think the great concern that we have in terms of this whole issue of racially-polarized voting is the world in which you limit that opportunity, in which I simply won't vote for you, Mr. King, because you are White. I think we would all concede that even though I can exercise a preference that I have, if I engage in that conduct, then that is something that's not quite what we want to have happen in our world.

Ms. STROSSEN. Congressman, could I make a point?

Mr. KING. Go ahead, Ms. Strossen.

Ms. STROSSEN. Thank you so much. I would be very curious as to whether those exceptions would fall within the covered jurisdictions. Our research indicates that the problem of racially-polarized voting is most prevalent in what is most relevant to this Committee's concern, and that is the covered jurisdictions.

I would also like to call your attention to my statement in our report which emphasizes that we're not just giving anecdotal findings here. We are talking about repeated conclusions by courts of law in recent litigation, including courts or judges that cross the ideological spectrum just as a matter of statistical analysis.

Mr. KING. Ms. Strossen, I appreciate your bringing that up and I look back to your testimony where you referenced packing minority voters to dilute their influence. I would submit that there's another factor in this equation that could well be the polarization of political ideology rather than, I'll say skin color, for example. There might well be some substance. Have you seen any of that evidence?

Ms. STROSSEN. That was not what we were looking for. We were looking for what was relevant to the Voting Rights Act and namely packing of minority districts——

Mr. KING. Thank you——

Ms. STROSSEN [continuing]. There's one very dramatic example where a court recently made a finding with respect to South Dakota, and there were enough—I don't have the exact numbers in front of me, you can find it in the table of contents of our report, but there were more than enough Native Americans to have two majority-minority districts and instead they were concentrated into only one and that was found to be a legal violation.

Mr. KING. Thank you, and in a short time, Mr. Lee?

Mr. LEE. Mr. King, we tried to address that. Ours was a bipartisan panel, and so we delved into the question of whether this was party-specific and we found that there were documented instances of Democratic primary elections in which, frankly, the race card was played, and I think the fact—the danger in racially-polarized voting is it provides a ready mechanism for the race card to be played in any particular election.

Mr. KING. Thank you, and Mr. Chairman, I'll yield back the balance of my time.

Mr. CHABOT. The gentleman yields back his time.

The gentleman from North Carolina, Mr. Watt, is recognized, and we may be able to get through this.

Mr. WATT. Thank you, Mr. Chairman. I'll try to be quick. I just want to do some clean-up things to make sure that, since this may be the last hearing before a bill is dropped, that we've done all our due diligence.

I want to inquire of the Chair to be sure there his unanimous consent request was broad enough to cover——

Mr. CHABOT. I'm sorry.

Mr. WATT. I wanted to make sure that the Chair's unanimous consent request was broad enough to cover and get all of these reports into the record.

Mr. CHABOT. It was and we'll leave the record open for 5 days, as well.

Mr. WATT. That was my second question. Okay.

Now, I haven't done this in a long time because I haven't practiced law in 13 years, but I don't know Lieutenant Governor Rogers' background, but I know the background of the three people on this end and I think their record is such that they would be recognized as experts if they were in a court of law on some of these issues, and I think Mr. Rogers is going to be recognized as an expert as a result of having participated in the Commission.

So I want to get technical legal here and ask each of you, Mr. Lee, Ms. Strossen, Mr. Henderson, whether you have an opinion, satisfactory to yourself, which you are able to express to a reasonable certainty as to whether the reports that you all have submitted for the record today are reliable.

Mr. LEE. I can—yes, absolutely.

Mr. WATT. And your opinion is?

Mr. LEE. My opinion is our report is reliable. I looked at the 1981 report that was prepared by the Civil Rights Commission and compared it to our report and our report is actually broader. Our report covers a broader geographic area. Our report covers not only reported decisions, but unreported decisions. Our report covers not only objections, but withdrawals and Attorney General coverage, which was not covered by the 1981 report. So our report is actually broader.

Mr. WATT. Ms. Strossen, the same——

Ms. STROSSEN. I have an opinion and my opinion is that both of the ACLU reports are reliable.

Mr. WATT. Mr. Henderson?

Mr. HENDERSON. Mr. Watt, we believe that the extensive research that went into the preparation of these reports, review of DOJ objections, district court declaratory judgments, other elements that would allow us to form an opinion have allowed me to believe that these are reliable reports.

Mr. WATT. And Lieutenant Governor Rogers?

Mr. ROGERS. I would simply concur with the Chair that, yes, in fact, we believe these reports are accurate and, in fact, reliable.

Mr. WATT. Okay. Final question. As experts, do you have an opinion satisfactory to yourself that you are able to express to a reasonable certainty as to whether it is necessary to extend and renew the provisions of the 1965 Voting Rights Act, the expiring provisions? Mr. Lee?

Mr. LEE. Yes. Our Commission did not come to such a conclusion, but I personally have such an opinion.

Mr. WATT. And that opinion is?

Mr. LEE. And my opinion is that the evidence is overwhelming that it is appropriate to reauthorize the Voting Rights Act's temporary provisions.

Mr. WATT. Ms. Strossen?

Ms. STROSSEN. I have an opinion and the opinion is that it is necessary to reauthorize, renew, and, I would add, revitalize by fixing the problems that were caused by the Supreme Court's decisions in *Bossier* and *Ashcroft* that have been alluded to. Those are inconsistent with what we believe to be Congress's original intent.

Mr. WATT. Mr. Henderson?

Mr. HENDERSON. Based on the information I have reviewed, Mr. Watt, I certainly concur with the two previous statements. I believe that reauthorization of the Voting Rights Act is necessary. I also strongly believe that restoring and revitalizing the act is also necessary regarding at least——

Mr. WATT. Necessary or unnecessary?

Mr. HENDERSON. Is necessary——

Mr. WATT. I wanted to make sure.

Mr. HENDERSON [continuing]. Absolutely necessary and that that conclusion is based on a careful review of the evidence gathered from the reports we've prepared.

Mr. WATT. Lieutenant Governor Rogers?

Mr. ROGERS. Congressman, I am hesitant to answer your question because our role has been solely as a fact-finding role.

Mr. WATT. Okay.

Mr. ROGERS. I would say that the facts clearly demonstrate that there are problems that presently exist and that the act in and of itself has been a remedy to solve these problems. It appears that it would be so both for the present and future. But I have one word of caution, if I may——

Mr. WATT. Absolutely.

Mr. ROGERS. The demographics of the country are changing. Presently in the United States, seven out of every ten people in the country are White. One out of every ten people in the country is roughly Black, and roughly one out of every ten people in the country are Hispanic. In just 24 years, one-third of the Nation will be minority. In just 44 years from today, nearly one-half of America will be minority. And so the demographics of the country are changing in such a way that you can look forward in the context of this act to what it will mean in its broader sense as the country becomes much more concentrated in terms of minority——

Mr. WATT. You seem to be making the case that about 50 years from now, we may need a Voting Rights Act for the other minority—— [Laughter.]

To protect their voting rights.

Mr. CHABOT. That is why we have been so gracious in holding these hearings. [Laughter.]

Mr. WATT. So when we get there, let the record show, if I'm still around, I'm going to be equally supportive of that notion. [Laughter.]

With that, Mr. Chairman, I'm happy to yield back.

Mr. CHABOT. The Chair notes Mr. Watt's comment.

The gentleman from Maryland is recognized for 5 minutes, or if he can make it shorter, that would be great because we have a vote on the floor.

Mr. VAN HOLLEN. I won't take up much time because I think a lot has been covered, especially in the last round of questioning from my colleague, Mr. Watt.

I would just really point out that the testimony that you've given and all the individual stories that you searched for and found to support a continuation and a reinforcement of the Voting Rights Act, I think those individual stories are reflected in the aggregate by the statistics that Mr. Lee pointed out in his testimony, and just to repeat that for emphasis, where the Justice Department refused to preclear over 1,100 voting changes contained in more than 650 section 5 submissions since 1982, and I think that aggregate figure clearly supports the individual stories and the specific cases that you have looked at and brought to the Committee.

So I thank you for your work, and Mr. Chairman, I thank you for having this set of hearings.

Mr. CHABOT. I thank the gentleman for yielding back.

There are a series of votes on the floor now so we're all, unfortunately, going to have to run. I want to thank this panel for their very helpful testimony this afternoon. I thought you did an excellent job in bringing a lot of things together here in concluding the ten hearings that we've had on the Voting Rights Act. So thank you very much.

If there is no further business to come before the Committee, we're adjourned. Thank you very much.

[Whereupon, at 6 p.m., the Subcommittee was adjourned.]

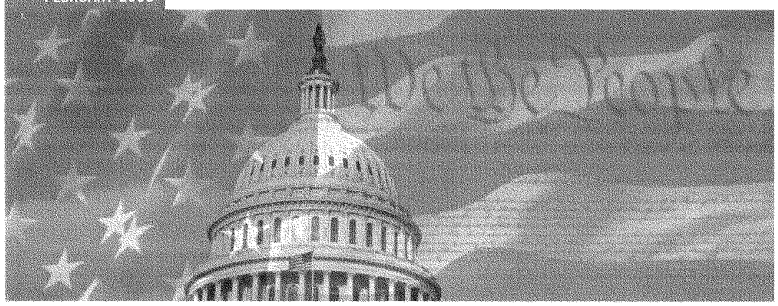
APPENDIX

Material Submitted for the Hearing Record

APPENDIX TO THE STATEMENTS OF THE HONORABLE BILL LANN LEE AND THE HONORABLE JOE ROGERS, "PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK, 1982–2005," A REPORT BY THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT

National Commission on the Voting Rights Act

FEBRUARY 2006



PROTECTING MINORITY VOTERS

The Voting Rights Act at Work 1982-2005

A Report by:

The National Commission
on the Voting Rights Act

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK, 1982-2005

A Report By The
National Commission on the Voting Rights Act

February 2006

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FOREWORD

When the Lawyers' Committee, in conjunction with the civil rights community, first conceived of a National Commission to study the impact of the Voting Rights Act and the state of discrimination in voting today, we could not have anticipated the overwhelming response from experts, citizens and advocates to the Commission's work. Responding to this demand, the Commission held ten hearings. During the hearings we heard from over 100 witnesses. We are very touched by all who responded enthusiastically to our invitations to share their expertise and stories.

We could not ask for a better or more committed group of Commissioners. They volunteered their time and expertise and ensured that the record of discrimination in voting was thoughtfully and thoroughly examined. Over a year ago, Commissioner Chandler Davidson was charged with the enormous task of leading the effort to review the record and draft the Report for the National Commission. With considerable input and insight from all the Commissioners, the Commission has produced a Report that captures the triumphs and challenges that remain for the Act.

As the Report demonstrates, the Act has been instrumental in improving minority voters' access to the ballot and their ability to elect the candidates of their choice. Unfortunately, the Report also shows, in great detail, that those who would deny these rights to minority voters have also been hard at work undermining the promise and potential of the Act. One cannot help reading the Report without concluding that the Act cannot simply be dismissed as a relic of our past. Its protections are still needed. The promise of our constitution is still a work in progress.

Barbara Arnwine
Executive Director
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Honorary Chair, Charles McCurdy Mathias, Jr., is a former Representative and Senator from Maryland. Before serving in Congress, Mathias served a year in the Maryland House of Delegates from 1959–1960, was a city attorney of Frederick from 1954-1959 and an assistant attorney general of Maryland from 1953-1954. He served for four terms in the United States House of Representatives (1961-69). As a three-term Senator from January 1969 through January 1987, Senator Mathias served as Chairman of both the Special Committee on Termination of the National Emergency and the Committee on Rules and Administration and as Co-chairman of both the Joint Committee on Printing and the Joint Committee on the Library. Mathias currently practices law in Washington, D.C.

Chair, Bill Lann Lee, is a partner with the law firm Lieff, Cabraser, Heimann & Bernstein, LLP in San Francisco. Lee is the former Assistant Attorney General for Civil Rights of the U.S. Department of Justice. Lee was an attorney for 17 years with the NAACP Legal Defense and Educational Fund, the law firm founded by Justice Thurgood Marshall. He headed the Legal Defense Fund's Western Regional Office in Los Angeles. Lee is the recipient of numerous honors and awards, including the ABA Spirit of Excellence Award (2004), the Anti-Defamation League Pearlstein Civil Rights Award (2002), the U.S. Department of Justice John Randolph Distinguished Service Award (2001), and the Pioneer Award from the Organization of Chinese Americans (2000).

Hon. John H. Buchanan is an ordained Baptist minister who served churches in Alabama, Tennessee, Virginia, and Washington, D.C. Buchanan also represented Birmingham, Alabama, in Congress for sixteen years. As a senior member of the House Education and Labor Committee, Buchanan was instrumental in the writing and passage of Title IX. From the outset of his career, he worked for and was a strong proponent of full voting representation in Congress for the District of Columbia. After leaving Congress, he chaired the board of the civil liberties organization, People For the American Way, for ten years.

Chandler Davidson is the Radoslav Tsanoff Professor of Public Policy Emeritus and Research Professor of Sociology and Political Science at Rice University. Dr. Davidson has written or edited several books and articles on race, politics, and inequality. He was the co-editor of *Quiet Revolution in the South*, a definitive work on the impact of the Voting Rights Act in the South.

Dolores Huerta is the co-founder and First Vice President Emeritus of the United Farm Workers of America AFL-CIO (UFW) and President of the Dolores Huerta Foundation. She helped form the National Farm Workers Association (NFWA), the predecessor to the UFW, with Cesar Chavez. In addition to organizing, she has been instrumental in the passage of legislation allowing voters the right to vote in Spanish and in lobbying efforts for the unemployed, underemployed, and farm workers.

Elsie Meeks is the Executive Director of First Nations Oweesta Corporation, a national financing intermediary that offers technical assistance and capital to help Native communities establish community development financial institutions. She is an enrolled member of the Oglala Lakota Tribe and was appointed by Senate Majority Leader Tom Daschle to the U.S. Commission on Civil Rights in 1999 as the first Native American to serve on the Commission.

Charles Ogletree is the Harvard Law School Jesse Climenko Professor of Law and Vice Dean for the Clinical Programs. He is the co-author of the award-winning book, *Beyond the Rodney King Story: An Investigation of Police Conduct in Minority Communities*, and the author of last year's *All Deliberate Speed: Reflections on the First Half-Century of Brown* v. *Board of Education*. Before becoming a professor, Ogletree was the Deputy Director of the District of Columbia Public Defender Service and worked in private practice. Ogletree also has a long record of commitment and service to public schools and higher education.

Joe Rogers is a national speaker, lecturer and practicing attorney in Colorado. In 2003, Rogers completed his term as the Lieutenant Governor of Colorado, where he held the distinction of serving as America's youngest Lieutenant Governor and only the fourth African American in U.S. history ever to hold the position. He has served as Founding Chairman of the Republican Lieutenant Governors' Association and served on the executive committee of the National Conference of Lieutenant Governors.

LEAD STAFF

Jon Greenbaum is Director of the National Commission on the Voting Rights Act and Director of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law. As Director of the Voting Rights Project, Mr. Greenbaum is responsible for the Lawyers' Committee's efforts to secure racial justice and equal access to the electoral process for all voters.

From 1997-2003, Mr. Greenbaum was a trial attorney in the Voting Section of the Department of Justice, Civil Rights Division, where he enforced the Voting Rights Act to protect the rights of minority citizens throughout the country.

Marcia Johnson-Blanco is Deputy Director of the National Commission on the Voting Rights Act and Staff Attorney at the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law. As a Staff Attorney, one of her core responsibilities is working on issues relating to the reauthorization of the Voting Rights Act.

PROTECTING MINORITY VOTERS:

THE VOTING RIGHTS ACT AT WORK, 1982-2005

A Report

By the National Commission on the Voting Rights Act

February 2006

Executive Summary

The National Commission on the Voting Rights Act was established by the Lawyers' Committee for Civil Rights Under Law, a nonprofit, nonpartisan civil rights organization, in conjunction with the civil rights community. Its purpose is to determine whether serious and widespread vote discrimination has continued since the Act's last major reauthorization in 1982. To this end, the Commission held ten hearings across the nation from March through October 2005, at which more than 100 witnesses spoke. After examining testimony from these hearings, as well as documents entered into the record and information obtained from governmental, legal, media and scholarly sources, the Commission prepared the following Report of its findings.

The Commission is composed of a politically and ethnically diverse group of men and women, including former elected and appointed public officials, scholars, lawyers, and leaders. The honorary chair is Charles Mathias, former Senator and Representative from Maryland who played a crucial role in the initial passage and subsequent reauthorizations of the Act. The chair is Bill Lann Lee, former Assistant Attorney General for Civil Rights. Other members are John Buchanan, Chandler Davidson, Dolores Huerta, Elsie Meeks, Charles Ogletree, and Joe Rogers. Their biographies are included in the preface to this Report. Guest Commissioners—men and women with experience in voting rights, the electoral process, and/or civil rights—were also invited to participate in several of the hearings.

A summary of the proceedings of the Commission, entitled *Highlights of Hearings of the National Commission on the Voting Rights Act, 2005,* is set forth as a supplement to this Report.

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The Voting Rights Act was signed into law at the end of a tumultuous period of civil rights struggles in the South. The Civil Rights Act of 1964 had abolished the Jim Crow system but failed to adequately address black voting rights. Following the brutal attack in Selma, Alabama, by local law enforcement officers on civil rights demonstrators crossing the Edmund Pettus Bridge in March 1965, President Lyndon Johnson asked Congress to pass legislation guaranteeing the voting rights of all citizens. Bipartisan majorities in both houses swiftly complied, and Johnson signed the Act in early August.

Amended and reauthorized on a bipartisan basis four times, the Act consists of both permanent and nonpermanent features. The most important permanent provision is Section 2, which applies nationwide and prohibits any voting qualification or practice that results in denial or abridgement of voting rights on the basis of a citizen's race, color, or membership in one of the language-minority groups identified in Section 4, described below. The nonpermanent provisions are scheduled to expire August 6, 2007, unless Congress renews them. They include the following:

- *Section 5*, which requires covered states and political subdivisions to submit all proposed electoral changes for approval ("preclearance") either to the Attorney General or the U.S. District Court for the District of Columbia. Unless precleared, the changes cannot be implemented.
- Parts of *Sections 6-9 and 13*, which permit the Justice Department to send federal examiners and observers to polling places in covered political subdivisions that the Department has reason to believe will engage in electoral discrimination based on race or color.
- *Section 4*, which contains the formula for preclearance and examiner/observer coverage, and also requires certain jurisdictions falling under that coverage to provide language assistance to speakers of Spanish, as well as of Native American, Native Alaskan, and Asian languages.
- *Section 203*, which also requires certain jurisdictions to provide language assistance to speakers of Spanish, Native American, Native Alaskan, and Asian languages under a different coverage formula.

The focus of the Act historically has been twofold: (1) to guarantee racial or ethnic minorities access to the ballot, by prohibiting the many "tests and devices" that had been used to impede that access, as well as more subtle disfranchising measures developed by states and localities; and (2) to ensure that, once minority voters have access to the ballot, their votes are not diluted through electoral devices that prevent them from electing candidates of their choice. Congress has reauthorized the nonpermanent provisions several times because of the continuing existence of both kinds of discrimination: in 1970, for five years; in 1975, for seven years; and in 1982, for twenty-five years, except for Section 203, which was renewed in 1982 for ten years, and then for an additional fifteen years in 1992.

When necessary, Congress has also expanded the Act to respond to new evidence of disfranchisement and dilution. For example, in 1975, Congress recognized the needs of certain language minorities for federal protection against both disfranchisement and vote dilution, and they, too, were brought under the aegis of the Act through Sections 4(f)(4) and 203.

With respect to disfranchisement, the efforts of white southerners to prevent African Americans from voting are well-documented in history texts. Going back to the nineteenth century, these efforts consisted of a host of devices that were designed to frustrate the purpose of the Fifteenth Amendment while appearing racially neutral: literacy tests; the "grandfather clause"; good-character and understanding tests; and the poll tax. In addition, throughout the South, violence and harassment were directed at blacks who tried to vote.

Less well-known are the techniques of vote dilution. They, too, initially were employed by whites in the nineteenth century when southern blacks could still vote, and they were widely employed once again by southern officials in the twentieth century, particularly after the Supreme Court outlawed the white primary in 1944. They continued to be adopted in numerous jurisdictions after passage of the Act. The standard dilutive techniques, still used in many places today, include racial gerrymandering, at-large (as distinct from district) election systems, anti-single-shot rules, staggered terms, the majority run-off requirement, annexing predominantly white suburbs while excluding minority areas, as well as other practices. All of these techniques rely on racially polarized voting—a pattern of white voters preferring different candidates than minority voters—as the necessary underpinning of vote dilution; and they were most often used in majority-white venues.

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The Commission examined enforcement of the nonpermanent provisions of the Act by the Department of Justice, finding that most federal enforcement efforts had occurred after the 1982 reauthorization rather than before.

One important measure of the extent of vote discrimination is the number of Section 5 objections interposed by the Department. Of the 1,116 objections from the Act's passage through 2004, 626, or 56 percent of the total, occurred after August 5, 1982. The largest number of post-1982 objections occurred in Mississippi, followed by Texas, Louisiana, Georgia, South Carolina, and Alabama. Sixty-three of those objections in the six states were statewide objections, typically interposed to prevent racially discriminatory redistricting plans. The overwhelming majority of the objections occurred in counties within the southern states having a sizable non-white voting-age population (VAP). The same general pattern holds for results adverse to jurisdictions that filed declaratory judgment Section 5 actions in the U.S. District Court for the District of Columbia: the majority of such unsuccessful actions occurred after 1982.

Another measure of vote discrimination is a jurisdiction's withdrawal of a proposed voting change as a result of Department of Justice requests for more information before granting preclearance. Such a withdrawal suggests that, at least in many instances, officials in the jurisdiction concluded that the change would be objected to as violating the Act if it were not withdrawn. While complete data on submission withdrawals prior to 1982 were not available for the Commission's analysis, the post-1982 data revealed at least 206 withdrawals.

Yet another indicator of actual or potential vote discrimination is an event known as an "observer coverage," whereby the Attorney General sends federal observers on Election Day to a locale because racial tensions are high and efforts to discriminate may occur. The Act allows observers to be sent either because the jurisdiction is covered under Section 4, or pursuant to a federal court order. Post-1982 data reveal 622 such coverages, involving several thousand federal observers. There were 520 coverages in the earlier period. There were 250 coverages in Mississippi alone after 1982, involving over 3,000 observers. Five of the six Deep South states originally covered by Section 5 accounted for 66 percent of all post-1982 coverages.

Between passage of the Act and 2004, the Department of Justice filed or joined as *amicus curiae* or plaintiff intervenor in 107 enforcement actions against Section 5 jurisdictions to force them to

submit proposed changes that had not been precleared. Of these, the majority—61—occurred after 1982, although it is unknown how many of these were successful. Private parties are also permitted to file enforcement actions, and some have. Research by the Commission staff discovered 105 successful Section 5 enforcement actions after 1982, filed either by private citizens or the Department. In the case of minority language enforcement actions in which the Department was involved since 1975, while few were filed, all were successful and the overwhelming majority of them—19 of 21—were filed between 1982 and 2004.

An analysis of vote-related Department of Justice trends on a one-year and five-year basis was also conducted in order to discover whether more fine-grained patterns emerge. This analysis revealed that Section 5 objections interposed by the Department of Justice reached a historic peak in the early 1990s, followed by a significant decline since. While some commentators have taken this decline as evidence that discrimination against minority voters is rapidly disappearing, an examination of the activities by the Department of Justice and the D.C. District Court to enforce the temporary provisions of the Act demonstrates that there is appreciably more evidence of attempted vote discrimination during the past ten years than a focus on objections alone would suggest.

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Data regarding Section 2 of the Act also point to widespread and continuing vote discrimination. Section 2 suits may be brought either by the Department of Justice or private plaintiffs in order to enforce the Act's prohibitions against disfranchisement and vote dilution. A high level of successful Section 2 litigation would demonstrate that violations persist.

A study limited to reported Section 2 suits filed anywhere in the nation since 1982, conducted by Professor Ellen Katz and the University of Michigan Voting Rights Initiative, revealed in late 2005 that 117 of these cases led to favorable outcomes for plaintiffs, a majority of whom were African Americans. (Fifty-seven percent of the successful cases were filed in jurisdictions covered by Section 5.) Katz and her colleagues concluded from their findings that serious racial discrimination in voting is still widespread nationally.

However, successful reported suits represent a small fraction of all successful Section 2 suits, as Katz has pointed out. The Commission staff compiled a non-comprehensive list of both reported and unreported Section 2 cases resolved in a manner favorable to minority voters since 1982 in eight of the nine states entirely covered

by Section 5, as well as North Carolina. This research identified 653 successful cases. Obviously, the number would be greater nationwide.

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Racially polarized voting, a necessary precondition for vote dilution to occur, continues in many venues across the country, with the result that qualified minority candidates often have difficulty winning election outside of majority-minority districts. Candidates sometimes make appeals to voters' racial prejudice, increasing the polarization. Racially polarized voting plays an important role in depressing the number of minority elected officials relative to their group's proportion of the citizen VAP.

Testimony at the hearings brought home how widespread this phenomenon is. Data were cited from court findings and expert testimony in numerous voting rights cases. South Dakota, Texas, Mississippi, North and South Carolina, Louisiana, Maryland, New York—these are only some of the states where racially polarized voting occurs that were mentioned by witnesses or in judicial opinions. According to other witnesses, it exists not only in many general (partisan) elections but in nonpartisan local ones and in some Democratic primaries.

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In addition to the data taken from academic studies or developed and analyzed specifically for the Report, the Commission was able to draw on testimony and information entered into the record during its ten hearings in 2005. People from many walks of life with a wide variety of experience and expertise took the time to present their views. The Commission accepted testimony from lawyers and activists, some of whom have been involved in voting rights struggles in the South from the 1960s onward; election officials; scholars with a specialty in racial politics; expert witnesses in voting rights cases; participants in election protection programs; former key officials in the Voting Section of the Department of Justice; current members of the U.S. Senate and House of Representatives, as well as other state and local elected officials; and ordinary citizens who simply spoke of their life histories and their hopes. Because the hearings were widely dispersed across the nation, testimony shed light on voting problems in varied locales affecting a broad spectrum of racial and ethnic groups.

Taken as a whole, the evidence presented at the hearings strongly suggests that the two major problems which have been the focus of the Act—restricted ballot access and minority vote dilution—continue in twenty-first century America. Several people who gave testimony stressed that problems encountered by minorities are the work of both white Democrats and Republicans.

The Commission found that while massive systematic disfranchisement has been overcome by the provisions of the Act, efforts to suppress the minority vote, while not as systematic and pervasive as those of the pre-Act South, are still encountered in every election cycle across the country. The location of polling places for minority voters is changed, often on short notice. Citizens with English-language difficulties are sometimes discouraged from voting. Requirements to register and vote, ostensibly to protect against ballot fraud, are sometimes unduly burdensome to minority voters.

Moreover, many jurisdictions continued to adopt or employ vote dilution techniques after the Act was passed. As the Latino civil rights movement has gained strength in the Southwest, Latinos are the victims of vote dilution techniques as well, given that there is often bloc voting among non-Hispanic whites and Latinos. Native Americans face the same problem.

Nonetheless, the hearings also provided substantial evidence of the important role the Act has played in protecting against and remedying discrimination. The Commission heard several examples of the deterrent effect that Section 5 has had in preventing discrimination, as well as the positive effect the language-minority provisions have had on voters and their ability to elect candidates of choice.

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The Commission also assessed the situation of the four major groups who have benefited from the Act's nonpermanent provisions: African Americans ("blacks"), Latinos ("Hispanics"), Native Americans (including both "American Indians" and "Alaska Natives"), and Asian Americans (including "Pacific Islanders").

With regard to *African Americans*, the following facts are relevant:

- In 2000, African Americans made up 11.9 percent of the VAP nationally, and 11.7 percent of all citizens who reported voting in the presidential election. Fifty-five percent of African Americans lived in the South.

- The gap in reported voter turnout between African Americans and non-Hispanic whites ("Anglos") in 2000 was 6.9 percentage points, down from 12.2 in 1964. In 1964, most of the difference in black-white turnout was due to the severely depressed voter registration rates among southern blacks, which in turn resulted largely from disfranchising tests and devices the Act outlawed a year later.
- Because of continuing racially polarized voting, it is harder for African Americans to win office in majority-Anglo venues than in majority-minority ones. Black candidates have a harder time winning statewide offices such as governor or U.S. Senator than they do winning congressional and state legislative seats, because in these latter cases the Voting Rights Act has been effectively used to create majority-minority districts. Data presented in Chapter 7 indicate that the continuing under-representation of blacks in majority-Anglo jurisdictions and districts is in large measure the result of racially polarized voting.

Some of the salient facts regarding *Latinos* related to voting are:

- A rapidly growing population (12.6 percent of the total in 2000), Latinos now outnumber African Americans. As of 2000, non-citizens composed 39.1 percent of the Latino VAP, which partly explains why Latinos make up a much lower proportion of actual voters than blacks. Even among the citizen VAP, however, Latinos vote at a much lower rate than Anglos (non-Hispanic whites)—in 2000, for example, only 45 percent of Latino voting-age citizens reported voting, compared to 62 percent of Anglos.
- Latino candidates have had to contend with racially polarized voting and numerous vote dilution schemes employed by Anglos.
- Latino candidates are much more likely to win election from venues that are majority-minority.
- Latinos continue to face problems when trying to register and vote, sometimes because they cannot get the language assistance the law requires, sometimes because of impediments imposed by statutes or election administrators.

Concerning *Native Americans*, these facts are noteworthy:

- In 2000, Native Americans represented a very small proportion of the nation's population (0.9 percent), but in some counties of various states, they are a significant proportion. In Arizona, for example, Native Americans composed 6 percent of the state's population and 78 percent of the population in Apache County. In South Dakota, they made up 8 percent of the population, but 94 and 86 percent, respectively, in Shannon and Todd Counties.
- In the aggregate, Native Americans suffer high rates of poverty and disease, much of it resulting from the violence and discrimination they have historically suffered at the hands of whites.
- Until recently, the Act was enforced on behalf of Native Americans infrequently. However, beginning in the 1990s, they have filed and won several important suits that have drawn attention to disfranchising efforts and vote dilution against Native Americans.
- The Voting Rights Act has contributed substantially to Native Americans' ability to participate in the electoral process and elect candidates of their choice.

The following facts are germane in describing *Asian Americans*:

- In 2000, this group comprised 4 percent of the nation's population, and 49 percent lived in three states: California, New York, and Hawaii. Their population is quite diverse, embracing over 25 nationality groups.
- The Asian American population has grown rapidly, from 1.5 million in 1970 to 12 million in 2000. Much of the growth is the result of immigration. Voter turnout is relatively low for this group. Only 43 percent of Asian VAP citizens reported voting in November 2000, as compared to 62 percent of Anglo citizens.
- Like the other groups described above, Asian Americans have long experienced discrimination by whites, and considerable hostility towards them exists today, as detailed in reports compiled in recent elections.

- The number of Asian American elected officials (AEOs) remains small. It increased modestly from 120 in 1978 to 346 in 2004, in spite of an eight-fold increase in Asian American population between 1970 and 2000.

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The Commission's Report briefly reviews the history of the denial and curtailment of minority voting rights following Reconstruction and continuing well past the midpoint of the twentieth century, as well as the more recent history of electoral discrimination since the Act was passed (Chapter One). It then describes the two main types of voting discrimination the Act was fashioned to prevent: disfranchisement of minority voters, and, when these voters are enfranchised, dilution of their vote (Chapter Two). It explains the mechanisms of the Act and how these work to prevent disfranchisement and vote dilution (Chapter Three). The Report then describes the demography and current political status of the major racial or ethnic groups who have been the primary beneficiaries of the Act (Chapter Four). It then presents data from many sources on the enforcement of the Act's nonpermanent features (Chapter Five) and of the most important permanent feature, Section 2 (Chapter Six). Next, it surveys evidence of the continuing problem of racially polarized voting, which is an essential feature of minority vote dilution (Chapter Seven). Finally, the Report offers a summary of the findings and a conclusion (Chapter Eight).

CHAPTER ONE

Introduction: The Climax of the Second Reconstruction

The Voting Rights Act was the last of four major civil rights laws passed by Congress in the late 1950s and early 1960s as the southern civil rights movement gradually crested. The earlier laws—those of 1957, 1960, and 1964—were ineffective measures with regard to minority voting rights, placing the burden of protecting them on individual victims of discrimination, who were required to pursue justice through courts in the South on a case-by-case basis, with very limited success.[1] After the famous events in Selma, Alabama, in March 1965, culminating in what became known as "Bloody Sunday," President Lyndon B. Johnson told his Attorney General, Nicholas deB. Katzenbach, to draft the "goddamnedest toughest" voting bill he could write, which Katzenbach proceeded to do.[2] Passed by Congress with unusual swiftness and strong bipartisan support, it was signed into law by Johnson on August 6, 1965.

There was deep symbolism in the fact that Johnson chose the President's Room in the nation's capitol as the site for the signing. One hundred five years earlier, in 1861, Abraham Lincoln, in the same room, had signed the first Confiscation Act, by which the Union had taken control of all slaves whom the Confederacy had coerced into service. Lincoln's action was the first legal step toward full emancipation of slaves. After signing the Voting Rights Act, Johnson then met in the Cabinet Room with several African American leaders, including the Rev. Martin Luther King, Jr., and Rosa Parks. An aide to Johnson later recalled: "There was a religiosity about the meeting, which was warm with emotion—a final celebration of an act so long desired and so long in achieving."[3] After the ceremony, Dr. King said the new Act "would go a long way toward removing all the obstacles to the right to vote." A few years later, at the end of his presidency, Johnson pointed to the Act as his greatest accomplishment.[4]

The new law would later be seen as the climax of what historian C. Vann Woodward called the Second Reconstruction. By giving the post-World War II civil rights movement that name, Woodward called attention to the fact that the nation had undergone not one but two tumultuous efforts to establish basic citizenship rights, including voting rights, for African Americans. The first one, following the Civil War, had been undermined, at great cost in life and freedom to the recently enfranchised former slaves and their children. The second, following World War II, was fueled in part by the anger and frustration of black soldiers who, returning from that war after having defended American democracy from the Axis powers, confronted a Jim Crow

system in the South which denied blacks fundamental democratic rights, including the right to vote—the most fundamental right of all.

Forty years after its passage the Voting Rights Act is widely considered to be the most successful civil rights law in American history. It resulted from the epochal movement for racial equality that played out most intensely in the eleven states of the former Confederacy. It was meant to sweep away racial barriers to voting that previous congressional acts, passed as the civil rights movement gained momentum, had not. In many respects the Voting Rights Act succeeded dramatically.[5] Even so, it is well to ponder the sobering observation of Alexander Keyssar, whose work, *The Right to Vote*, is an authoritative history of American voting rights:

> [T]he very structures and rules of electoral politics periodically become touchstones and lightning rods of conflict. This lesson drawn from the history of suffrage should lead us to expect recurrent skirmishing once universal suffrage has been achieved. . . . History offers no examples of political institutions that can permanently guarantee genuine political equality. Democracy therefore must remain a project, a goal, something to be endlessly nurtured and reinforced, an ideal that cannot be fully realized but always can be pursued.[6]

In light of this admonition, those who celebrate both the Act's passage by Congress and its broad impact over four decades must take a close look not only at what it has achieved but at what it has not. In particular, it is useful to take stock of the degree of voting discrimination on the basis of race and ethnicity in the United States today, especially in the jurisdictions covered by the Act's temporary features. The extent to which such discrimination still exists, as reflected in answers to the following questions, is the primary focus of this Report.

Have the nonpermanent features of the Act, in combination with the permanent ones, accomplished the goal of fully incorporating racial and ethnic minorities into the American body politic, and if so, is this incorporation secure? With respect particularly to the period between 1982 and 2005, are ethnic and racial minorities—especially African Americans, Latinos, Native Americans, and Asian Americans and Pacific Islanders, who are the primary concern of the Act—no longer faced with barriers to voting? Do they participate with whites at the voting booth with equal ease? Are they still subject to the efforts of individuals, groups, or political parties to threaten, intimidate, or misinform them with regard to voting? In comparison

with the white majority, are they reasonably able to elect their candidates of choice? Have all the "tests and devices," the subterfuges such as literacy tests and poll taxes designed to frustrate their rights guaranteed under the Fourteenth and Fifteenth Amendments to the Constitution, been completely abolished?[7] *In short, do race, language, and ethnic heritage per se no longer make a significant difference in the ability of American citizens to participate equally in the political system?*

This question is all the more germane given the findings of a major survey of the nation's politics published in a leading political science journal devoted to scholarly reviews of academic research. Entitled "The Centrality of Race in American Politics," its authors, Vincent L. Hutchings and Nicholas A. Valentino, take a searching and measured look at race as a factor in political partisanship, voting behavior, public policy, the media, and campaigns for public office. After surveying over 150 works by social scientists and other writers, they conclude:

> We have reviewed a wide range of studies that try to answer a fundamental question: What role does race play in contemporary American politics? Conclusions have been tentative in some cases, and complex in others, but overall we have found that, even 50 years after the *Brown* decision, race remains a fundamental component of the American political system. Racial divisions, racial resentments, and group loyalties influence the form and content of the political party system, the nature and distribution of public opinion, and the behavior of political elites in and out of office. In 1903, [W.E.B.] Dubois warned that the "problem of the twentieth century is the problem of the color line." In many areas of politics, his statement is as true today as it was 100 years ago.[8]

If the color line of which these political scientists speak is still the fundamental line of demarcation across the American political landscape today, then Keyssar's warning must be taken seriously indeed by everyone who believes voting rights is the foundation of the American democracy. It is a concern with these rights that has animated the investigation reported here.

Certain kinds of evidence were given special consideration in this inquiry: data from the U.S. Department of Justice provided through the Freedom of Information Act; facts collected during the public hearings of the National Commission on the Voting Rights Act

held in ten cities across the country between March and October 2005; data collected, analyzed, and made public by Professor Ellen D. Katz and her students at the University of Michigan Law School; data from the electronic federal court dockets known as PACER; and information from numerous civil rights organizations, voting rights lawyers, and electoral experts who generously provided counsel or made their files available. This Report also cites findings in the scholarly literature and in the news media when appropriate. Because the transcripts, written testimony, and other documents from the hearings comprise thousands of pages, the appendix from the hearings containing these documents can be found at the National Commission's website, www.votingrightsact.org.

CHAPTER TWO

The Two Problems Addressed by the Act

Any adequate consideration of voting rights cannot help but convey the great degree of human ingenuity that has gone into devising methods to abridge or deny them. These methods are many and complex. Nonetheless, they can be classified under two headings: disfranchisement and vote dilution. The Act was designed to prohibit both kinds. In order to elucidate the distinction between them it is useful to review, in very brief compass, the history of vote discrimination against African Americans in the South, particularly in the first two-thirds of the twentieth century.

Disfranchisement

Following the Civil War, passage of the Fourteenth and Fifteenth Amendments gave to black males a constitutional right to vote and take part in the civic life of the nation, and they took full advantage of that right during the Reconstruction period. Large numbers of African Americans were elected in the early years of the First Reconstruction, when they composed 15 percent of all southern officeholders.[9] However, following the Compromise of 1877, the Republicans agreed to refrain from using federal troops to protect black voting rights in the South, and white Democrats in that region embarked on a generation-long effort both to disfranchise blacks and remove them from office. By the time the National Association for the Advancement of Colored People was founded in 1910, the black franchise in the South had been severely restricted, and black officeholders in the region had virtually disappeared.[10]

In addition to violence and fraud, all manner of legal devices were used to keep blacks, as well as various other minorities, from casting a ballot, including the poll tax, the literacy test, the grandfather clause, the good-character test, the understanding test, and the white primary. These disfranchising devices, taken together, were measures to limit ballot access—i.e., to keep minorities from actually voting, or, in the case of the white primary laws, from casting a meaningful vote by prohibiting them from participating in the most important elections in the South during this period of Democratic Party hegemony.

Limiting ballot access accomplished two important goals of whites. First, it kept anyone from getting elected—black or white—who would feel a responsibility to enact legislation benefiting blacks, for the simple reason that there would be no black voters to answer to in the next election. Second, and equally important, limiting ballot

access solely to whites prevented the election of black candidates in particular. Not only would there be no elected officials to publicly espouse and work for the interests of blacks, but blacks would be denied the important symbolic achievement of having people of their own race hold public office and engage in the give-and-take of policy making. This symbolic importance is often overlooked, even today, by those who argue that ethnic minority voters are overly concerned with electing people of their own kind to office. For groups long denied full citizenship rights, seeing people of their own race or ethnicity in the corridors of power is an extraordinarily important reminder of their status as citizens of good standing in the American democracy.

As this Report will demonstrate, disfranchisement has been significantly reduced in the forty years since the Voting Rights Act was passed. However, the problem has by no means been completely eradicated by the Act, and efforts to suppress the votes of ethnic and language minorities continue into the present century. The September 2005 report by the Election Assistance Commission (EAC)—a nonpartisan federal organization—is suggestive in this regard. The Commission made public the findings of the first comprehensive national survey of election administrators ever carried out regarding a presidential election.[11]

The EAC was created by the Help America Vote Act of 2002, which Congress passed to address some of the many problems besetting the 2000 presidential election. The EAC's report on the 2004 election indicated that problems were far from solved four years later, and that, as in 2000, racial disparities on Election Day were still widespread. Based on responses from 6,568 local election administrators in the fifty states, the District of Columbia, and four territories—Guam, Puerto Rico, American Samoa, and the U.S. Virgin Islands—the survey revealed "different levels of service, staffing, ballot counting and even registration accuracy among racial and ethnic groups in the United States."[12] Several of the report's findings are summarized in the newsletter for election specialists, *electionline Weekly*:

- Voters in predominantly Hispanic jurisdictions reported the highest rate of provisional ballot use in the country.[13] Native American districts were next, followed by the more general "urban and high-population density areas."
- In the jurisdictions that reported registration rates, those "with higher education, higher income, election-day registration, more rural and small town in nature" had the highest numbers of registered voters.

Conversely, areas covered under Section 203 of the Voting Rights Act, often predominantly Hispanic jurisdictions, had higher rates of inactive voters.[14]

- Native American voters had the highest rate of presidential drop-off, or ballots with no vote for the office. Hispanic voters had the second highest rate. In congressional races, voters in predominantly African American districts had a drop-off rate of almost 23 percent, a figure that could be influenced by "the noncompetitive nature of congressional races" in those districts, the survey stated.
- The contrasts extended to poll workers as well. Jurisdictions with a greater percentage of African American voters had the highest number of precincts with staffing problems. Hispanic and Native American precincts followed.[15]

The EAC report also identified "common" patterns, two of which were:

- "Jurisdictions with low education and income, compared with other jurisdictions, tend to report more inactive voter registration, lower voter turnout, higher numbers of provisional ballots cast, higher drop-off and associated components of over-votes and under-votes, lower average number of poll workers per polling place and a greater percentage of inadequately staffed polling places...."
- "Jurisdictions covered by Section 203 of the Voting Rights Act report more inactive voter registration, lower voter turnout, fewer returned absentee ballots and much greater numbers of provisional ballots cast..."[16]

Nothing in the EAC report either alleged or discounted the possibility of disfranchising efforts directed against minority voters as one cause of the difficulties described. The report does, however, indicate that those voters, and ones who rank low in socio-economic status generally, typically confront more problems in voting than do the rest of the population. Evidence from other sources, moreover, indicates that intentional vote suppression is one type of such problem.

Data surveyed by the National Commission on the Voting Rights Act, testimony from its 2005 national hearings, and published studies

point to attempts since 1982 in many parts of the nation to suppress the vote in minority neighborhoods.[17] While some charges of vote suppression are based on rumor and false information, notable instances where efforts at minority disfranchisement have been documented indicate that efforts to disfranchise are ongoing. The following examples of complaints regarding vote-suppression efforts are taken from testimony at the Commission hearings.

At the Southern Regional Hearing in Montgomery, Alabama, Dr. Gwen Patton, a long-time Alabama voting rights activist and teacher, mentioned recent instances of polling places being relocated in Black Belt counties without voters knowing where the new sites were, as well as charges filed against people at the polls who "were simply assisting elderly people with the right to vote."[18]

At the same hearing, Vernon Burton, a historian at the University of Illinois who specializes in southern history, relied on his expert testimony in a 2003 congressional redistricting case in Texas to remark on "how overt some racial appeals" are in that state.[19] He mentioned hearings held by the NAACP in Texas regarding the 2000 and 2002 elections, in which various kinds of intimidation of and misinformation directed at blacks were reported, as well as "late change of polling places; dropping individuals from poll lists without cause; not allowing individuals to file challenge ballots," as well as "a hate crime in Wharton [Texas]," where the home of a campaign staff treasurer for a black candidate for sheriff was burned. "[H]er husband, a former county commissioner," was inside, "and got [out] only because the dog was barking. And she had just received threatening calls saying what would happen to her if she did not get [that]—and we won't use the N word—sign out of her yard."[20]

Burton also referred to other forms of anti-black discrimination of which a judge took note in a recent Charleston, South Carolina, voting rights case, including "people making it hard for African-Americans to vote."[21] He introduced his expert witness reports in that case and another recent one in South Carolina that, he said, "echoed—and recently—the very things that Dr. Patton was telling . . . about in Alabama." These, he said, "can be documented [in the 1990s and 2000s], including "poll watchers, who make it hard for people [to vote]," among other things.[22]

Victor Landa, representing the Southwest Voter Registration Education Project, described "strategic" efforts in the 2004 Texas election cycle to prevent some citizens from registering to vote. "In one county in South Texas, some of our Spanish-speaking volunteers were denied the eligibility to be deputized as registrars," he said, adding that in Texas only deputized registrars can register voters in the field. "Some officials who are employed by law to deputize

registrars deliberately set obstacles to deputization for people who may have belonged to an opposing political party."[23] He also mentioned a San Antonio election in which Section 5 was used to prevent the shifting of early-voting sites out of predominantly Latino areas, as had been planned by officials.[24]

Testifying at the Southwest Regional hearing in Phoenix, Claude Foster, national field director for the NAACP National Voter Fund, summarized complaints voiced at a Voter Irregularity Hearing held by the Houston Coalition for Black Civic Participation in Harris County (Houston) Texas on December 12, 2001, shortly after a nonpartisan mayoral run-off election. Among those attending, he said, were the county tax assessor-collector, a U.S. Department of Justice official, and an official from the county clerk's office, as well as representatives of black and Latino organizations.[25] A problem in the 2001 election, he said, was that "over 166 precincts were changed without the African-American community being notified . . . until the civil rights community challenged election officials under Section 5 . . ."[26]

The Southwest Regional hearing testimony of Nina Perales, regional counsel of the Mexican American Legal Defense and Educational Fund (MALDEF), included examples of past ballot access problems in Colorado: "Voting registration branches being placed in Anglo homes, limited hours for farm workers to register to vote, and a system where Anglo county commissioners tapped their friends for election judge, resulting in an all-Anglo election judge pool."[27]

Ms. Perales also testified about voter harassment in November 2004, when Anglos standing outside polling places in Dona Ana County (Las Cruces), New Mexico, videotaped the license plates of Mexican Americans as they went to vote. According to the voters who complained, "it is very intimidating . . . to be videotaped and to have their license plates videotaped by Anglos standing outside the polling place."[28] Such videotaping sometimes occurs in minority precincts in other places in the nation, and the Department of Justice discourages videotaping when it is called to the Department's attention, pointing out that videotaping could violate Section 11(b) of the Voting Rights Act, which forbids intimidation of voters.[29]

Exit polls conducted in 2004 by the Asian American Legal Defense and Education Fund (AALDEF) in several cities revealed numerous complaints of discourteous or hostile behavior by poll workers, incorrect directions to polling sites or election districts, missing names from the lists of registered voters, and many other kinds of Election Day problems as well.[30]

The Midwest Regional hearing held in Minneapolis received both testimony and written reports on a wide range of vote-

suppression incidents in that region. One of the most remarkable incidents involved discrimination against Arab American voters in a 1999 mayoral election in Hamtramck, Michigan—almost two years before 9/11. Poll challengers accosted Arab American and other dark-skinned voters in the city's general election. Because of the challenges, election officials required many Arab American voters to take a citizenship oath as a requirement for voting. Some Arab Americans apparently decided not to vote after they heard of the harassment. Criminal charges were brought against two election officials, who were convicted of delaying voters and fined. The Department of Justice sued the city, alleging that its failure to stop challenges against Arab American and other dark-skinned voters violated Section 2 of the Voting Rights Act. The Department and the City ultimately entered a consent decree, providing for bilingual, Arabic- and Bengali-speaking inspectors at all polling stations and for federal observers to monitor elections. In 2003, a Bangladeshi American resident was elected to the city council for the first time.[31] Even so, in 2004, "several Bangladeshi voters" at one polling station complained that they were given incorrect information about poll sites. According to Margaret Fung of AALDEF, "Bangla interpreters are still needed in this location."[32]

Other examples of techniques falling under the heading of vote suppression or harassment include but are by no means limited to the following: voters in Saginaw, Michigan being asked in 2000 if they were felons; a Republican Michigan state legislator telling supporters in July 2004 that their party would have a tough time in November unless they "suppress[ed] the Detroit vote," referring to the predominantly black city; a 2004 complaint "that a police officer outside a polling location in Cook County [Illinois] asked voters for photo identification and told them they could not vote if they had ever been convicted of a felony"; and complaints from several Minnesotans that they had received telephone calls instructing voters to go to the wrong precinct or giving an incorrect election date.[33] These examples are only a few of the many allegations of vote suppression efforts in recent years in the Midwest. Hundreds of such complaints were reported.[34]

At the South Georgia regional hearing in Americus, Tisha Tallman, regional counsel for MALDEF, mentioned an event in Alamance County, North Carolina, in which a sheriff obtained a list of Latino registered voters and "publicly stated that he was going to go door-to-door to the house of every single registered Latino voter and determine whether or not they were U.S. citizens and to systematically arrest every single person he did not believe to be a U.S. citizen." Resulting publicity and MALDEF's notification of the

Department of Justice, however, caused the sheriff not to carry out his plan.[35]

These accounts represent only a sampling of information obtained through testimony and written documents submitted at the ten Commission hearings. They strongly suggest that while the mechanisms of yore for massive disfranchisement are gone, there is a continuing pattern of disfranchisement occurring on a smaller scale. Such behavior by individuals or groups acting on their own, or by election officials acting on behalf of the jurisdictions they represent, are just as illegal today as the "tests and devices" of an earlier epoch.

Vote Dilution

Even before the Voting Rights Act was passed in 1965, blacks had gradually made progress in abolishing some of the devices whites had used to prevent them from voting. Officials responded by adopting new measures to minimize the impact of black re-enfranchisement. These measures are forms of vote dilution, defined as a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among a majority group to diminish or cancel the voting strength of a minority group, even if the latter votes as a bloc in favor of its preferred candidates. Put differently, if a racial or ethnic minority group votes in a unified fashion for its preferred candidates, it can, under some voting rules, elect those persons even if the white majority votes cohesively for white candidates. Where both the white majority and the ethnic minority vote as blocs—what is referred to as racially polarized voting—whites have a better chance of preventing the election of minority candidates under some electoral rules than others. The rules that make the election of minority candidates more difficult are forms of vote dilution.

These arrangements are well-known. They include efforts that ensure that in a multi-district election system no district will contain a majority of minority voters—districting plans, in other words, that "crack" minority neighborhoods and spread their voters among several districts. They include the equally pernicious efforts to "pack" more minority voters than necessary into a district, so as to decrease the number of districts from which minority representatives can be elected. They also include, in majority-white jurisdictions, the abolition of multi-district elections entirely so that all candidates are elected at large, thus ensuring that all winners are elected from a majority-white constituency. Other dilutive schemes involve annexing predominantly white suburbs in order to increase the white percentage of the electorate, or de-annexing predominantly black

suburbs to accomplish the same result. Another scheme—the numbered place requirement—forbids a practice by which minority voters, in an at-large, multi-seat election, can increase the value of the votes going to their candidates by voting only for one candidate (a practice known as "single-shot" or "bullet" voting). This is impossible when candidates have to declare for a particular numbered place. Single-shot voting can also be thwarted by introducing staggered terms for elected officials. Another dilutive tactic is to switch from a plurality-win to a majority requirement, thus making it less likely in a majority-white venue that in an election where the white vote is initially split between two or more white candidates, a black candidate, say, with strong black support will win without getting a majority of the total vote.

Finally, various stratagems are sometimes employed when dilutive mechanisms fail and minorities are elected to office. One is to enact laws that diminish the authority of the officeholders—such as abolishing a strong mayor form of government and replacing it with a city manager form. Another takes the authority of filling an office out of the hands of the voters altogether, by replacing an elective post with an appointive one, where those in charge of the appointments are members of the white majority. While these latter gambits are not examples of vote dilution in the strict sense, they nonetheless serve the same purpose as dilutive laws in that they diminish the power of enfranchised minorities.

The political impact of vote dilution has long been understood by white lawmakers. In 1876, a Texas newspaper described districts in heavily black areas of the state as "elongated most absurdly." Thanks to white domination of the districting process, "districts were 'Gerrymandered,' the purpose being, in these elections, and properly enough, to disfranchise the blacks by indirection," so they would not constitute more than "a third of the voters in each district."[36]

Disfranchisement by indirection—a term which nicely captures the purpose of vote dilution—was widely employed during the Second Reconstruction as well, although usually it was not so honestly described by those who employed it. Following the 1954 school desegregation decision in *Brown* v. *Board of Education*,[37] Texas increasingly adopted the numbered-place system in city and school board elections. Required by court order in the mid-1960s to redistrict its malapportioned legislative and congressional districts, the legislature racially gerrymandered its districts in Harris County, the state's most populous, to dilute black votes there. The legislature soon thereafter adopted a majority-vote requirement in elections for the Houston school board after two blacks and a white racial liberal had won election under the existing plurality requirement.[38]

In North Carolina, according to political scientists William R. Keech and Michael Sistrom, "after blacks were elected to public office in several cities in the 1940s and 1950s, concerned whites borrowed from the earlier strategies of the 1870s and 1880s to dilute black voting strength by changing district lines or electoral systems." They describe numerous examples of this both at the local and state legislative level.[39] In Alabama, officials began replacing district with at-large systems on a large scale not long after the Supreme Court, in *Smith* v. *Allwright* (1944)[40] ruled the white primary unconstitutional. By the time the Voting Rights Act was adopted, "most Alabama jurisdictions already used citywide or countywide elections designed, together with a 'numbered-place' requirement, to dilute black voting strength. The state could thus prevent black officeholding without having to change its election laws (and thus be subject to the preclearance provision of section 5). . . . Black officeholding in Alabama was [therefore] achieved, by and large, only as a result of successful voting rights litigation challenging the use of at-large elections," write scholars familiar with Alabama racial politics.[41] Similar events were occurring elsewhere:

> Various kinds of dilutionary responses to increased black voting developed in every southern state in the 1960s [writes another scholar]; but the boldest response, linked directly to passage of the Voting Rights Act, occurred in Mississippi. Convening in January 1966, the all-white legislature passed thirteen bills concerning the election process, with little floor debate and without public hearings. None of the bills directly denied blacks the vote; yet all seemed intended to diminish their voting strength, either through creating racial gerrymanders, switching from district to multimember election systems, changing public offices from elective to appointive, or increasing the qualifications for candidacy. The changes wrought by these bills were massive, affecting numerous state and local governments. For example, all county boards of supervisors and all county boards of education in the state—bodies having considerable public power—would now be elected at large in each county rather than from districts, as they had been since the nineteenth century. While the legislature was unusually reticent in explaining the motives behind this spate of laws, a few members were as forthright as their nineteenth century counterparts had been. One state senator, for example, opined that the switch to countywide elections would

> safeguard "a white board [of education] and preserve our way of doing business."[42]

The brazen effort by the Mississippi legislature to "disfranchise through indirection" even after the Act had been passed indicated the importance vote dilution had assumed for southern whites when the longstanding methods of "direct disfranchisement" were finally outlawed. Unfortunately, the new Mississippi laws (some of which the Department of Justice refused to preclear under the brand-new Section 5) were a harbinger of things to come, not only in Mississippi but in many other covered states, as well as in non-covered ones.[43]

The Senate report accompanying the Act's 1982 reauthorization paid special attention to the electoral changes in the covered states since 1965 that were designed to dilute minority votes. Quoting the Supreme Court in *Allen* v. *Board of Elections*, a decision announced four years after the Act's passage, the report noted that "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."[44] The Senate report continued:

> Following a dramatic rise in registration, a broad array of dilution schemes was employed to cancel the impact of the new black vote. Elective posts were made appointive; election boundaries were gerrymandered; majority runoffs were instituted to prevent victories under a prior plurality system; at-large elections were substituted for election by single-member districts, or combined with other sophisticated rules to prevent an effective minority vote. The ingenuity of such schemes seems endless. Their common purpose and effect has been to offset the gains made at the ballot box under the Act.[45]

The 1982 Senate Report noted that findings of dilution were reported by Congress in the 1970 hearings on reauthorization of the Act, as well as in those in 1975. "Once again, Congress continued the preclearance requirement for the jurisdictions originally covered in 1965," the report stated, "not on the basis of some permanent stigma for events which had occurred before 1965, but rather on the basis of a careful review of the contemporaneous record of on-going voting rights discrimination in 1970 and 1975, respectively."[46] Then, speaking of the present as of 1982, the report added:

> A review of the kinds of proposed changes that have been objected to by the Attorney General in recent years reveals the types of impediments that still face minority voters in the covered jurisdictions. Among the types of changes that have been objected to most frequently in the period from 1975-1980 are annexations; the use of at-large elections, majority vote requirements, or numbered posts; and the redistricting of boundary lines.
>
> This reflects the fact that, since the adoption of the Voting Rights Act, covered jurisdictions have substantially moved from direct, overt impediments to the right to vote to more sophisticated devices that dilute minority voting strength.[47]

In Chapters 5 and 6, the issue of vote dilution since the 1982 reauthorization is explored in depth.

The U.S. House of Representatives report on the 1982 reauthorization also discussed minority vote dilution, and pointed to the link between dilution and racially polarized voting.[48] Indeed, the link is a necessary one. Were there no racially polarized voting, none of these mechanisms would have a dilutive effect. In a community where racial bloc voting doesn't exist, i.e., where minority voters are free to vote and where their candidates of choice have regularly run for office and received wide support from white voters, then both the majority and the minority electorates have gotten beyond race as a divisive factor in that community's politics. There would be no reason to file a voting rights suit challenging vote dilution. As historian Peyton McCrary has observed with regard to "the hundreds of vote-dilution lawsuits tried or settled in the last quarter century . . . no court has ever found a violation . . . absent proof, typically presented through expert statistical analysis, that white or Anglo voters routinely defeat the candidates of choice of minority voters."[49] Thus any effort to measure the status of minority voters in American politics must address the question of how widespread and serious is racially polarized voting. Chapter 7 returns to this issue.

CHAPTER THREE

What The Voting Rights Act Does

As originally passed in 1965, the Act was designed primarily to protect the voting rights of African Americans in the southern states with a long history of disfranchisement. The Act was intended by Congress to enforce the Fifteenth Amendment, ratified after the Civil War, which had been egregiously violated by white supremacists who controlled the states of the former Confederacy. In enacting the new law ninety-five years after passage of the Fifteenth Amendment, Congress found that racial discrimination in voting was "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." In the words of the Supreme Court the following year, in a case testing the constitutionality of Section 5, in particular, Congress was responding to that defiance by shifting "the advantage of time and inertia from the perpetrators of the evil to its victims."[50] In its subsequent reauthorizations of the Act, Congress recognized the need to remedy discrimination against other racial and ethnic groups, particularly Latinos, Native Americans, and Asian Americans, and to combat vote dilution in addition to disfranchisement.

The Act, Congress's statutory scheme to remedy and prevent vote discrimination, contains both temporary and permanent provisions. The temporary ones, which apply to certain portions of the country based on coverage formulas, have been renewed multiple times, and are currently set to expire in August 2007. The general provisions are national in scope and permanent. [51]

Temporary Provisions: An Overview

The temporary provisions are found in Sections 4 through 9, Section 13, and Section 203. As described in detail below, states and political subdivisions that meet the coverage criteria under Section 4 are subject to the Section 5 preclearance provisions and the examiner and observer provisions of Sections 6 to 9 and 13. The need for these provisions has been considered so great that they have been renewed three times by Congress, after careful consideration of the extent of continuing vote discrimination in the covered jurisdictions—once for five years (1970), once for seven years (1975), and once for twenty-five years (1982). The other temporary provision is Section 203, which requires jurisdictions that meet another coverage formula to provide language assistance to minority language voters. Section 203 was added in 1975 and reauthorized in 1982 and 1992 based on findings

of continued discrimination against language-minority voters. Section 203 expires at the same time as the other temporary provisions.

Section 4 Coverage Formula

Any jurisdiction is covered under Section 4(a)-(c) if it meets one of these three criteria:

1) The jurisdiction maintained on November 1, 1964, any test or device as a precondition for voting or registering, and less than 50 percent of its total voting-age population were registered on November 1, 1964, or voted in the presidential election of 1964. (When the Act was first passed, this was the sole criterion.)
2) The jurisdiction maintained on November 1, 1968, a test or device as a precondition for voting or registering, and less than 50 percent of its total voting-age population were registered on November 1, 1968, or voted in the Presidential election of 1968. (This criterion was added in the 1970 amendment to the Act.)
3) The jurisdiction maintained on November 1, 1972 any test or device, as a precondition to voting or registering, and less than 50 percent of its citizens were registered on November 1, 1972, or voted in the Presidential election of 1972. (This criterion was added in the 1975 amendment to the Act.)[52]

For the third criterion, the meaning of "test or device" was amended in 1975 to include not only such things as literacy tests but any practice or requirement by which a jurisdiction, where more than 5 percent of its voting-age citizens were members of a single language-minority group, made available only in the English language registration or voting notices, forms, instructions, assistance, or other information relating to the electoral process, including ballots.[53] This addition brought under coverage three entire states with a history of discrimination against language minorities, as well as several political subdivisions elsewhere.

Where a state falls within the coverage criteria, all jurisdictions (counties, municipalities, school boards, special districts, or other governmental units) within the state are covered. *Political subdivision* refers to the main local unit for holding elections. In most states, that means the county; in some states, it is a municipality. Where a

political subdivision is covered, all political units within that subdivision are covered.

Today, nine states are entirely included under the Section 4 coverage formula. Six have been covered continuously since 1965—Louisiana, Mississippi, Alabama, Georgia, South Carolina, and Virginia. Three others—Texas, Arizona, and Alaska—have been covered continuously since 1975. A tenth state, North Carolina, has had a significant number of its jurisdictions covered since 1965; today forty of its one hundred counties are covered. In addition, various counties or townships in the following states are currently subject to the Section 4 coverage formula: California (four counties), Florida (five counties), New York (three counties), South Dakota (two counties), Michigan (two townships), and New Hampshire (ten townships).[54] **(See Map 1.)**

Bailing Out From Section 4 Coverage

At the time the Act was first considered by Congress, it was noted by Attorney General Nicholas Katzenbach that the coverage formula was not perfect, as it would allow some jurisdictions guilty of discrimination to evade coverage.[55] However, it might also bring under special government oversight other jurisdictions which did not merit coverage. A provision was thus added which spelled out the means by which the latter jurisdictions could gain exemption, or "bail out," from coverage, by filing a declaratory judgment action in the U.S. District Court for the District of Columbia and demonstrating, in essence, a record of good behavior regarding voting rights. The provision did not, however, allow political subdivisions such as counties to bail out individually if the entire state to which they belonged was covered.

In its 1982 reauthorization, Congress enacted two important revisions to the bail-out procedure. Beginning in 1984, political subdivisions could bail out separately. Also, the criteria were changed to recognize and reward good conduct rather than making jurisdictions await a fixed expiration date without consideration of their record.

The Department of Justice has described the existing procedures for bailout as follows:

> The successful applicant for bailing out must now demonstrate that during the previous ten years:
>
> - No test or device has been used within the state or political subdivision;

- All changes affecting voting have been reviewed under Section 5 prior to their implementation;
- No change affecting voting has been the subject of an objection by the Attorney General or the denial of a Section 5 declaratory judgment from the District of Columbia district court;
- There have been no adverse judgments in lawsuits alleging voting discrimination;
- There have been no consent decrees or agreements that resulted in the abandonment of a discriminatory voting practice;
- There are no pending lawsuits that allege voting discrimination; and
- Federal examiners have not been assigned.

Before being allowed to bail out, the jurisdiction must have eliminated those voting procedures and methods of elections that inhibit or dilute equal access to the electoral process. It also must demonstrate that it has made constructive efforts to eliminate intimidation and harassment of persons seeking to register and vote and to expand opportunities for voter participation, such as opportunities for registration and voting, and to appoint minority officials throughout the jurisdiction and at all levels of the stages of the electoral process. The jurisdiction must also present evidence of minority electoral participation.

The failure to establish any one of these criteria may not prevent the jurisdiction from bailing out if the jurisdiction can establish the incidents that did occur "were trivial, were promptly corrected, and were not repeated." In addition, these requirements apply to all governmental units within the geographical boundaries of the jurisdiction. Thus, if a county is seeking to bail out, it must establish each criteria [sic] for every city, town, school district, or other entity within its boundaries. [56]

As a result of this change, nine jurisdictions in Virginia have bailed out, and the voting rights attorney who represented their case to the U.S. District Court for the District of Columbia believes many

more covered jurisdictions would have done so had they understood that the procedure was not onerous for those who had a good voting rights record.[57]

Section 5: Preclearance

Section 5 of the Act, another temporary provision, specifies the requirements governing those jurisdictions that are included by the coverage formula in Section 4(a)-(c). Section 5 gives the federal government special oversight in matters of voting rights enforcement. It requires all covered jurisdictions to submit any proposed changes in voting or electoral procedures either to the Attorney General or to a three-member panel of the U.S. District Court for the District of Columbia (referred to colloquially as "the D.C. Court") for preclearance before the changes can be implemented.[58] The changes may be minor—such as moving a polling place to another location—or they may be high-profile ones on the order of the decennial redistricting of a state's congressional seats. Other kinds of proposed changes include (but are not limited to) qualifications for voting, registration or voting procedures, candidate qualifications, length of term of office, or method of vote counting. Any time a covered jurisdiction plans to make one or more such changes, all must be submitted to the Attorney General or the D.C. Court for inspection before implementation is allowed. If the latter refuses to preclear a submission, the jurisdiction may appeal directly to the U.S. Supreme Court.

The purpose of the preclearance requirement is to ensure, as the statute puts it, 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 or color."[59] As a result of Supreme Court decisions, the standard for preclearance is now referred to as the "retrogression" standard, which means that the proposed change must not have the purpose or effect of making a racial or ethnic minority group's voting situation worse than before the change.[60] If the submission is made to the Attorney General rather than to the D.C. Court, the examination of these proposed changes, as well as the preliminary recommendation as to whether to approve them, has by long-standing tradition fallen to the Department of Justice staff in the Voting Section of the Civil Rights Division.

Covered jurisdictions in the great majority of cases make their submissions to the Department of Justice, which must either preclear or object within sixty days. (When the Department needs more information to determine whether submissions are discriminatory, it may take up to sixty days after that information is received before

making its decision.) If the Attorney General decides not to object to a submission, that decision is not subject to challenge in court under Section 5. [61] However, it may still be legally challenged by other means—for example, under Section 2.

If, on the other hand, the Attorney General decides to object to a submission, the jurisdiction may then appeal to the D.C. Court. However, just as few jurisdictions originally submit their proposed changes to the court instead of the Department of Justice, few appeals to the court of Department of Justice objections have been made over the years, as the Department's decisions in this regard are generally recognized as sound.

In general, the federal government's oversight of states and localities under Section 5 appears to have been extraordinarily efficient, both in preventing proposed changes that are discriminatory and in deterring jurisdictions from proposing such changes. The role of the preclearance requirement in preventing discrimination, and therefore the continuing need for it, was emphasized by Attorney General J. Stanley Pottinger during the 1975 hearings on reauthorizing the Act:

> The number of objections which the Attorney General has made to changes in voting laws submitted to him under section 5 shows that there is still a potential for the passage of legislation which has either as its purpose or effect the exclusion of black voters from their rightful role. This potential could become reality in the absence of some objective control at the Federal level.[62]

Sections 6-9 and 13: Examiners and Observers

Sections 6-9 and 13 enable the Attorney General to certify jurisdictions for examiner/observer coverage. Where there is reason to suspect that any type of unconstitutional racial vote discrimination exists in a covered jurisdiction, the Attorney General may assign federal "examiners" to help register voters in covered jurisdictions that are certified by the Attorney General or a court order, and assign federal "observers," trained and supervised by the Office of Personnel Management, to monitor Election Day activities. The Attorney General's authority to certify jurisdictions under Sections 6-9 and 13 is temporary [63]

Few examiners have been needed in recent years. However, many federal observers continue to be assigned when racial vote discrimination, including a lack of legally mandated language assistance, seems likely.[64] The observers write reports—often lengthy

and detailed—of what they have seen. They are also in contact on Election Day with Department of Justice lawyers who, in the event of voting irregularities, can contact the official in charge of the election. If the official does not solve the problem, the Department of Justice may file a civil action under the Voting Rights Act after the elections are over.[65] Since 1966, roughly 25,000 observers have been deployed in over 1,100 elections.[66]

Sections 4(f)(4) and 203: Minority Language Assistance

Another set of temporary provisions concern the needs of certain citizens who are limited-English proficient. In 1975, when Congress amended the Act for the second time, it concluded that

> through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. . . . The 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. [67]

The language-minority groups specifically mentioned in the Act are "persons who are American Indian, Asian American, Alaska Natives, or of Spanish heritage."[68]

Consequently, as mentioned above, Congress included in its definition of "tests and devices" the use of English-only election materials under certain conditions, bringing three entire states and numerous other jurisdictions under Section 5 coverage in 1975, as shown in Map 2. **(See Map 2.)** These jurisdictions were described in the congressional debates over reauthorization that year as areas where more severe kinds of discrimination against language minorities occurred, including "physical, economic, and political intimidation when they seek to participate in the political process." [69] Jurisdictions covered under Section 4(f)(4) must provide assistance in the language that triggers coverage, in addition to meeting the requirements of Section 5 and being subject to the examiner and observer provisions.

In 1975, Congress enacted another provision with a different formula that required covered jurisdictions to provide minority language assistance: Section 203. This section was extended in 1982 and amended in 1992. It is yet another important part of the Act that will expire in 2007 if not renewed.

A jurisdiction is covered under Section 203 where "limited-English-proficient" U.S. citizens of voting age in a single language group within that jurisdiction number more than 10,000 or are more than 5 percent of all voting-age citizens (or on an Indian reservation, exceed 5 percent of all reservation voting-age citizens), and the illiteracy rate of the group is higher than the national illiteracy rate.[70] The states of California, New Mexico, and Texas are covered by Section 203 (for Spanish heritage). Also covered are jurisdictions in twenty-six other states, for twenty-nine languages in one of the four major language groups.[71] (**See Map 3.**)

The requirements of Section 4(f)(4) and Section 203 as they relate to minority language material and assistance are essentially identical.[72] The minority language provisions are comprehensive, applying to every stage of the election process for all types of elections. The minority language provisions were designed to ensure that people who do not speak or read English well and are either American Indian, Asian American, Alaska Native, or of Spanish heritage are supplied with assistance in their own language, including "registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process," to enable them to vote without hindrance.[73] Generally speaking, however, it is not necessary to supply printed material to those American Indians and Alaska Natives without written languages, for which oral assistance is required.[74]

Permanent Provisions

A key permanent provision is Section 2, which provides the primary means to remedy voting discrimination against racial and language minorities through litigation. The substance and language of the Fifteenth Amendment in particular is reflected in this section which states, in its entirety:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by

> members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion of the population.[75]

Congress added Section 2(b) as an amendment in 1982 to address a 1980 Supreme Court decision in a case originating in Mobile, Alabama seven years earlier.[76] The amendment makes clear that not only is denial of the right to vote prohibited but denial of a protected class of citizens' right to have an equal chance to elect their preferred representatives. Moreover, the amendment speaks in terms of results, not intentions. The Court interpreted the Constitution to say that African Americans in Mobile, who invoked the Fourteenth and Fifteenth Amendments to challenge the system preventing the election of blacks to city council, must show that the whites who instituted the system in 1911 had intended thereby to discriminate against black voters. Congress, in amending Section 2, created a route—statutory rather than constitutional—for making a showing of intent unnecessary. From thence forward, evidence of discriminatory effect would be sufficient.

Section 3(a) also enables a federal court as part of a voting rights action to certify a jurisdiction for examiner and observer coverage to prevent unconstitutional racial vote discrimination.[77] As discussed below, Section 3(c) has been used with some regularity. Section 3(c)—a permanent provision—allows a court which has found a voting rights violation under the Fourteenth or Fifteenth Amendment to require a jurisdiction not subject to Section 5 to submit certain future election changes to the Attorney General for preclearance for an "appropriate" period of time.[78] This so-called "pocket trigger" of preclearance coverage has been applied to the state of New Mexico, for example, leading to a Department of Justice objection while the coverage was in effect. The pocket trigger has also been applied, for example, to the state of Arkansas; Escambia County, Florida; Buffalo County, South Dakota; and Cicero, Illinois.[79] While this section has been used sparingly, it nonetheless is thought to have served as an important deterrent to discrimination where it has been used.[80]

Certain other permanent provisions of the Act that apply nationally are worth noting. Section 10 bars jurisdictions from using

a poll tax.[81] Section 201 prohibits the use of "tests or devices" in voting.[82] This section targeted the array of barriers such as literacy tests, "understanding" tests, and "good-character" tests that, when administered by whites prior to 1965, prevented blacks from voting. Section 208 is short and to the point. It says:

> Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.[83]

Section 11(a) prevents election officials from refusing to count a legitimate vote, and Section 11(b) prohibits intimidation, threats, or coercion in the voting process.[84] Section 4(e) requires jurisdictions to provide language assistance to United States citizens who were educated in Puerto Rico.[85]

Interpretations and Debates

A substantial body of case law has arisen in the years since the Act was first passed specifying the rules for applying Sections 2 and 5, especially regarding vote dilution, and these have become more complex as a result of Supreme Court decisions beginning in the 1990s round of redistricting. Moreover, there is controversy among both political actors and scholars over whether, as the law is applied to redistricting, there is a necessary trade-off for minority voters between "descriptive representation" (representation by a person of one's own ethnic group) and "substantive representation" (representation in terms of achieving one's policy goals, whatever the ethnicity of one's representatives), and, if so, whether the creation of majority-minority districts to increase descriptive representation of groups who, for example, tend to vote heavily Democratic, may not decrease their substantive representation by decreasing the number of Democratic seats overall. This is not an easy question to resolve, even though political scientists have spilled much ink on the subject. The answer almost certainly depends on the specific circumstances surrounding the adoption of a redistricting plan.[86] Whatever the answer, however, the Act today continues to prohibit attempts to prevent minorities of color from voting or from having an equal chance to elect their preferred candidates. As such, it remains true to the Fourteenth and Fifteenth Amendments it was designed in 1965 to enforce.

CHAPTER FOUR

The Primary Groups the Voting Rights Act Has Helped

The Voting Rights Act has so far focused primarily on protecting the rights of four major American ethnic groups. African Americans will be described first, because their long history of slavery and disfranchisement, followed by their intense struggle in the modern era for full citizenship, was the reason the Act was passed. Then Latinos, currently the largest ethnic minority group in the nation, will be described, followed by Native Americans,[87] whose history of mistreatment by the dominant white majority goes back as far as that of blacks. Last, the experiences of Asian Americans and Pacific Islanders, a relatively small, heterogeneous, and rapidly growing population, will be considered.

African Americans

There were 36.4 million African Americans in the United States in 2000,[88] 55 percent of whom lived in the South.[89] (**See Map 4A** for their geographical distribution.) African Americans composed 11.9 percent of the United States voting-age population (VAP).[90] This compares to 9.2 percent in 1960.[91] In the 2000 presidential election, African Americans were the largest minority group among citizens who reported voting, constituting 11.7 percent. This compared with 80.7 percent for non-Hispanic whites (Anglos). Latinos made up 5.4 percent of the voters; Asian Americans, 1.8 percent; and "other" (including Indians and Alaska Natives), 0.4 percent.[92]

The Census Bureau estimated that 53.5 percent of the black citizen VAP, compared to 60.4 percent of comparable Anglos, cast a ballot for president in 2000.[93] To be sure, these figures are based on the self-reported behavior of respondents and probably understate the racial gap, as previous studies have found that while both blacks and whites tend to over-report their voting behavior, a somewhat higher percentage of blacks do so.[94] The census figures represent significant progress in closing the voter turnout gap since the 1960s. In 1964, one year before the Act's passage, 58.5 percent of voting-age blacks nationwide reported voting, as compared to 70.7 percent of comparable whites. In the North and West, 72.0 percent of blacks voted, as did 74.7 of whites.[95] In the South, on the other hand, 44.0 percent of blacks voted, as compared to 59.6 percent of whites. In other words, in the South there was almost a 16-point racial gap in turnout, while in the North and West, about a 3-point gap. In some

southern states the gap was even greater than the regional figure would suggest.

In large measure, this regional difference in voter turnout was the result of drastic differences in registration rates. In 1964, the black registration rate in the eleven states of the former Confederacy was 43.1 percent.[96] In South Carolina it was 38.7 percent; in Louisiana, 32.0 percent; in Alabama, 23.0 percent; and in Mississippi, 6.7 percent. The reason was obvious. As late as 1960, nine of the eleven states of the former Confederacy still had a literacy test, a poll tax, or both. Much, though by no means all, of the registration gap in the southern states disappeared within a few years of the Act's passage. The black registration rate in those states jumped from 43.1 percent in 1964 to 62.0 in 1968.[97] Twenty years later, in 1988, the average black-white registration gap in those same four states of South Carolina, Louisiana, Alabama, and Mississippi was a mere 4 percentage points. In Mississippi, where the gap in 1965 had been 63.2, it was 6.3 by 1988.[98]

A central aspect of a minority group's political incorporation is how successful its members have been in holding elective office and thus having a chance to directly affect policy. The above discussion of white officials' efforts to dilute minority votes underscores the importance of this issue. In terms of sheer numbers, blacks have made striking progress since the Joint Center for Political and Economic Studies first began tracking black elected officials (BEOs). In 1970, there were only 1,469 in the entire nation. In the six southern states originally covered entirely by Section 5, there were 345 at all levels of government.[99] By 2000, the number nationally had increased to 9,040—a gain of over 600 percent, and in the same six states, 3,701—a gain of over 1,000 percent.[100] Seen differently, in the six states, BEOs as a proportion of the national total of BEOs rose from 26 to 41 percent in thirty-one years.[101] Without a doubt, this represents great progress.

However, the fact remains that black candidates are unlikely to be elected when non-Hispanic whites are the majority of the electorate. Further, the higher the office, the steeper the grade of difficulty. Both of these factors come into play when blacks run for statewide office. No African American has been elected president or vice-president of the United States, of course. Douglas Wilder of Virginia is the only one to have been elected governor of an American state. Edward Brooke of Massachusetts, and Carol Moseley-Braun and Barack Obama of Illinois, are the only three African Americans to have been elected to the U.S. Senate since the First Reconstruction.[102] Today the Senate is a hundred-member body that would have ten blacks as members were blacks elected in proportion to their

percentage of the VAP. Instead, Senator Obama stands alone in that regard. A fourth African American, Harvey Gantt, former mayor of Charlotte, was ahead in some polls during his 1990 challenge of North Carolina Senator Jesse Helms until Helms's campaign aired blatantly racist TV ads and, in cooperation with the state Republican Party, systematically mailed registered black voters false information about state voter qualifications. (The latter action led to a post-election suit by the Department of Justice, charging both the state Republican Party and the Helms campaign with violating the Voting Rights Act by intimidating and interfering with black voters. Both defendants signed a consent decree agreeing not to engage in such tactics in the future.)[103]

At the statewide level, numerous blacks hold office, although their percentage is still significantly below the black proportion of the VAP. (**See Table 1.**)[104] As of 2000, thirty-five BEOs held offices filled by a statewide vote—less than one per state.[105] As blacks are a minority of the VAP in all fifty states, even thirty-five represents progress. Nonetheless, BEOs make up only 5 percent of all such offices, and often it is only after blacks have first been appointed to a vacancy that they are able to win election to a statewide office as incumbents. Moreover, in order for a black to win statewide election, a prior appointment to fill a vacancy is not always sufficient. Congressman Melvin Watt, testifying before the National Commission on the Voting Rights Act, noted the case of Judge Allyson K. Duncan, an African-American Republican woman appointed to the North Carolina Court of Appeals, a statewide office, who was then defeated by a white challenger when she ran for election as an incumbent. Her qualifications were such that she was later appointed to the U.S. Fourth Circuit Court of Appeals.[106]

With regard to Congressional seats, the percentage of BEOs in that body was almost twice as high as for those holding statewide office—9 percent. The reason for this larger proportion is obvious. The geographical concentration of blacks within some areas of certain states makes it possible to draw majority-minority districts, thus enabling black candidates to overcome the effects of racially polarized voting. Sections 2 and 5 of the Act play an important role in this process. As Table 1 indicates, the median Anglo (non-Hispanic white) VAP in districts electing black Representatives was just 31 percent in 2000. In fact, only four of the thirty-eight black Congressmen were elected from majority-Anglo districts that year.[107]

The impact of district racial composition is also obvious in Table 2, which compares the number of Anglo districts electing black state legislators with the number of majority-minority districts doing so. (**See Table 2.**) As the table indicates, in 2000 only 8 percent of

black U.S. representatives holding office in the fifty states were elected from majority-Anglo districts. Sixteen and 18 percent, respectively, of black state representatives and senators who were officeholders that year were elected from majority-Anglo districts in the forty-one states for which data are available. In light of the findings of racially polarized voting presented below, Tables 1 and 2 provide support for the continuing need for majority-minority districts if minority voters are to continue to be able to elect candidates of their choice. In the South and other jurisdictions covered by Section 5, that provision of the Act has played a very important role in ensuring that that is the case.

African-American underrepresentation is, of course, the result of several factors. Running for office typically takes time and money, and blacks are far less well-off, on the whole, than whites. Research has shown that minority candidates for state legislatures, and blacks specifically, have less campaign financing on average than do whites.[108] This is almost certainly true in races for other types of office as well. To a large degree, however, the continuing underrepresentation of BEOs is the result of two factors that may be connected but are not identical—strong anti-black attitudes that continue to find expression in virtually every aspect of American life, and racially polarized attitudes on a host of policy questions that loom large in the American political universe.

Anti-black attitudes lead to discrimination in housing, education, law enforcement, health care, and a multitude of other areas of everyday life, including voting.[109] Racially polarized attitudes toward public policy questions are often connected with anti-black attitudes and blacks' response to them, but disagreements between racial conservatives and racial liberals cannot always be reduced to white racism and its opposite. In any case, the fact that blacks and whites often disagree sharply over policy is beyond dispute.

Two research reports published in 1997 underline the sharp racial differences in policy preferences. Scholars at the University of Georgia surveyed scientifically selected segments of the adult population, asking their opinions on "various kinds and degrees of government intervention to improve the life chances of African Americans." They found that whites in the non-South were far more favorably inclined to support government intervention on behalf of blacks than were whites in the South, and that whites in the Deep South were far less likely to do so than those living in the South as a whole. In the sample, 67 percent of whites in the Deep South sample believed government was spending "too much" on assistance to blacks, as compared to 33 percent of whites in the South as a whole and 18 percent of whites in the remainder of the nation. (Less than 3

percent of a national sample of blacks felt the government was spending "too much.") The Deep South as defined by the authors consists of five states covered in their entirety by Section 5—Georgia, Alabama, Louisiana, Mississippi, and South Carolina.[110] They conclude that "Southerners in general—and Deep Southerners in particular—are the least likely to endorse policies intended to ameliorate racial inequality."[111] Very similar findings on attitudes toward government spending on behalf of African American drawn from longitudinal data obtained from several survey organizations, are reported in another study on racial attitudes published the same year.[112]

Some of the reasons behind blacks' strong support for government help is suggested in a 2005 report by the National Urban League documenting the inequality African Americans still face in the first decade of the current century. A set of indices created to measure the relative position of blacks in terms of economic well-being, health, education, social justice, and civic engagement dramatically underscored the plight of the average African American in the United States today as compared to the average white.[113]

Whoever is right on the various policy issues related to race, the social science data point to serious differences of opinion between the races, on average, in many parts of the nation, particularly the Deep South—differences that contribute to racial polarization at the voting booth.

Latinos

With the exception of Puerto Ricans in the continental United States and Latinos in general in a few other locales, people of Hispanic heritage were not included, as such, under the protections of the nonpermanent features of the Voting Rights Act until 1975, when Congress passed Sections 4(f)(4) and 203 to aid citizens who lacked English proficiency and also extended the reach of Section 5 to include the entire states of Alaska, Texas, and Arizona as well as other political subdivisions. Sizable populations of Latinos lived in the latter two states.[114] While litigation challenging Latino vote dilution was already well under way in Texas by the late 1960s, Section 5 coverage in Arizona and Texas changed the political landscape in significant ways.[115] As two scholars have noted, "it is only in the modern era—since the extension of the Voting Rights Act to Latinos in 1975—that it is possible to speak of a national 'Latino' as opposed to Mexican American or Cuban American politics that has a predictable impact on candidates' strategies and electoral

outcomes."[116] There were 5,205 Hispanic elected officials (HEOs) nationwide as of 2000.

The Latino population has grown rapidly in recent decades, both absolutely and as a percentage of the total population. In 1970, there were 9.6 million Latinos residing in the United States, representing 4.7 percent of the total population. In 2000, there were 35.6 million, and their percentage of the total had grown to 12.6.[117] Of the 26 million person increase during this thirty-year span, immigrants accounted for 45 percent.[118] Latinos are concentrated in the American Southwest but significant populations are found in the East, and there are sharp increases in the South as well. **(See Map 4B.)** Most Latinos are of Mexican descent (more than 26 million), but many from other countries in Latin America have immigrated to the United States in recent years, either in search of work or to escape war, terror, or civil unrest in their home countries. Puerto Ricans living stateside (as distinct from the Island of Puerto Rico) have long resided in the United States, but immigration from the island continues, and in 2003 they numbered almost 4 million by census estimates.[119] The existence of literacy tests into the 1960s which affected Puerto Ricans in New York played a role in the coverage of three counties in that state under Section 5.[120]

An estimated 8.5 million undocumented persons lived in the United States in 2000, of which about three-fourths were of Hispanic origin. Their influx has created growing concern among many citizens and led to considerable hate-related violence.[121] This concern sometimes expresses itself in behavior that threatens the rights of Latino citizens who are registered to vote, as recent events in Arizona illustrate. Proposition 200, a popular Arizona referendum passed in 2004, requires anyone registering to vote to present proof of citizenship, and anyone voting must present a photo identification or two pieces of identification with the voter's name and address. According to election officials, these requirements will prevent "thousands" of citizens from voting.[122]

In 2000, non-citizens composed 39.1 percent of the Latino VAP nationwide, which meant that far fewer Latinos actually voted than their proportion of the VAP would suggest. Moreover, even among Latino citizens of voting age, only 45 percent reported voting in the 2000 elections, compared to 62 percent of Anglos.[123] Recent research suggests that part of that difference is the result of difficulties some Hispanic citizens have with English-only ballots in areas not covered by Section 203.[124] Moreover, some advocates of Latino voting rights believe that incompetently translated ballots in jurisdictions covered by Section 203 discourage Latino voting.[125]

As is true for blacks, Latinos as a group are poorer and less well educated than are non-Hispanic whites, on average. Also like blacks, Latinos, many of whom trace their roots in the United States back centuries, have long been victims of racial prejudice and violence. In Texas, for example, Latinos ranked above blacks but below whites on the racial caste hierarchy for generations, and were subject to some of the same politically exclusionary laws as blacks. In the 1960s, Latinos in the Southwest mounted a highly visible and effective civil rights movement, challenging discrimination in public schools, on the job, and at the ballot box. They also fought to overcome subordination within the Anglo-dominated Democratic Party.[126]

At the time Section 5 was extended to the entire states of Texas and Arizona, the Latino civil rights movement in Texas had already begun to challenge control by Anglo Democratic bosses along the Rio Grande border, and activities by various civil rights organizations such as the Southwest Voter Education Project (SWVEP) and the Mexican American Legal Defense and Educational Fund (MALDEF), collaborating with voting rights lawyers, filed suits attacking electoral arrangements such as multi-member districts. Section 5 made their task much easier. For example, blacks and Latinos in Houston, one of the nation's largest cities, had gone to court in the early 1970s challenging the city's at-large election system as diluting their vote. Only one black city councilman had been elected since Reconstruction, and no Latinos had been, although the city by 1970 was 26 percent black and 12 percent Latino. The city's huge land area made an at-large council campaign costly. Elections were highly polarized. The plaintiffs lost the case and had begun trying to raise money for an appeal when, in 1975, Congress extended Section 5 coverage to Texas. Soon thereafter, the city annexed some territory south of the municipal boundary. The population was predominantly white and would thus add to the white percentage of the city. But Houston now had to get approval from the Department of Justice, and the Department required the city to change its council election method to include at least some single-member majority-minority districts. As a result, the city got its new territory, the minority communities got an election plan they were satisfied with—nine single-member seats and five at-large seats—and the plaintiffs in the earlier voting rights case were spared the expense and time of mounting a challenge to the court's decision. The city soon had several minority members on council.[127]

When Latino candidates oppose Anglos, the pattern is often one of racial polarization (as discussed in Chapter 7), and in constituencies with Anglo majorities, the ability of Latino voters to elect their preferred candidates is diminished. Table 3 indicates the

extent to which HEOs holding office in 2000 had been elected from majority-Anglo state legislative districts. (**See Table 3.**) It suggests the presence of ethnically polarized voting, as well as the need for Latinos to have majority-minority legislative districts to enable them to elect their candidates of choice. Indeed, there were no Latino U.S. Representatives holding office in 2000 who had been elected from majority-Anglo districts.

Native Americans

Native Americans, described by the Census as American Indians and Alaska Natives, composed 0.9 percent of the total United States population in 2000, or 2,475,956 persons, and were concentrated in the West and Alaska.[128] (**See Map 4C.**) Many of the political subdivisions in states such as Arizona, New Mexico, and South Dakota are covered by Section 203 for one or more Native American languages. Moreover, the entire state of Alaska is covered by Section 4(f)(4), as are subdivisions in other states. In 2003, Native Americans composed 19 percent of the population in Alaska, 11 percent in New Mexico and Oklahoma, 9 percent in South Dakota, and 8 percent in Montana.[129] In Arizona, where Native Americans composed about 6 percent of the population, they made up approximately 78 and 30 percent, respectively, in Apache and Coconino Counties.[130] In some other states as well—South Dakota, for example—Native Americans make up a considerably large proportion of certain counties than of the state as a whole.

Native Americans have long suffered high rates of disease and social problems resulting from their treatment at the hands of whites. According to a recent report, they are

> 670 percent more likely to die from alcoholism, 650 percent more likely to die from tuberculosis, 318 percent more likely to die from diabetes, and 204 percent more likely to suffer accidental deaths than members of other groups. Although the average life span of Native Americans has increased from 51 years in 1940 to 71 years today, it is still six years below that of other Americans.[131]

Without elected representatives to advocate solutions to these particularized needs, it is unlikely that such problems will be adequately addressed by government policy.

There is no comprehensive list of Native American elected officials, and so it is difficult to make general statements about their numbers and the conditions of their election. Moreover, given their

small numbers nationally, the census does not provide post-election data on their turnout rates. It is nonetheless true that many Indian candidates for office face the same types of problems as do other minority candidates, including racially polarized voting when they oppose whites.[132] Dan McCool of the University of Utah has compiled a list of sixty-six lawsuits filed between 1966 and 2005 in which the voting rights of Native Americans were at issue. Plaintiffs achieved some measure of success in sixty-two of them, according to McCool. South Dakota and New Mexico tied for the highest number filed in their jurisdictions—seventeen each. But lawsuits targeted jurisdictions in several states, including Arizona, North Carolina, Minnesota, Nebraska, Maine, Wisconsin, Utah, Montana, Colorado, and North Dakota. Twenty-one of the cases involved Sections 5 or 203.[133]

The extent of discrimination against Native Americans has been described by civil rights lawyer Laughlin McDonald, executive director of the ACLU Voting Rights Project, in a recent law review article. He points to the testimony regarding discrimination against Native Americans in the 1975 House Judiciary Committee hearings on reauthorization of the Voting Rights Act, as well as to statements on the issue made in the Senate debate.[134] He notes, however, that "despite the application of the Voting Rights Act to Indians, both in the enactment in 1965 and extension in 1975, relatively little litigation to enforce the Act, or the constitution, was brought on behalf of Indian voters in the West until fairly recently."[135] Significant cases were filed by Native American plaintiffs in the 1990s, and others were brought in the present century. Findings in these cases revealed a high level of racially polarized voting when Native American candidates appeared on the ballot, as well as the standard vote dilution schemes enacted by white lawmakers that have long been used by their counterparts elsewhere, most notably in the South.[136]

A significant judicial finding of vote discrimination against Native Americans appears in *Bone Shirt* v. *Hazeltine*,[137] a case brought in 2001 by Alfred Bone Shirt and three fellow Indians, represented by the ACLU, against the state of South Dakota for failing to submit a legislative redistricting plan for preclearance. The district judge in 2004 invalidated the plan, which diluted Native American voting strength, and issued a 144-page opinion that contained a detailed history of South Dakota's discrimination against Native American voters, including several instances since 1999. Among these recent instances were illegal denials of the right to vote in certain elections, dilutive voting schemes in elections for county commissioners and school board members, barriers to voter registration, intimidation and unsubstantiated charges of vote fraud, non-compliance with the

Voting Rights Act's language assistance provision, and lack of access to polling sites. Legislators engaged in debate over an unsuccessful bill to make it easier for Indians to register were quoted in the opinion as expressing prejudice against Indians. Alluding to Indians, one legislator said, "I'm not sure we want that kind of person in the polling place."[138]

On the positive side of the ledger, there appears to be a notable increase in Native American voter turnout in recent years, which traditionally has been quite low.[139] Moreover, largely as a result of prolonged voting rights litigation, eight majority-Native American legislative districts were recently created in Montana.[140] (Eight Native American legislators now serve, as well.) The redistricting was conducted by a bipartisan committee appointed by the state Supreme Court, with a Native American tie-breaker.[141] This success in Montana brought the number of Native American legislators nationwide in 2005 to 37 in 13 states.[142] Native Americans composed 13.7 percent of Alaska's VAP in 2000. In 2006, both U.S. Senators and the state's U.S. Representative are white. However, there are seven Alaska Natives in the sixty-member state legislature.[143]

Despite these advances, Indians continue to face numerous obstacles to full political participation, a fact underlined by an election protection project carried out in twelve states with a significant Indian population in 2004. Among the complaints listed on Election Day were 182 regarding registration problems, 22 regarding poll judges, 3 regarding poll watchers, 29 regarding voting machines, 14 regarding provisional ballots, 37 regarding absentee ballots, 8 regarding intimidation, and 8 of a miscellaneous nature. There is no way to know how large a universe of actual voter problems besetting Native Americans these registered complaints represent, and they are not easy to summarize. However, a few examples suggest the kinds of difficulties Native Americans continue to face at the dawn of the twenty-first century.

- "Several poll workers made comments on how everybody should have to speak English in order to vote, or were questioning people based on their speech patterns." (Washington)
- "Native voters were not as consistently offered provisional ballots as White voters were." (Montana)
- "Man taking photographs of voters was not asked to stop or leave." (Michigan)

- "Female went to go vote and was told by three men that she could not vote there, but instead had to 'go vote on the reservation'." (Washington)
- "A poll watcher photographed 4 Native voters at least two of whom cast provisional ballots." (Washington)[144]

Similar complaints were voiced by several persons from several states in Indian Country who testified at the Commission's hearing in South Dakota in Rapid City. Among the numerous discriminatory practices mentioned there were intimidation by polling officials, racial gerrymandering, and gross malapportionment of districts—a practice outlawed by the Supreme Court in 1964.[145]

Professor McCool testified at the South Dakota hearing that among the problems Indians face are the false but "widespread perception" that Indians are not taxpayers, and thus shouldn't be allowed to vote, "especially in state and local elections"; the long distance from place of residence to polling stations, "especially over bad roads; polls that are not located conveniently or not on Indian reservations; hostility among election workers and public officials; the purging of voter lists; a poor understanding of election laws and procedures; difficulties and resistance when attempting to register to vote; and efforts to dilute the impact of Indian voting."[146]

McCool's concluding opinion was that while Indians are achieving "remarkable gains" in some places, the "Voting Rights Act, . . . including Sections 5 and 203, has played a pivotal role in providing American Indians with an opportunity to vote and elect candidates of their choice. The impact is enormous."[147]

Asian Americans

Asian Americans alone in 2000 composed 3.6 percent of the population and 2.6 percent of its citizen VAP; Asians in combination with one or more other races (including Native Hawaiian and other Pacific Islanders) composed 4.2 percent, or 11.9 million people. Of these, 49 percent lived in the West, 20 percent in the Northeast, 19 percent in the South, and 12 percent in the Midwest. (**See Map 4D.**) Slightly more than half lived in three states: California (4.2 million), New York (1.2 million), and Hawaii (0.7 million). New York City and Los Angeles ranked first and second in terms of the size of their Asian population, followed by San Jose and San Francisco. Chicago and Houston ranked seventh and eighth, respectively. Seattle ranked tenth. The Asian population is quite diverse in terms of national heritage, embracing over twenty-five groups. The five largest are

Chinese (except Taiwanese), followed by Filipino, Asian Indian, Vietnamese, and Korean.[148]

Like the other minority ethnic groups described in this Report, Asian Americans have a history of subjugation and discrimination by the white majority spanning centuries and continuing, in attenuated form, into the present. Vicious anti-Chinese sentiment in nineteenth century California led to the Chinese Exclusion Act of 1882, the first time in American history an entire ethnic group was singled out and legally forbidden entry. Gradually expanded to include other Asian groups, it continued in force until 1943.[149] Much more recently, more than 110,000 West-Coast Japanese, 64 percent of whom were citizens, were imprisoned during World War II, solely on the basis of their ethnic heritage, losing much of their property in the process—an act approved by the U.S. Supreme Court in 1944 and later repudiated by Congress.[150] Recent studies show continued hostility toward Asian Americans on a wide scale.[151] A recent Gallup poll on discrimination in the workplace, cited by the U.S. Equal Employment Opportunity Commission, found that 31 percent of Asian-American workers perceived that they had been subjected to discriminatory or unfair treatment—the highest percentage for any group. (African Americans were second, with 26 percent.)[152]

There has been a sharp increase in Asian-American immigration over the past generation. From 1970 to 2000, the population of this group increased from 1.5 million to its current 12 million, much of it as a result of immigration.[153] While the proportion of Asians among the continuing influx of immigrants from all continents to America is relatively small, it has provoked some nativist prejudice. Race crimes and hate incidents against Asian Americans have received attention in the media and by scholars.[154] Anti-immigrant attitudes undoubtedly account for some of the difficulties Asian voters face at the polls—difficulties described in detail at various hearings by the National Commission on the Voting Rights Act.[155]

It may also make the election of Asians to office more difficult than it would otherwise be. The number of Asian Elected Officials (AEOs) has increased very modestly from 120 in 1978 to 346 in 2004, in spite of an eight-fold increase in the Asian population between 1970 and 2000. Seventy-five percent of AEOs in 2004 were local officials, as distinct from state or federal ones.[156] It is true that six AEOs currently serve at the national level, most notably U.S. Senator Daniel Inouye of Hawaii, a veteran of World War II, where he was a member of the famous Japanese-American 442nd Regimental Combat Team—the most highly decorated unit of its size in American history. Another, California Representative Mike Honda, was elected in 2000.

He spent his early childhood in an internment camp (as did fellow California Congresswoman Doris Matsui), and today is one of five vice-chairs of the Democratic National Committee. But there is indirect evidence, at least, that Asian Americans, like other minorities of color, face racially polarized voting in many elections. James S. Lai, pointing to the relatively low number of AEOs, suggests the lack of Asian-American population concentration in most jurisdictions as an explanation, and he notes that where there is such concentration, particularly in California suburban communities, the number of AEOs rises.[157]

In recent years, civil rights groups have mounted extensive election protection programs, and their findings yield insights into some of the reasons there are relatively few AEOs. Glenn D. Magpantay, a staff attorney with the Asian American Legal Defense and Education Fund (AALDEF), has reported on election problems these citizens confronted on Election Day 2000 in New York City; and his organization more recently has reported on such problems in a study of eight states and twenty-three cities in 2004. New York City is particularly interesting in that its Asian population grew by 71.1 percent in the decade of the nineties, compared to the city's total growth of 9.4 percent, such that, by the turn of the century, Asians composed 10.9 percent of New York City's population.[158] (Several of the city's boroughs are covered for Chinese and/or Korean languages under Section 203.) Among the problems discovered in 2002 were faulty translations of bilingual ballots, signs, and voting materials; an absence of translators at polling sites; poorly trained, rude, threatening, or hostile poll workers; numerous omissions of Asian American voters from voter lists; confusing changes in poll sites; and breakdowns in voting machinery.[159] AALDEF's far more comprehensive investigation of the 2004 election revealed many of the same problems, and provided a quantitative classification of them. The authors concluded that "more must be done to ensure that Asian Americans can fully exercise their right to vote."[160]

The AALDEF findings were corroborated by those of the National Asian Pacific American Legal Consortium (NAPALC), now known as the Asian American Justice Center, resulting from that group's intensive monitoring and exit polling during the 2004 presidential election of eight counties across the nation with significant Asian American populations. NAPALC listed both "good practices" and problems that came to light as a result of their investigations. The problems were by and large the same type as those uncovered by AALDEF.[161] These may partly account for the significantly lower turnout among Asians as compared to Anglos and blacks. According to the Census Bureau, only 43.3 percent of Asian

voting-age citizens reported voting in November 2000, as compared to 61.8 percent of Anglo citizens.[162]

In summary, this brief overview of the demography and electoral status of these four major ethnic groups indicates that, in spite of their differences, they share many politically relevant similarities. All of them have been treated badly by the dominant white population for many generations. All have suffered violence, humiliation, and various forms of disfranchisement. Unfortunately, discrimination arising from racial prejudice is far from disappearing. Significant numbers of citizens among three of the groups continue to face problems at the polling place because they are not proficient in English, even though they wish to exercise their basic right to vote. All four groups are protected by the permanent features of the Voting Rights Act, and many of their members are also protected by one or another of its nonpermanent features.

CHAPTER FIVE

Enforcement of the Act Through Its Temporary Provisions

Responsibility for enforcement of the Voting Rights Act rests in large measure with the Department of Justice and, more specifically, the career attorneys and other staff in the Voting Section and their administrative superiors. Thus, a logical way to begin an inquiry into the extent of continuing vote discrimination is to examine records kept within the Department's files. The Act also gives private parties an important role in enforcement, and while there are no recent systematic studies of which the Commission is aware that try to determine the extent of such enforcement efforts by non-government personnel, this question will also be briefly examined.

The Section 5 Objection Process

As the result of forty years of experience, the Department has developed an efficient, practical, and sensible way of handling the thousands of submissions for preclearance it receives every year. The Section 5 unit of the Voting Section handles the bulk of the submissions, with assistance from the section's litigators when necessary. The Section 5 unit comprises attorneys, civil rights analysts, and support staff who are specially trained to analyze the submissions, and they have developed specific protocols for processing them through each step of the process.[163]

The Department has also issued detailed guidelines relating to the substance and procedure of Section 5 review.[164] The guidelines set forth the elements that each submission should contain, including clear references to the voting change or changes in each submission, the date each change was adopted and will take effect, and a statement of the anticipated effect of each change on racial or language-minority groups.[165]

The importance of a Section 5 objection bears remarking on. An objection is a legal finding that originates when the staff—lawyers and civil rights analysts in the Voting Section assigned to a particular submission—spots possible problems in it. For submissions that are potentially objectionable, the staff becomes extremely familiar with the racial and political dynamics of the jurisdiction. They write or telephone both officials and minority leaders in the community, including elected officials, candidates, or other minority citizens involved in the electoral process. For redistricting submissions, the Voting Section statistician performs a racial bloc voting analysis.

Moreover, any citizen may initiate contact and meet with Department staff, either to call attention to problems or express support for changes.[166]

There has been a long-standing process in place for making a determination on a submission. The Section 5 staff assigned to it makes a written recommendation to object or preclear a submission and sets forth the reasons therefor. Decisions to preclear routine submissions have been delegated to the Chief of the Voting Section, and jurisdictions are notified by letter that the change or changes have been precleared. If the recommendation is to object or to preclear any statewide voting change, the Chief of the Voting Section reviews the recommendation and, in writing, either indicates agreement or disagreement with the recommendation. The Assistant Attorney General for Civil Rights, acting under the authority of the Attorney General, then makes the ultimate decision about an objection.[167] Subject to a caveat below, an objection letter implies that *at least one proposed change in the jurisdiction's submission would violate, on the basis of race or color or membership in a language-minority group, legally guaranteed voting rights of citizens.* The targets of discrimination are virtually always racial minorities and language-minority citizens. An objection, in other words, is an instance of vote discrimination that would have been perpetrated by local government officials were it not foiled by Section 5.

A single submission by a covered jurisdiction may contain more than one proposed change in election procedure, and an objection letter may, in one stroke, prevent several discriminatory measures from being enacted. Indeed, quite a few of the submissions over the years each included three or more proposed discriminatory changes that were not precleared. In the data on objections that follows, the term *objection* refers to an objection letter, not the change or changes objected to in the letter. Overall, the average objection letter denied preclearance to 1.4 proposed changes.[168]

The caveat is that some objections are later withdrawn. Sometimes these withdrawals are made because objectionable changes are compensated for by ameliorative ones. A common reason for the Department's withdrawing an objection to a proposed dilutive annexation, for example, is the jurisdiction's agreement to change their election system from at-large to single-member districts. In such a case, even a withdrawn objection indicates a potentially discriminatory change which has been compensated for under Department supervision. But on other occasions, withdrawals may result from the Department's changing its mind after further communications with a jurisdiction. Because the data shown in our maps include objections that were later withdrawn as well as the

much larger number of those which were not, they slightly overstate the number of discriminatory changes. Until further research is conducted into the reasons for all withdrawals by the Department of Justice, the exact relationship between the number of objection letters and the number of discrete objectionable changes cannot be known.

Objections Interposed Over Four Decades

What are the facts regarding the number of objections? To answer this question, copies of all objection letters were obtained from the Department of Justice.[169] Between the issuance of the first objection in June 1968 and the last one for the year 2004, there were 1,116 objections interposed by the Department of Justice, prohibiting 1,589 distinct proposed election-related changes judged to be racially discriminatory. Second, the number of objections (626) interposed between August 5, 1982, when Section 5 was last reauthorized and December 30, 2004 was actually greater than the number before that date, constituting 56 percent of the total since 1968. To be sure, the two time periods are unequal as well—the post-1982 period comprises approximately 59 percent of the total period Section 5 has been in effect. Moreover, as Arizona, Alaska, and Texas only came under coverage in 1975, the percentage of objections in those states might well have been greater in the pre-1982 period than in the latter period if these states had been covered since 1965. Nonetheless, it is obvious that a considerable number of objections were interposed after 1982.

To put the matter in terms of averages, 268 months elapsed between August 6, 1982 and December 31, 2004. The number of objection letters in that period averaged more than four per month. Had it not been for the preclearance mechanism, therefore, considerably more discrimination would have occurred in the past twenty-three years than actually has occurred. Furthermore, the number of changes to which objections were interposed is probably not the total number of discriminatory changes in election procedures intended by covered jurisdictions. The Department has no means to systematically monitor all such jurisdictions to ensure that all changes are actually submitted for preclearance, and some probably were not submitted and were then enacted into law. In one troubling case it was discovered, in the words of a federal judge, "from . . . 1976 [when two counties in South Dakota were first subject to Section 5] until 2002, South Dakota enacted over 600 statutes and regulations that affected elections or voting in Shannon and Todd Counties, but submitted fewer than 10 for preclearance." Only after Indians in the

counties brought suit against the state in 2002 to enforce compliance with Section 5 did the state begin to submit the statutes to the Department of Justice.[170] The Department continues to examine these South Dakota submissions as this Report is being written. In the 1990s, private parties brought actions against at least nine Alabama jurisdictions found not to have submitted changes. All were then required to submit them.[171] One leading voting rights litigator, Joaquin Avila, believes many voting changes have not been submitted. In *Lopez* v. *Monterey County*,[172] seven different voting changes relating to electing judges in Monterey County, California, between 1972 and 1983 were not submitted for preclearance until the county and the state of California were compelled to do so as a result of litigation in the 1990s.

In circumstances where jurisdictions go years and sometimes decades without submitting voting changes and then the changes are submitted at one time, the Department of Justice is placed in an awkward position where, even if changes might be discriminatory, it is difficult to object for practical reasons. For example, even though Monterey County stipulated at one point during the *Lopez* litigation that voting changes at issue violated Section 5,[173] those same changes were eventually precleared by the Department of Justice.[174] Though the reasons for the preclearance are confidential, the *Lopez* cases discuss at length the difficulty of trying to undo a series of unsubmitted precleared changes.

It is unknown how many changes were not submitted for preclearance by covered jurisdictions, and of those, how many were discriminatory. This problem was described in 1984 by Drew Days and Lani Guinier, the former of whom served as Assistant Attorney General for Civil Rights in the Carter administration, and the latter as Days' assistant at the time. They attributed the absence of a systematic method for identifying unprecleared changes to underfunding by Congress. [175]

Map 5A shows, by state, both the total number of objections interposed by the Attorney General from 1966 through 2004 and the number from August 5, 1982 through 2004. **(See Map 5A.)** The states are color-coded to indicate the non-white proportion of the voting-age population (VAP).[176] The map shows that in nine of the sixteen Section 5-covered states, more objections were interposed after 1982 than before.[177]

The continuing pattern of proposed discriminatory changes that would have been implemented had they not been prohibited by the Department of Justice is also obvious in Map 5B, which shows only objections to statewide changes—primarily redistricting of legislatures or congressional delegations. **(See Map 5B.)** These are, as a type, the

most newsworthy objections, as they affect the most people in the state. The number of statewide objections in the covered jurisdictions before 1982 was eighty-six, compared to eighty-eight afterwards.

Objections in the Southern "Black Belt"

A noteworthy fact shown in Maps 5A and 5B is that all but two of the sixteen states covered entirely or partially by Section 5 are states with a large non-white population—Latino, black, and others. In Texas, Arizona, and California in particular, there are sizable Hispanic populations, which include many recent immigrants from Mexico.

The close link between large non-white populations and objections is also strikingly visible within individual states whose counties on the maps are color-coded by percent non-white VAP.[178] **(See Maps 5C-5K.)** These are maps of all states, except Alaska, that are completely covered by Section 5, as well as North Carolina, forty of whose counties are covered.[179] As can be seen, the objections were concentrated in the so-called "Black Belt" of most southern states, including the majority-minority counties—those areas V.O. Key, the pioneering scholar of twentieth-century southern politics, identified almost sixty years ago as being most resistant to black enfranchisement.[180]

On the other hand, in Texas, where the most heavily non-white counties (60-100 percent) are predominantly majority-Latino, located along the Mexican border, there were few objections in the post-1982 period. Even so, the 40-60 percent non-white Texas counties are far more likely than the remaining ones with smaller minority populations to have experienced objections. Numerous East Texas counties, whose minority population is largely black, are locales where numerous objections were interposed. This was the area in which most of the slave plantations were located before the Civil War. In Louisiana, Orleans Parish, which includes the city of New Orleans, is another majority-minority jurisdiction where there have been no objections in the post-1982 period. It is not surprising that there are areas with a predominant minority population where there have been none. In these, there may be enough minority officials to protect the interests of minority voters.

Nonetheless, Section 5 has helped prevent discrimination against those voters when statewide changes are at issue. For example, the Department of Justice objection to the Texas State House redistricting plan in 2001 was predicated on the state's attempt to eliminate effective districts for Latino voters in heavily Latino South and West Texas.[181] Orleans Parish has also been the

focus of voting rights litigation in statewide redistricting: the 1980s congressional redistricting plan was found to dilute minority voting strength there[182] and the post-2000 effort to eliminate a majority-minority state house district in Orleans Parish was thwarted by the Section 5 process. Louisiana elected to abandon its Section 5 declaratory judgment action when it became apparent that the court was going to rule against it.[183]

Examples of Section 5 at Work

Section 5 has proven to be effective and efficient in preventing discriminatory voting changes. Because the burden is on the covered jurisdiction to show that its proposed changes are not discriminatory, preclearance is efficient in a way that Section 2 often is not. For in a Section 2 case, the burden is on the plaintiff, and shouldering that burden can be costly. Some suits last for years, involve appeals to the Supreme Court, require numerous lawyers and experts, and then are often won by defendants. Section 5, on the other hand, typically involves a swift process in which an intended electoral change is submitted by letter to the Department of Justice, examined by government staff with expertise in voting, and either precleared or objected to within several weeks at most. If the Department objects, the proposed change cannot become law. On the other hand, if the change is precleared, it can quickly be put into effect.

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.[184] 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.[185]

The opinion was affirmed unanimously by the Court of Appeals for the Fourth Circuit,[186] and in the first election by districts, in 2004, black voters 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

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.[187] 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 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.[188] 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.

In addition, Section 5 also serves to maintain gains achieved through Section 2 suits. A dramatic example of this was given at the Commission's Mississippi hearing. As described by Brenda Wright, Managing Attorney at the National Voting Rights Institute, it concerned that state's dual registration system, which was a relic of the state's 1890 constitutional convention called for the purpose of disfranchising blacks. Following Congress's amendment of Section 2 in its reauthorization of the Act in 1982, Mississippi's system was finally challenged by a Section 2 suit, and in 1987, a federal court found that the system was adopted for a discriminatory purpose and had a discriminatory effect, accounting, in part, for the 25 percentage-point difference in the registration rates of blacks and whites.[189] However, following passage of the National Voter Registration Act (NVRA) in 1993, the state once more adopted a dual registration system, becoming the only state in the union to require people who registered to vote in federal elections at drivers' license offices and other NVRA-sanctioned offices to register yet again for state and local elections. In contrast, people who registered with the circuit clerk were allowed to vote in all elections. After at first refusing to submit the changed procedure to the Department of Justice for preclearance, Mississippi was forced to do so by a Section 5 enforcement action, with the U.S. Supreme Court unanimously ruling that the state was required to submit the change. When the state did so, the Department of Justice issued an objection, finding, just as the court had found in the 1987 Section 2 case, that the new dual system was racially discriminatory both in purpose and effect.[190]

Section 5 has also played a significant role recently in Alaska. During the last redistricting cycle, the Alaska Redistricting Board took special care to preserve existing "Native Districts"–districts which provided Native voters the opportunity to elect the candidates of their choice.[191] The board hired an expert, Lisa Handley, to determine whether the legislative plan it proposed complied with Section 5,[192] and she concluded that it did.[193]

Voting rights advocates in Alaska believe that the Act is vital in protecting Native interests. Native Alaskans for Fair Redistricting, a coalition seeking the implementation of "an equitable redistricting plan that will serve to provide the best representation to Alaskan voters," was involved in the 2001 redistricting process.[194] This group worked with Alaskan Native leaders to ensure compliance with the Act. According to Myra Munson, an attorney for Alaskans for Fair Redistricting, overall the Act "has had the effect of causing all parties to consider the need to protect Native districts in a way they might ignore" if the state were not covered. "This is important since it means substantial areas of the state are protected prior to the more partisan wrangling that occurs regarding the rest." [195]

Moreover, the deterrent effect of Section 5 is substantial. Once officials in covered jurisdictions become aware of the logic of preclearance, they tend to understand that submitting discriminatory changes is a waste of taxpayer time and money and interferes with their own timetables, because the chances are good that an objection will result. Conscientious officials, therefore, have a vested interest in submitting changes that will quickly be precleared. There was substantial hearing testimony about the deterrent effect of Section 5.[196]

Section 5 Declaratory Judgment Actions in the U.S. Court for the District of Columbia

So far the focus has been primarily on the best-known and most frequently used measure of a covered jurisdiction's efforts to pass discriminatory laws—Department of Justice objection letters. However, these are just one indicator of intended discriminatory changes. Another is *unsuccessful* Section 5 declaratory judgment actions brought by jurisdictions in the three-member U.S. District Court for the District of Columbia. As noted earlier, jurisdictions covered by Section 5 always have the option of bypassing the Department of Justice and going directly to the D.C. Court for preclearance. Jurisdictions' unsuccessful actions were relatively few compared to Department objections—there were a total of forty-two. [197] However, the same pattern exists, regarding the distribution

of these judicial "objections" since the 1960s, as exists for Department of Justice objections. The majority (twenty-five) occurred in the post-1982 period. (**See Map 6.**)

Section 5 Submission Withdrawals

There is yet another measure of discriminatory electoral changes proposed by covered jurisdictions, known as a *withdrawal letter.* This is not to be confused with a Department of Justice withdrawal of an objection described above. Rather, this is a jurisdiction's official notification to the Department that it is withdrawing one or more proposed changes submitted earlier, following inquiries by the Department.

When the Voting Section staff is considering submissions for preclearance, it often comes across one that seems potentially but not clearly discriminatory. When this occurs, it is standard procedure to send a letter to the submitting jurisdiction requesting more information before making an objection or deciding to preclear. Sometimes the language of the letter can signal that the Department is likely to object to the submission. In some cases, jurisdictions respond to "more information letters" by supplying the additional material requested and then receiving either a preclearance or an objection letter. But in other cases, jurisdictions decide to withdraw the proposed change or changes in question. Such a withdrawal letter is frequently a tacit admission of one or more proposed discriminatory changes and has the same practical significance as an objection letter—a proposed change is not put into effect.[198]

Jurisdiction withdrawals between August 5, 1982, and December 30, 2003 were calculated from data on submissions provided by the Department of Justice under the Freedom of Information Act.[199] There were at least 205 withdrawal letters during this period. This compares to 626 objection letters in approximately the same period. As with objections, withdrawals refer to submission letters that may contain more than one illegal change. The most common changes involved polling place location, as well as redistricting and precinct boundary alignment. However, they ran the gamut of electoral changes that were targeted by objection letters as well, including registration procedures, election administration, annexation, purging of voter rolls, term of office, type of elections adopted, number of elected officials, and qualifications of candidates. A comparison of Map 7, showing withdrawals, with Map 8, showing objections during the same period, indicates that the geographical distribution of withdrawals was similar to that of objections, although

Texas outranked Mississippi in the total number of withdrawals. (**See Maps 7 and 8.**)

Because these three phenomena discussed so far—objections, adverse declaratory judgment actions, and submission withdrawals—roughly measure the same thing, they can be summed to obtain a more accurate depiction of an estimate of covered jurisdictions' proposed discriminatory actions that failed to obtain preclearance since Section 5 was last reauthorized. The sum for each state from August 5, 1982 on is seen in Map 9. It is particularly useful to compare it with the previous map showing only objections during the same period. **(See Maps 8 and 9.)** The sum in most of the covered states is much higher than the number of objections alone. In Texas, for example, the sum of the three is 70 percent higher than the number of objections; in Georgia, 48 percent higher; in South Carolina, 31 percent higher; and in Mississippi, 29 percent higher. Overall, the sum (856) is 40 percent higher than the number of objections (626).

Procedure for Federal Observer Coverages

There are yet other indicia of actual and potential discriminatory behavior against voters that are not equivalents of Section 5 objections but which provide suggestive information about the status of minority voting rights. One of these is an observer coverage. As mentioned above, Sections 3 and 6 of the Voting Rights Act allow the federal courts and the Attorney General, respectively, to certify certain jurisdictions for the presence of federal examiners—officials who in the early days of the Act were empowered to help register minority voters in those certified jurisdictions, at a time when white registration officials prevented such registration. Today, the examiners do not play an active role, but Section 8 authorizes the Department of Justice to request that federal observers be sent to monitor polling places during elections in those jurisdictions which have been certified for examiners.[200] Typically, such a request results from communication among Voting Section lawyers and local officials, minority leaders, and U.S. Attorneys in various communities in the months before Election Day to determine whether voting rights violations are expected. In many cases, the message from these jurisdictions is that no problems are anticipated. But in other cases, racial tensions may be running high, or there may be threats of vote suppression efforts or perhaps inflammatory political rhetoric in a campaign involving minority candidates. Such situations indicate a federal presence is needed.

In a jurisdiction already certified by a court or the Department of Justice, the Assistant Attorney General for Civil Rights must give his approval before trained observers, usually employees of the Office of Personnel Management, are sent to the locales, where they take careful notes at polling places and vote-counting sites.[201] If the jurisdiction has not already been certified either by the Department of Justice or a court, the Attorney General must personally do so. Plans to send observers are usually made at least three weeks in advance of elections but decisions are sometimes made immediately beforehand.

On Election Day, the observers at the polling site are in contact with observer co-captains who travel between sites. In the event of a problem, the co-captains notify the captain and the Department of Justice lawyers present for the election, who then notify the jurisdiction's chief election official of the problem and attempt to resolve it on the spot. On the evening of the election, the observers are debriefed by the lawyers, and the observers then complete extensive written reports, known as observer reports. Some reports indicate that little or no discrimination occurred. At other times, efforts at vote discrimination are detailed. Even when nothing is reported, the presence of federal observers has a deterrent effect. Unlike ordinary poll watchers authorized by state or local laws, federal observers are allowed inside the polling place, as well as where the ballots are counted. In the words of a former Deputy Assistant Attorney General in the Civil Rights Division, "posting volunteers outside a polling place helps, but . . . you can't go in and face-to -face talk to election officials . . . . [As a mere election-protection worker] your hands are tied in a lot of ways."[202]

The Pattern of Observer Coverages

For purposes of analysis, each occasion when federal observers are detailed to a jurisdiction covered by Section 5 or by Section 203 is referred to as one *observer coverage*, even though several observers may have been present. (In the post-1982 period, for example, there were 250 coverages in Mississippi involving over 3,000 federal observers.) At the very least, such a coverage is related to potential vote discrimination: observers are sent because there are reasonable grounds in the opinion of the Department of Justice to expect discrimination on Election Day.[203] However, it is obvious that an observer coverage does not represent the same type of phenomenon as does an objection, a withdrawal, or a declaratory judgment, and so the number of such coverages was not added to the sum to produce Map 9 above. Nonetheless, as an indicator of at least potential (and sometimes actual) vote discrimination, the list of observer coverages is

an important data set. Their number (1,142 total) and geographical dispersion by state since 1966 are indicated in Map 10A. **(See Map 10A.)**

The more recent pattern of coverages among the states is somewhat different from patterns in previous maps, as seen in the next set of maps that focus on the post-1982 period. Map 10B shows a fairly high number in New Mexico, a state not covered by Section 5 but rather by Section 203. (Federal courts have approved settlement agreements providing for observer coverages in several of that state's counties.) On the other hand, there were relatively few in Texas. Significantly, however, Louisiana, Mississippi, Alabama, Georgia, and South Carolina—five of the six states originally covered by Section 5—accounted for 66 percent of all 622 coverages since 1982. **(See Map 10B.)**

Mississippi alone, long considered the most resistant of all states to black voting rights, accounted for 40 percent. Mississippi also ranks highest among the fifty states in terms of the proportion of African-American population. Maps of observer coverage since 1982, by county, in five of the six states originally covered entirely by Section 5 are shown in individual maps.[204] **(See Maps 10C-G.)** To the extent that coverages are indicia of continuing racial troubles on Election Day, these maps suggest that such troubles are ongoing. And the most intense battles, it would seem, are in those counties that are more than 40 percent nonwhite—the legendary Black Belt. In Alabama, for example, the great majority of the coverages in the post-1982 period occurred in counties that were over 60 percent nonwhite, and almost all of the rest in counties that were at least 40 percent nonwhite. In Georgia, Louisiana, and South Carolina, too, most coverages were in counties 40 percent or more nonwhite.

Mississippi, however, stands out among these states in the number of coverages in counties less than 40 percent nonwhite. True, a large number of the coverages are concentrated in heavily black Mississippi Delta counties. But others are liberally scattered among the 20-40 percent nonwhite counties, and some even in the 10-20 percent counties. The heavily black counties in the northwest part of the state, ten to be precise, accounted for 100 coverages in the post-1982 period alone—more in absolute numbers than in any entire state but Mississippi. In fact, those 100 coverages between 1982 and 2004 outnumber the entirety of coverages in any states but Alabama and the rest of Mississippi in the period between 1966 and 2004.

According to Barry Weinberg, an experienced former Department of Justice lawyer involved in the observer process since the 1960s, the need for observers is still great:

> Violations of the Voting Rights Act continue to happen in polling places throughout the United States. The need for federal observers to document discriminatory treatment of racial and language-minority voters in the polls has not waned. The use of a thousand or more federal observers at election after election beginning in 1965 decreased to the use of hundreds of observers at elections after the early 1980s as a result of the effective enforcement of the Voting Rights Act in Southern states. But the enforcement of the language-minority provisions of the Voting Rights Act, added in 1975, has required the use of hundreds more federal observers to disclose to Justice Department attorneys evidence of harassment of members of language-minority groups, and instances where ballots and other election material and procedures are not available to those voters in a language they can understand. The result is that between 300 and 600 federal observers continued to be needed annually from 1984 to 2000. The facts supplied by federal observers to Civil Rights Division attorneys are crucial and irreplaceable in the enforcement of the Voting Rights Act. Most parts of the voting process are open to the public, and the evidence of Voting Rights Act violations that are involved in the voting process can be obtained by Department of Justice lawyers through routine investigations. But most state laws limit access to polling places on election day, allowing only voters and polling place officials to remain in the polls (police are allowed too when called to deal with disturbances). Thus, unless an exception is made in these rules to allow federal investigators to get special access to the polls, the harassment of racial and minority language voters and other violations of the Voting Rights Act inside the polling places would go unseen and unchecked.[205]

Weinberg's point was brought home in some of the hearing testimony. Events in Hale County, Alabama, and its county seat of Greensboro, deep in the state's Black Belt, were discussed by State Senator Bobby Singleton. [206] The senator mentioned one especially tense situation in 1992, during the elections of the first blacks in the city:

> 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 . . .[207]

The Department of Justice, Singleton added, was contacted many times to prevent efforts to change voting hours and to prevent "intimidation of black voters going to the poll." As a result of Department intervention and the presence of federal observers, he said, blacks in the county are now a majority on many if not most of the elected governments in Hale County—school boards, the county government, "most of the cities in the area," and, Singleton added, "we were able to elect a black circuit judge, black circuit clerk, myself as a state representative . . ."[208]

The impact observers can have in documenting problems at the polls is perhaps best illustrated by events in Reading, Pennsylvania, as related by Carlos Zayas, a lawyer and voting rights activist in that city who testified at the Northeast Regional hearing, and in the court's findings in *United States* v. *Berks County.*[209] In *Berks County,* the court allowed the Department of Justice to deploy observers to the city because of evidence that Latino voters were treated unfairly at the polls.[210] Subsequently, the observers documented what the court described as "substantial evidence of hostile and unequal treatment of Hispanic and Spanish-speaking voters by poll officials, including but not limited to asking Latino voters for identification although there was no identification requirement at that time."[211] Based on the evidence uncovered by the observers, the court issued a permanent injunction in favor of the United States that required Berks County to provide language assistance to Spanish-speaking citizens at all stages of the electoral process, and enabled the United States to continue to send observers.

In spring 2004, the Commission staff requested from the Voting Section all observer reports from 1982 on to the present. Citing concerns about protecting the identity of the observers and complaining witnesses and the lack of staffing to redact this information, the Voting Section produced observer reports from only twenty-five elections. None of the reports involved African-American voters.[212] As a result, the reports received do not constitute a suitable

sample to reach broad-based conclusions about what federal observers have reported.

However, reports from twenty-one of the twenty-five elections were reviewed. In the majority of precincts observed, there were either no problems or minor ones. But in others, several notable problems came to light, including the following:

- Observers in Reading, Pennsylvania, documented several instances of poll workers making unwelcoming statements about Hispanic voters, including the following:
  - "This is why we don't like you Hispanic people coming here, you get everything messed up."[213]
  - "I don't know why the ballot is in Spanish if Hispanics don't know how to read."[214]
  - Poll workers making fun of a Hispanic voter, shouting "Hip, hip, hooray" and then the voter's name while the voter was in the booth.[215]
  - A poll worker asking a Hispanic voter: "Why do you guys have such long last names?"[216]
- Several examples where election materials were not in the minority language or were poorly translated.[217]
- Examples where minority voters were required to provide identification information but not requiring the same of white voters.[218]

In summary, observers have played a major role for decades in deterring race-based discrimination on Election Day, and evidence in numerous cities across the nation indicates the observers have served a useful role in the current century. The continued need for them in various states was emphasized by Joseph Rich, former Chief of the Voting Section, in his testimony before the Commission. He noted that in 2004 alone, the Department of Justice had dispatched a total of 898 federal observers and monitors to 85 jurisdictions.[219] The presence of these observers on Election Day has "consistently . . . had a calming effect curing highly charged elections in which there have been allegations of possible Voting Rights Act violations and has helped deter discriminatory acts," he asserted. Rich cited the presence of observers at several elections in Passaic County, New Jersey, as an example of their importance:

> The county was under a consent decree which required specific actions to bring the county into compliance with

> Section 203 . . . On the basis of information gathered [by the observers], the Department took legal action to ensure full implementation of Passaic's court-mandated language assistance program.[220]

The result of federal involvement on behalf of language assistance to voters led to the first election of a Latino mayor in the city.[221]

Section 5 Enforcement Actions

In addition to its administrative jobs of determining preclearance and monitoring elections through observer coverages, the Department of Justice may file suit to enforce the Act. (Private parties may also bring such actions.) For example, if a jurisdiction attempts to implement a voting change that has not received preclearance, the Department, either alone or in concert with private parties, may file suit under Section 5. In private Section 5 enforcement actions, courts often seek the views of the Department of Justice.

Such an enforcement action, for example, was filed in Waller County, Texas, in 2004, in which the city of Prairie View is located. The county contains historically black Prairie View A&M University within the majority-black city of Prairie View. In the 1970s, the county registrar went to dramatic lengths to prevent most students from voting, on the alleged ground that they were not legal residents of the county. Only legal action under Section 5 prevented the registrar from doing so, in a case that went to the Supreme Court.[222] In the early 1990s a number of students were indicted for "illegal voting"; all of the charges were subsequently dropped.

Two Prairie View students decided to run for local office in the March 2004 primary, including one for Waller County Commissioners' Court, the county governing body. The white criminal district attorney, a former state judge, threatened the predominantly black Prairie View student body with felony prosecution for illegal voting if they voted in the election. Almost five weeks before Election Day, the university chapter of the NAACP and five students sued the district attorney, who shortly thereafter backed down.

The issue did not end there, however. Less than a week after the lawsuit was filed, and a month before the election, the Waller County Commissioners' Court voted to reduce the availability of early voting at the polling place closest to campus, from seventeen hours over two days to six hours in one day. This was particularly significant because the students would be on spring break during the

day of the primary and would have to vote early if they planned on leaving town for the break.

A Section 5 enforcement action was filed by the university student NAACP chapter to enjoin Waller County from implementing this change without Section 5 preclearance. County officials abandoned the change and restored the additional eleven hours, which technically mooted the lawsuit, although the objectives of the suit were fulfilled. About three hundred Prairie View students took advantage of the early voting period, compared to sixty who would vote on the day of the primary, and the Prairie View student running for a seat on the commissioners' court narrowly prevailed in his primary contest.[223]

Map 11 shows the number of such actions either filed by the Department or in which it joined as a plaintiff intervenor or *amicus curiae*—a total of 107 between 1966 and 2004.[224] (**See Map 11.**) Consistent with previous maps, this one indicates that the majority (61) of suits reflecting discrimination occurred in the post-1982 period.

However, it is not known how many *successful* Section 5 enforcement actions have been filed, either by the Department of Justice or private citizens. The Department apparently keeps no record of them, or, to the knowledge of the Commission, does anyone else. In order to at least partially remedy the dearth of information on this subject, the Commission staff, utilizing a number of sources, compiled a list of such cases (both reported and unreported) in eight of the nine fully covered states (Alaska was the exception) plus North Carolina.[225] More precisely, the list contains only those cases, filed either by the Department or private plaintiffs, which were resolved favorably to minority citizens in the post-1982 period. The list is presented in Table 4. (**See Table 4.**)

The comparison of this table with Map 11 is informative. Both data sets pertain to the post-1982 period. Whereas the data provided by the Department of Justice displayed in Map 11 indicate 61 enforcement actions in which it was involved, including some which may not have been successful, the Commission staff identified 105 successful enforcement suits alone—i.e., ones in which the plaintiffs won at trial or, more typically, convinced a jurisdiction to settle. There may well have been other such suits not captured in either data set in the nine states under investigation. There were probably others in the eight partially covered states that were not the subject of the Commission's inquiry, not to mention the remaining fully covered state, Alaska. Therefore, the number of successful enforcement actions both by the Department and by private citizens since the Act was last renewed was significantly higher than the figures in Map 11.

Language Assistance Requirements

As explained in Chapter 3, various parts of the Act either require language assistance for people of limited-English proficiency under coverage formulas in Sections 4(f)(4) and 203, or protect Puerto Rican citizens from literacy requirements. When a language-minority population is eligible under either coverage formula for language assistance, it is the duty of the election officials in those jurisdictions to ensure that all needed election material is provided in the specified language. (In the case of certain American Indian and Native Alaskan languages that do not have a written language, interpreters are required at the polling site.) More is required, however, than simply the provision of written material in the covered language at the polls. Federal guidelines say that Section 203 "should be broadly construed to apply to all stages of the electoral process, from voter registration through activities related to conducting elections, including for example the issuance . . . of notifications, announcements, or other informational materials concerning the opportunity to register, . . . the time, places and subject matters of elections, and the absentee voting process."[226] How well do the jurisdictions measure up to this standard? Put differently, how often do they violate the law by failing to provide what the Act requires?

In the hearings held by the Commission during 2005, testimony was heard depicting prejudiced attitudes of poll workers and other officials toward language minorities on Election Day. Sometimes these attitudes found expression in harassment and intimidation, and sometimes in simply not providing the assistance and materials the Voting Rights Act requires. Various civil rights groups also presented systematically collected data, typically acquired through election protection programs in the last four years, indicating that language-minority voters encounter polling place problems across the nation.[227]

Language Assistance in Practice: Responses from Administrators

Nonetheless, what has been lacking until quite recently is a study adhering to social scientific standards that measures the success of covered jurisdictions in meeting their legal obligations under the Act's language-assistance provisions. Some of the results of such a study were recently made public. It was conducted by a former senior trial attorney in the Voting Section, James Tucker; political scientist Rodolfo Espino; and a group of honors students at Arizona State University, where both Tucker and Espino teach. The findings are based on a survey sent to 810 covered jurisdictions in 33

states.[228] Over half responded, and complete responses were received from 361 jurisdictions in 31 states.[229] The purpose was to update previous studies by the General Accounting Office on the costs related to the language-assistance provisions, and also to "determine the practices of public elections officials in providing oral and written language assistance." The survey assessed

> the availability and quality of assistance in several different areas: the use of bilingual coordinators who act as liaisons between the election office and the covered language groups; recruitment and training of election day poll workers; telephonic assistance; oral language assistance at every stage of the election process; written language materials provided to limited-English proficient voters; outreach and publicity; and the ability of voters to receive assistance from the person of their choice.[230]

Regarding the cost of administering language assistance in its many facets, the study concluded that the fears of critics of Section 203 that it imposes high costs on local election officials "have not materialized."[231] However, it is also true that there are fairly high rates of noncompliance with some of the language-assistance requirements:

> Of the jurisdictions responding to the survey, 80.6 percent . . . report providing some type of language assistance to voters: 60.4 percent report providing both oral and written language assistance, 14 percent . . . report only providing written language materials, and 6.2 percent report only providing oral language assistance.[232]

In other words, about one jurisdiction out of five surveyed was in total noncompliance with these two basic provisions of the law, and less than two-thirds provided both oral and written assistance. There were other problems as well. Only 39.0 percent of jurisdictions provided assistance to telephone inquiries in all the covered languages in their jurisdiction; 57.1 percent reported not having at least one full-time worker fluent in the covered language; only 38.2 percent reported having a bilingual coordinator who speaks a covered language; and although the Department of Justice requires covered jurisdictions to have "direct contact with language-minority group organizations," only 37.3 percent reported having such contact. In addition, 76.2 percent reported translating more than half of all election materials; 32.9 percent reported that they provide language

assistance for more than half of all election activities; 66.2 percent reported that their poll worker training does not include information on the languages covered in their jurisdiction.[233] Noncompliance with Section 208, which provides assistance for "blindness, disability, or inability to read or write," was even greater than noncompliance for language assistance: "Only 10.3 percent . . . reported voter assistance practices that are at least as protective as Section 208," the study found.[234] Finally, in spite of the low levels of language assistance to voters reported by Tucker and Espino, their report also found that 71.3 percent of responding jurisdictions sampled believed the language-assistance mandate should remain in effect for public elections.[235]

The unimpressive level of assistance is difficult to reconcile with the relatively high degree of expressed support for the provision. However, there is the suggestion in the report that much of the noncompliance can be attributed to ignorance of the extent of the provision's requirement.[236] If so, perhaps a larger part of the government's enforcement efforts should be educational.

In some cases, however, the "education" can only be accomplished through litigation. Jorge Sanchez, a staff attorney with the Mexican American Legal Defense and Educational Fund's Chicago office, testified at the Midwest Regional hearing that "MALDEF has found that even sympathetic county registrars and clerks have dragged their feet in . . . translating election materials." In Cook County, which he termed "fairly friendly" to both immigrants and Latinos, "it was only after litigation that the clerk of Cook County ordered all materials to be translated" for Latinos, who are covered there by Section 203. Other jurisdictions in Illinois, he said, were even more difficult to convince—King County, for example. From 2001 through 2004, the county did little to prepare for its obligations in providing language assistance. "Even after they agreed that they were covered, that they had the obligation to translate everything, we found them fighting about what needed to be translated: 'Well, does it really have to be everything?'" According to Sanchez, it was only after the threat of litigation that King County finally did what was required.[237]

Lydia Guzman, Policy Director of the Clean Elections Institute, who has been involved in several voter registration efforts in the Latino community, emphasized the importance of Spanish-language election materials. She described how Spanish-language registration materials and ballots empowered limited-English-proficient citizens. She also recounted the difficulty her mother had had in casting her first vote ever in the 2004 election because nobody at the polling site was able to assist her in Spanish. "There were no bilingual assistants

outside," and so Guzman explained the voting procedure to her mother. "I thought I did a wonderful job explaining to her for the first time. [However], I forgot one important thing. So when she went in, she was lost. The poll workers, they didn't deny her the right to vote, but they did deny her the opportunity of being properly instructed in how to vote. It was a terrible experience for her. She was heart-broken because she thought maybe her vote didn't count."[238]

On the same topic, Alberto Olivas, former outreach coordinator for the Arizona Secretary of State, stressed the difficulties faced by Indians because of the complexity of the ballot materials. He also doubted that the state's programs would continue without Section 203.[239]

Examples of Effective Language Assistance Programs

Testimony at the Commission hearings pointed to the willingness of some election officials to comply enthusiastically with both the letter and the spirit of the law. Three themes were interwoven in this testimony: the fact that the federal mandate ensured better assistance both to covered and, in some cases, non-covered language groups; the belief that the expiration of Section 203 would lead many jurisdictions to revert to their old ways; and the impact of language assistance on voter turnout.

Progress in turnout among Indians was described in the Commission's hearings by Penny Pew, Elections Director of Apache County, Arizona, since 2001. Pew discussed the difficulties of providing language assistance to the 35,000 Native American registered voters in a county of 11,000 square miles. She described the techniques her office has employed to ensure that these voters are able both to understand their rights and to vote easily, using ballots in Navajo. These means include training poll workers in bilingual assistance, translating English materials into Navajo—a "time-consuming" task, in her words—as well as constructing pamphlets, making power-point presentations to poll workers, ensuring that transportation is available to those who need it, sending out early-voting trailers to remote areas, clearly identifying the large precinct boundaries through the use of special mylar maps, and explaining issues on the ballot, when necessary.

Pew was nonetheless enthusiastic about the language assistance her office provided to Navajos, and assured the Commission that "reauthorization [of Section 203] will help us continue with our program." Included in her packet of materials submitted at the hearing was a graph indicating increased turnout in presidential elections among Apache County residents between 2000

and 2004, which she believes resulted in part from her staff's efforts.[240]

The importance of Section 203 was also underlined by Shirlee Smith, a Navajo who serves as the Voting Rights Act coordinator for Bernalillo County, New Mexico. Smith discussed her work, which provides assistance and outreach to four Indian tribes located in the county. She described how because of Section 203, and the creation of her position, elderly Indian voters were able to participate in the election process for the first time. "It's really touched my heart to see our people," Smith said, "not knowing what the process is and how much their voice can be [heard], it's important to them, and it's important to us, . . . that they can make a difference."[241]

Some of the most interesting testimony regarding language assistance came from two women on opposite coasts charged with administering the language-assistance requirements, Conny McCormack and Margaret Jurgensen. McCormack, Los Angeles County Registrar-Recorder/County Clerk, provided the Commission with a variety of "outreach instruments," which included an instructional DVD created by her office, entitled "An All American Polling Place"; a printed election guide explaining the various kinds of voting machines; an analysis of the general election ballot, with arguments for and against propositions on the ballot; special instructions concerning language assistance in six languages; a colored brochure entitled "Voters' Survival Guide," including specific instructions on language assistance and information on the voter Web site; information on multilingual targeting; information on the "voter outreach committee"; an instructional pamphlet entitled "Cultural Interactions: Precinct Coordinator Continuing Enhancement Program"; and, among other things, examples of multilingual signs used in polling places and ads in various non-English-language newspapers in the county, giving advice to voters on when and where to vote.[242]

In light of the numerous comments made during the Commission's hearings regarding the lack of enthusiasm for language assistance among voting officials in some venues, McCormack's advocacy for effective use of bilingual materials and language assistance in general is noteworthy. Indeed, her office went beyond the requirements of Section 203 in that poll workers were recruited who spoke the language of some groups not covered by the assistance provisions, including Russian and Armenian.[243] (However, she also made clear that she provides more assistance to the language groups covered by Section 203 because of the federal mandate.)[244] McCormack gave the Commission an overview of her office's three-pronged multilingual program—"provision of translated written

material; oral assistance; and collaboration with key community-based organizations." She also spoke about various measures of effectiveness of the program, which includes not only tallying multilingual voter requests received by her office per year (which requests have increased enormously from 6,227 in 1993 to 135,129 through August 2005). Most of the requests have come from Latinos, she said, followed in number by Chinese and Koreans.[245]

Another measure of effectiveness, McCormack said, was the relationship her office had with the Department of Justice:

> [I]n both pre- and post-election meetings with attorneys from the U.S. Department of Justice (USDOJ), L.A. County's ML [multilingual] services program has been described as very good and comprehensive. Indeed, from feedback from other counties covered by Section 203 of the VRA, we have learned that the USDOJ has held L.A. County's multifaceted program as a model for other jurisdictions to follow. Also, our commitment to the permanence of our extensive, successful ML program is demonstrated by assigning specified staff to this program including a designated ML Coordinator, an Executive Liaison Officer and several additional full- and part-time staff.[246]

Information on the impact of Section 203 in Maryland was provided by McCormack's counterpart on the East Coast, Margaret Jurgensen, who is election director for the Montgomery County, Maryland, Board of Elections. The county saw 518,000 registered voters participate in the 2004 election. "The multicultural voter empowerment community engaged over 100 community representatives and volunteers as election information guides and we designed the election judge training module to incorporate the legal and technical voting system requirements, and this program was unique as well as successful," she said. "Our election judge training was redesigned and delivered by experienced election-judge trainers. This program included hands-on experience, take-home videos, and a quick reference guide and open-the-door refresher."[247]

Like McCormack in Los Angeles and Pew in Arizona Indian Country, Jurgensen was strongly supportive of language-assistance measures and expressed enthusiasm for implementing them. "In the process of recruiting approximately . . . 3,200 election judges necessary to conduct the election on November of 2004," she said, "our goal was to make certain that we had at least one individual that spoke Spanish in every precinct." The results were noteworthy: "We

achieved that goal in all instances and it was the decision of our multicultural voter empowerment committee to also reach out to other members of our community that spoke other languages. And we ultimately represented seventeen different languages in our county . . ."[248] Like McCormack's program, Jurgensen's extended beyond what was required by Section 203, for only the Latino population in Montgomery County was large enough to meet the provision's threshold.[249] As is true in Los Angeles, the people whose language is covered by the threshold are given more assistance than those who are not, even though both election administrators were strong supporters of language assistance.[250]

When asked what would happen if Section 203 did not exist, Jurgensen said that because she had invested the money in the translation program she would keep it going. But she recalled her days as election commissioner in Nebraska "in the '80s, early '90s," where

> one of the very first things that I tried to do and [it] was very simple was to create a sample ballot in both English and Spanish. I was really met with a lot of resistance. That was considered not a good investment of the public money and all of the things that come with that. And so I think it would be harder on the local level to convince the public policy makers, your county commissioners, your town councils, that that is an important investment in public dollars.[251]

Rogene Calvert, former president of Houston Chapter of the Organization of Chinese Americans, spoke about the difference that Section 203 coverage of Vietnamese voters beginning in July 2002 has made in the Houston area. As a result of an agreement between the county and the Department of Justice, the county's ballot is now translated in Vietnamese; the county has hired a Vietnamese staff member in the county clerk's office; and it has staffed precincts having a significant number of Vietnamese voters with poll workers who speak the language.[252] These measures had a direct impact on the participation of Vietnamese voters and probably are responsible, in part, for the election of Hubert Vo, the first member of the Texas Legislature of Vietnamese descent, who in 2004 won election to the state house of representatives by 16 votes.[253]

Language Assistance and Voter Turnout

Victor Landa, representing the Southwest Voter Registration Education Project at the Southern Regional hearing, stressed the causal link he believes exists between effective language assistance and voter turnout. In particular, he noted the importance Latino citizens attach to having election materials, especially registration cards, in Spanish:

> I've found that citizens who prefer Spanish registration cards do so because they feel more connected to the process. They also feel they trust the process more when they fully understand it. Many older citizens, new citizens, and first-time voters whose primary language is Spanish would not have registered to vote if not for the access to registration cards in Spanish. Without materials in Spanish, those citizens whose eagerness . . . to participate . . . would compel them to register even using a form with registration instructions they did not understand, would run the risk of making errors on the registration card that could prevent them from voting if those errors made them wrongly appear ineligible. Without materials in Spanish, many citizens not fluent in English would find the process too difficult to navigate and would not vote or would not necessarily vote in the way that they had intended.[254]

Adam Andrews, an executive assistant with the Tohono O'Oodham Nation, stated at the Southwest Regional hearing that the elderly members of his tribe needed language assistance and that Pima County, because of the Section 203 requirements, has made affirmative efforts to work with the tribe, including hiring tribal members to serve as poll workers. He said that these efforts have resulted in unprecedented turnout of tribal members in the 2002 and 2004 elections.[255]

Eugene Lee, staff attorney for the Voting Rights Project at the Asian Pacific American Legal Center of Southern California (APALC), testifying at the Western Regional hearing in Los Angeles, attributed the extraordinary growth in both Asian and Pacific Islander American (APIA) registration and turnout rates to Section 203. The total turnout rate among APIA registered voters increased a phenomenal 98 percent between 1998 and 2004, according to his statistics.[256] The efficacy of Section 203, he believes, can partly be attributed to outreach efforts in some areas by election officials.[257]

In summary, the report on language assistance compiled by Tucker and Espino, as well as the testimony presented at Commission hearings, along with accompanying statistics and other materials, suggest that while Section 203 has had a positive impact on language-minority turnout across the nation, it is far from being fully implemented. If this important provision of the Act is to be continued, more thought must be given to means for making it work everywhere in the way it now works in a limited number of jurisdictions.

Language Assistance Enforcement Actions

If jurisdictions fail to meet language assistance requirements under Sections 203, 4(f)(4), or 4(e), the Department of Justice or individual citizens may file an action to ensure compliance, just as they are entitled to do with regard to Section 5. Map 12 shows the number of language-assistance enforcement actions taken by the Department of Justice over the years—most of them occurring after 1982, as was true for the Section 5 enforcement actions by the Department.[258] All of the language-assistance actions, moreover, were successful, as they were settled by defendants who agreed to ensure future compliance.[259] (**See Map 12.**) The number of these actions, while small in comparison with the number filed under Section 5, should not be taken as a sign that there is widespread compliance. Indeed, as Tucker and Espino found, the opposite is true. There is no doubt, however, that these suits have played an important role in changing the way voting officials do business in the jurisdictions where they have been filed. Some—Boston and Dade County, Florida, for example—are quite large, and Department of Justice intervention (even short of filing a suit) can have a big effect on the ability of many citizens who are not proficient in English to vote easily.

Overall enforcement trends in the Post-1982 Period

In the analysis so far, either two time periods have been compared —1966-1982 and 1982-2004—or the latter period has been focused on. In the comparison, the data have demonstrated more indicia of potential discriminatory activity by covered jurisdictions in the latter period than in the former. It is nonetheless important to examine trends *within* the post-1982 period.

To address this issue in more detail, two graphs have been created. Figure 1 shows, in five-year increments, three sets of activities.[260] (**See Figure 1.**) The red line, representing objections

only, demonstrates a striking decline since the early nineties. The number of objections per year reached historic highs in the later years of the first Bush administration and the first years of the Clinton administration, and then declined precipitously. In the five-year period between 1991 and 1995, the number of objections was 291; between 1996 and 2000, it was 32; and between 2001 and 2004, it rose slightly to 39.

The blue line indicates a similar trend, but with a noteworthy difference. This line represents the sum of objections, submission withdrawals, and declaratory judgments adverse to jurisdictions, which sum, as discussed above, is a measure of three variables that are roughly commensurable, in that all indicate voting changes that were first proposed by jurisdictions but not put into effect, thanks to Section 5. The sum of three variables declined from a peak of 399 in the early 1990s to a low of 59 in the latter half of that decade, followed by an increase to 91 in the first four years of the current century. The latter number indicates, however, that more than twice as many discriminatory changes were prevented than one might infer by focusing solely on the number of objections (39) in the same period.

The third line, a green one, also represents a sum, combining the three variables represented by the red line, but in addition two other components—Department of Justice enforcement actions related to Section 5 and to the language-assistance sections, and observer coverages. This latter sum combines apples and oranges, so to speak, but if it is taken to represent simply the number of different measures of federal behavior designed to prevent vote discrimination as proscribed by the Act, it is a useful indicator of government enforcement activity. The green line makes clear that objections alone are an inadequate measure of Act-related enforcement involvement. In the period between 1991 and 1995, the five-variable sum peaked at 550, as compared to the 291 objections. In the most recent period, the green line dropped to an average of 192, as compared with 39 objections.

In short, Figure 1 suggests that objections alone are not as good a measure of intended discriminatory voting changes that were frustrated by the federal government as the three-variable sum, and that neither of these measures is as good a measure of *general* federal activities designed to prevent vote discrimination, represented by the five-variable sum.

A more detailed picture of the situation is revealed in Figure 2, which shows, in one-year intervals, the various activities described above, separately plotted: objections, withdrawals, declaratory judgment actions, observer coverages, and Department of Justice

Section 5 and language-assistance enforcement actions. **(See Figure 2.)** Once again, the lesson to be learned is that more discriminatory activity is being prevented in any given year than is suggested by the number of objection letters alone. Most noteworthy in this graph is the fairly high level of observer coverages (indicated by the red line), which, except for withdrawals (green) in the year 2002, represents a higher level of activity since 1996 than any other type of activity plotted. It should be remembered that the Commission's research into successful Section 5 enforcement actions in a nine-state area revealed far more such actions than are plotted in the graph.

The Mystery of the Decline in Objections

Still, the fact remains that Department of Justice objections have declined sharply in recent years. Although the Act has been in effect forty years, it was only thirteen years ago—1993—that the number of objections interposed (79) was at a historic high. Some decline in objections during the latter part of the decade is to be expected because most jurisdictions have completed redistricting and making other voting changes often connected to redistricting, such as large-scale precinct and polling changes. The same cannot be said for the beginning part of the decade.

It should be noted that this decline has occurred while at least some other enforcement activities appear to be robust. As Figure 2 shows, in 2002, the number of withdrawals (30) was greater than at any time since 1982, the first year for which the Department of Justice has provided such data. The number of observer coverages in 1997 (45) was greater than at any time since 1985, and was the third highest number since 1970. The average number of enforcement actions since 1983 was 3.72, and that figure was twice exceeded (5 in 2002 and 4 in 2004) in the new century. How to explain the decline in objections?

One explanation with some currency is that since 2001 the Department of Justice has not been enforcing Section 5 as aggressively as it should be. In 2005, critics, including some former line attorneys in the Voting Section, have alleged that political appointees in the Department have made decisions during the current administration without appropriate consultation with the Section 5 Unit's professional staff, and that some line attorneys in the Civil Rights Division have been punished for aggressive enforcement of civil rights laws.[261] Unless the current administration has decided to weaken its enforcement of some provisions of the Act but not others, this explanation of the decline does not entirely square with the fact, as shown in Figure 2, that aside from objections, some other

indicators of Department enforcement of the Act in recent years are positive, especially observer coverages.

Whatever the facts regarding the dispute over aggressive enforcement, however, if Congress finds that Section 5 is still needed to protect voters against discrimination, the allegations of inadequate enforcement, even if true, do not argue for scrapping Section 5 but rather argue for ensuring that it is properly enforced in the future.

Another explanation for the decline in objections concerns the Supreme Court's interpretation of what that section means. Preclearance requires the jurisdiction to show that the submitted 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." In January 2000, the Court announced its decision in *Reno* v. *Bossier Parish School Board (Bossier II)*,[262] a Section 5 case involving a preclearance submission from a parish (county) in Louisiana. Following the 1990 census, the all-white school board in Bossier Parish had submitted to the Department of Justice a redistricting plan for the election of its twelve members. The parish of some 80,000 residents was approximately 20 percent African-American. No black had ever been elected to the school board, and the new plan contained no majority-black districts, which at the time appeared to have been necessary for the election of a black candidate, given the racially polarized voting in the parish. At trial the board admitted that a reasonably compact black-majority district could be drawn within Bossier City. Furthermore, according to undisputed testimony, at least one board member had said that the failure to draw a black district reflected the board's opposition to "black representation."[263] In other words, there was strong evidence that the plan submitted to the Department of Justice was designed to dilute black votes and prevent the election of a black school board member to office. Under the interpretation of Section 5's intent standard until *Bossier II* was announced—the same standard applied in constitutional cases involving the Fourteenth and Fifteenth Amendments—the school board's plan should not have been allowed. Indeed, the Department of Justice found it to be objectionable in the Section 5 submission process and so argued in the subsequent declaratory judgment action. Under the Supreme Court's new ruling, however, an intent violation now required showing not simply that the jurisdiction officials' purpose was to discriminate, but that it was to make the situation for minorities worse than before—i.e., that the officials intended to "retrogress." And as there had never been any blacks on the Bossier Parish School Board and there were no majority-black districts, the all-white board's efforts to prevent any

from being elected did not violate Section 5's intent standard, according to the Court's majority.[264]

The *Bossier II* decision, involving a 5-4 split on the Court, was a tremendous setback to minority voters. In the words of a former lawyer in the Voting Section, "the Court essentially read the purpose test entirely out of the statute by keeping the purpose inquiry within the narrow confines of the retrogression analysis"[265] As another voting rights lawyer noted:

> The *Bossier Parish* decision greatly weakens the anti-discrimination protections of the Voting Rights Act. To give one important example, if this interpretation had been applied during the first 35 years of Section 5's history, it would have required Justice Department approval of a Georgia congressional redistricting plan championed by a state legislator who openly declared his opposition to drawing a "nigger district" after the 1980 Census. Georgia's plan was not retrogressive, but because it was blatantly discriminatory the Supreme Court in 1983 affirmed a decision denying preclearance under Section 5. Because of the objection, Georgia redrew its districts to provide a better opportunity for black representation, with the result that Congressman John Lewis was able to win election from a majority-black congressional district in 1986. Under the *Bossier* decision, however, the courts would have been forced to approve Georgia's original, discriminatory plan.[266]

On its face, the Supreme Court's new interpretation of the intent standard would be expected to sharply depress the number of objections interposed by the Department of Justice. The evidence seems to bear out this hypothesis. In a paper whose first author is a historian in the Voting Section, a careful investigation of objection letters before and after *Bossier II* reveals that the proportion of objections based entirely on the intent requirement of Section 5 gradually increased from 2 percent in the 1970s to 25 percent in the 1980s to 43 percent in the 1990s. The authors point out that the number of objections after *Bossier II* decreased to 16 percent of the number in the comparable period in the 1990s.[267] The authors do not attribute the decline entirely to the new retrogressive intent standard, but it is reasonable to believe *Bossier II* could partially account for the low number of objections between 2001 and 2004 observed in Figure 2 above.

Another explanation is that covered jurisdictions have accepted Section 5 as a principle they *must* comply with whenever they make a voting change, like it or not, and they have developed procedures for substantially increasing the likelihood of preclearance. Such procedures may include negotiating agreement with the minority community before making voting changes and enlisting specialists, such as state and local governmental employees who work on voting and redistricting matters, and private consultants. Many of these specialists have developed substantial expertise in navigating the Section 5 process. In this respect, Section 5 may be no different from governmental regulation in other areas where a decrease in the number of violations over time results primarily from those who are subject to the regulation improving their procedures for ensuring compliance—as opposed to a lessening of the need for the regulation itself. A good example of this may be found in environmental regulation.

In summary, there were fewer objections interposed by the Department of Justice during the current administration's first term than in the first term of any president since Richard Nixon, and fewer objections by far in the first four years following a decennial census—a period when numerous redistricting submissions must be precleared. Is this decline the result of *Bossier Parish II*, or of the politicizing of the Voting Section under the current administration? Is it the result of jurisdictions having "learned their lesson" and finally deciding after several decades to comply with the law of the land as a matter of principle (or at least expediency)? Is it perhaps the result of a combination of these factors? An answer is impossible without more information than is now available. Yet, to repeat, despite a general decline in objections beginning in the early nineties, there continues to be an appreciable number of interventions of various kinds by the Department of Justice and by private plaintiffs to prevent vote discrimination. And in the period from 1982 through 2004, more of these interventions occurred than in the Act's earlier years.

CHAPTER SIX

Enforcement of Section 2

In its 1982 reauthorization of the Act, Congress amended Section 2 to prohibit vote discrimination on the basis of results alone, whether or not the discrimination was intentional (intentional discrimination also violates Section 2). It has since become a widely used weapon to attack minority vote dilution. In its report to accompany this amendment, the Senate listed a number of factors courts might consider in deciding whether plaintiffs have met their burden of proof. These were derived from various federal judicial decisions involving vote dilution and subsequently were identified by the Supreme Court as the "authoritative source" for interpreting Section 2 as amended.[268] These became known as "the Senate factors," and consist of the following:

1) The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2) The extent to which voting in the elections of the state or political subdivision is racially polarized;
3) The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4) If there is a candidate slating process, whether members of the minority group have been denied access to that process;
5) The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6) Whether political campaigns have been characterized by overt or subtle racial appeals;
7) The extent to which members of the minority group have been elected to public office in the jurisdiction.[269]

These factors, along with a growing body of case law, have provided specific guidelines to plaintiffs challenging vote

discrimination generally and vote dilution in particular, and as one scholar notes, "the 1982 amendments to Section 2 dramatically altered voting rights litigation nationwide. While prior to 1982 plaintiffs had rarely invoked Section 2 in its original form, most plaintiffs alleging racial vote dilution since 1982 have consistently brought their claims under Section 2."[270] This section was particularly useful in situations—even in states covered by Section 5—where Section 5 could not be used to challenge vote discrimination. For example, several dilutive laws in the southern states were enacted before the Voting Rights Act was passed, and therefore these laws did not require preclearance. Moreover, for states not covered, Section 2 is the primary means for challenging vote dilution.

Findings of the Michigan Voting Rights Initiative

There is no comprehensive account of Section 2 enforcement.[271] However, a major step forward in this regard was taken while this Report was being written. Professor Ellen Katz of the University of Michigan Law School and her students conducted a year-long analysis of all *reported* cases that addressed Section 2 claims since June 29, 1982, based on a large data base her group constructed. The project, called the Voting Rights Initiative (VRI), has made both its report and its data base available to the public.[272] The Katz study is important because it provides useful information about the extent of several kinds of vote discrimination challenged under Section 2 and found illegal since 1982. It also provides powerful evidence that serious discrimination against racial and ethnic minorities has continued into the first decade of the current century.

To briefly summarize the Initiative's findings, after June 1982 there were 322 reported cases in the United States in which a Section 2 claim was resolved in a manner that the researchers could determine. Of this total, 88 found a violation and another 29 resulted in a favorable determination for plaintiffs, typically a settlement, without finding a Section 2 violation. Thus 117 of the cases led to a reported outcome favorable to plaintiffs of various racial or ethnic groups asserting vote discrimination. The great majority of the 322 cases—including the 117 favorable to plaintiffs—challenged vote dilution. The vote dilution cases involved 145 challenges to at-large elections, 110 challenges to reapportionments; and 11 challenges to majority-vote requirements (A few more cases challenging dilution were included under other rubrics.) Of those cases challenging dilution, 108 had a favorable outcome for plaintiffs. [273] Katz's VRI research team also found that 57 percent of the successful cases were

filed in Section 5-covered jurisdictions, which in 2000 contained less than one-quarter of the nation's population, 39 percent of the U.S. African Americans, 31.8 percent of Latinos, and 25 percent of Native Americans.[274] Black plaintiffs filed the great majority (268) of Section 2 cases ending with a published opinion, followed by Latinos (96), Native Americans (12) and Asian Americans (7). Black plaintiffs also won the largest number of suits (103 or 88 percent of all favorable outcomes).[275]

The VRI team also measured the trend in case resolution. Of the cases ending with a finding of a violation, 60.2 percent were resolved in the first ten years after 1982, and 39.8 percent in the following thirteen years. Finally, Katz's VRI team measured judicial documentation of the Senate factors in these lawsuits, including 107 findings of a history of discrimination affecting the right to vote, 91 findings of racially polarized voting, 85 findings of minority-candidate difficulty getting elected, 42 instances of racial appeals in campaigns, and 10 findings of denied access to candidate slating, as well as recent examples of all other Senate factors. Katz's report also includes examples of official discrimination in voting that has occurred since 1982 in both covered and non-covered jurisdictions.[276]

The conclusions from the investigation most relevant to the Commission's Report are worth quoting at length:

> Four decades after the enactment of the Voting Rights Act, racial discrimination in voting is far from over. Federal judges adjudicating Section 2 cases over the last twenty-three years have documented an extensive record of conduct by state and local officials that they have deemed racially discriminatory and intentionally so. Judicial findings under the various factors set forth in the Senate Report reveal determined, systematic, and recent efforts to minimize minority voting strength.
>
> Examples abound. Last year's decision in the *Bone Shirt* litigation documents how county officials in South Dakota have purposely blocked Native Americans from registering to vote and from casting ballots. The Charleston County, South Carolina litigation reveals deliberate and systematic efforts by county officials to harass and intimidate African-American residents seeking to vote. The *North Johns* litigation in Alabama describes the town mayor's refusal to provide African-American candidates registration forms required by state law. The *Harris* litigation in Alabama tells of Jefferson County's refusal to hire black poll workers for white precincts—and

the blind eye state government turned to the voting discrimination perpetuated at local polls. A Philadelphia lawsuit describes a deliberate and collusive effort by party officials and city election commissioners to trick Latino voters into casting illegitimate absentee ballots that would never be counted. The *Town of Cicero* litigation categorizes an 18-month residency requirement deliberately designed to stymie Hispanic candidacies. Many more cases tell of state and local authorities drawing district lines for the express purpose of diminishing the influence of minority voters, or to protect partisan interests knowing that doing so will hinder minority voting strength.

Section 2 lawsuits also catalogue formal and informal slating procedures implemented by party officials and private associations that function to deny minority candidates meaningful access to the ballot—from the local Democratic party in Albany, NY and the Republican party in Hempstead, NY, to informal groups in Texas and Louisiana and the state-funded firefighters on the Eastern Shore of Maryland. Federal judges further have identified a host of campaign tactics nationwide designed to appeal to base racial prejudice, tactics that include manipulating photographs to darken the skin of opposing candidates, allusions or threats of minority group "take over," or imminent racial strife, and cynical attempts to increase turnout among voters perceived to be "anti-black."

Courts have also documented some instances of suspicious or "tenuous" policies—as when the legislature in Alabama removed the only majority-minority district from its reapportionment plan after the governor threatened a veto. Courts also carefully considered the ways in which local and state governments responded to minority needs—noting, for example, a Colorado school board's refusal to provide requested bilingual and Native American educational programs in order to keep the curriculum "ethnically clean."[277]

In Search of More Section 2 Cases in Nine States

If there is a limitation to this excellent study by Katz and her students, it is that it focuses exclusively on reported cases. The authors of the study readily acknowledge this fact and point to its

implications. They were given information by the ACLU on the number of both *reported and unreported* Section 2 cases filed in the post-1982 period in South Carolina and Georgia, and by the law firm of Rolando Rios on such cases in Texas. These lists were so large in comparison to hers that Katz concludes: "Insofar as these ratios of filings to reported decisions are at all representative, [our] study's compilation of 32[2] lawsuits suggests more than 1600 Section 2 filings nationwide with filings in covered jurisdictions possibly exceeding 800 filings."[278]

To obtain more information on this subject, the Commission staff constructed as comprehensive a list as possible of all Section 2 claims—reported and unreported—resolved in a manner favorable to minority voters since 1982 in eight of the nine fully covered Section 5 states plus North Carolina. (Alaska was excluded because of limited information available in the short time in which the research was conducted.) Commission staff contacted several voting rights attorneys and requested information about Section 2 plaintiffs they had represented, which was generously supplied. Added to these lists were other Section 2 cases obtained from published sources and Web-based search engines, and each suit listed was checked, to determine which ones had results favorable to minority voters. These lists of cases represent a "best effort" to obtain a comprehensive accounting of the total number of such cases, but some were no doubt overlooked. In addition, several cases were intentionally omitted. These were suits in which a Section 2 claim was stated but in which the primary thrust was a one-person, one-vote challenge. It was decided not to classify them as Section 2 cases.[279] Therefore, for both these reasons—the lists do not capture the entire universe of cases stating a Section 2 claim, and they exclude cases that were primarily one-person, one-vote suits in spite of stating a Section 2 claim—they are conservative measures of the degree of vote discrimination successfully challenged under Section 2.[280]

Measuring the Impacts on Counties of Section 2 Cases

The information thus obtained was analyzed in a way to overcome an important limitation on measuring the extent of vote discrimination solely by counting the number of Section 2 suits resolved favorably to minority voters. For it is well-known that sometimes a single lawsuit may affect numerous discriminatory mechanisms in many jurisdictions. A spectacular example is *Harris* v. *Graddick*,[281] filed on behalf of minority plaintiffs. This single Section 2 action in the 1980s ultimately forced 65 of Alabama's 67 counties to implement a non-discriminatory poll worker appointment

process that allowed African Americans to participate equally. The state was also a defendant in this case and, after a trial, was compelled to create several new statewide procedures to ensure non-discriminatory treatment of African American voters at the polls.[282]

Therefore, a more accurate measure of the extent of electoral discrimination would tally not only the number of successful lawsuits but the number of jurisdictions affected by their outcome. An even more accurate measure is suggested by this question: Within the counties of a state affected at least once by a racially discriminatory election procedure or practice that was found since 1982 to violate Section 2, how many distinct discriminatory practices were abolished? The answer to this last question provides yet another gauge of the extent of vote discrimination.

By this methodology, the unit of analysis is *the county (i.e., its voting population) affected by one or more successful Section 2 lawsuit's results.* Each affected county which has within its boundaries an entire governmental subdivision, or part of one, that was required since 1982 to change some aspect of its electoral system as a result of a Section 2 case is identified, and then the number of times a change was required by one or more successful suits is tallied. If County A is the site of a county board of commissioners, a school district, and a municipality, all three of which are required to change from an at-large to a district system as a result of one or more Section 2 suits, then the voters of County A will be affected three times, by this reckoning. Furthermore, if County B, along with Counties C and D, are part of a multi-county school district whose elective board is required by a Section 2 suit to abolish its at-large election method, each of the counties will be affected once. (However, if an entire state is required to modify its districting scheme, this methodology treats all counties as unaffected, simply because there is no way, without access to the old and new districting plans, to determine which counties were affected.)

To recapitulate, this procedure has the virtue both of demonstrating the impact of a single case such as *Harris* v. *Graddick* on voters in numerous counties as well as the impact of numerous cases on a single county's voters. The maps below therefore show not simply the number of cases resolved favorably to minority plaintiffs, or even the number of jurisdictions required to abolish a discriminatory voting procedure, but rather the number of times voters in the counties were affected by these lawsuits.

Map 13A shows the results of this analysis for Texas, the state with the largest number of Section 2 suits resolved on behalf of minority plaintiffs since 1982. In that state, 206 such suits, both reported and unreported, were identified. **(See Map 13A.)** This

compares with the 7 successful cases—reported ones only—identified by Katz in that state.[283] As a result of these 206 cases, 197 jurisdictions changed their discriminatory voting procedures. The map shows that 110 of Texas' 254 counties were affected at least once by the suits, for a total of 274 times. The map indicates that two counties—one that was 60 percent or more minority, the other between 40 and 60 percent—have each experienced eleven changes in voting procedure as a result of Section 2 cases since 1982.

Texas is in some respects unusual, in that it has both a large black and Latino population. As was true of Department of Justice objections interposed in the state, there were very few successful Section 2 cases resolved in the heavily minority counties along the Rio Grande border. Latinos are now fairly well-integrated into the political structure of that area. It is also interesting that most of the East Texas counties, whose minority populations are largely black, appear not to have witnessed much Section 2 activity—even those in the 20 to 40 percent minority range.[284] (In this respect, Texas differs from the other Section 5-covered states that also belonged to the Confederacy.) Rather, West and Central Texas are the locus of most of the litigation. These are counties where the Latino population is growing in size and political aspirations.

The situation in the other states where at least 50 cases were resolved in the post-1982 period—Alabama, Georgia, North Carolina, and Mississippi—is seen in Maps 13B-E. The number of cases in the remaining states of South Carolina, Louisiana, Arizona, and Virginia totals only 68, and their maps are not included. (**See Maps 13B-E.**) What stands out in these four states is not only the number of counties affected—many multiple times—but the fact that it is not just the heavily black counties that are affected. In Alabama, even most of the counties with black populations that are 10 percent or less black have been affected at least once. Indeed, all counties but one have been affected—one as many as 11 times. Mississippi has numerous counties that are less than 40 percent black which have been affected at least once, although the Delta Counties have been affected disproportionately, as they were by Department of Justice objections. Georgia and North Carolina have numerous counties affected that are less than 40 percent black. The latter state is interesting in that, while the majority of its Section 5-covered counties were affected, only about a fifth (13) of its 60 non-covered counties were.

The general findings of this methodology for the nine states are shown in Table 5. *Reported* Section 2 cases from 1982 onward that were successful for minority groups in the nine states is shown in the first column. (**See Table 5.**) There was 66 such cases altogether.

The second column shows that the sum of both *reported and unreported* successful cases—653—is almost ten times as great as the number of reported cases in those same states alone. Finally, the third column shows the number of times counties in the nine states were affected by the outcome of these same 653 suits. The figure is 825.

These are the states with the worst record of vote discrimination. Yet the Katz project discovered that while reported Section 2 cases resolved favorably to plaintiffs were found disproportionately in the sixteen states covered by Section 5 (which includes the nine in the sample), a significant minority of these cases—43 percent—occurred in non-covered states. If anywhere near that percentage of successful unreported cases were resolved outside the Section 5-covered states, the total number of reported and unreported cases since 1982 could reach 1,000.

Section 2's Impact: A Summing Up

To summarize the research on Section 2's impact, the following can be said. First, the number of reported Section 2 cases leading to favorable results for minority voters, identified by the Voting Rights Initiative (VRI), was 117 nationwide in the 23-year period following the 1982 reauthorization. Second, the cases analyzed by the VRI revealed judicial findings of widespread and serious vote discrimination by whites against minorities. Third, the majority of the 117 cases were filed in Section 5-covered jurisdictions, in spite of the fact that only about a quarter of the nation's population lived in them. Fourth, cases with black plaintiffs were the most numerous, followed by those with Latino plaintiffs. Fifth, the Commission's investigation in nine states of reported and unreported Section 2 cases resolved favorably to minorities, including those cases identified by the VRI, came to approximately ten times the number of reported cases identified by the VRI in these states. Sixth, the number of times counties in the nine states were affected by favorably resolved Section 2 lawsuits is larger than the number of such lawsuits. Specifically, 653 such lawsuits were favorably resolved in those states, while counties were affected by them a total of 825 times. These figures are all the more remarkable when it is remembered that the list of cases in the nine-state study is not comprehensive, and the definition of a Section 2 case is conservative, excluding the primarily one-person, one-vote suits even though a Section 2 claim was stated. Finally, the nine-state data on reported and unreported Section 2 cases forcefully underscore Katz's conclusion that there is still much serious vote discrimination against minorities in America today.

CHAPTER SEVEN

The Persistence of Racially Polarized Voting

Forty years after the Voting Rights Act was passed, the two problems it has principally addressed—the disfranchisement of ethnic minorities and the dilution of their votes—are still present in American politics. The massive disfranchisement of southern blacks through the notorious "tests and devices" of an earlier era has been overcome, thanks to the prohibition of these tactics and the aggressive use of federal registrars in the South in the latter half of the 1960s. The use of dilutive mechanisms has been more narrowly circumscribed through Department of Justice enforcement of Section 5 and the widespread filing of Section 2 claims both by the Department and private citizens. Still, both problems remain.

As described in Chapter 2, disfranchising efforts now typically consist of the sudden and unannounced moving of polling places in minority neighborhoods shortly before elections, the manipulation of early-voting hours, the harassment and intimidation of minority voters by polling officials and partisan actors, discriminatory hiring of poll workers, illegal purges of voter rolls, and the failure to provide election materials in the language of citizens of limited English proficiency.

The nature of vote dilution, on the other hand, is unchanged. It consists of mechanisms employed by whites since the First Reconstruction in the nineteenth century, including packing or cracking minority communities during redistricting, at-large or multi-member district elections, the use of the numbered-place system and staggered terms, the majority-vote requirement, and race-based annexations. As noted above, none of these devices would have any impact were it not for the existence of racially polarized voting.

Evidence from the Commission Hearings

How widespread is this phenomenon of racially polarized voting today? One answer was given at the Commission's first hearing in March 2005. Political scientist Richard Engstrom, a voting rights scholar at the University of New Orleans and expert witness in numerous vote dilution cases in several states for many years, testified about the extent and degree of racially polarized voting, which he called "a central concept which we deal with in Section 5 of the Voting Rights Act." His research, he said, revealed that much polarization still exists.[285]

> Today I want to tell you race remains the central demographic division in American politics. Don't trust me; read the literature. Read the recent books on southern politics. Race is still the major demographic division in southern politics and, indeed, politics across the country. And racially polarized voting persists. I know this because I study it.[286]

Since the 2000 census, Engstrom has worked in seven states conducting studies of racially polarized voting, "or at least what it takes to elect minority-choice representatives." As an example of his findings, he presented several data sets measuring polarization in different ways in various types of Louisiana elections. Specifically, he focused on ninety elections using three measures of polarization for each. "Almost every election analysis in those tables," he testified, shows "racially-polarized voting in that election. . . . There are a few exceptions, usually when African Americans themselves may not be supportive of the African-American candidate. But . . . rarely is that the case." Engstrom analyzed elections for at least ten types of office in his study—from governor to the recorder of mortgages. "It doesn't matter what office is at issue; it doesn't matter whether it's high profile or low profile; it doesn't matter whether it's top of the ballot or down on the ballot. Time, place, and office do not matter. What we find consistently in almost every instance," he testified, is racially polarized voting. Engstrom claimed there was nothing unique to Louisiana in this respect. He pointed to other states in which he had recently conducted polarization analysis—South Carolina, Georgia, Florida, Alabama, and North Carolina (regarding African Americans and whites), and Texas (regarding Latinos and Anglos). He also noted that he has worked as an expert for defendants and plaintiffs, for states, for civil rights organizations, and for the Department of Justice. He believes, as a consequence of his research, that Section 5 is still needed to protect against vote dilution.[287]

Polarization was a significant theme of the hearings. Corroborating Engstrom's views was attorney Sam Hirsch, a partner in the law firm of Jenner & Block, who testified at the Mid-Atlantic Regional hearing in October 2005. Hirsch's litigation practice focuses primarily on election law, redistricting, and voting rights. He said that in the last ten years he has worked in redistricting litigation in about twenty states, and many of his cases have involved Sections 2 or 5 of the Act. In his experience, "there are politically significant statistical levels of racial polarization between Anglos and Latinos, as between whites and blacks, in almost every locale which I have experienced." His focus was on two states—Texas and Maryland—and regarding the

latter he introduced into the record an expert report on polarization by Engstrom. The Maryland example was particularly germane in light of North Carolina Congressman Melvin Watt's earlier claim at the same hearing that racially polarized voting was not simply a function of partisan differences between blacks and whites in his state.[288] In Maryland, the voting patterns of those two racial groups had been analyzed for purposes of litigation in Democratic primary elections only, in the heavily Democratic Prince George's County. The data indicated that racially polarized voting was very much in play. In four of the five primary elections for state legislators, all since 1994, "the preferences of white voters and the preferences of black voters diverge in 80 percent of the instances," he said.[289]

Regarding Texas, Hirsch introduced reports on congressional elections by Jonathan Katz, a political scientist at Caltech. "Dr. Katz studied 113 different general elections in the U.S. House alone in the 1990s," he said. These were in districts with large black or Latino populations. Katz found "a virtually universal pattern of racially polarized voting with the Latino and black voters overwhelmingly preferring Democratic [candidates] . . . and Anglo [i.e., non-Hispanic white] . . . voters heavily preferring Republican candidates for Congress in Texas."[290]

But this polarization in Texas was not limited to partisan contests. A study by Allan J. Lichtman, a historian at American University, also found it to be common in numerous Democratic primary contests in which at least one black or Latino faced at least one Anglo. While acknowledging that in Texas the race of candidates alone was not always determinative of voting behavior, and that the states of Maryland and Texas "obviously . . . don't speak directly to the forty-eight [other] states," Hirsch nonetheless stressed the quality of the experts' reports, which were "comprehensive, . . . withstood the test of cross-examination . . . and are a rich source of very up-to-date and very carefully executed social scientific analysis and data gathering."[291]

At the Florida hearings held in Orlando, Brad Brown, Political Action Chair of the Miami-Dade NAACP, spoke of political conflicts and polarization between Cuban Americans and African Americans (including Haitians) in that area of the state—conflicts in which, he said, the rights of African Americans were often ignored regarding ballot access. Department of Justice intervention has sometimes been necessary, he said, to protect the rights of African Americans.[292] Brown's testimony pointed to the phenomenon of polarization between two minority groups which sometimes occurs—a subject that has yet to be given the attention it deserves.

At the same hearing, the situation of blacks in South Carolina was addressed by Meredith Bell Platts, an attorney with the Voting Rights Project of the ACLU Southern Regional Office. She spoke of "the high levels of racial polarization," with the result that "black voters are rarely able to elect their candidates of choice in majority-white districts." One result of this situation is the need for majority- or near-majority-black districts, which in some cases appears to depress the number of Democratic seats in the legislature. According to Bell Platts, a Democratic governor, Jim Hodges, argued that black percentages in such districts should be reduced, "to ward off further electoral failures for the Democratic party in senatorial elections." His reasoning was rejected by the three-judge court in the case of *Colleton County Council* v. *McConnell.*[293] As an illustration of the intensity of racial feelings regarding redistricting, Bell Platts noted that during the trial, "it was reported that a group of citizens in Lexington County . . . which is slightly outside the City of Columbia, informed one of their Republican representatives that they didn't want any, and they used a racial epithet, the 'n' word, on the Lexington County delegation, referring specifically to a plan that had drawn a black representative into portions of Lexington County."[294] The situation in North Carolina was described at the Florida hearing by Congressman G. K. Butterfield, one of the first black U.S. Representatives elected from that state since 1899. Butterfield asserted that "racially polarized voting continues to be a very, very serious problem in the rural South."[295]

Similar problems regarding Indians in South Dakota were mentioned by Dan McCool, a professor of political science at the University of Utah. At the South Dakota hearing, he testified "there is still a high level of racial polarization in a number of areas. . . . [While not true everywhere in the state] this is especially true when Indians run against Anglos . . ."[296]

Some of the most powerful testimony regarding the persistence of racial polarization was given at the Mississippi hearing by voting rights attorney Robert McDuff who, like several speakers at this and other hearings, acknowledged the undeniable progress in the number of minority elected officials, attributing it in large part to the Voting Rights Act, both its permanent and nonpermanent features. However, also like several of his fellow witnesses, McDuff argued that voter discrimination is ongoing. He recalled, as a law student in the 1970s, attending U.S. Supreme Court oral arguments in a Mississippi legislative redistricting case in which the late Frank Parker, a legendary voting rights attorney affiliated with the Lawyers' Committee for Civil Rights Under Law, was arguing on behalf of the state's black voters. McDuff continued, " . . . the attorney for the

State of Mississippi kept saying, you know, 'That's all ancient history. That's all ancient history.' And that was before we had an African-American member of Congress. That was before we had any black judges in the state . . . And so, it wasn't all ancient history in 1977, and it's not all history now. There are no statewide black elected officials in Mississippi."[297] He went on to elaborate on this last point:

> In 2003, there was an election for state treasurer. One of the candidates, African-American, had been the director of the State Department of Economic Development. He had a number of qualifications for the job that made him clearly the best choice, and he was defeated by a 29-year-old white man who had no relevant experience in the area in an election that was characterized by severe racially polarized voting. Until elections in Mississippi are not characterized by the extreme levels of polarization that exist here, Section 5 must remain in place.[298]

Another witness, Jackson attorney Carlton Reeves, secretary of the predominantly black Magnolia Bar Association, added his observation to McDuff's illustration of racially polarized voting in the 2003 race for state treasurer. It is true, he said, that the African American was a Democrat and the white who beat him, a Republican; and this fact might lead the uninformed observer to infer that the outcome was determined by partisanship, not race. However, Reeves pointed to another contest, for attorney general, in the same election cycle. This one was between two white candidates of roughly the same age and experience for the job, in which the Republican "lost resoundingly," suggesting that race rather than party was the operative factor in the contest the black lost for statewide office. Moreover, Reeves noted, even those races involving a Supreme Court judgeship that blacks have won have occurred after they were first appointed to the post. "All the black justices of the Supreme Court were first appointed. No justice has been elected first."[299] Reeves also pointed to the use of the phrase, "He's one of us," by white candidates opposing blacks. He added, "We know what those signals mean, 'being one of us'." [300]

Joaquin Avila, a noted voting rights attorney, law professor, and former MacArthur fellow, addressed racially polarized voting during his testimony at the Commission's Western Regional hearing. He attributed the underrepresentation of Latinos at the local level—on city councils, school boards, and governing bodies of special election districts in California—to "the pernicious effects of racially polarized

voting in at-large methods of election and to the absence of effective enforcement of the bilingual election provisions."[301]

Caltech historian Morgan Kousser, a long-time resident of Los Angeles County whose research—and much of his testimony as an expert in voting cases—has focused on the South, stressed some of the similarities between California and the South. As an example, he cited a suit decided in 1990 in which Los Angeles County was found to have racially gerrymandered its county supervisor districts to prevent the election of Latinos.[302] "[T]here are instances like this," he said, "even in the enlightened state of California, where you have a history of . . . very important and powerful discrimination," Kousser noted, and then amplified his point:

> It's also true in Monterey [County]. . . . When Californians think of Monterey County, they think of Big Sur, they think of Pebble Beach Golf Course, they think of Monterey Bay Aquarium. They don't think of the north county areas. They don't think of the terrible strikes that we've had, the long history of the farm worker—anti-farm worker—violence in Monterey County. They don't think of the degree of discrimination on the county level in drawing the supervisorial districts. It looks just like L.A. County and it looks just like several southern counties and cities that I've worked in. Again and again, they drew boundaries to ensure that Latinos had no opportunity to elect candidates of their choice, and this went through the 1990s. And they abolished local courts to allow only the countywide Anglo-majority voters to elect, then, virtually all whites to the . . . judgeships.[303]

Kousser stressed that not all elections are polarized, pointing as an example to those in the Pasadena Unified School District, as well as to the statewide election for lieutenant governor won by the Latino candidate Cruz Bustamante. Nonetheless, he noted other examples of racial polarization in statewide California contests. Kousser believes African American candidates draw the most white opposition, but that Latinos and Asians attract some, too.[304]

Evidence from Scholarly Sources and Court Opinions

Political Scientist Bernard Grofman, a noted expert on the Voting Rights Act, wrote in the early 1990s that "there is strong evidence for continuing patterns of racially polarized voting for both blacks and Hispanics. Such continuing polarization makes it likely

that minorities will feel the need to sue to protect their voting rights . . ." While noting that "most of the evidence on racial polarization is buried in court records," he pointed to the work of sociologist James Loewen, whose review of data from South Carolina elections provided, in Grofman's words, "stark testimony about the levels of polarization in that state which suggests little or no change in polarization over the course of a decade." Grofman stated that both in the Deep South and in many non-southern states, "black legislative success essentially occurs only in districts where blacks constitute a substantial portion of the electorate. While the pattern for Hispanics is not quite as stark, it is similar."[305]

According to knowledgeable observers, racial politics may actually be getting more acutely polarized than in the nineties, in part because of partisan polarization. David Bositis of the nonpartisan Joint Center for Political and Economic Studies, writes that

> the degree of racially polarized voting in the South is increasing, not decreasing. . . . [and is] in certain ways re-creating the segregated system of the Old South, albeit a de facto system with minimal violence rather than the de jure system of late.[306]

By the same token, research published by Grofman and his colleagues in 2001 urge caution with respect to overly broad generalizations of racial voting patterns, noting that several factors affect the degree of polarization.[307]

No comprehensive study of the extent of racially polarized voting in recent years exists, to the Commission's knowledge, but a cursory examination of the information "buried in the court records," as Grofman put it, is suggestive. A brief and far from comprehensive search for cases involving statewide redistricting plans since the 1982 reauthorization revealed twenty-three cases in sixteen states (eight of which are not covered by Section 5) that found racial bloc voting. More than one-third of the cases were decided in 2000 or later.[308]

A few examples of the language judges employ in such cases are instructive. The following quotes are taken from federal court decisions:

- Florida: "The parties agree that racially polarized voting exists throughout Florida to varying degrees. The results of Florida's legislative elections over the past ten years established the presence of racially polarized voting."[309]

- South Carolina: "In this case, the parties have presented substantial evidence that this disturbing fact has seen little change in the last decade. Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary elections and general elections. Statewide, black citizens generally are a highly politically cohesive group and whites engage in significant white-bloc voting. Indeed, this fact is not seriously in dispute."[310]

- Louisiana: "A consistently high degree of electoral polarization in Orleans Parish was proven through both statistical and anecdotal evidence. Particularly as enhanced by Louisiana's majority vote requirement, . . . racial bloc voting substantially impairs the ability of black voters in this parish to become fully involved in the democratic process."[311]

- Maryland: "In sum, the *Gingles* threshold inquiry clearly shows that a bloc-voting white majority on the Eastern Shore [of Maryland] consistently defeats black candidates supported by a politically cohesive and geographically compact black community. Plaintiffs' claim of vote dilution is anything but hypothetical."[312]

- Massachusetts: "The evidence establishes beyond peradventure that African-American voters in the Boston area are politically cohesive. The same evidence, taken as a whole, also suffices to show that white voters, who constitute a majority in most districts, vote sufficiently as a bloc to enable them, as a general rule, to defeat the black-preferred candidates."[313]

- Texas: "This court recognizes that Plaintiffs have established racially polarized voting and a political, social, and economic legacy of past discrimination."[314]

- South Dakota: "The court concludes that substantial evidence, both statistical and lay, demonstrates that voting in South Dakota is racially polarized among whites and Indians in Districts 26 and 27."[315]

Another source suggestive of the extent of racially polarized voting is the analysis of reported Section 2 cases by the Voting Rights Initiative at the University of Michigan.[316] The 323 lawsuits in their data base, as noted above, represent only a small percentage of all post-1982 Section 2 cases, reported and unreported. Of the 186 cases that addressed racially polarized voting, in 91 (49 percent) there was a judicial finding, not overturned by a later court, that it existed. The governments whose elections were so characterized included school boards, city councils, state legislatures, judicial bodies, county commissioner boards, and state commissions of transportation and of public service. These cases were filed in 24 states, both within and outside Section 5 jurisdictions. (Ten states were totally outside Section 5 coverage.) Geographically, the states ranged from California to New York and from Wyoming to Florida. Even in some of the cases minority plaintiffs did not win, the court nonetheless found racial bloc voting.[317]

In short, a broad range of evidence points to continuing racial polarization in many elections across the nation. The causes are more complex than white racism alone, although this factor obviously plays an important role. But for whatever reasons, minority voters are often prevented by a white bloc vote, in combination with dilutive voting mechanisms, from electing their preferred candidates in venues numerically dominated by whites. It is this diamond-hard fact that the Department of Justice and minority voters have addressed, often effectively, using both the permanent and nonpermanent features of the Voting Rights Act as their weapons.

CHAPTER EIGHT

Summary and Conclusions

The continuing impact of the Voting Rights Act can be fully appreciated only by understanding the historical context in which it was passed. From the beginning of the twentieth century, when southern blacks were almost completely disfranchised, until 1965, when many had regained the franchise and others were struggling to do so, key elements of the southern white power structure opposed black voting and ensured continued implementation of the myriad tests and devices designed decades earlier to prevent blacks from casting a ballot. Into the 1960s, black civil rights activists, along with their white allies, were threatened, harassed, jailed, beaten and even murdered as they encouraged and helped black citizens to register and vote.

Nonetheless, after the Supreme Court declared the white primary unconstitutional in 1944 and the Civil Rights Movement gathered momentum, southern whites, at least the more prescient, saw the handwriting on the wall. They began to prepare for the day when blacks would once again achieve the right to vote. White officials set about changing many aspects of the election systems they controlled in order to dilute the power of the black vote as it became more widespread. These changes were put in place at every level of government in the southern states, in many instances soon after a black was elected to office or came close to winning. Electoral districts were racially gerrymandered or abandoned entirely and replaced by at-large schemes. Majority-vote requirements replaced plurality-win rules. The numbered place system and staggered terms replaced rules allowing single-shot voting. Offices were changed from elective to appointive, or their authority was diminished. Municipal annexations or de-annexations were designed to increase the white percentage of cities' population. In short, black vote dilution was white supremacy's second line of defense when the first line of defense, massive disfranchisement, was breached—as it was in 1965.

The task of African Americans, who now had at their disposal a new and powerful weapon to secure their voting rights, was thus twofold: to put an end to massive disfranchisement, primarily in the South; and to dismantle the dilutive mechanisms designed to prevent them from electing their preferred candidates. The first task was accomplished, in the main, within a few years of the Act's passage in 1965, as the gap in black-white voter turnout narrowed dramatically. In 2000, the reported black voter turnout nationwide, as a percentage of their VAP, was 53.5 percent; for non-Hispanic whites, it was 60.4. The percentage of blacks who reported *voting* nationwide in 2000 was

thus almost as high as the percentage of blacks *registered* in 1964—58.5 percent.[318] While efforts to depress the black vote in the South and elsewhere have continued into the twenty-first century, the relatively high black turnout rate is a measure of the Act's success.[319]

The attack on black vote dilution—and on minority vote dilution generally, as the Act's purview expanded to include Latinos, Indians, Alaska Natives, and Asian Americans—was slower to gain force. Although both Sections 5 and 2 were used early on by the Department of Justice and private plaintiffs to dismantle dilutive structures not only in the South but around the nation, the battle has been lengthy, and the most dramatic manifestations of it—redistricting—continue to be fought at least once a decade, given the widespread persistence of racially polarized voting. This is not to deny that dramatic progress has been made on this front as well. However, the battle is far from over, and many knowledgeable observers and participants have expressed the belief that congressional failure to renew Section 5, a major bulwark against both disfranchisement and vote dilution, would be a serious step backward. Testimony at the Commission's national hearings in 2005 addressed both problems.

Problems Facing Language Minorities

While the original focus of the Voting Rights Act was almost entirely on African Americans, amendments in 1975 broadened the focus to include language minorities. As a result of the discrimination experienced by Latinos, primarily in the Southwest, and by Native Americans and Asian Americans, the coverage formula in Section 4 was changed so as to expand Section 5 protections to include three states in their entirety as well as other smaller jurisdictions. As a result of both this expansion and the addition of Section 203, language assistance was mandated for four language groups: Latinos, American Indians, Alaska Natives, and Asian Americans. Research and hearing testimony on the problems faced by these groups in the electoral process reveals continuing discrimination against them, as well as a widespread failure by election officials in Section 203-covered jurisdictions to comply with the law requiring language assistance. The record of the Department of Justice in enforcing language assistance is discussed below.

Enforcement of Section 5

One important measure of the extent of voting discrimination of both types is the number of Section 5 objections interposed by the

Department of Justice. Of the 1,116 objections from 1968 through 2004, prohibiting 1,589 proposed election changes submitted for preclearance, 626, or 56 percent of the total, occurred after August 5, 1982. There is no system for monitoring whether covered jurisdictions submit all the proposed changes required by law, as was vividly demonstrated when civil rights lawyers in the early part of this decade discovered that several hundred such changes in the two South Dakota counties covered by Section 5 had not been submitted for preclearance since the 1970s.

The largest number of post-1982 objections occurred in Mississippi, followed by Texas, Louisiana, Georgia, South Carolina, and Alabama. Sixty-three of those objections in the five states were statewide objections, typically to prevent racially gerrymandered redistricting plans. The overwhelming majority of the objections occurred in counties within the southern states having a sizable non-white voting-age population. The same general pattern is true for declaratory judgments adverse to Section 5 jurisdictions handed down by the U.S. District Court for the District of Columbia: the majority of such judgments occurred after August 5, 1982.

Yet another index of voting discrimination is a jurisdiction's withdrawal of a proposed voting change as a result of Department of Justice requests for more information, suggesting that, at least in many instances, officials in the jurisdiction concluded that the change would be objected to if it were not withdrawn. While no data on submission withdrawals prior to 1982 were available for the Commission's analysis, the post-1982 data revealed 205 withdrawals, compared with 626 objections and 25 declaratory judgment actions favorable to minorities in the same period.[320]

The Role of Federal Observers

A somewhat different indicator of actual or potential vote discrimination is an observer coverage, whereby the Attorney General sends federal observers to a locale covered by either Sections 5 or 203 on Election Day, when there is credible evidence that racial tensions are high and efforts to discriminate may occur. Post-1982 data revealed 622 such coverages, involving several thousand federal observers. There were 250 coverages in Mississippi alone during this period, involving over 3,000 observers. Five of the six states originally covered by Section 5 accounted for 66 percent of all post-1982 coverages.

Section 5 and Section 203 Enforcement Actions

Between passage of the Act and 2004, the Department of Justice filed or joined as *amicus curiae* or plaintiff intervenor in 107 enforcement actions against Section 5 jurisdictions to force them to submit proposed changes that had not been precleared. Of these, the majority—61—occurred after 1982, although it is unknown how many of these were successful. Research by the Commission staff discovered 105 successful Section 5 enforcement actions in the same period, either by private citizens or the Department. In the case of Section 203 enforcement actions in which the Department was involved, while few were filed, virtually all of them were successful and the overwhelming majority of them—19 of 21—were filed since 1982.

Trends in Federal Enforcement of the Nonpermanent Provisions

An analysis of voting-related Department of Justice trends on a one-year and five-year basis was also conducted in order to discover whether more fine-grained patterns emerge. This analysis revealed that the number of Section 5 objections reached historic highs in the early 1990s, but then began to decline significantly since then. While some commentators have taken this decline as evidence that discrimination against minority voters is rapidly disappearing, Figure 2, discussed above, shows that when all the activities by the Department of Justice and the D.C. Court to prevent vote discrimination are examined simultaneously, there has been appreciably more enforcement activity over the past decade than a focus on objections alone would suggest. Further, there is the possibility—so far unverified—that part of the recent decline in objections can be traced to a less aggressive stance toward Section 5 submissions by the Department of Justice under the current administration than in the past. Another likely reason for part of the decline in objections is the Supreme Court's *Bossier Parish II* decision in 2000 that sharply constricted the criterion for applying the Section 5 intent standard. An additional reason might be that jurisdictions have finally learned to adopt practices and procedures for voting changes that conform to Section 5 as they would with most governmental regulation. Absent Section 5, some jurisdictions may disregard those practices and procedures.

Enforcement of Section 2

Data regarding Section 2 of the Act also point to widespread and continuing vote discrimination, right down to the present. A study by Professor Ellen Katz and the University of Michigan Voting Rights Initiative of reported cases since 1982, revealed that 117 led to favorable outcomes for plaintiffs, most of whom were African Americans. (Fifty-seven percent were filed in jurisdictions covered by Section 5, but 43 percent were filed elsewhere.) The study concluded that racial discrimination in voting is still widespread nationally.

However, reported suits represent a small percentage of all Section 2 suits filed, as Katz has pointed out. A non-comprehensive list compiled by the Commission staff of both reported and unreported Section 2 cases resolved in a manner favorable to minority voters since 1982, limited to eight of the nine states entirely covered by Section 5 as well as North Carolina, revealed that the great majority of such cases went unreported. Whereas Katz's focus on reported suits led to a finding of 117 successful cases nationwide, the Commission's focus on both reported and unreported suits in the nine states led to a finding of 653 successful cases. Obviously the number would be substantially greater nationwide.

Evidence from the National Commission's Ten Hearings

In addition to the data so far described, the Commission was able to draw on testimony and information entered into the record during its ten widely dispersed hearings across the nation in 2005. People from many walks of life with a wide variety of experience and expertise took the time to present their views. The Commission accepted testimony from lawyers and activists, some of whom have been involved in voting rights struggles in the South from the 1960s onward; election officials; scholars with a specialty in racial politics; expert witnesses in voting rights cases; participants in election protection programs; former key officials in the Voting Section of the Department of Justice; current or recent members of the U.S. House of Representatives and the U.S. Senate, as well as other elected officials; and ordinary citizens who simply spoke of their life histories and their hopes and fears regarding minority voting rights. Because the hearings were widely dispersed across the nation, testimony shed light on problems in varied locales affecting a broad spectrum of racial and nationality groups. (The highlights of the hearings are available in a separate document prepared by the Commission.)

Taken as a whole, the evidence presented at the hearings strongly suggests that the two major problems the Act has focused on

solving—restricted ballot access and minority vote dilution—continue in twenty-first century America. Efforts to suppress the minority vote, while not as systematic and pervasive as those of the pre-Act South, are still encountered in every election cycle in many venues across the country. The location of polling places for minority voters is changed, often on short notice. Citizens with English-language difficulties are sometimes discouraged from voting. Requirements to register and vote are sometimes unduly burdensome on minority voters. Racially polarized voting continues in many venues across the country, with the result that qualified minority candidates often have difficulty winning election unless from majority-minority districts. Appeals to voters' racial prejudice are sometimes made by candidates, increasing the polarization. Several people who gave testimony stressed that problems encountered by minorities are the work of both white Democrats and Republicans.

In short, both the evidence from the hearings and the additional data relied on in this Report indicate that while the Voting Rights Act has accomplished much during its first forty years, more remains to be done in order to protect the rights of racial and ethnic minorities to fully and equally participate in the electoral process.

NOTES

[1] Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* (Westbury, N.Y.: The Foundation Press, Inc., 1998), 264-66; Nick Kotz, *Judgment Days: Lyndon Baines Johnson, Martin Luther King Jr., and the Laws That Changed America* (Boston & New York: Houghton Mifflin Company, 2005), 269-70.

[2] Howell Raines, *My Soul is Rested: Movement Days in the Deep South Remembered* (New York: Putnam, 1977), 337.

[3] Stephen B. Oates, *Let The Trumpet Sound: The Life of Martin Luther King, Jr.* (New York: Harper & Row, 1982), 370.

[4] Kotz, *op. cit.*, 337; Steven F. Lawson, *In Pursuit of Power: Southern Blacks and Electoral Politics, 1965-1982* (New York: Columbia University Press, 1985), 4.

[5] For an account of the Act's impact in the South during its first twenty-five years, see Chandler Davidson and Bernard Grofman (eds.), *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton, New Jersey: Princeton University Press, 1994).

[6] Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000), 323.

[7] For a list of state-imposed disfranchising measures, see *ibid.*, 325-401.

[8] Vincent L. Hutchings and Nicholas A. Valentino, "The Centrality of Race in American Politics," *Annual Review of Political Science* 7 (2004), 401. Political scientist Linda Williams makes the point in stronger terms. She argues that "the real problem is the social and political construction of race in a way that advantages whites over people of color in economic markets, political institutions, and social policies. . . . In effect, the problem of the twenty-first century is not the color line but finding a way to successfully challenge whiteness as ideology and reality." For her balanced yet critical assessment of racial progress in the twentieth century, see Linda Faye Williams, *The Constraint of Race: Legacies of White Skin Privilege in America* (University Park, Pennsylvania: The Pennsylvania State University Press, 2003), Chapter 8.

[9] James M. McPherson, *Abraham Lincoln and the Second American Revolution* (Oxford: Oxford University Press, 1990), 19.

[10] For accounts of this chapter in American history, see C. Vann Woodward, *Origins of the New South, 1877-1913* (Baton Rouge: Louisiana State University Press: 1951, 1971); and J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restrictions and the Establishment of the One-Party South, 1880-1910* (New Haven: Yale University Press, 1974). For a brief overview of this period, see also John Hope Franklin and Alfred A. Moss, Jr., *From Slavery to Freedom: A History of Negro Americans* (6th ed.) (New York and other cities: McGraw Hill, Inc., 1988), 227-38.

[11] Kimball W. Brace, *Final Report of the 2004 Election Day Survey, Submitted to the U.S. Election Assistance Commission, September 27, 2005* (Washington, D.C.: Election Data Services, 2005).

[12] Summary of the report's findings on ethnic inequality quoted in Dan Seligman, "EAC Survey Answers Raise Equality Questions," *electionline Newsletter*, 29 Sept. 2005.

[13] Voters cast provisional ballots when election workers at the polls cannot verify their eligibility. They are set aside from other ballots and the decision whether to count them is made after the election.

[14] The definition of "inactive" in the EAC report does not allow the reader, without further information, to determine whether inactive voters were legally or illegally designated as such. See Brace, *op. cit.*, 43.
[15] Seligman, *op. cit.* For specifically race-related findings in the EAC report, see 30, 34, 37, 53, 59, 70, 75, 88, 97, 103, 114, 120, 129, 134, 144, 152, 156, 160, 175, 179, 183, 191, 195, 199, 203, 215, 222, 231, 242. Page numbers refer to pdf document containing the report.
[16] Brace, *op. cit.*, 15.
[17] See, for example, Ronald Hayduk, *Gatekeepers to the Franchise: Shaping Election Administration in New York* (Dekalb: Northern Illinois University Press, 2005); Steven Donziger *et al.*, *America's Modern Poll Tax* (Washington, D.C.: The Advancement Project, 2001); *The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today: A Report by PFAW Foundation and NAACP* (Washington, D.C.: 2004), see http://www.pfaw.org/pfaw/dfiles/file_462.pdf (last visited 11 Nov. 2005); and Laughlin McDonald, "The New Poll Tax," *The American Prospect*, 30 Dec. 2002, 26-28.
[18] Gwen Patton, Southern Regional transcript, 49, 59, Appendix 1A.
[19] Vernon Burton, Southern Regional transcript, 73, Appendix 1A.
[20] *Ibid.*, 94-95.
[21] *Ibid.*, 95.
[22] *Ibid.*, 73-74.
[23] Victor Landa, Southern Regional transcript, 147-48, Appendix 1A.
[24] *Ibid.*, 180.
[25] Written Statement of Claude Foster, Southwest Regional Hearing, 3-4, Appendix 2C.
[26] *Ibid.*, 5.
[27] Nina Perales, Southwest Regional transcript, 46-47, Appendix 2A.
[28] *Ibid.*, 48.
[29] See, for example, letter from Deval L. Patrick, Assistant Attorney General for Civil Rights, to Edward S. Allen, Esq., Birmingham, Alabama, 2 Nov. 1994, which states that "an attempt to videotape areas where black voters are present at their polling places could constitute a violation of Section 11(b) of the Voting Rights Act, 42 U.S.C. 1973I(b)."
[30] *The Asian American Vote: A Report on the AALDEF Multilingual Exit Poll in the 2004 Presidential Election* (New York: Asian American Legal Defense and Education Fund, 2005), 15.
[31] Dorsey & Whitney LLP, *Report to the National Commission on the Voting Rights Act: Midwest Regional Hearing, July 22, 2005* (Minneapolis, MN: 2005), 59, Appendix 4R. See also, Written Statement of Ihsan Ali Alkhatib, Midwest Regional Hearing, 2-4, Appendix 4B.
[32] Written Statement of Margaret Fung, Northeast Regional Hearing, 3, Appendix 3E. A disturbing account of recent discrimination against Arab Americans nationwide is found in Hussein Ibish and Anne Stewart, *Report on Hate Crimes and Discrimination Against Arab Americans: The Post-September 11 Backlash, September 11, 2001-October 11, 2002* (Washington, D.C.: American-Arab Anti-Discrimination Committee, 2003), submitted to the National Commission on the Voting Rights Act, Midwest Regional Hearing, Appendix 4B, Ex. 1.
[33] Dorsey & Whitney, LLP, *op. cit.*, 40, 58, 59, 65.
[34] See, for example, Election Protection Coalition, *Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections* (December 2004),

available at www.lawyerscomm.org/preliminaryreport.pdf (last visited 18 Oct. 2005).
[35] Tisha Tallman, South Georgia transcript, 19, Appendix 5A.
[36] Lawrence D. Rice, *The Negro in Texas: 1874-1900* (Baton Rouge: Louisiana State University Press, 1971), 26.
[37] 349 U.S. 294 (1954).
[38] Chandler Davidson, "The Voting Rights Act: A Brief History," in Bernard Grofman and Chandler Davidson (eds.), *Controversies in Minority Voting: The Voting Rights Act in Perspective* (Washington, D.C.: The Brookings Institution, 1992), 26.
[39] William R. Keech and Michael Sistrom, "North Carolina," in Davidson and Grofman, *Quiet Revolution, op. cit.*, 159-60.
[40] 321 U.S. 649 (1944).
[41] Peyton McCrary, Jerome A. Gray, Edward Still, and Huey L. Perry, "Alabama," in Davidson and Grofman, *Quiet Revolution, op. cit.*, 39.
[42] Chandler Davidson, "The Voting Rights Act: A Brief History," in Grofman and Davidson, *Controversies, op. cit.*, 27.
[43] For the specific aspects of the Mississippi law objected to, see letter of Jerris Leonard, Assistant Attorney General for Civil Rights to Honorable A. F. Summer, Attorney General of Mississippi, 21 May 1969, Files, U.S. Department of Justice.
[44] 398 U.S. 544, 569 (1969).
[45] S. Rep. No. 97-417 (1982), reprinted in 1982 U.S.C.C.A.N. 177 (hereinafter *Senate Report*), 6.
[46] *Ibid.*, 8-9.
[47] *Ibid.*, 10.
[48] H. Rep. No. 97-227 (1981), 18.
[49] Peyton McCrary, "Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990," *University of Pennsylvania Journal of Constitutional Law* 5 (May 2003): 700.
[50] *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 328 (1966).
[51] The explanation of the Act contained in this Chapter is indebted to the summary found in *The Voting Rights Act: Unfulfilled Goals* (Washington, D.C.: U.S. Commission on Civil Rights, 1981).
[52] 42 U.S.C. §§ 1973b(b), 1973b(f)(3).
[53] U.S. Commission on Civil Rights, *op. cit.*, 5 n.14.
[54] Map 1 was taken from the Voting Section Web site, http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited 29 Aug. 2005).
[55] U.S. Commission on Civil Rights, *op. cit.*, 6-7.
[56] U.S. Department of Justice, Civil Rights Division, Voting Section, "Terminating Coverage Under the Act's Special Provisions," available at http://www.usdoj.gov/crt/voting/misc/sec_4.htm> (last visited 29 Dec. 2005).
[57] J. Gerald Hebert, *Statement to the Committee on the Judiciary, Subcommittee on the Constitution, Oversight Hearing on 'The Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act'*, 20 Oct. 2005, 2-5.
[58] 42 U.S.C. § 1973c.
[59] *Ibid.*
[60] In 1976, the Supreme Court interpreted the meaning of effect in Section 5 as "retrogressive effect." *Beer* v. *United States*, 425 U.S. 130 (1976). Until 2000, the retrogression standard applied only to the effects prong of Section 5. However, a Supreme Court decision that year interpreted the standard to apply to the intent prong as well. See discussion at the end of Chapter 5.

[61] *Morris* v. *Gressette*, 432 U.S. 491 (1977).
[62] Quoted in U.S. Commission on Civil Rights, *op. cit.*, 8.
[63] U.S.C. § 1973d. On examiners and observers, see the Voting Section Web site, http://www.usdoj.gov/crt/voting/examine/activ_exam.htm (last visited 29 Aug. 2005).
[64] At the Commission's Mid-Atlantic Regional Hearing, Guest Commissioner Karen Narasaki asked former Department of Justice lawyer Mark Posner whether, given the frequent need for observers to investigate compliance with the minority language provisions, it might be a good idea to extend the Attorney General's authority to certify examiner/observer coverage to jurisdictions covered by Section 203. Posner replied that it would. Mark Posner, Mid-Atlantic Regional transcript, 212, Appendix 9A.
[65] For a detailed account of the examiner and observer process, see Barry H. Weinberg, *Statement . . . Before the Subcommittee on the Constitution, Committee on the Judiciary, United States House of Representatives, Concerning the Voting Rights Act, Sections 6, 7, and 8—Federal Examiner and Observer Provisions*, 15 Nov. 2005.
[66] Calculated from U.S. Department of Justice list, "Geographic Public Listing, Elections in All States, During All Dates," 10 Nov. 2003, Department of Justice files.
[67] http://www.usdoj.gov/crt/voting/sec_203/203_brochure.htm (last visited 29 Aug. 2005).
[68] 42 U.S.C. § 1973l(c)(3).
[69] *Testimony of Dr. James Thomas Tucker . . . Before the House Committee on the Judiciary, Subcommittee on the Constitution, Oversight Hearings on the Voting Rights Act: Section 203, Bilingual Election Requirements, Part 2*, 9 Nov. 2005, 16 n.6.
[70] 42 U.S.C. § 1973aa-1a(2). A Limited-English-Proficient (LEP) person is defined as one who speaks English "less than very well" and would need assistance to participate effectively in the political process. Tucker, *op. cit.*, 3.
[71] Tucker, *op. cit.*, 3; For an overview of Section 203 see U.S. Department of Justice, Voting Section, *Language Minority Brochure*, available at http://www.usdoj.gov/crt/voting/sec_203/203_brochure.htm (last visited 30 Dec. 2005).
[72] 28 C.F.R. Part 55.8
[73] U.S. Department of Justice, *Language Minority Brochure*, *op. cit.*
[74] U.S.C. § 1973aa-1a(c).
[75] 42 U.S.C. § 1973.
[76] *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980).
[77] 42 U.S.C. § 1973a(a).
[78] 42 U.S.C. § 1973a(c).
[79] Information provided by Commission staff.
[80] Mark Posner, Mid-Atlantic Regional transcript, 179, Appendix 9A.
[81] 42 U.S.C. § 1973h.
[82] 42 U.S.C. § 1973aa. Section 201 was added in 1975 and made the ban on tests and devices permanent. In the 1965 enactment of the Act, the ban on tests and devices was for five years in the Section 5 covered jurisdictions, and in 1970, the ban was extended for an additional five years. S. Rep. No. 94-295 (1975), 20-21.
[83] 42 U.S.C. § 1973aa-6.
[84] 42 U.S.C. § 1973i.
[85] 42 U.S.C. § 1973b(e).
[86] A judicious, if brief, summary of the issues regarding the possible trade-off between these two types of representation can be found in Larry Bartels, Hugh Heclo, Rodney E. Hero, and Lawrence R. Jacobs, "Inequality and American

Governance," in Lawrence R. Jacobs and Theda Skocpol (eds.), *Inequality and American Democracy: What We Know and What We Need to Learn* (New York: Russell Sage Foundation, 2005), 131-36.

[87] For purposes of this Report, Native Americans means American Indians and/or American Indians and Alaska Natives.

[88] Voting and population statistics cited in this chapter to shed light on recent demographic facts will usually refer to the year 2000, first, because the sample size on which the statistics are based is often larger and produces more accurate results than do samples drawn between decennial censuses; and, second, because a single year allows of better comparisons.

[89] *The Black Population: 2000* (Washington, D.C.: U.S. Census Bureau, 2001), 3. Publication available at http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf (last visited 2 Jan. 2006). Because the census in 2000 began giving respondents a chance to indicate multiple races to which they belonged, it now typically presents its findings in terms of a) people who say they belong only to one race and b) those who indicate they belong to other races in addition to the one specified. In the racial statistics mentioned in this Report for 2000 or later, the data sometimes refer to a single-race population (referred to as "alone" in census tables) and sometimes to a single-race population plus any people who are of the specified race in combination with any other race (referred to as "alone or in combination"). The differences between "alone" and "alone or in combination" for each of the five major racial groups in the United States are not large, as percentages of the total population—but they are large enough to make note of. In 2003, for example, the two categories of whites composed 81.1 and 82.2 percent of the total population, respectively; regarding blacks, 12.7 and 13.2 percent; American Indians and Alaska Natives, 0.9 and 1.5 percent; Asians, 3.8 and 4.3 percent; and Native Hawaiian and other Pacific Islanders, 0.2 and 0.3 percent.

[90] U. S. Bureau of the Census, *Statistical Abstract of the United States: 2004-2005*, 124th Ed. (Washington, D.C.: 2004), Table 407, 256.

[91] U.S. Bureau of the Census, *Statistical Abstract of the United States: 1965*, 86th Edition (Washington, D.C.: 1965), Table 524, 385.

[92] U.S. Census Bureau, *Voting and Registration in the Election of November 2000*, Detailed Tables for Current Population Report, P20-542. Calculated from data in Table 2. Available at http://www.census.gov/population/www/socdemo/voting/p20-542.html (last visited 1 Nov. 2005). Turnout data in 2000 by ethnicity, as reported by the census, differ, by a percentage point or more, depending on the publication.

[93] *Ibid.*, Tables 2 and 4c.

[94] Raymond E. Wolfinger and Steven J. Rosenstone, *Who Votes?* (New Haven and London: Yale University Press, 1980), 117-18. See also Gerald D. Jaynes and Robin M. Williams, Jr. (eds.), *A Common Destiny: Blacks and American Society* (Washington, D.C.: National Academy Press, 1989), 234.

[95] Jaynes and Williams, *ibid.*, 235.

[96] This eleven-state black registration rate, it will be noted, is slightly higher than the actual voter turnout rate for the same year reported above. This discrepancy is likely due to the fact that the census definition of the South contains more than the eleven states of the old Confederacy.

[97] Harold W. Stanley, *Voter Mobilization and the Politics of Race: The South and Universal Suffrage, 1952-1984* (New York, Westport, Conn., and London: Praeger, 1987), 97; and James E. Alt, "The Impact of the Voting Rights Act on Black and

White Voter Registration in the South," in Davidson and Grofman, *Controversies, op. cit.*, 374.

[98] U.S. Department of Justice, "The Effect of the Voting Rights Act," Table entitled "Voter Registration Rates (1965 vs. 1988)" on the Voting Section Web site at http://www.usdoj.gov/crt/voting/intro/intro_c.htm (last visited 3 Jan. 2006). Some of the data in the table differ trivially from data in Stanley, *ibid.*, and Alt, *ibid.*

[99] *National Roster of Black Elected Officials* (Washington, D.C. and Atlanta: Metropolitan Applied Research Center, Inc. and Voter Education Project, 1970), Table entitled, "Black Elected Officials in United States," no pagination.

[100] Calculated from data in David A. Bositis, *Black Elected Officials: A Statistical Summary, 2000* (Washington, D.C.: Joint Center for Political and Economic Studies, 2002), 15, 16. The total includes 204 officials in the District of Columbia and 39 in the Virgin Islands.

[101] *Ibid.*, 18.

[102] Two blacks were elected to the Senate from Mississippi during the First Reconstruction—Hiram Revels and Blanche K. Bruce. See Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper & Row, Publishers, 1988), 352, 357. Both senators were selected by the state legislature, as was the practice before adoption of the Seventeenth Amendment in 1912.

[103] "The 1990 Campaign: Democrats Accuse G.O.P. of Voter Intimidation in Two States," *The New York Times*, 2 Nov. 1990, A19; Laughlin McDonald, "The New Poll Tax," *op. cit.*, 28; C. Mathesian, "N.C. Republicans Settle Complaint," *Congressional Weekly Report*, 29 Feb. 1992, 487.

[104] In Tables 1, 2, and 3, data identifying BEOs and HEOs holding elective office in 2000 (i.e., officials elected earlier than 2000 and thus incumbents that year) were obtained respectively from the Joint Center for Political and Economic Studies and the National Association of Latino Elected and Appointed Officials ("NALEO"). Data on the racial demography of the districts the officials represented were obtained primarily from the Census 2000 Redistricting Project. However, state compliance with this project was voluntary. Ten states did not participate at all: Arkansas, California, Florida, Hawaii, Kentucky, Maine, Maryland, Minnesota, Montana, and Texas. Of these ten states, however, Texas presented data on all legislative districts on its state Website. Thus, district demographic data for 9 states in Tables 2, 3, and 4 are missing entirely. Moreover, of the 41 other states, only 36 submitted data on all legislative districts, and so some of their legislative data are not included in the tables' analysis. In the case of North Carolina, the missing data were obtained from that state's Web site. (Regarding congressional districts, however, the Joint Center and NALEO supplied demographic data for all U.S. Representative districts that year.) To summarize the extent of the data base for the tables, all states electing a black or Latino member of Congress are represented in the tables. Of the 40 states participating in the census project, plus Texas, there is complete legislative data for 36. In the remaining 5 states, there is demographic data for 82.8 percent of upper-chamber legislative districts and 75.1 percent of lower-chamber districts. For the 41 states for which there was at least some information, data were obtained for 99.1 percent of all legislative districts. To the Commission's knowledge, this is the most complete database of congressional and state legislative districts electing BEOs and HEOs for the year 2000.

[105] David A. Bositis, *Black Elected Officials: A Statistical Summary 2000* (Washington, D.C.: Joint Center for Political and Economic Studies, 2002), 22.

[106] Hon. Melvin Watt, testimony to the National Commission on the Voting Rights Act, Mid-Atlantic Regional transcript, 38-40, Appendix 9A.
[107] A similar table published in another venue by a reputable source indicates thirteen (34%) of the 37 black U.S. representatives in 2002 were elected from *minority-black* districts. (Bositis, *op. cit.*, 2003, 22). Yet only four (11%) were elected from *majority-non-Hispanic white* districts in 2002. By focusing just on the proportion of blacks in a district, one can mistakenly infer that "whites" are more likely to vote for blacks than is actually the case. In fact, there are other minority groups in many of the minority-black districts—the most numerous typically being Latinos, many of whom also consider themselves white and report this to the census. The dramatic nature of the distinction can be seen in the ethnic makeup of the district represented by Sheila Jackson Lee, an African American. In 2000 her district's VAP was 39% black. But it was only 27% non-Hispanic white. It was also 30% Hispanic. It is highly unlikely she would have won if the non-black VAP had been 61% non-Hispanic white.
[108] Samantha Sanchez, *Money and Diversity in State Legislatures, 2003* (Helena, Montana: The Institute on Money in State Politics, 2005), 7, 22.
[109] Jaynes and Williams, *op. cit.*, 1-32.
[110] Steven A. Tuch and Jack K. Martin, "Regional Differences in Whites' Racial Policy Attitudes," in Steven A. Tuch and Jack K. Martin (eds.), *Racial Attitudes in the 1990s: Continuity and Change* (Westport, Connecticut & London: Praeger Publishers, 1997), 167-69; Steven A. Tuch, Lee Sigelman, and Jack K. Martin, "Fifty Years after Myrdal: Blacks' Racial Policy Attitudes in the 1990s," in Tuch and Martin, *ibid.*, 233.
[111] "Regional Differences," *ibid.*, 173.
[112] Howard Schuman, Charlotte Steeh, Lawrence Bobo, and Maria Krysan, *Racial Attitudes in America: Trends and Interpretations*, rev'd. ed. (Cambridge & London: Harvard University Press, 1997), 172-78.
[113] The National Urban League and Global Insights, Inc., "National Urban League 2005 Equality Index," in Lee A. Daniels (ed.), *The State of Black America 2005* (New York: The National Urban League, 2005), 15-40.
[114] Puerto Ricans were given protection against discriminatory literacy tests in New York by Section 4(e) when the Act when passed in 1965; and some small numbers of Latinos lived in those primarily Deep South states initially covered by Section 5.
[115] Robert Brischetto, David Richards, Chandler Davidson, and Bernard Grofman, "Texas," in Davidson and Grofman, *Quiet Revolution*, *op.cit.*, 239ff.
[116] Louis DeSipio and Rodolfo O. de la Garza, "Between Symbolism and Influence: Latinos in the 2000 Elections," in Rodolfo O. de la Garza and Louis DeSipio (eds.), *Muted Voices: Latinos and the 2000 Elections* (Lanham, Maryland, and other cities: Rowman & Littlefield Publishers, Inc., 2005), 15.
[117] Campbell Gibson and Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For the United States, Regions, Divisions, and States* (Washington, D.C.: U.S. Census Bureau, Population Division, 2002), Table 1; U. S. Bureau of the Census, *Statistical Abstract of the United States: 2004-2005* (124th Ed.)(Washington, D.C.: 2004), Tables 13, 14.
[118] Roberto Suro and Jeffrey S. Passell, *The Rise of the Second Generation: Changing Patterns in Hispanic Population Growth* (Washington, D.C.: Pew Hispanic Center, 2003), 3.
[119] Angelo Falcon, *Atlas of Stateside Puerto Ricans* (Washington, D.C.: Puerto Rico Federal Affairs Administration, n.d.), 1.

[120] Juan Cartagena, "Latinos and Section 5 of the Voting Rights Act: Beyond Black and White," *National Black Law Journal* 18 (2005), 207-08.
[121] Jeffrey Passel, "New Estimates of the Undocumented Population in the United States," *Migration Information Source*, 22 May, 2002, http://www.migrationinformation.org/feature/display.cfm?ID=19 (last visited 25 Nov. 2005); on anti-Hispanic violence, see Carmen T. Joge with Sonia M. Pérez, *The Mainstreaming of Hate: A Report on Latinos and Harassment, Hate Violence, and Law Enforcement Abuse in the '90s*, Final ed., (Washington, D.C.: National Council of La Raza, 1999).
[122] Nicholas Riccardi, "Eligible to Vote? Prove It," *Los Angeles Times*, 5 Nov. 2005, http://www.latimes.com/news/printedition/la-na-arizona5nov05,1,2598787.story (last visited 5 Nov. 2005). For the response of non-Hispanics in the South to the recent influx of Latinos, see Clay Risen, "Immigration Migrates: Going South," *The New Republic Online*, post date 3 Oct. 2005 http://www.tnr.com/doc.mhtml?i=20051107&s=risen110705 (last visited 4 Oct. 2005).
[123] Michael Jones-Correa, "Language Provisions Under the Voting Rights Act: How Effective Are They?" *Social Science Quarterly* 86 (September 2005), 551. The Anglo turnout figure given by Jones-Correa—62 percent—differs slightly from the figure of 60.4 given in the text above.
[124] *Ibid., 558.* "Residing in an area offering voting materials in the respondent's language of origin . . . is significant[ly] and positively correlated with voter turnout for Latinos but has no effect for Asian Americans. . . . Latinos living in an area covered by the language provisions of the Voting Rights Act were 4.4 percent more likely to have voted in 1996 and 2000 than their counterparts residing elsewhere."
[125] Nina Perales, Southwest Regional transcript, 49-52, Appendix 2A.
[126] The standard work on Mexican Americans in Texas is David Montejano, *Anglos and Mexicans in the Making of Texas, 1836-1986* (Austin: University of Texas Press, 1987). See especially Chapters 10-11 for an account of "Jim Crow" as it applied to Latinos, and Chapter 12 on its abolition. For a more general account of Latino politics nationwide, see Kim Geron, *Latino Political Power* (Boulder, Colorado: Lynne Rienner Publishers, Inc., 2005).
[127] "Material on Houston's Adoption of Its 9/6 City Council Plan," Fondren Library, Rice University.
[128] The 2000 census combined the two categories of Alaska Native and American Indian. The figure of 0.9 refers to those who chose that designation alone, exclusive of other racial mixtures. U.S. Census Bureau, *The American Indian and Alaska Native Population: 2000* (Washington, D.C.: U.S. Department of Commerce, February 2002), Table 1, 3. http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf (last visited 1 Nov. 2005).
[129] U.S. Census Bureau, *Race and Hispanic Origin in 2003* (Population Profile of the United States, Dynamic Version, 2005), 4.
[130] Russ Lehman and Alyssa Macy, *Native Vote 2004: A National Analysis of Efforts to Increase the Native Vote in 2004 and the Results Achieved* (First American Education Project: 2005), submitted as part of the testimony of the Native American Rights Fund and the National Congress of American Indians before the National Commission on the Voting Rights Act, Rapid City, South Dakota, 9 Sept. 2005, 13, Appendix 7D.
[131] Therese Droste, "States and Tribes: A Healthy Alliance," *State Legislatures* (Apr. 2005), 29.

[132] For a succinct account of events from the 1960s into the early 1980s that led to sharp and occasionally violent clashes between Indians and non-Indians and which undoubtedly still resonate in some states, see U.S. Commission on Civil Rights, *Indian Tribes: A Continuing Quest for Survival* (Washington, D.C.: U.S. Government Printing Office: 1981), Chapter 1.

[133]Dan McCool, South Dakota Transcript, 30, Appendix 7A. See also "Table 1: Voting Rights Cases Brought on Behalf of American Indians and/or Interpreting the Voting Rights Act re Indian Interests," compiled for inclusion in McCool's forthcoming monograph to be published by Cambridge University Press, Appendix 7E.

[134] Laughlin McDonald, "The Voting Rights Act in Indian Country: South Dakota, A Case Study," *American Indian Law Review* 29 (2004): 46-47.

[135] *Ibid.*, 52.

[136] *Ibid.*, 55-65. The focus of McDonald's account in these pages is South Dakota.

[137] 336 F. Supp. 2d 976 (D.S.D. 2004).

[138] *Ibid.*, 1023-27. For an account of the issues leading to the *Bone Shirt* case, see McDonald, *op., cit.*, 59ff.

[139] Lehman and Macy, *op. cit.*, 4. See also Russ Lehman, *The Emerging Role of Native Americans in the American Electoral Process* (Olympia, Washington: Evergreen State College Native American Applied Research Institute, 2003), for an overview of Indian involvement in electoral politics, particularly in recent years.

[140] The litigation, based on the 1990s redistricting plan, was not successful. However, it brought to light enough problems that a different process was used in the post-2000 redistricting. See *Old Person* v. *Cooney*, No. 98-36157 (9th Cir. Oct. 27, 2000).

[141] Lehman and Macy, *op. cit.*, 24.

[142] Sia Davis, "Indian Country Concerns," *State Legislatures* (Apr. 2005), 31.

[143] *Ibid.*, 31.

[144] Heather Dawn Thompson, *Special Report: Native Vote 2004 Election Protection Project* (Washington, D.C.: National Congress of American Indians, February 2005), submitted to the National Commission on the Voting Rights Act, South Dakota Hearing, 25, 29, Appendix 7D, Ex. 1.

[145] *Reynolds v. Sims*, 377 U.S. 533 (1964).

[146] Dan McCool, South Dakota transcript, 32-33, Appendix 7A.

[147] *Ibid.*, 33.

[148] All data in this paragraph are found in Jessica S. Barnes and Claudette E. Bennett, *The Asian Population: 2000 (Census 2000 Brief)*, C2KBR/01-16 (Washington, D.C.: U.S. Census Bureau, 2002), 3-4, 7, 9. Available at http://www.census.gov/prod/2002pubs/c2kbr01-16.pdf (last visited 3 Jan. 2006).

[149] H.M. Lai, "Chinese," in Stephan Thernstrom (ed.), *Harvard Encyclopedia of American Ethnic Groups* (Cambridge, MA, and London: The Belknap Press, 1980), 220; *The Oxford Companion to United States History* (Oxford and New York: Oxford University Press, 2001), 51, 361-62.

[150] Harry H.L. Kitano, "Japanese," in Thernstrom, *ibid.*, 566-67. Congress apologized for the unjustified internment in 1988 and granted compensation of $20,000 to each surviving prisoner.

[151] For a discussion of some of these studies' findings, see Asian American Justice Center, *Testimony Submitted to the House Judiciary Committee on the Constitution, Oversight Hearings on the Voting Rights Act of 1965*, 22 Nov. 2005, 3-4.

[152] U.S. Equal Employment Opportunity Commission, "New Gallup Poll on Employment Discrimination Shows Progress, Problems 40 years After Founding of

EEOC," news release, 14 Dec. 2005, at http://www.eeoc.gov/press/12-8-05.html (last visited 14 Dec. 2005).

[153]For the 1970 figure, see Gibson and Jung, *op. cit*, Table 1.

[154] See Angelo N. Ancheta, *Race, Rights, and the Asian American Experience* (New Brunswick, NJ: Rutgers University Press, 1998).

[155] See, for example, Written Statement of Margaret Fung, Northeast Regional Hearing, 2-4, Appendix 3E.

[156] 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," paper presented at the 2005 Annual Meeting of the American Political Science Association, 4. The data seem to include AEOs in American Samoa, the Mariana Islands, and Guam.

[157] James S. Lai, "The Suburbanization of Asian American Politics," *National Asian Pacific American Political Almanac* (Los Angeles: UCLA Asian American Studies Center, 2005), 7-9.

[158] Glenn D. Magpantay, "Ensuring Asian American Access to Democracy in New York City," *AAPI Nexus* 2 (2004), 91.

[159] *Ibid.*, 96-110.

[160] Asian American Legal and Education Fund, *The Asian American Vote: A Report on the AALDEF Multilingual Exit Poll in the 2004 Presidential Election* (New York: AALDEF, 2005), 14-15. For a more detailed account of 2004 election problems in New York City, see letter from Glenn D. Magpantay to John Ravitz, Executive Director of the New York City Board of Elections, *et al.*, 16 June 2005.

[161] National Asian Pacific American Legal Consortium, *Sound Barriers: Asian Americans and Language Access in Election 2004* (Washington, D.C.: NAPALC, 2005), 9-12.

[162] Amie Jamieson, Hyon B. Shin, and Jennifer Day, *Voting and Registration in the Election of November 2000*, Current Population Reports: P20-542 (Washington, D.C.: U.S. Census Bureau, February 2002), Tables 1, 5.

[163] Interview with Joseph Rich, former Section Chief.

[164] 28 C.F.R., Part 5.

[165] 28 C.F.R. 51.27.

[166] Interview with Joseph Rich, former Section Chief.

[167] At least, this was the procedure used until fall 2005. According to media reports, the Civil Rights Division changed the review process at that time so that a recommendation comes only from the section chief. The staff is now allegedly instructed not to make a recommendation. Michelle Mittelstadt, "Voting-rights friction building inside Justice: Recommendations no longer allowed by career staff in cases, critics say," *Dallas Morning News*, 9 Dec. 2005, 1A. See also, Dan Eggen, "Staff Opinions Banned In Voting Rights Cases," *Washington Post*, 10 Dec. 2005, A03.

[168] The definition of voting change chosen for this analysis is conservative. For example, regarding annexations, some analysts have treated all annexations objected to within a given objection decision as separate changes. This analysis treats them as one change only.

[169] Data on objections were obtained by the Commission and compared with (and supplemented by) a data base prepared by Peyton McCrary and Christopher Seaman.

[170] *Bone Shirt* v. *Hazeltine*, 336 F. Supp. 2d 976, 1027 (D.S.D. 2004).

[171] Information provided to the National Commission on the Voting Rights Act by J. Gerald Hebert, an attorney involved in all nine cases, telephone call, 5 Dec. 2005.
[172] 519 U.S. 9 (1996) (*Lopez I*), and 525 U.S. 266 (1999) (*Lopez II*).
[173] 525 U.S. 266.
[174] *Lopez I*, 519 U.S. 9, 12.
[175] Drew S. Days III and Lani Guinier, "Enforcement of Section 5 of the Voting Rights Act," in Chandler Davidson (ed.), *Minority Vote Dilution* (Washington, D.C.: Howard University Press, 1984), 168-69.
[176] Non-white is defined here as the total VAP minus all non-Hispanic whites. Data are from the 2000 decennial census.
[177] Note that the single objection in New Mexico was interposed under Section 3, mentioned above; New Mexico has not been covered under Section 5.
[178] These maps do not show objections to statewide submissions—only those at the county or sub-county level. Note that different non-white VAP intervals are employed in these maps' color code than in the national-level maps.
[179] Alaska's two objections are both to statewide submissions, and thus the color coding of counties cannot reveal a correlation between percent non-white and objections.
[180] V.O. Key, Jr., *Southern Politics in State and Nation* (New York: Knopf, 1949), 9.
[181] Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, to Geoffrey Connor, Acting Secretary of State of Texas, 16 Nov. 2001. (Department of Justice files.)
[182] *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983).
[183] Written Statement of Debo Adegbile, Florida Hearing, 7-8, Appendix 6D.
[184] 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).
[185] *United States* v. *Charleston County*, 316 F. Supp. 2d 268, 277-278, 286 n.23, 295-97 (D.S.C. 2003).
[186] *United States* v. *Charleston County*, 365 F.3d 341 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 606 (2004).
[187] *Charleston County*, 316 F. Supp. 2d at 283.
[188] 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).
[189] Written Statement of Brenda Wright, Mississippi Hearing, 3, Appendix 10D. See also Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* (Chapel Hill and London: The University of North Carolina Press, 1989), 206, on the impact of dual registration on blacks: "Substantial numbers of black voters apparently were not informed of the dual registration requirement when they registered to vote with the circuit clerks or were otherwise unaware of the requirement, and disproportionate numbers of black voters have been denied the ballot in municipal elections in Mississippi because they had failed to register again with their municipal clerks."
[190] Wright, *ibid.*, 5-7.
[191] Letter from Philip R. Volland to Chief of the Voting Section, United States Department of Justice, 25 Apr. 2002, 2, 4.

[192] *In re 2001 Redistricting Cases*, No. 3AN-01-8914 CI, slip op. at 9 (Alaska Sup., Ct., 3rd Dist., May 18, 2002), *aff'd*, 47 P.3d 1089 (Alaska 2002).
[193]Lisa Handley, A Voting Rights Act Evaluation of the Proposed Alaska State Legislative Plans: Measuring the Degree of Racial Bloc Voting and Determining the Effectiveness of Proposed Minority Districts, in Philip R. Volland, letter to Joseph D. Rich, United States Department of Justice, 26 July 2001, Appendix C, 2.
[194] Myra Munson and Donald Simon, *Report to the Alaska Redistricting Board and Proposed Plan*, 3 Apr. 2001, 1.
[195]Myra Munson, e-mail to Nancy Barnes, aide to Alaska State Senator Albert Kookash, 3 Jan. 2006; submitted to the National Commission on the Voting Rights Act, 17 Jan. 2006.
[196] For example, see Joaquin Avila, Western Regional transcript, 40-41, Appendix 8A; Anita Earls, *Overview of Current Racial Discrimination in Voting in North Carolina*, 2-3, Appendix 1E; Laughlin McDonald, Southern Regional transcript, 247, Appendix 1A; Joseph Rich, Northeast Regional transcript, 99-101, Appendix 3A; Theodore Shaw, Northeast Regional transcript, 84, Appendix 3A; Kent Willis, Mid-Atlantic transcript, 73-75, Appendix 9A.
[197] The declaratory judgments used for this map were obtained from a list entitled "Declaratory Judgments" supplied by the Department of Justice. After consultation with Joseph Rich, former Section Chief of the Voting Section, the list was narrowed to include only those instances in which a case was heard on its merits with one of four results: 1) the jurisdiction's changes were denied; 2) the case was dismissed by the court or dismissed voluntarily by plaintiffs; 3) the case was dismissed and a subsequent change to cure the discriminatory problem was submitted and reviewed administratively; 4) a consent decree was agreed to, thus curing the problem.
[198] Not all withdrawals are due to a jurisdiction's belief that its submission contains an objectionable change. By the same token, the number of changes per submission is greater than the total number of submissions. So here, too (as with the problem of Department of Justice objection withdrawals discussed above), two facts may work against each other, with regard to reckoning the total number of proposed illegal *changes* on the basis of the total number of withdrawn *submissions*. Does the undercount of illegal submissions withdrawn compensate for the fact that there are more changes than the count of submission withdrawals alone would indicate? This would be a useful subject of further research.

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.

In summary, the method employed to tally withdrawals a) significantly understates the actual number of all *submission withdrawals* in the Department's files (because of the failure to understand the second type of notation used to identify them), b) understates the number of *changes withdrawn* (because there were more changes, on average, than submissions), and c) overstates the number of

submissions withdrawn containing illegal changes (because legal changes were not counted).

[199] Withdrawal data before 1980 are not available from the Department of Justice.

[200] Regarding the current status of examiners, see Weinberg, *op. cit.*, 6.

[201] In addition to observers, the Department of Justice sometimes sends lawyers or paralegals from the Voting Section, or from other sections, to oversee Election Day activities. These are called "monitors" and may be sent to jurisdictions that are not certified for examiners or observers. However, they do not have all of the authority of federal observers. For example, they do not have the right to be inside polling places without consent of the jurisdiction.

[202] Anita Earls, Southern Regional transcript, 229-30, Appendix 1A.

[203] In the words of a former Department of Justice official with extensive experience in Section 5 enforcement: "Of course observers are not sent out willy-nilly but are sent out after the Department identifies potential problems on Election Day and they're a way to try to prevent those problems from occurring, to try to have people on the ground should problems occur." He went on to point out "there has been a close connection between observer activity . . . and subsequent lawsuits and enforcement actions and work under [Section] 203. . . . [I]f you take it [the sending of federal observers] as a whole, I think it is a clear indication of the presence of problems." Mark Posner, Mid-Atlantic Regional Transcript, 202, Appendix 9A.

[204] There is no map for Virginia, the sixth state, because there were no observer coverages during this period.

[205] Weinberg, *op. cit.*, 4.

[206] Hon. Bobby Singleton, Southern Regional transcript, 186-8. Appendix 1A.

[207] *Ibid.*, 189.

[208] *Ibid.*, 190-91.

[209] Carlos Zayas, Northeast Regional Hearing transcript, 176-84, Appendix 3A; *United States* v. *Berks County*, 277 F. Supp. 2d 570 (E.D. Pa. 2003).

[210] *Ibid.* at 574.

[211] *Ibid.* at 575-76.

[212] The jurisdictions for which the Voting Section produced observer reports were Alameda County, CA (4 elections); San Benito, CA (1 election); East Chicago, IN (3 elections); Hamtramck, MI (6 elections); Sandoval County, NM (5 elections); Suffolk County, NY (2 elections); Reading, PA (3 elections); Buffalo County, SD (1 election).

[213] Office of Personnel Management Observer Report, Berks County, Reading, PA, 2nd Ward, 1st Precinct (Senior Center), 4 Nov. 2003.

[214] Office of Personnel Management Observer Report, Berks County, Reading, PA, 3rd Ward, 1st Precinct (Rhodes Apartments), 4 Nov. 2003.

[215] Office of Personnel Management Observer Report, Berks County, Reading, PA, 3rd Ward, 2nd Precinct (Southern Middle School), 27 Apr. 2004.

[216]Office of Personnel Management Observer Report, Berks County, Reading, PA, 9th Ward, 2nd Precinct (City Hall), 20 May 2003.

[217]See, for example, Office of Personnel Management Observer Report, Sandoval County, NM, Precincts 18, 21, and 22 (Cuba Independent School District), 22 Sept. 1987; Office of Personnel Management Observer Report, Alameda County, CA, Oakland Korean Church, 5 Nov. 1996; Office of Personnel Management Observer Report, Berks County, Reading, PA, 13th Ward, 2nd Precinct (St. Marks Church), 20 May 2003.

[218] See, for example, Office of Personnel Management Observer Report, Wayne County, Hamtramck, Precincts 10 (Recreation Center), 7 Nov. 2000; Berks County, Reading, PA, 6th Ward, 1st Precinct (Neversink Fire Station), 20 May 2003.

[219] Written Statement of Joseph D. Rich, Northeast Regional Hearing, 3, Appendix 31.
[220] *Ibid.*, 3.
[221] *Ibid.*, 5
[222] *Symm* v. *United States*, 439 U.S. 1105 (1979), *aff'g United States* v. *Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978). For an account of the Prairie View cases in the 1970s, see David Richards, *Once Upon A Time in Texas: A Liberal in the Lone Star State* (Austin, Texas: The University of Texas Press, 2002), Chapter 16.
[223] Information provided by John B. Strasburger (Houston, Texas), a lawyer representing the students. E-mail to the Commission 9 Jan. 2006.
[224] The number of Section 5 enforcement actions in which the Department of Justice was involved was calculated from the Department list, "Voting Section Cases in Which the United States' Participation Began Since October 1, 1976," 18 Oct. 2005, 5-7, 12, 14-16.
[225] The purpose of this effort is to identify as many Section 5 enforcement actions known to be successful, whether brought by the Department of Justice or private parties, in order to get as full a picture as possible of the reach of these suits. Because of the unique nature of such actions, there are different ways in which they may be successful. One is when a covered jurisdiction, after the action is filed, submits (either "voluntarily" or by court order) the voting change it previously refused to submit, even if the change is subsequently precleared. Another way is when the court enjoins implementation of the proposed change. A third way is when the jurisdiction, under a court order to do so, abandons or modifies the change after the lawsuit is brought. In any of these situations, a Section 5 action is defined as "successful." The cases were obtained from several sources: data bases and files of voting rights litigators; cases published in Lexis, cases noted on the Voting Section's list of cases, and docket information contained on the federal courts electronic file system known as PACER. As a check, a Freedom of Information Act request was made to the Voting Section for a Submission Tracking and Processing System report on every Section 5 submission involving a change in a method of election resulting from the suit. An attempt was made to rely on more than one source for information, although this was not always possible. As with the compilation of successful Section 2 cases described below, the list of Section 5 cases compiled using these methods is the most comprehensive one the Commission is aware of, but there are undoubtedly cases that are missing, especially those resolved in the early to mid-1980s, when many of the court dockets were not on PACER.
[226] 28 C.F.R. § 55.15.
[227] See, for example, the supplementary data entered into the record at various Commission hearings, contained in the appendices to this Report, especially Appendices 3, 4, and 6, which contain the transcripts and supplementary material of the hearings in the Northeast, Midwest, and Western Regional hearings.
[228] In the words of Tucker, "The surveyed jurisdictions include: all jurisdictions specifically identified by the Census Department under either Section 4(f)(4) or Section 203; all counties in the five states that are covered; all cities in covered jurisdictions that the 2000 Census reports as having 50,000 or more people; a handful of jurisdictions that no longer are covered as a result of the 2002 Census determinations; and the chief elections officer in each of the surveyed states." *Testimony of Dr. James Thomas Tucker . . . before the House Committee on the Judiciary, Subcommittee on the Constitution, Oversight Hearings on the Voting Rights Act: Section 203—Bilingual Election Requirements, part II*, 9 Nov. 2005, 5.

[229] *Ibid.*, 5.
[230] *Ibid.*, 4.
[231] *Ibid.*, 5. See Tucker's more expansive remarks on costs, *ibid.*, 4-6.
[232] *Ibid.*, 8.
[233] *Ibid.*, 10-13.
[234] *Ibid.*, 13.
[235] *Ibid.*, 15.
[236] See, for example, *ibid.*, 10.
[237] Jorge Sanchez, Midwest Regional transcript, 176-79, Appendix 4A.
[238] Lydia Guzman, Southwest Regional transcript, 157-64, Appendix 2A.
[239] Alberto Olivas, Southwest Regional transcript, 70-71, 85-86, Appendix 2A.
[240] Penny Pew, Southwest Regional transcript, 27-36, Appendix 2A.
[241] Shirlee Smith, Southwest Regional transcript, 155, Appendix 2A.
[242] See materials submitted to the National Commission on the Voting Rights Act, Western Regional Hearing, Appendix 8F, Exs. 1-38.
[243] Written Statement of Conny McCormack, Western Regional Hearing, 3, Appendix 8F.
[244] Conny McCormack, Western Regional Transcript, Appendix 8A.
[245] "Multilingual Voter Requests on File, as of 8/26/05," submitted to the National Commission on the Voting Rights Act, Western Regional Hearing, Appendix 8F, Ex. 22.
[246] Written Statement of Conny McCormack, Western Regional Hearing, 4, Appendix 8F, 24.
[247] Margaret Jurgensen, Mid-Atlantic Regional transcript, 127, Appendix 9A.
[248] *Ibid.*, 128.
[249] *Ibid.*, 132-33.
[250] *Ibid.*, 132-34.
[251] *Ibid.*, 134-35.
[252] Rogene Calvert, Southwest Regional transcript, 196-202, Appendix 2A.
[253] Lisa Falkenberg, "Heflin likes his odds in the House," *Houston Chronicle*, 16 Dec. 2005, B1.
[254] Victor Landa, Southern Regional transcript, 143-45, Appendix 2A.
[255] Adam Andrews, Southwest Regional transcript, 192-96, Appendix 2A.
[256] Written Statement of Eugene Lee, Western Regional Hearing, 3, Appendix 8E.
[257] *Ibid.*, 4.
[258] The number of language-assistance enforcement actions in which the Department of Justice was involved was calculated from the Department list, "Voting Section Cases in Which the United States' Participation Began Since October 1, 1976," 18 Oct. 2005, 7-9. There have been very few private language-assistance enforcement actions since 1982.
[259] Interview with Joseph Rich, former Chief of the Voting Section, 13 Jan. 2006.
[260] The period 2001-04 is the exception. Data for 2005 were not available with regard to all the variables for which trends were charted. The missing data would only affect the lines in the graphs if there were a very large rise in various enforcement activities in 2005, which does not seem to be true.
[261] William R. Yeomans, "An Uncivil Division," Legal Affairs. See http://www.legalaffairs.org/printerfriendly.msp?id=878 (last visited 24 Oct. 2005); the Department of Justice has denied these allegations. Ari Shapiro, "Career Lawyers Leaving Justice Department," Nation Public Radio Morning Edition, 6 Oct. 2005. See http://www.npr.org/templates/story/story.php?storyId=4946744 (last visited 6 Oct. 2005). In less than six months, according to another line attorney

who resigned, the Chief, Deputy Chief, and eight lawyers in the Voting Section—"approximately 1/3 of the entire section"—left it. He called it "unprecedented . . . as I understand it . . ." E-mail message of David J. Becker to the election law blog of Professor Rick Hasen, owner-election-law_gl@majordomo.lls.edu (10 Oct. 2005).

[262] 528 U.S. 320 (2000).

[263] *Bossier Parish School Bd.* v. *Reno*, 907 F. Supp. 434, 438 n.4 (D.D.C. 1995).

[264] For a detailed treatment of *Bossier Parish II* and its effects on the Department of Justice enforcement of the Act, see Peyton McCrary, Christopher Seaman, and Richard Valelly, "The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act," *Michigan Journal of Race and Law* 11 (Spring 2006), forthcoming.

[265] Mark Posner, Mid-Atlantic Regional transcript, 145, Appendix 9A.

[266] Brenda Wright, Managing Attorney, National Voting Rights Institute. Document submitted to the National Commission on the Voting Rights Act, e-mail, 5 Oct. 2005.

[267] McCrary *et al.*, *op. cit.*, 99-102.

[268] Ellen Katz, *et al.*, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982* (December 2005), 7. http://www.votingreport.org (last visited 17 Jan. 2006). Reprinted in *University of Michigan Journal of Law Reform* 39 (forthcoming 2006).

[269] *Senate Report, op. cit.*, 28-29. Two other factors were mentioned by the Senate Report as having "probative value" in deciding a Section 2 case: 1) Whether "there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group"; and whether there is a "tenuous" justification for the policy behind the challenged arrangements. *Ibid.*, 29. These are sometimes referred to as the additional Senate factors.

[270] Katz *et al.*, *op. cit.*, 8.

[271] For a summary of the progress made in attacking minority vote dilution in southern cities between 1965 and 1990, often through Section 2 lawsuits, see Bernard Grofman and Chandler Davidson, "The Effect of Municipal Election Structure on Black Representation in Eight Southern States," in Davidson and Grofman, *Quiet Revolution, op. cit.*, 302-34. For an account of progress in southern legislatures and congressional delegations during the same period, see Lisa Handley and Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations," in Davidson and Grofman, *Quiet Revolution, op. cit.*, 335-50.

[272] Ellen Katz and the Voting Rights Initiative, Voting Rights Initiative Database, http://www.votingreport.org (last visited 16 Jan. 2006). "Reported cases" were defined as those available through a search of the Westlaw and LexisNexis legal research data bases.

[273] Katz *et al.*, *op. cit.*, 8-9.

[274] *Ibid.*, 8, 52 n.42.

[275] *Ibid .*, 9.

[276] *Ibid.*

[277] *Ibid.*, 15.

[278] *Ibid.*, 8.

[279] The cases in question targeted jurisdictions covered by Section 5 that would not redistrict in compliance with Section 5. In some cases, the jurisdictions would adopt a plan that was not precleared and would then refuse to remedy the defects; in other instances, the jurisdictions would refuse to redistrict at all. In either event,

these jurisdictions would try to evade acknowledging minority voter concentration by simply keeping their old plans, and because no change was involved, the Department had no legal basis under Section 5 for objecting. Minority plaintiffs attacked such refusal to redistrict on the grounds that, as time had passed since the last redistricting, and population inequalities had grown among the districts, the outdated plans violated the Constitution's one-person, one-vote principle. Some of these cases also stated a Section 2 claim, but were primarily one-person, one-vote actions where jurisdictions were sued in order to compel them to conduct a post-census redistricting. There were several of these cases, particularly during the early 1990s, in Alabama, Georgia, Louisiana, Mississippi, and Texas. No matter how these suits are characterized, however, they attacked discrimination against minority voters.

[280] The definition of a "successful" Section 2 case—one resolved favorably to minority voters—is one in which a Section 2 claim or a claim of intentional vote dilution played a significant role in leading to a voting change that benefited the minority group or groups whom the case was designed to benefit. Successful cases include those where the plaintiffs prevailed at trial or a hearing; where the parties settled the matter regardless of whether the settlement was entered into the court record as a consent decree; where the court granted preliminary relief for plaintiffs and the parties settled; or where a voter referendum approving a change was passed after the lawsuit was filed. In some cases—particularly those involving redistricting—Section 2 was one of several claims (other typical claims being one-person, one vote claims and Section 5 enforcement claims). Where such cases were settled, an effort was made to determine, on a case-by-case basis, whether the Section 2 claim played a significant role in the settlement. If it did not, it was not included in the data base.

Cases were derived from a number of sources: data bases and files of voting rights litigators; cases published in Lexis; cases cited in the tables in *Quiet Revolution in the South* (Davidson and Grofman, *op. cit.)*; and docket information contained on the federal courts' electronic file system. As a check, a search was made in the Department of Justice data base known as Submission Tracking and Processing System, which reports every Section 5 submission involving a change in a method of election. This data base was obtained from the Voting Section through a Freedom of Information Act request. Efforts were made to rely on more than one source of information where possible.

Although the cases thus compiled are the most comprehensive list of Section 2 cases in fully covered states and North Carolina that the Commission knows of, the list is not comprehensive. There were probably a good many cases in the early and middle 1980s, when many of the court dockets were not listed on PACER. Further research to complete the list would be a welcome addition to the literature on the Voting Rights Act.

[281] 593 F. Supp. 128 (M.D. Ala. 1984).

[282] See *Harris* v. *Seligman*, 700 F. Supp. 1083 (M.D. Ala. 1988).

[283] The Katz number is derived from the Voting Rights Initiative's master list of suits, available on its Web site. See Voting Rights Initiative Database, *op. cit.*

[284] As discussed above in Chapter 5, this area has had a significant number of Section 5 objections, however.

[285] Richard Engstrom, Southern Regional transcript, 124, Appendix 1A.

[286] *Ibid.*, 125.

[287] *Ibid.*, 128-37.

[288] Hon. Melvin Watt, Mid-Atlantic Regional transcript, 38, Appendix 9A.

[289] Hirsch, Mid-Atlantic Regional transcript, 51-53, Appendix 9A.
[290] *Ibid.*, 57.
[291] *Ibid.*, 58-61.
[292] Brad Brown, Florida transcript, 118-24, Appendix 6A.
[293] *Colleton County Council* v. *McConnell*, 201 F. Supp. 2d 618, 641 (D.S.C. 2002).
[294] Meredith Bell Platts, Florida transcript, 106-8, Appendix 6A.
[295] Hon. R.K. Butterworth, Florida transcript, 45-47, Appendix 6A.
[296] Dan McCool, South Dakota transcript, 31-32, Appendix 6A.
[297] Robert McDuff, Mississippi transcript, 29, Appendix 10A.
[298] *Ibid.*, 29-30.
[299] Mississippi Supreme Court justices are not elected statewide, but from three three-member districts.
[300] Carlton Reeves, Mississippi transcript, 117-19, Appendix 10A.
[301] Written Statement of Joaquin G. Avila, Western Regional Hearing, 2, Appendix 8B.
[302] *Garza* v. *County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal. 1990), aff'd, 918 F.2d 763 (9th Cir.), *cert. denied*, 498 U.S. 1028 (1991).
[303] Morgan Kousser, Western Regional transcript, 52-54, Appendix 8A. For an account of Latino vote dilution in the Monterey county supervisor districts, see J. Morgan Kousser, "Tacking, Stacking, and Cracking: Race and Reapportionment in Monterey County, 1981-1992: A Report for *Gonzalez* v. *Monterey County Board of Supervisors*" (Rev. version 1992); and J. Morgan Kousser, "Racial Injustice and the Abolition of Justice Courts in Monterey County" (9 Sept. 2000), submitted to the National Commission on the Voting Rights Act, Western Regional Hearing, Appendix 8C, Ex. 1.
[304] Morgan Kousser, Western Regional transcript, Appendix 8A, 75-77.
[305] Bernard Grofman, "Would Vince Lombardi Have Been Right If He Had Said: 'When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing'?," *Cardozo Law Review* 14 (Apr. 1993), 1242-43. The article referred to is James W. Loewen, "Racial Bloc Voting and Political Mobilization in South Carolina," *The Review of Black Political Economy* 19 (1990), 23-37.
[306] David Bositis, "Impact of the 'Core' Voting Rights Act on Voting and Officeholding," in Richard M. Valelly (ed.), *The Voting Rights Act: Securing the Ballot* (Washington, D.C.: CQ Press, 2006), 119.
[307] Bernard Grofman, Lisa Handley, and David Lublin, "Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence," *North Carolina Law Review* 79 (June 2001), 1383-1430.
[308] Not all cases were Section 2 cases, nor did minority plaintiffs prevail in all. But judges found racially polarized voting in each. To compile this case list, a Commission staff member conducted a Lexis search of federal cases involving state districting plans and then added to the list unpublished statewide redistricting decisions the staff member knew about. The cases finding polarized voting are as follows: **Arkansas**: *Jeffers* v. *Clinton*, 730 F. Supp. 196, 208, 215-16 (E.D. Ark. 1990), *aff'd*, 498 U.S. 1019 (1991) ; *Smith* v. *Clinton*, 687 F. Supp. 1310, 1317 (E.D. Ark. 1987), *aff'd*, 488 U.S. 988 (1988); **Colorado**: *Sanchez* v. *Colorado*, 97 F.3d 1303, 1321-22 (10th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997); **Florida**: *Martinez* v. *Bush*, 234 F. Supp. 2d 1275, 1298-99 (D. Fla. 2002); *DeGrandy* v. *Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992), *aff'd in part and rev'd in part on other grounds sub nom. Johnson* v. *DeGrandy*, 512 U.S. 997, 1079 (1994); **Georgia**: *Georgia* v. *Ashcroft*, 195 F. Supp. 2d 25, 31, 94 (D.D.C. 2002), *vacated on other grounds by* 539 U.S. 461 (2003); **Louisiana**: *Hays* v. *Louisiana*, 936 F. Supp. 360,

365 (W.D. La. 1996); *Major* v. *Treen*, 574 F. Supp. 325, 351-52 (E.D. La. 1983): *Chisom* v. *Edwards*, 690 F. Supp. 1524, 1533 (E.D. La. 1988), *vacated by Chisom* v. *Roemer*, 853 F.2d 1186 (5th Cir. 1988), *appellate decision reversed and remanded by* 501 U.S. 380 (1991); *Clark* v. *Roemer*, 777 F. Supp. 445, 453-65 (M.D. La. 1990), *vacated on other grounds by* 501 U.S. 1246 (1991); **Maryland**: *Marylanders For Fair Representation* v. *Schaefer*, 849 F. Supp. 1022, 1060 (D. Md. 1994); **Massachusetts**: *Black Political Task Force* v. *Galvin*, 300 F. Supp. 2d 292, 310 (D. Mass. 2004); **Mississippi**: *Jordan* v. *Winter*, 604 F. Supp. 807, 812-13 (N.D. Miss. 1984), *aff'd sub nom. Mississippi Republican Executive Committee* v. *Brooks*, 469 U.S. 1002 (1984); *Martin* v. *Allain*, 658 F. Supp. 1183, 1193-94 (S.D. Miss. 1987); **Montana**: *Old Person* v. *Cooney*, 230 F.3d 1113, 1123 (9th Cir. 2000); **New Mexico**: *Sanchez* v. *King*, No. 82-0067-M, 24 (D. N.M. August 8, 1984); **North Carolina**: *Thornburg* v. *Gingles*, 478 U.S. 30, 80 (1986); **Ohio**: *Armour* v. *State of Ohio*, 775 F. Supp. 1044, 1060-61 (N.D. Ohio 1991) ; **South Carolina**: *Colleton County Council* v. *McConnell*, 201 F. Supp. 2d 618, 641, 656 (D.S.C. 2002); **South Dakota**: *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1036 (D.S.D 2004); **Tennessee**: *Rural West Tennessee African American Affairs Council* v. *Sundquist*, 209 F.3d 835, 841 (6th Cir. 2000), *cert. denied*, 531 U.S. 944 (2000); *Affairs Council* v. *McWherter*, 836 F. Supp. 453, 459-60 (W.D. Tenn. 1993), *vacated and remanded on other grounds*, 512 U.S. 1248 (1994); **Texas**: *Session* v. *Perry*, 298 F. Supp. 2d 451, 492-93 (E.D. Tex. 2004), *vacated and remanded on other grounds sub nom. Jackson* v. *Perry*, 125 S. Ct. 351 (2004).

[309] *DeGrandy* v. *Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992), *aff'd in part and rev'd in part on other* grounds *sub nom. Johnson* v. *DeGrandy*, 512 U.S. 997, 1079 (1994).

[310] *Colleton County Council*, 201 F. Supp. 2d at 641.

[311] *Major* v. *Treen*, 574 F. Supp. 325, 351-52 (E.D. La. 1983).

[312] *Marylanders For Fair Representation* v. *Schaefer*, 849 F. Supp. 1022, 1060 (D. Md. 1994).

[313] *Black Political Task Force* v. *Galvin*, 300 F. Supp. 2d 292, 310 (D. Mass. 2004).

[314] *Session* v. *Perry*, 298 F. Supp. 2d 451, 492 (E.D. Tex. 2004), *vacated and remanded on other grounds*, *Jackson* v. *Perry*, 125 S. Ct. 351 (2004).

[315] *Bone Shirt* v. *Hazeltine*, 336 F. Supp. 2d 976, 1036 (D.S.D. 2004).

[316] Katz, *et al.*, *op. cit.*

[317] E-mail to Commission containing the 91-case data base from one of the authors of the VRI report, Emma Cheuse, 10 Dec. 2005.

[318] As noted above, however, self-reported voter turnout probably understates the racial gap.

[319] The narrowing of the black-white turnout gap should not obscure the fact that blacks continue to vote at a lower rate for a number of structural reasons—including felon disfranchisement laws—enumerated by David Bositis, "Impact of the 'Core' Voting Rights Act on Voting and Officeholding," *op. cit.*, 114.

[320] The data for withdrawals obtained from the Department of Justice are only through 2003. The data for objections are through 2004—626 altogether. Three objections occurred in 2004.

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TABLE 1
BEOS IN OFFICE, 2000,
BY SELECTED TYPES OF JURISDICTION

Type of Office	Number of Elective Officeholders, All Races	BEOs (Number)	BEOs %	Median % White[a] VAP In Districts With BEOs
		Statewide Constituencies		
President	1	(0)	0	n/a
Vice President	1	(0)	0	n/a
U.S. Senator	100	(0)	0	n/a
Governor	50	(1)	2	65
Lt. Governor	50	(2)	4	84
State officials elected statewide[b]	733[c]	(35)	5	73
		Single-member District Constituencies		
U.S. Representative	435	(38)	9	31
State Senator[d, e]	1,528	(120)	8	33
State Representative[d, e]	3,568	(362)	10	31

[a]Non-Hispanic whites only.

[b]Excludes federal officials elected statewide, i.e., U.S. Representatives in Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming.

[c]In Maryland, Special Appeals Court judges are initially appointed by the governor, but must face a statewide at-large election after one year. In North Carolina, 82 Superior Court judges are appointed by the governor but must face a statewide election after one year. Total (733) pertains to the number of statewide elective offices in 1992, when a national census of these offices was taken.

[d]Demographic data for this row are based only on those 40 states that submitted some or all of their 2000 demographic data to the U.S. Bureau of the Census, plus Texas, whose data were obtained from its state's Web site. See endnote 104 for a description of methodology.

[e]Nine of the districts from which BEOs were elected were multi-member districts, and are included in the database on which the table is based.

SOURCES: Joint Center for Political and Economic Studies (Washington, D.C.), unpublished data; individual state Web sites; *Census 2000 American FactFinder* at (http://factfinder.census.gov/home/saff/main.html?_lang=3n; U.S Bureau of the Census, *1992 Census of Governments*, vol. 1, no. 2, "Popularly Elected Officials," GC92 (1)-2, 1995; David A. Bositis, *Black Elected Officials: A Statistical Summary 2000* (Washington, D.C.: Joint Center for Political and Economic Studies, 2002), 22.

TABLE 2
RACIAL COMPOSITION OF DISTRICTS[a]
REPRESENTED BY BEOS, 2000

Type of Office	Composition of District VAP					
	Majority-White[b]		Majority-Minority[b]		Total	
	(N)	%	(N)	%	(N)	%
U.S. Representative	(3)	8	(35)	92	(38)	100
State Senator	(19)	16	(101)	84	(120)	100
State Representative	(65)	18	(297)	82	(362)	100

[a]See note "d" in Table 1 for a list of states whose legislative districts are not included in this table. Congressional data are for all 50 states.

[b]"White" is non-Hispanic white; "minority" is the remaining population in the district, including blacks.

SOURCES: Same as those for Table 1 above.

TABLE 3
RACIAL COMPOSITION OF DISTRICTS[a] REPRESENTED BY HEOS, 2000

Type of Office	Composition of District VAP: Majority-White[b] (N)	%	Majority-Minority[b] (N)	%	Total (N)	%
U.S. Representative	(0)	0	(19)	100	(19)	100
State Senator	(12)	32	(26)	68	(38)	100
State Representative	(29)	26	(82)	74	(111)	100

[a]See note "d" in Table 1 for a list of states whose legislative districts are not included in this table. Congressional data are for all 50 states.

[b]"White" is non-Hispanic white; "minority" is the remaining population in the district, including blacks.

SOURCES: National Association of Latino Elected Officials (Los Angeles), unpublished data; individual state Web sites; U.S. Bureau of the Census, through Census 2000 American FactFinder (http://factfinder.census.gov/home/saff/main.html?_lang=3n).

TABLE 4

SUCCESSFUL SECTION 5 ENFORCEMENT ACTIONS, NINE STATES, JUNE 29, 1982-DECEMBER 31, 2004

State	Successful Section 5 Cases (N)
Texas	29
Alabama	22
Georgia	17
Mississippi	15
South Carolina	10
Louisiana	5
North Carolina	3
Arizona	3
Virginia	1
TOTAL	105

SOURCE: Data compiled by staff of the National Commission on the Voting Rights Act.

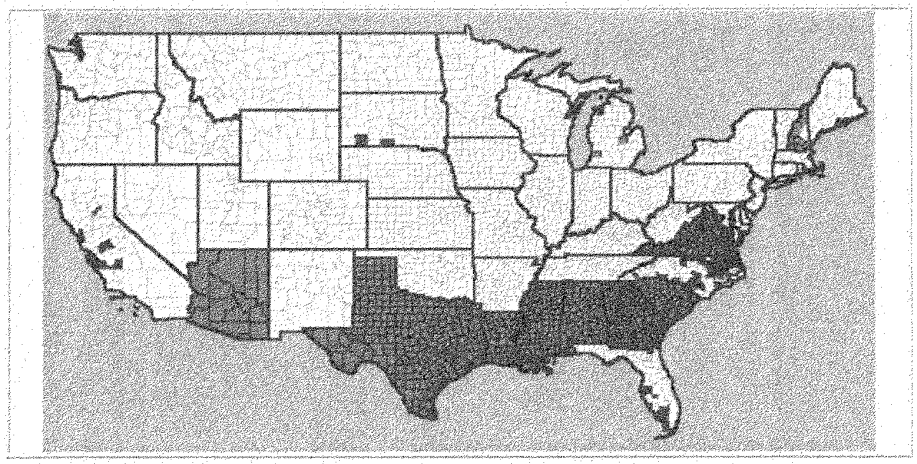
TABLE 5
SUCCESSFUL SECTION 2 CASES
AND THEIR EFFECTS ON COUNTIES,
NINE STATES, JUNE 29, 1982-DECEMBER 31, 2005

State	Reported Cases Only	All Cases, Reported & Unreported	County Voting Populations Affected
Alabama	12	192	275
Arizona	0	2	3
Georgia	3	69	76
Louisiana	10	17	14
Mississippi	18	67	74
North Carolina	9	52	56
South Carolina	3	33	36
Texas	7	206	274
Virginia	4	15	17
TOTAL	66	653	825

SOURCES: Reported cases from the Ellen D. Katz and the University of Michigan Voting Rights Initiative (provided by Emma Cheuse, e-mail to the Commission, 5 Jan. 2006); remaining information compiled by Commission staff.

MAP 1

Section 4(b) Covered Jurisdictions



Key: Covered Jurisdictions

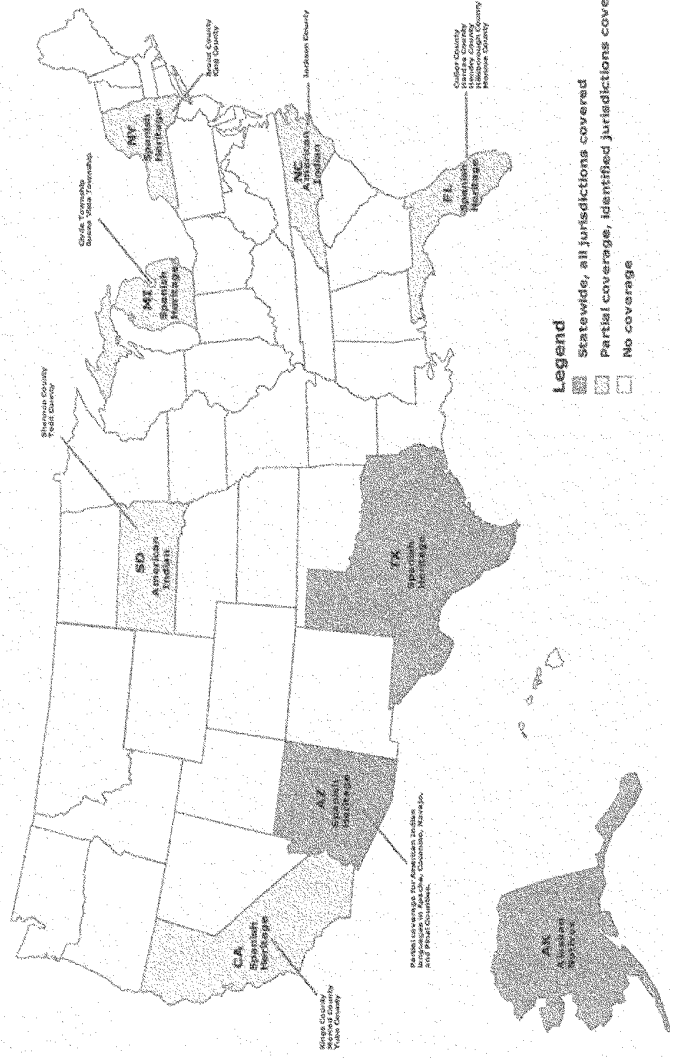
- *States Covered as a Whole*
- *Covered Counties in States Not Covered as a Whole*
- *Covered Townships in States Not Covered as a Whole*

The entire state of Alaska is also covered. No jurisdiction in Hawaii is covered

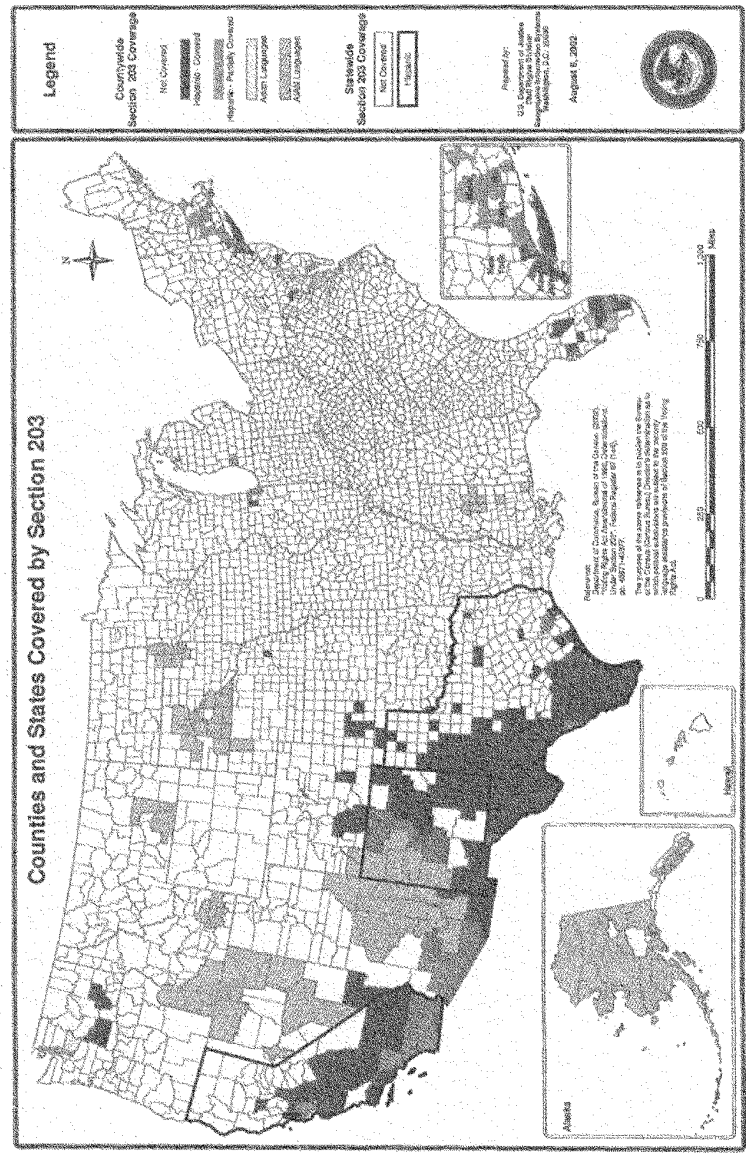
Map created by the United States Department of Justice based on coverage determinations made by 28 C.F.R. Part 51, Appendix

Map 2

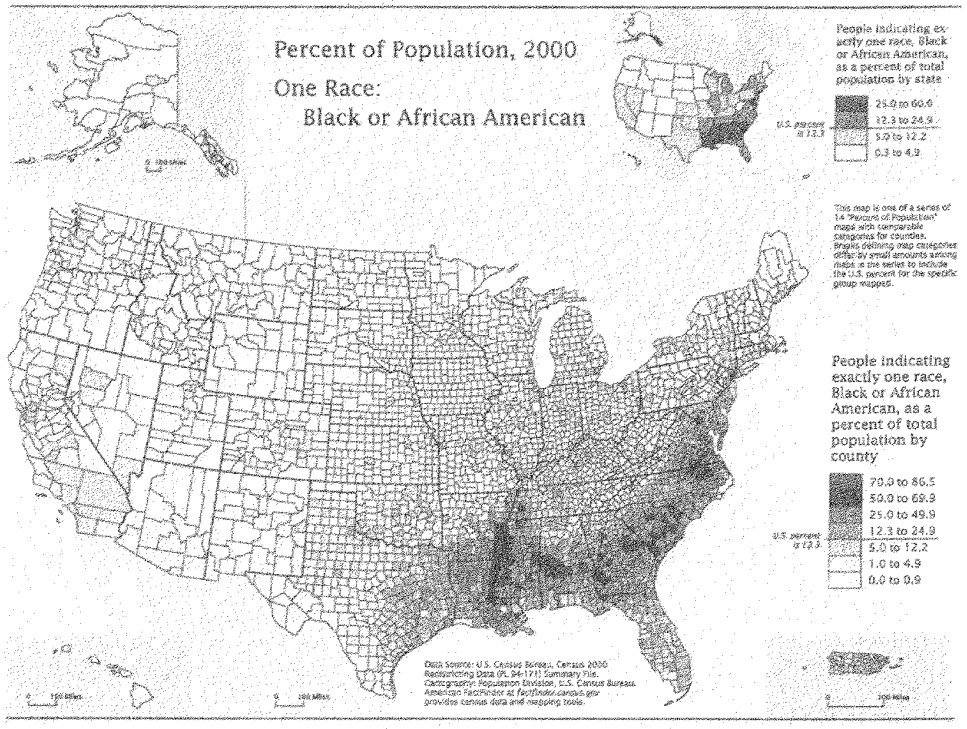
Jurisdictions Covered by Section 4(f)(4) of the Voting Rights Act, by State



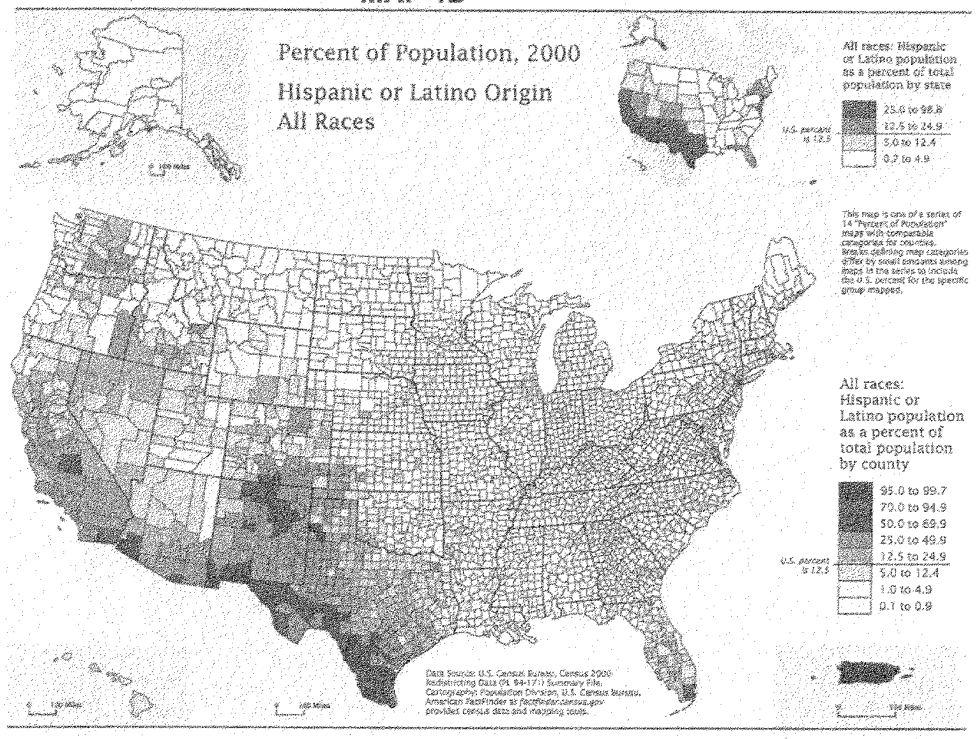
Map created by James T. Thicker based on coverage determinations contained at 28 C.F.R. Part 55, Appendix.


MAP 3
Counties and States Covered by Section 203
Legend
Countywide Section 203 Coverage
Not Covered
Hispanic Covered
Hispanic - Partially Covered
Asian Language
Alaskan Language
Statewide Section 203 Coverage
Not Covered
Hispanic
Prepared for:
U.S. Department of Justice
Civil Rights Division
Voting Section
Washington, D.C. 20035
August 6, 2002
Alaska
Hawaii

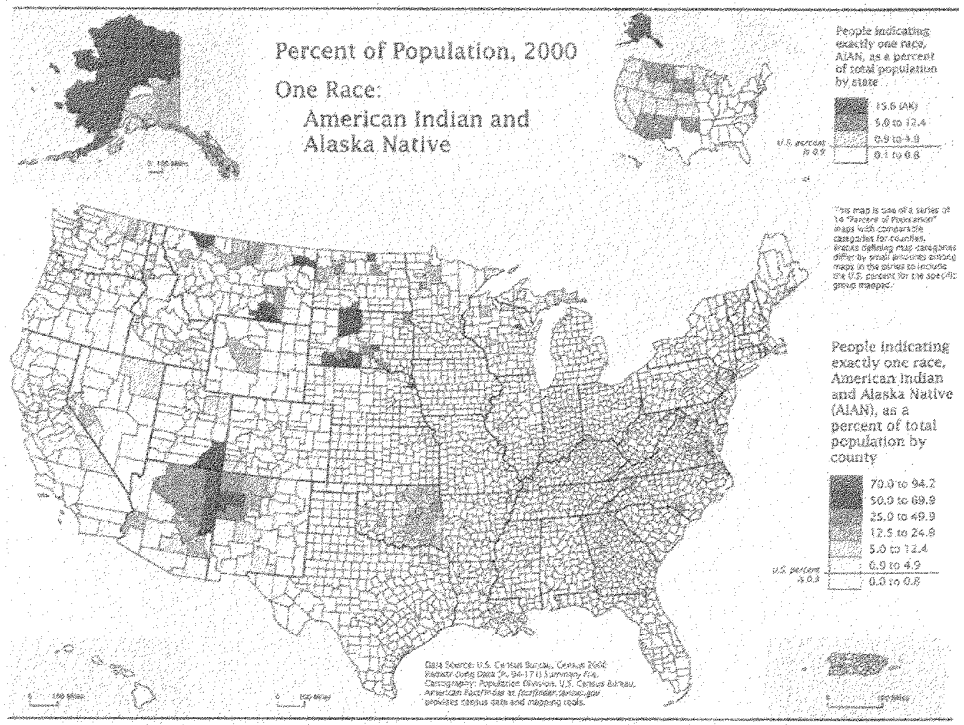
MAP 4A


Percent of Population, 2000
One Race:
Black or African American
People indicating exactly one race, Black or African American, as a percent of total population by state
25.0 to 60.6
12.3 to 24.9
5.0 to 12.2
0.3 to 4.9
U.S. percent is 12.3
This map is one of a series of 14 "Percent of Population" maps with comparable categories for counties. Breaks defining map categories differ by small amounts among maps in the series to include the U.S. percent for the specific group mapped.
People indicating exactly one race, Black or African American, as a percent of total population by county
70.0 to 86.5
50.0 to 69.9
25.0 to 49.9
12.3 to 24.9
5.0 to 12.2
1.0 to 4.9
0.0 to 0.9
U.S. percent is 12.3
Data Source: U.S. Census Bureau, Census 2000 Redistricting Data (P.L. 94-171) Summary File.
Cartographic Population Division, U.S. Census Bureau.
American FactFinder at factfinder.census.gov provides census data and mapping tools.

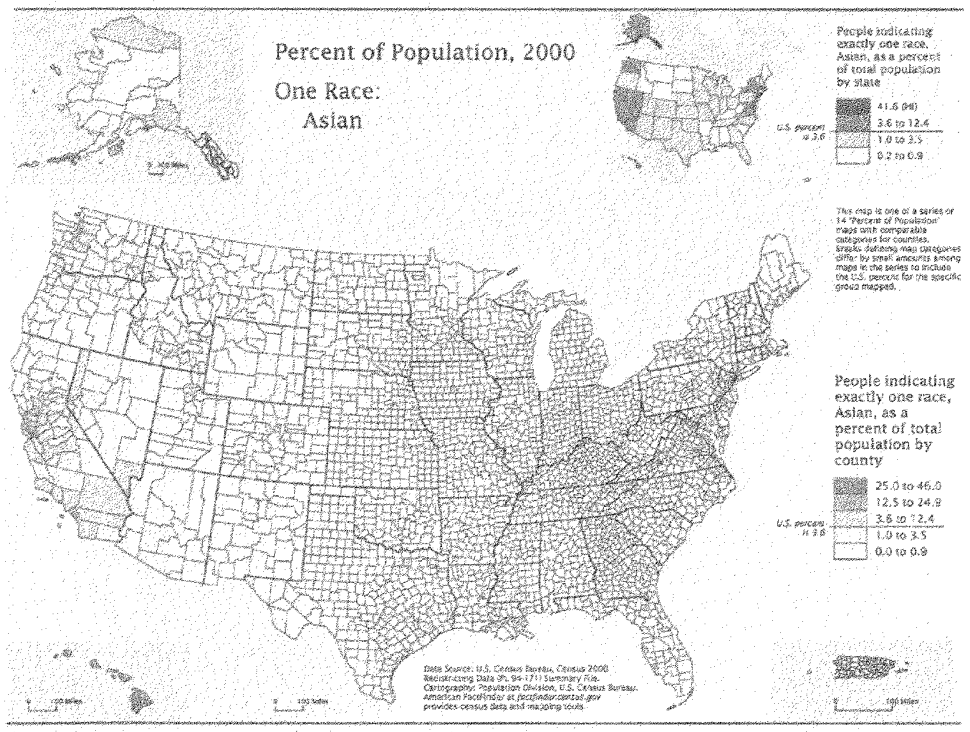
MAP 4B

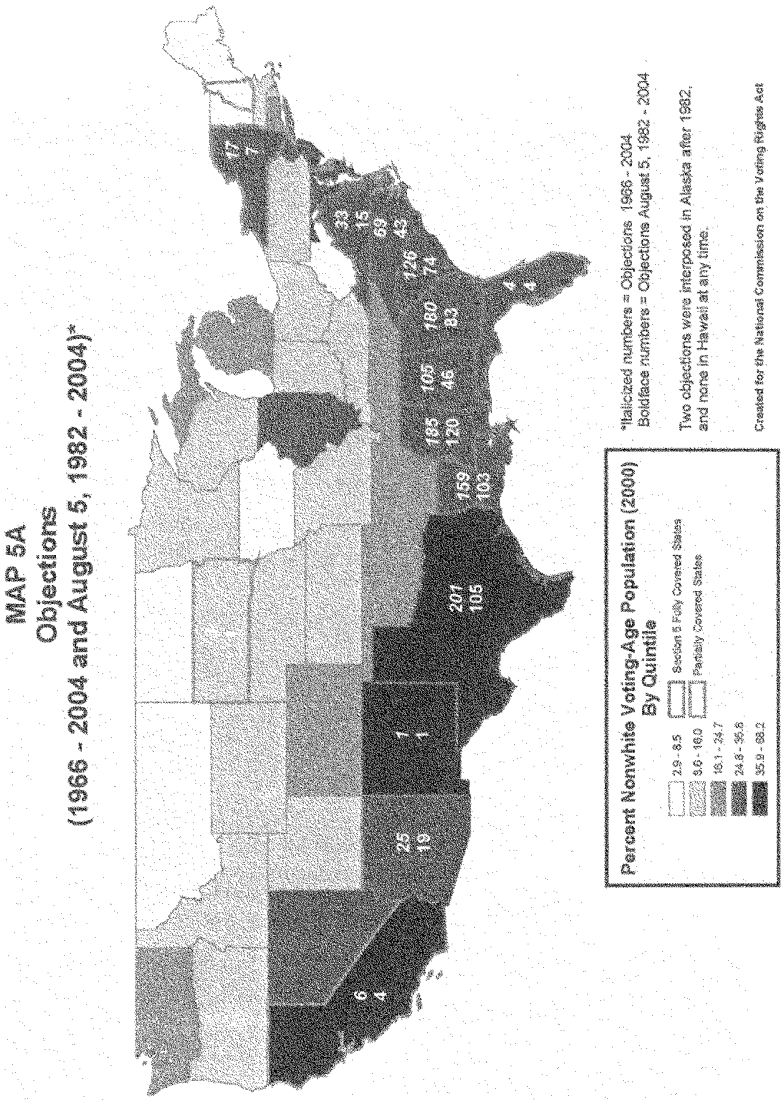

Percent of Population, 2000
Hispanic or Latino Origin
All Races
All races: Hispanic or Latino population as a percent of total population by state
25.0 to 98.8
12.5 to 24.9
5.0 to 12.4
0.2 to 4.9
U.S. percent is 12.5
This map is one of a series of 14 "Percent of Population" maps with comparable categories for counties. Breaks defining map categories differ by small amounts among maps in the series to include the U.S. percent for the specific group mapped.
All races: Hispanic or Latino population as a percent of total population by county
95.0 to 99.7
70.0 to 94.9
50.0 to 69.9
25.0 to 49.9
12.5 to 24.9
5.0 to 12.4
1.0 to 4.9
0.1 to 0.9
U.S. percent is 12.5
Data Source: U.S. Census Bureau, Census 2000 Redistricting Data (P.L. 94-171) Summary File.
Cartographer: Population Division, U.S. Census Bureau.
American FactFinder at factfinder.census.gov provides census data and mapping tools.

MAP 4C

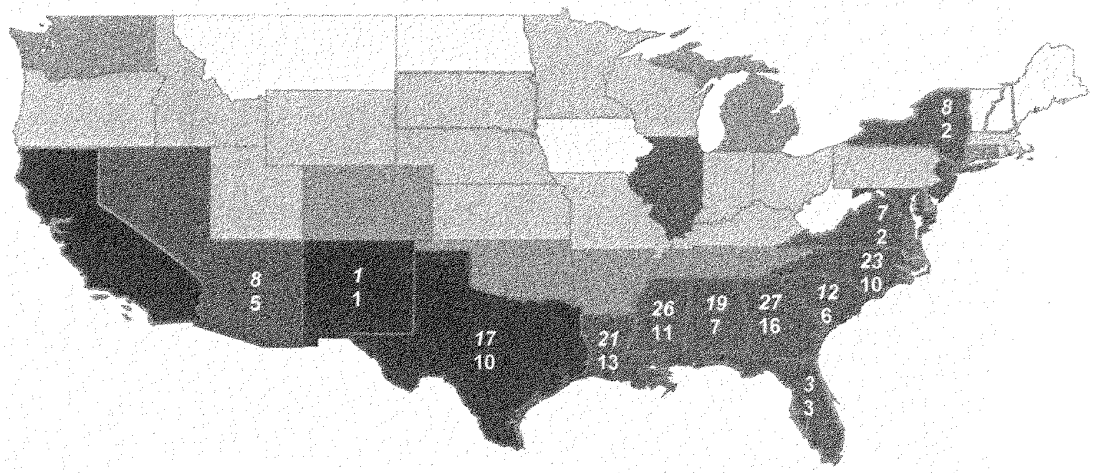

Percent of Population, 2000
One Race:
American Indian and Alaska Native
People indicating exactly one race, AIAN, as a percent of total population by state
15.6 (AK)
5.0 to 12.4
0.9 to 4.9
0.1 to 0.8
U.S. percent is 0.9
"This map is one of a series of 14 "Percent of Population" maps with consistent categories for counties. Breaks defining map categories differ by small amounts among maps in the series to include the U.S. percent for the specific group mapped."
People indicating exactly one race, American Indian and Alaska Native (AIAN), as a percent of total population by county
70.0 to 94.2
50.0 to 69.9
25.0 to 49.9
12.5 to 24.9
5.0 to 12.4
0.9 to 4.9
0.3 to 0.8
U.S. percent is 0.9
Data Source: U.S. Census Bureau, Census 2000 Redistricting Data (P.L. 94-171) Summary File
Cartography: Population Division, U.S. Census Bureau
American FactFinder is factfinder.census.gov
provides census data and mapping tools.

MAP 4D


Percent of Population, 2000
One Race:
Asian
People indicating exactly one race, Asian, as a percent of total population by state
41.6 (HI)
3.6 to 12.4
1.0 to 3.5
0.2 to 0.9
U.S. percent = 3.6
This map is one of a series of 14 "Percent of Population" maps with comparable categories for counties. Graphic distinctions may categories differ by small amounts among maps in the series to include the U.S. percent for the specific group mapped.
People indicating exactly one race, Asian, as a percent of total population by county
25.0 to 46.0
12.5 to 24.9
3.6 to 12.4
1.0 to 3.5
0.0 to 0.9
U.S. percent = 3.6
Data Source: U.S. Census Bureau, Census 2000 Redistricting Data (P. L. 94-171) Summary File.
Cartography: Population Division, U.S. Census Bureau.
American FactFinder at factfinder.census.gov provides census data and mapping tools.
0 100 Miles


MAP 5A
Objections
(1966 - 2004 and August 5, 1982 - 2004)*
6
4
25
19
1
1
201
105
159
103
185
120
105
46
180
83
126
74
69
43
33
15
17
7
1
1
Percent Nonwhite Voting-Age Population (2000)
By Quintile
2.9 - 8.5
9.6 - 16.0
16.1 - 24.7
24.8 - 35.8
35.9 - 88.2
Section 5 Fully Covered States
Partially Covered States
*Italicized numbers = Objections 1966 - 2004
Boldface numbers = Objections August 5, 1982 - 2004
Two objections were interposed in Alaska after 1982,
and none in Hawaii at any time.
Created for the National Commission on the Voting Rights Act

MAP 5B
Statewide Objections Only
(1966 - 2004 and August 5, 1982 - 2004)*



Percent Nonwhite Voting-Age Population (2000) By Quintile

- 0.0 - 8.5
- 8.6 - 16.0
- 16.1 - 24.7
- 24.8 - 35.8
- 35.9 - 88.2

Section 5 Fully Covered States

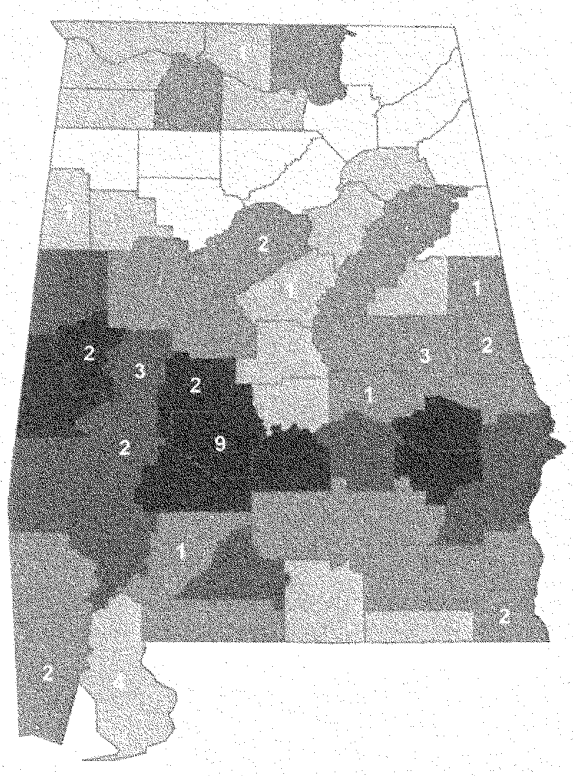
Partially Covered States

*Italicized numbers = Objections 1966 - 2004
Boldface numbers = Objections August 5, 1982 - 2004

Two objections were interposed in Alaska after 1982, and none in Hawaii at any time.

Created for the National Commission on the Voting Rights Act

MAP 5C
Objections by County: Alabama
(August 5, 1982 - 2004)

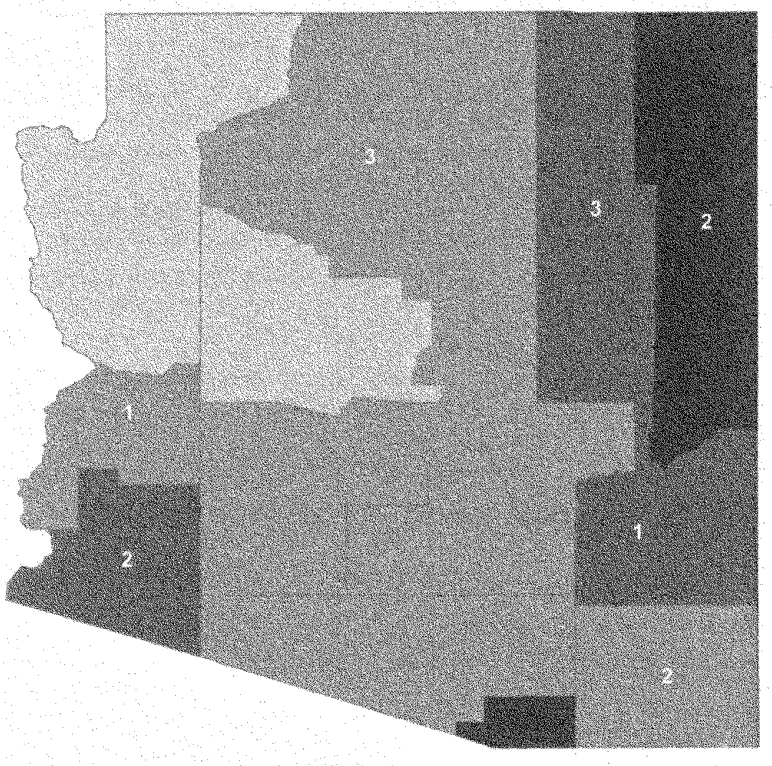


Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.1
- 40.1 - 60.0
- 60.1 - 100.0

Created for the National Commission on the Voting Rights Act

MAP 5D
Objections by County: Arizona
(August 5, 1982 - 2004)

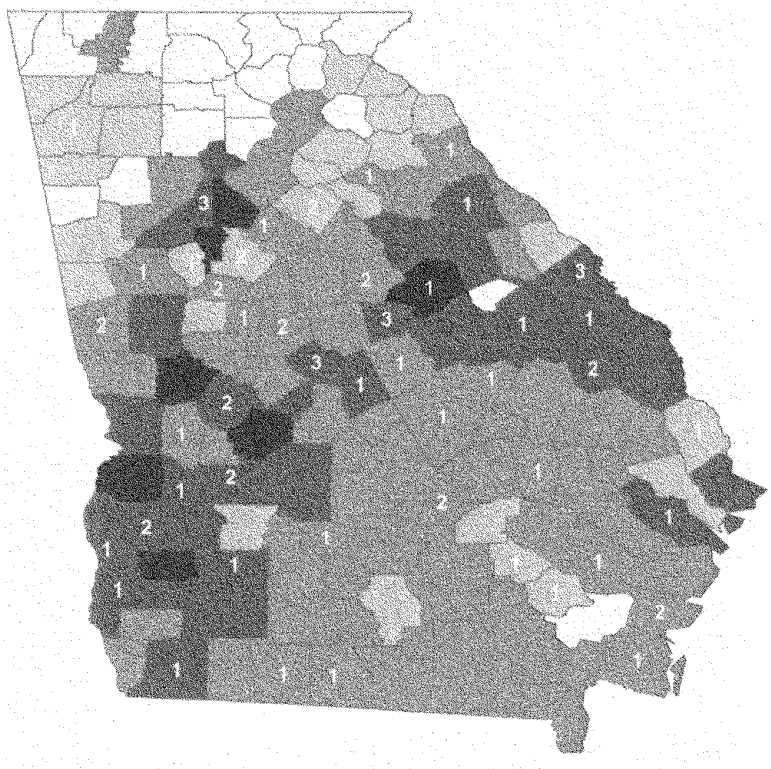


Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

Created for the National Commission on the Voting Rights Act

MAP 5E
Objections by County: Georgia
(August 5, 1982 - 2004)

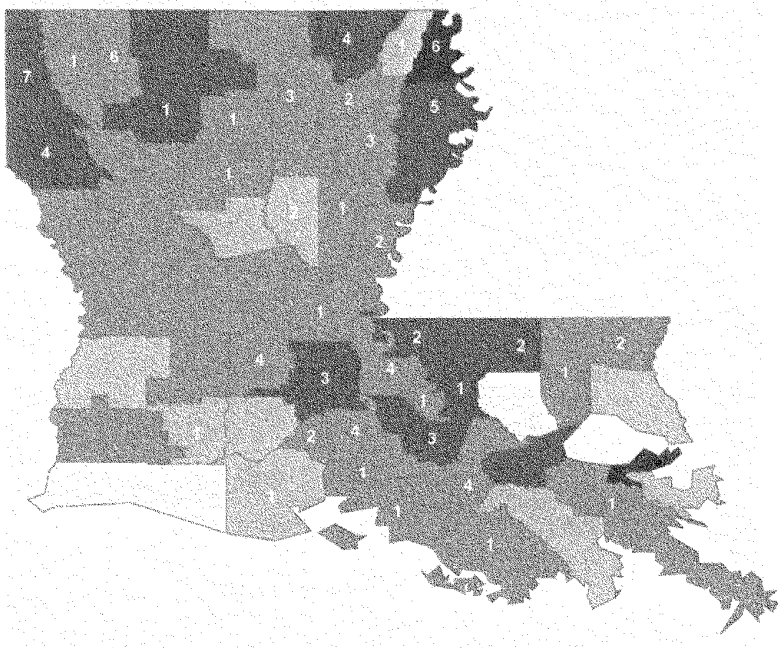


Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

Created for the National Commission on the Voting Rights Act

MAP 5F
Objections by Parish: Louisiana
(August 5, 1982 - 2004)

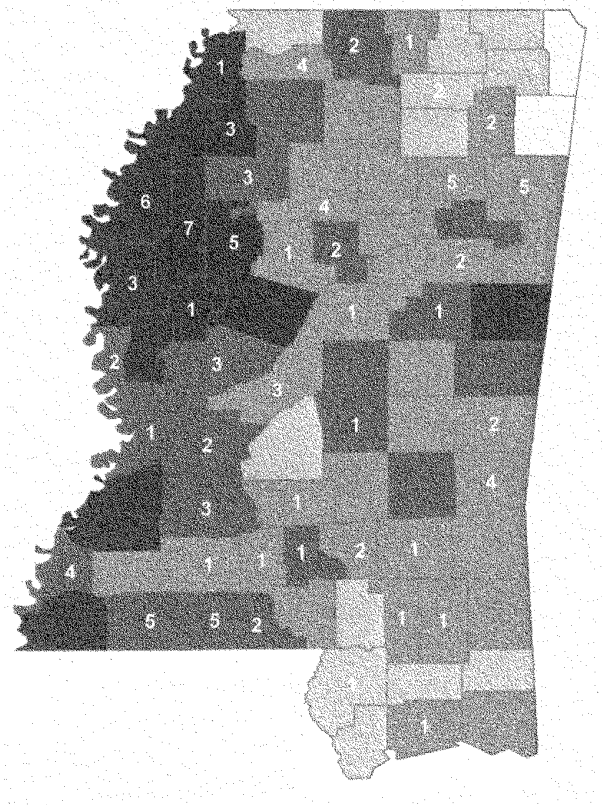


Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

Created for the National Commission on the Voting Rights Act

MAP 5G
Objections by County: Mississippi
(August 5, 1982 - 2004)

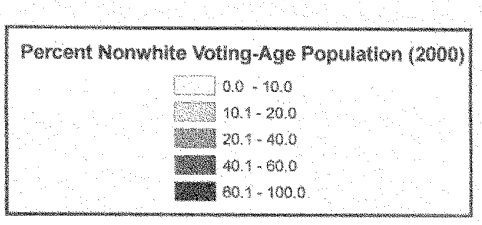


Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

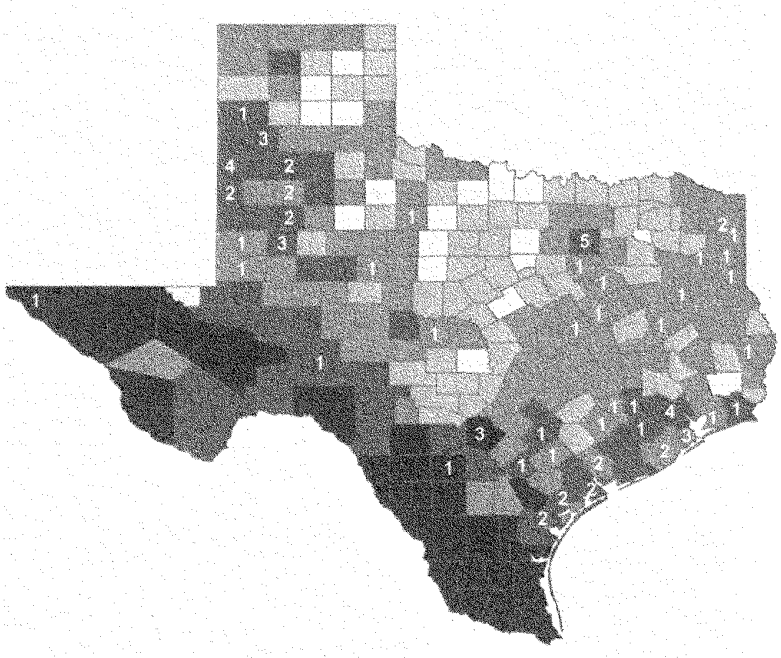
Created for the National Commission on the Voting Rights Act

MAP 5H
Objections by County: South Carolina
(August 5, 1982 - 2004)



Created for the National Commission on the Voting Rights Act

MAP 5I
Objections by County: Texas
(August 5, 1982 - 2004)



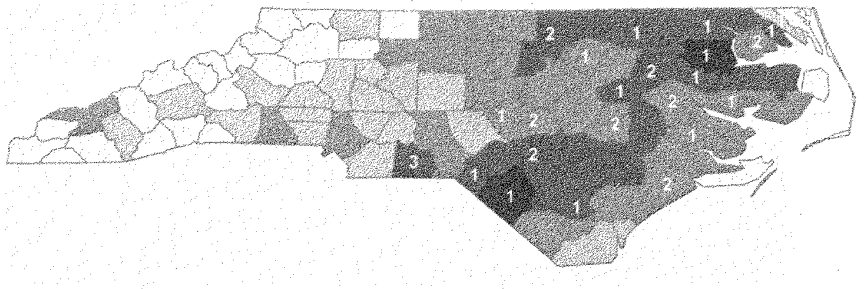
Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

Created for the National Commission on the Voting Rights Act

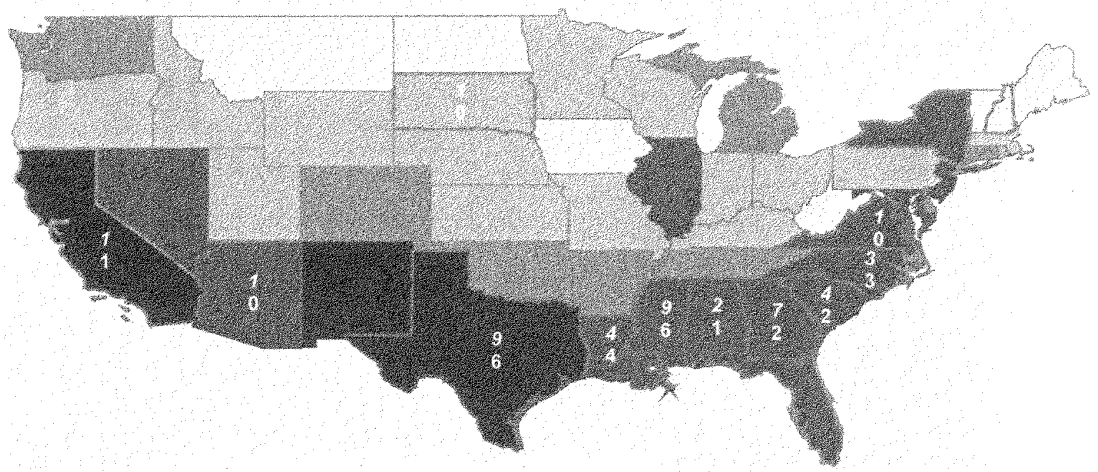
MAP 5J
Objections by County: Virginia
(August 5, 1982 - 2004)
Percent Nonwhite Voting-Age Population (2000)
0.0 - 10.0
10.1 - 20.0
20.1 - 40.0
40.1 - 60.0
60.1 - 100.0
Created for the National Commission on the Voting Rights Act

MAP 5K
Objections by County: North Carolina
(August 5, 1982- 2004)



Created for the National Commission on the Voting Rights Act

MAP 6
Declaratory Judgment Actions Favorable to Minorities
(1966 - 2004 and August 5, 1982 - 2004)*



Percent Nonwhite Voting-Age Population (2000) By Quintile

- 0.0 - 8.5
- 8.6 - 16.0
- 16.1 - 24.7
- 24.8 - 35.8
- 35.9 - 58.2

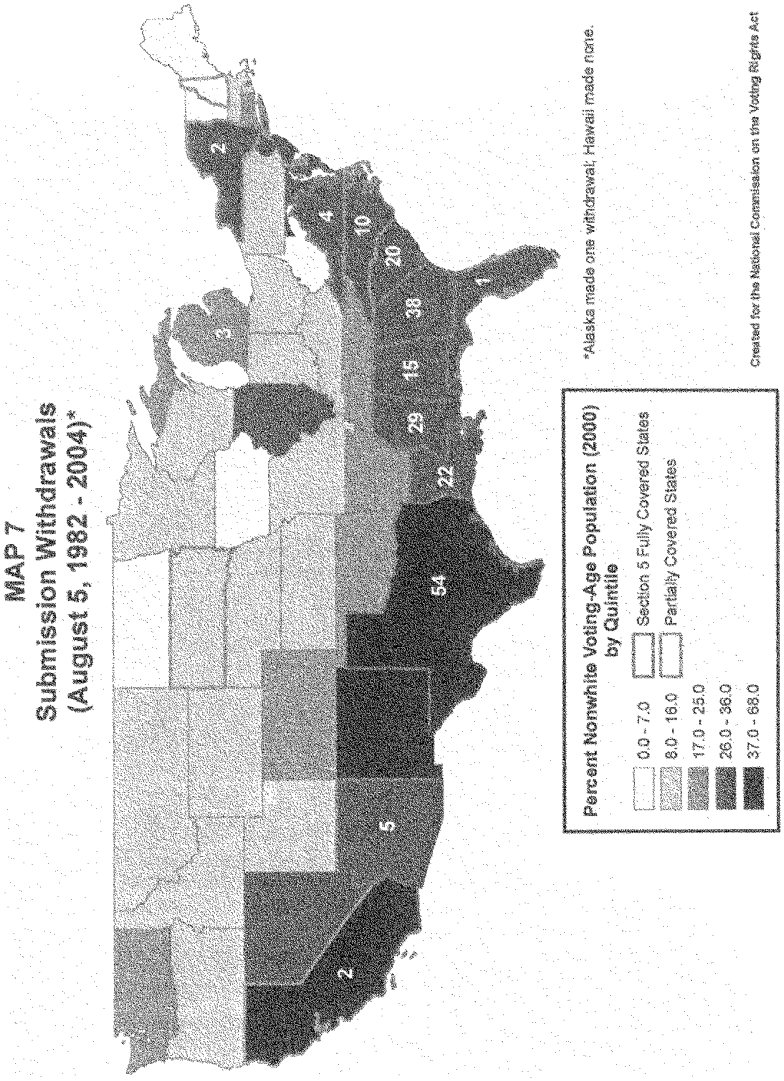
Section 5 Fully Covered States

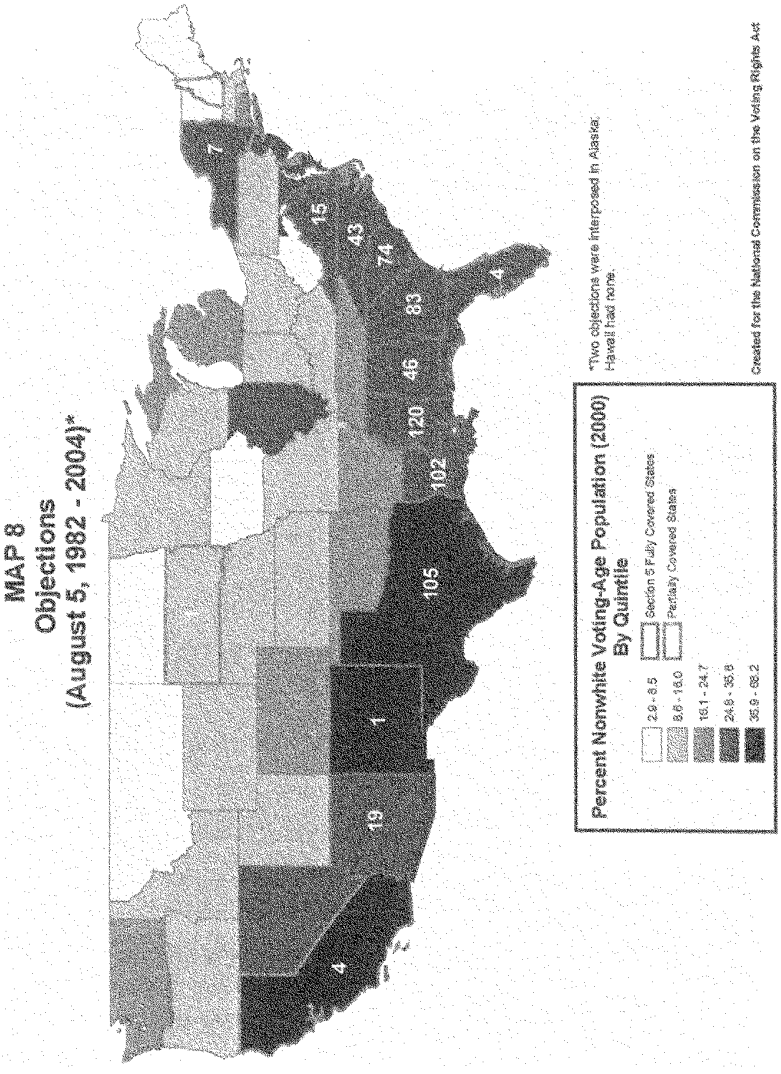
Partially Covered States

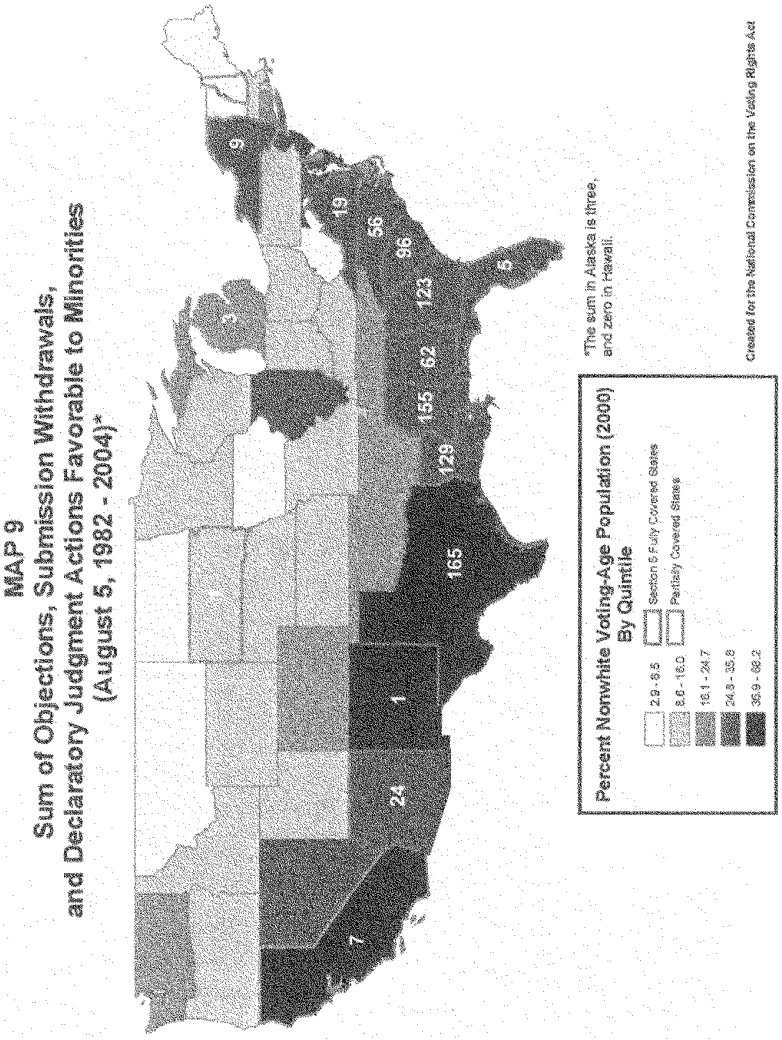
*Italicized numbers = Actions 1966 - 2004
Boldface numbers = Actions August 5, 1982 - 2004

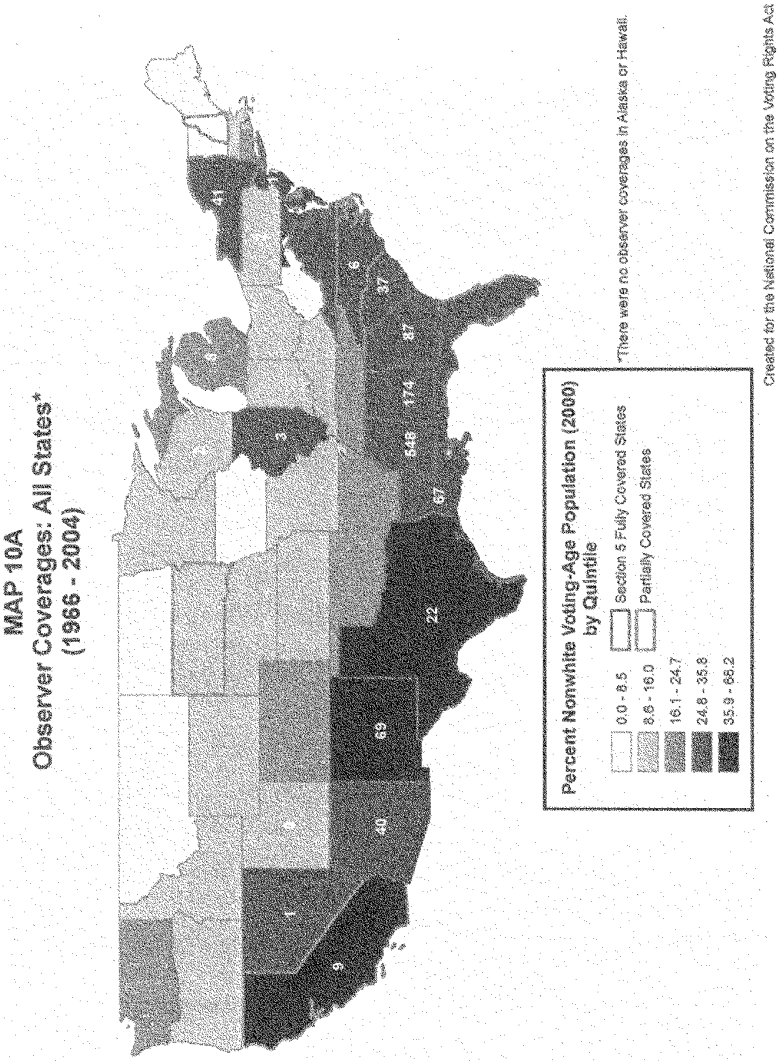
No actions were filed in Alaska or Hawaii.

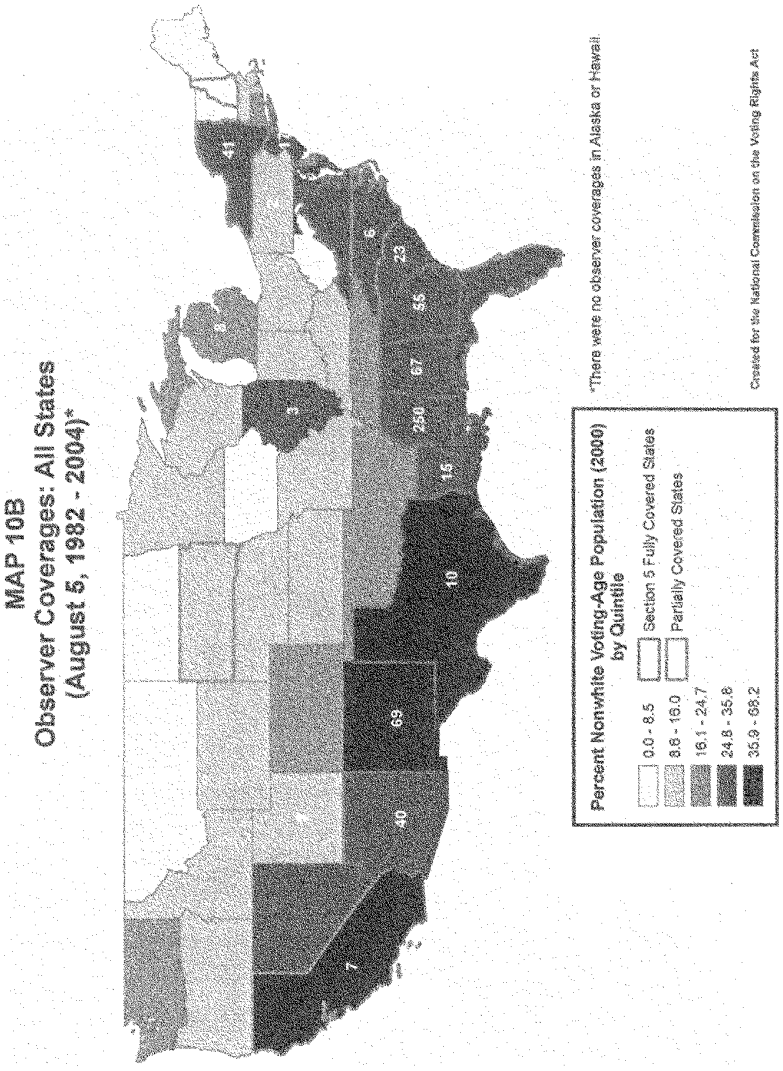
Created for the National Commission on the Voting Rights Act


MAP 7
Submission Withdrawals
(August 5, 1982 - 2004)*
2
5
54
22
23
15
38
20
10
4
2
3
1
Percent Nonwhite Voting-Age Population (2000)
by Quintile
0.0 - 7.0
8.0 - 16.0
17.0 - 25.0
26.0 - 36.0
37.0 - 68.0
Section 5 Fully Covered States
Partially Covered States
*Alaska made one withdrawal; Hawaii made none.
Created for the National Commission on the Voting Rights Act

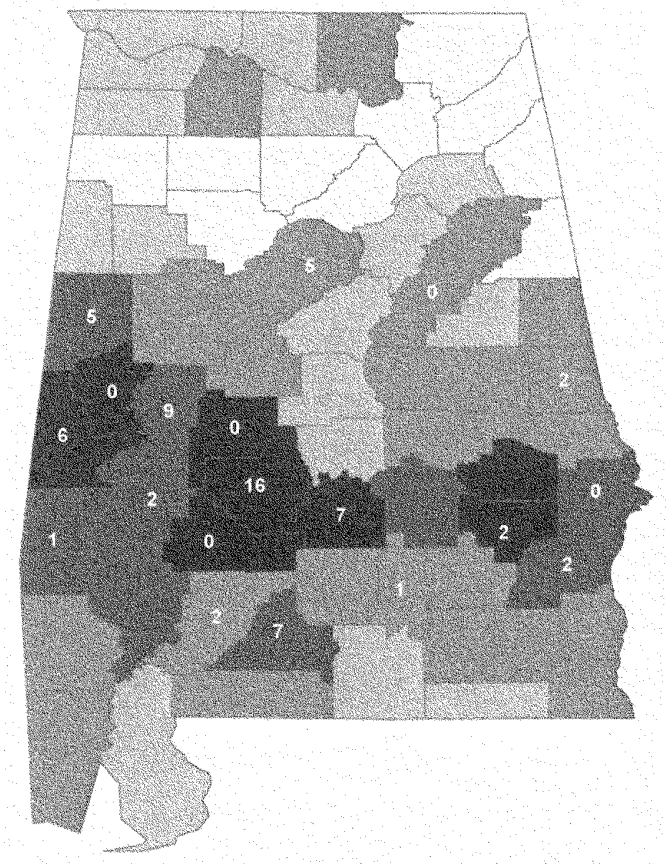

MAP 8
Objections
(August 5, 1982 - 2004)*
7
15
43
74
83
46
120
102
105
1
19
4
4
Percent Nonwhite Voting-Age Population (2000)
By Quintile
2.9 - 8.5
8.6 - 16.0
16.1 - 24.7
24.8 - 35.8
35.9 - 86.2
Section 5 Fully Covered States
Partially Covered States
*Two objections were interposed in Alaska;
Hawaii had none.
Created for the National Commission on the Voting Rights Act


MAP 9
Sum of Objections, Submission Withdrawals,
and Declaratory Judgment Actions Favorable to Minorities
(August 5, 1982 - 2004)*
7
24
1
165
129
155
62
123
96
56
19
9
3
5
Percent Nonwhite Voting-Age Population (2000)
By Quintile
2.9 - 9.5
9.6 - 16.0
16.1 - 24.7
24.8 - 35.8
35.9 - 88.2
Section 5 Fully Covered States
Partially Covered States
*The sum in Alaska is three,
and zero in Hawaii.
Created for the National Commission on the Voting Rights Act


MAP 10A
Observer Coverages: All States*
(1966 - 2004)
41
6
37
87
174
548
67
22
69
40
9
1
Percent Nonwhite Voting-Age Population (2000)
by Quintile
0.0 - 8.5
8.6 - 16.0
16.1 - 24.7
24.8 - 35.8
35.9 - 66.2
Section 5 Fully Covered States
Partially Covered States
*There were no observer coverages in Alaska or Hawaii.
Created for the National Commission on the Voting Rights Act


MAP 10B
Observer Coverages: All States
(August 5, 1982 - 2004)*
41
6
23
55
67
250
15
10
69
40
7
Percent Nonwhite Voting-Age Population (2000)
by Quintile
0.0 - 8.5
8.6 - 16.0
16.1 - 24.7
24.8 - 35.8
35.9 - 68.2
Section 5 Fully Covered States
Partially Covered States
*There were no observer coverages in Alaska or Hawaii
Created for the National Commission on the Voting Rights Act

MAP 10C
Observer Coverages by County: Alabama
(August 5, 1982 - 2004)

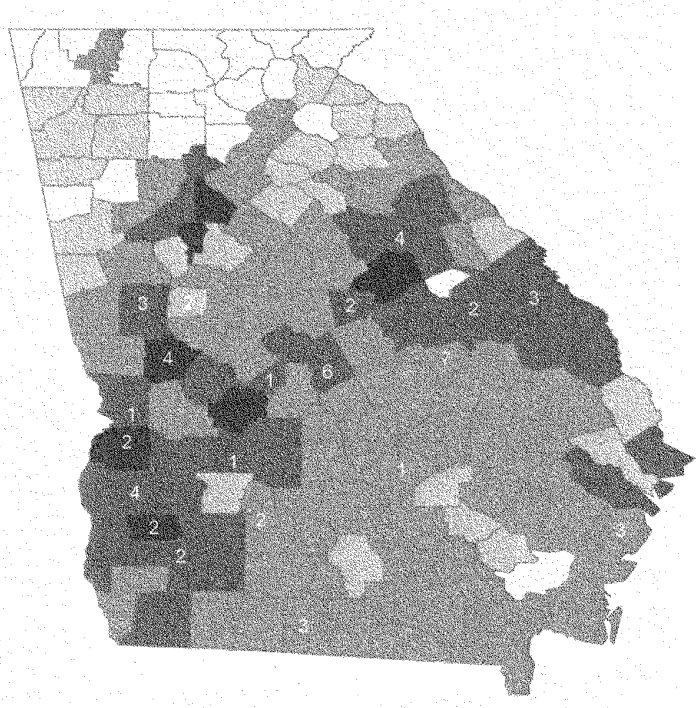


Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

Created for the National Commission on the Voting Rights Act

MAP 10D
Observer Coverages by County: Georgia
(August 5, 1982 - 2004)

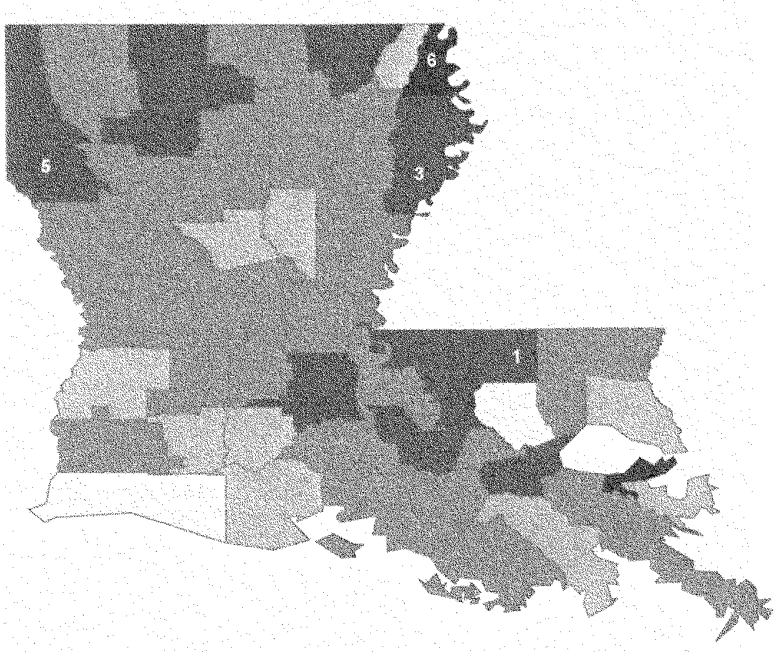


Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

Created for the National Commission on the Voting Rights Act

MAP 10E
Observer Coverages by Parish: Louisiana
(August 5, 1982 - 2004)



Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

Created for the National Commission on the Voting Rights Act

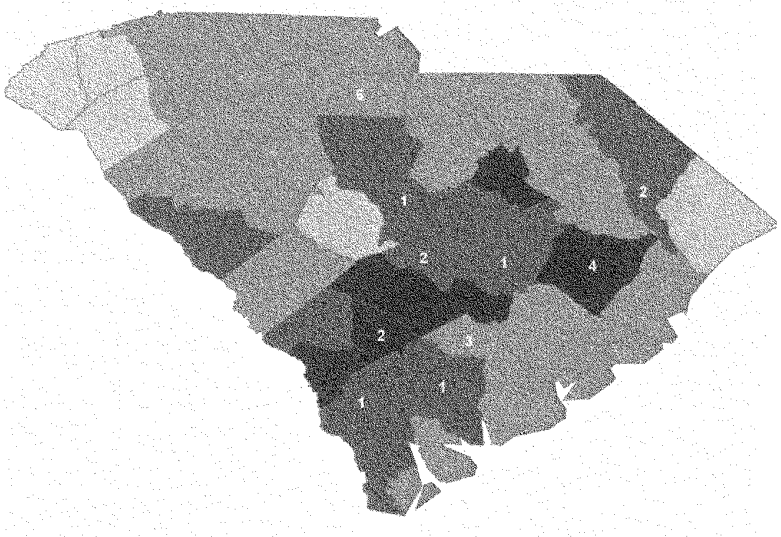
MAP 10F
Observer Coverages by County: Mississippi
(August 5, 1982 - 2004)

Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

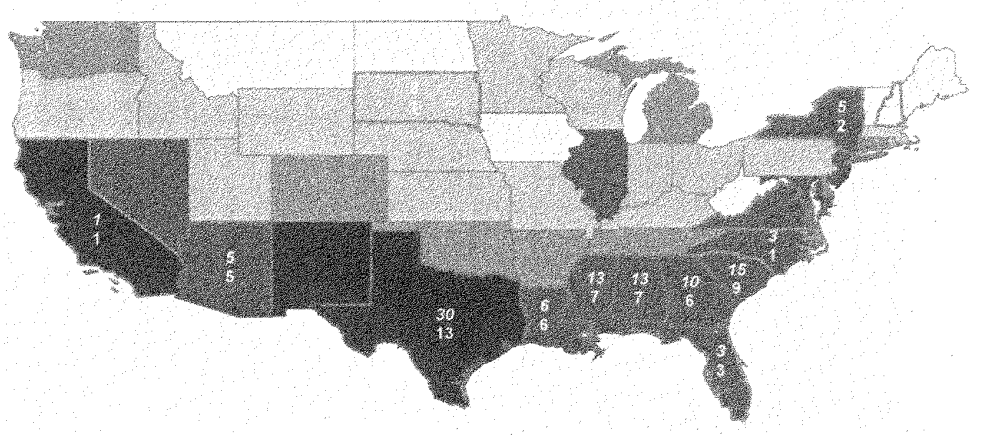
Created for the National Commission on the Voting Rights Act

MAP 10G
Observer Coverages by County: South Carolina
(August 5, 1982 - 2004)



Created for the National Commission on the Voting Rights Act

MAP 11
Section 5 Enforcement Actions in Which Department of Justice Participated (1966-2004 and August 5, 1982-2004)*



Percent Nonwhite Voting Age Population (2000) By Quintile

- 2.9 - 8.5
- 8.6 - 16.0
- 16.1 - 24.7
- 24.8 - 35.8
- 35.9 - 66.2

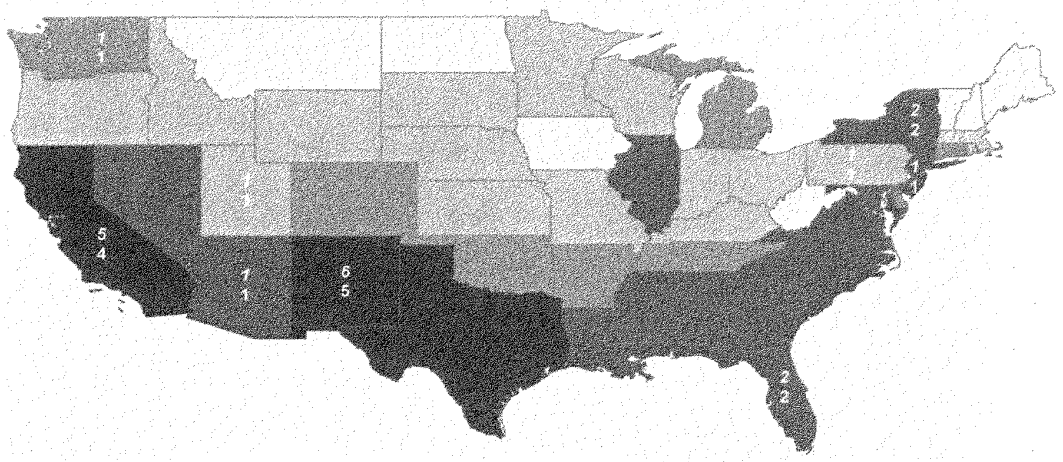
- Section 5 Fully Covered States
- Partially Covered States

*Italicized numbers = Enforcement Actions 1966 - 2004
Bold-faced numbers = Enforcement Actions August 5, 1982 - 2004

There were no enforcement actions in Alaska or Hawaii.

Created by the National Commission on the Voting Rights Act

MAP 12
Department of Justice Language Assistance Enforcement Actions
(1966-2004 and August 5, 1982-2004)*



Percent Nonwhite Voting-Age Population (2000) By Quintile

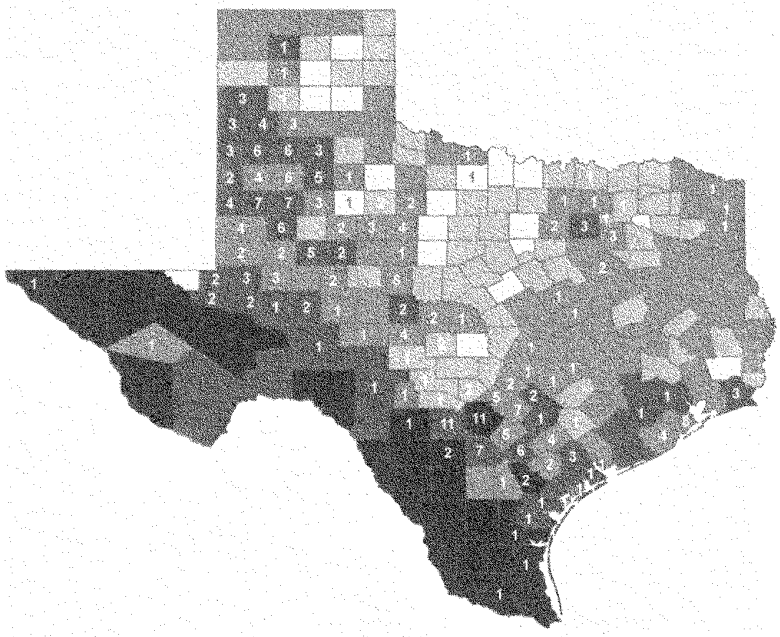
- 2.9 - 8.5
- 8.6 - 16.0
- 16.1 - 24.7
- 24.8 - 35.8
- 35.9 - 68.2

*Italicized numbers = Enforcement Actions 1966 - 2004
Bold-faced numbers = Enforcement Actions August 5, 1982 - 2004

*There were no enforcement actions in Alaska or Hawaii.

Created for the National Commission on the Voting Rights Act

MAP 13A
Number of Times Texas Counties Were Affected By Reported and Unreported Section 2 Lawsuits Resolved Favorably To Plaintiffs (June 29, 1982 - December 31, 2005)



Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

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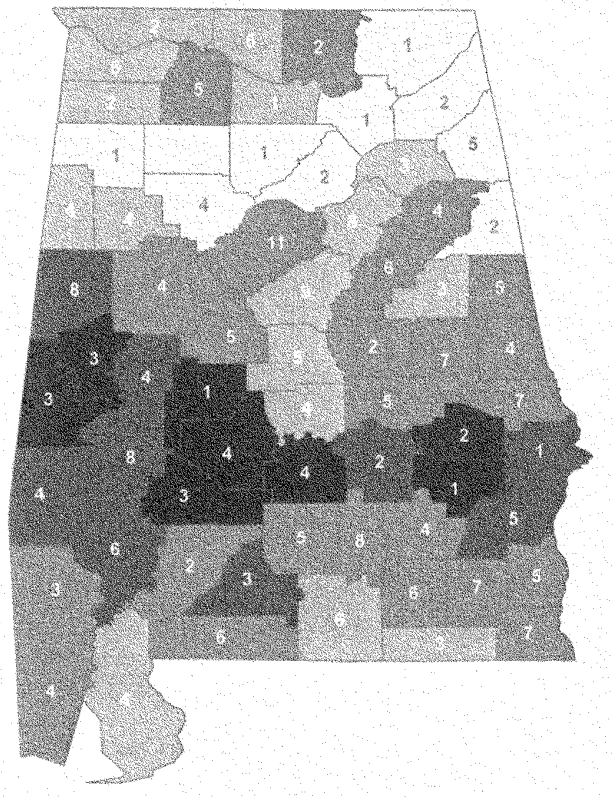
MAP 13B
Number of Times Alabama Counties Were Affected By Reported and Unreported Section 2 Lawsuits Resolved Favorably To Plaintiffs (June 29, 1982 - December 31, 2005)

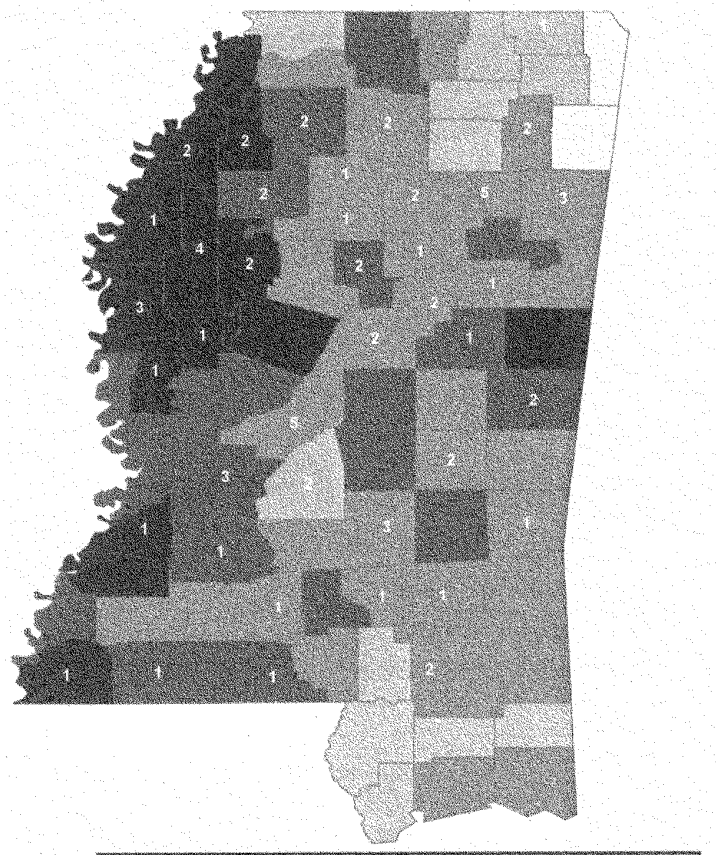


Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

Created for the National Commission on the Voting Rights Act

MAP 13C
Number of Times Mississippi Counties Were Affected By Reported and Unreported Section 2 Lawsuits Resolved Favorably To Plaintiffs (June 29, 1982 - December 31, 2005)

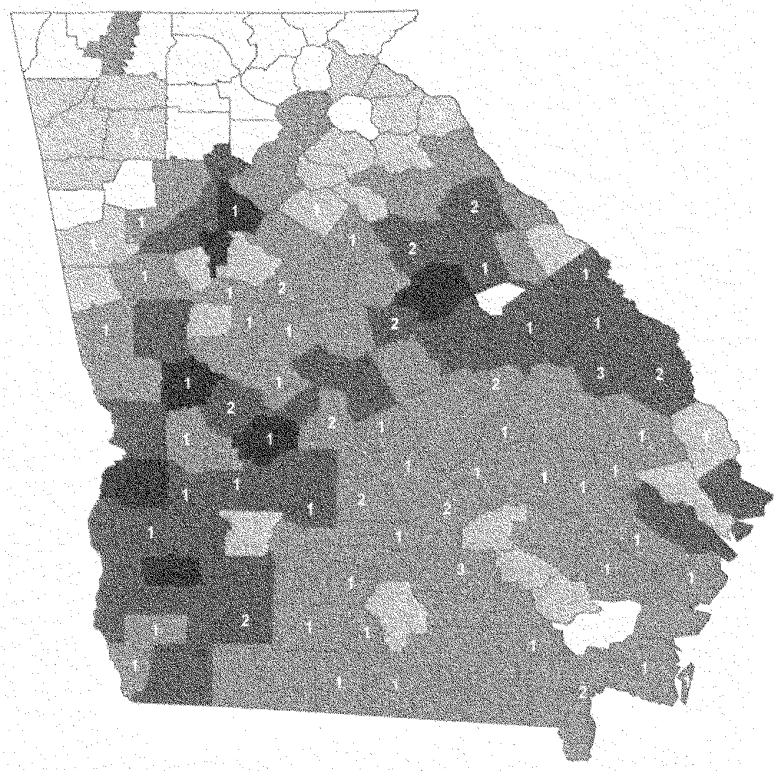


Percent Nonwhite Voting-Age Population (2000)

- 0.00 - 10.0
- 10.1 -20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

Created for the National Commission on the Voting Rights Act

MAP 13D
Number of Times Georgia Counties Were Affected By Reported and Unreported Section 2 Lawsuits Resolved Favorably To Plaintiffs (June 29, 1982 - December 31, 2005)

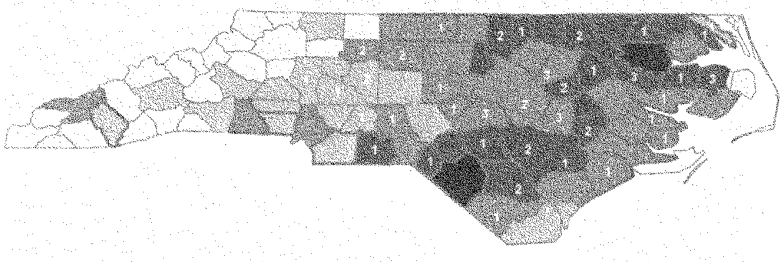


Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20 1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

Created for the National Commission on the Voting Rights Act

MAP 13E
Number of Times North Carolina Counties Were Affected By Reported and Unreported Section 2 Lawsuits Resolved Favorably To Plaintiffs (June 29, 1982 - December 31, 2005)



Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0
- Section 5 Covered Counties

Created for the National Commission on the Voting Rights Act

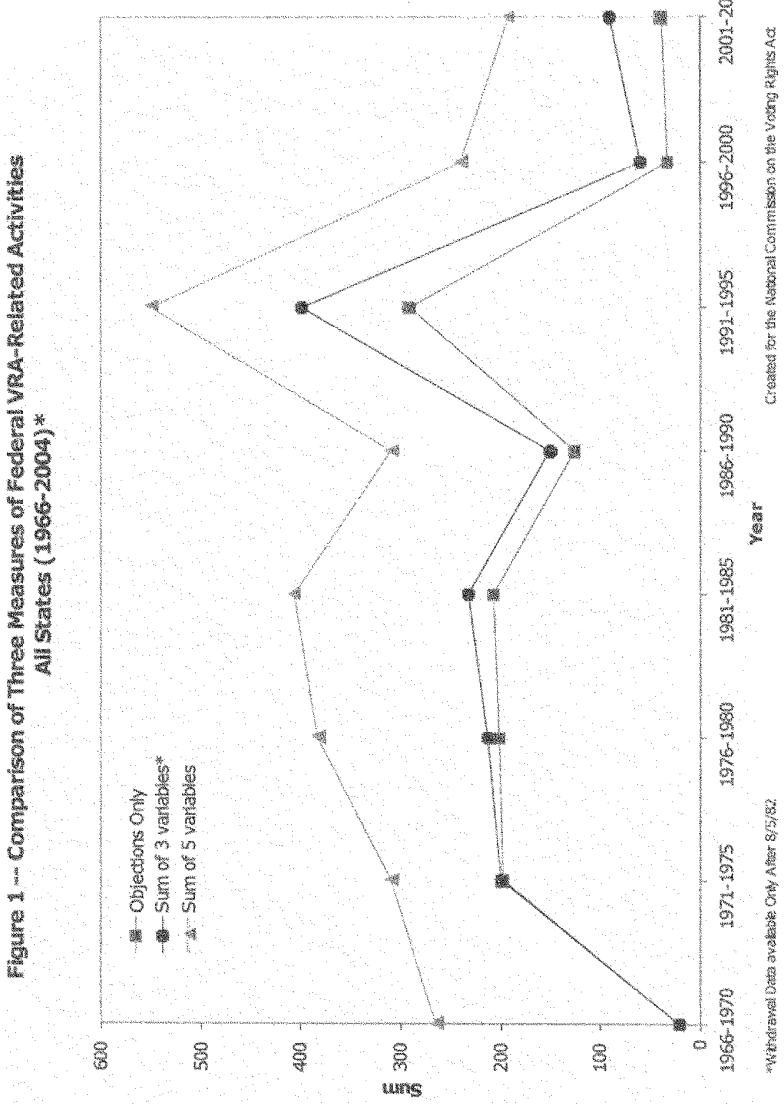


Figure 1 -- Comparison of Three Measures of Federal VRA-Related Activities
All States (1966-2004)*
Objections Only
Sum of 3 variables*
Sum of 5 variables
Sum
600
500
400
300
200
100
0
1966-1970
1971-1975
1976-1980
1981-1985
1986-1990
1991-1995
1996-2000
2001-2004
Year
*Withdrawal Data available Only After 8/5/82
Created for the National Commission on the Voting Rights Act

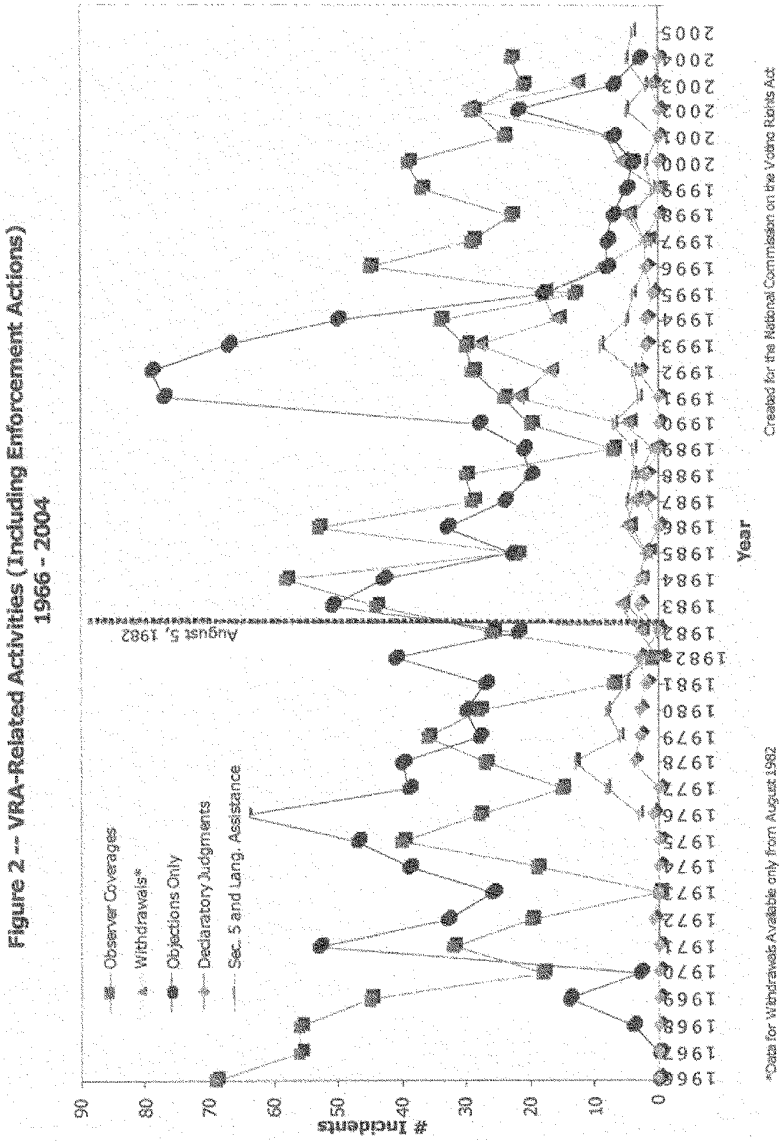
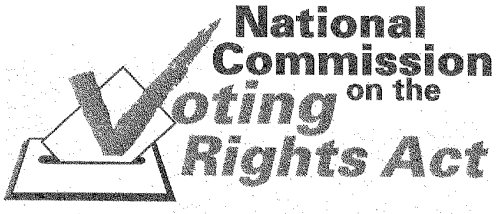


Figure 2 -- VRA-Related Activities (Including Enforcement Actions)
1966 - 2004
Observer Coverages
Withdrawals*
Objections Only
Declaratory Judgments
Sec. 5 and Lang. Assistance
August 5, 1982
Incidents
Year
*Data for Withdrawals Available only from August 1982
Created for the National Commission on the Voting Rights Act



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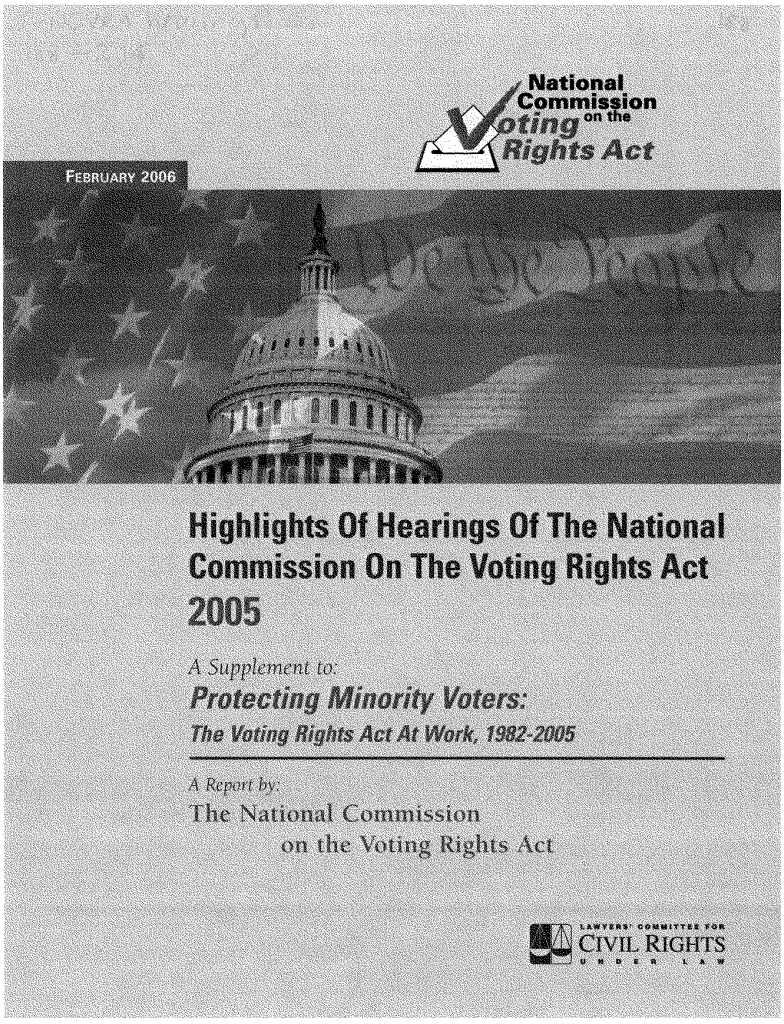
APPENDIX TO THE STATEMENTS OF THE HONORABLE BILL LANN LEE AND THE HONORABLE JOE ROGERS, "HIGHLIGHTS OF HEARINGS OF THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, 2005," A REPORT BY THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT



HIGHLIGHTS OF HEARINGS OF THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT 2005

A Supplement to

Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005:
A Report by the National Commission on the Voting Rights Act

February 2006

Published by Lawyers' Committee for Civil Rights Under Law

To order additional copies, contact the Lawyers' Committee at 1401 New York Avenue N.W. Suite 400, Washington, D.C. 20005, (tel) 202-662-8600, (fax) 202-628-2858, or visit the Web site of the National Commission on the Voting Rights Act, www.votingrightsact.org, to download a copy.

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INTRODUCTION

The National Commission on the Voting Rights Act was established in 2005 by the Lawyers' Committee for Civil Rights Under Law, a nonprofit, nonpartisan civil rights organization, in conjunction with the civil rights community. The Commission was tasked to produce a fact-based report to determine whether discrimination in voting is serious and widespread, particularly in the period since the Voting Rights Act's last major reauthorization in 1982. The National Commission has produced a Report of its findings: *Protecting Minority Voters: The Voting Rights Act At Work, 1982-2005* (the "Report").

One of the primary factual sources the National Commission relied upon in the Report was the ten field hearings the Commission conducted from March to October 2005. Six regional hearings were held: Southern Regional Hearing (March 11 in Montgomery, Alabama); Southwest Regional Hearing (April 7 in Phoenix, Arizona); Northeast Regional Hearing (June 14 in New York City); Midwest Regional Hearing (July 22 in Minneapolis, Minnesota); Western Regional Hearing (September 27 in Los Angeles, California); and Mid-Atlantic Regional Hearing (October 14 in Washington, D.C.). In addition, three state or local hearings were held: South Georgia Hearing (August 2 in Americus); South Dakota Hearing (September 9 in Rapid City); and Mississippi Hearing (October 29 in Jackson). The tenth hearing, which was held in conjunction with the National Bar Association's 80th Annual Convention, included witnesses from Florida and members of the National Bar Association from throughout the country (August 4 in Orlando, Florida).

The National Commission has eight members: Honorary Chair Charles McC. Mathias, Chair Bill Lann Lee, John Buchanan, Chandler Davidson, Dolores Huerta, Elsie Meeks, Charles Ogletree, and Joe Rogers. Biographies of the Commissioners are contained in the preface to the Report. None of the commissioners was able to attend all hearings. However, a number of Guest Commissioners with special knowledge of elections, voting rights and/or civil rights were invited to substitute for them. This added an important dimension to the hearings, as did the Guest Commissioners' familiarity with local and regional issues. Fred Gray, a lawyer for both Rosa Parks and Martin Luther King in the 1950s, for example, was a Guest Commissioner at the Florida hearing. Former U.S. Senator Tom Daschle, South Dakota Democrat, and current South Dakota Secretary of State Chris Nelson, a Republican, both served as Guest Commissioners at the South Dakota hearing.

The purpose of the hearings was to gather facts from people across the country regarding the presence of discrimination in voting, if any, and the impact of the Voting Rights Act in combating such discrimination. The Commission heard from voting activists, election administrators, attorneys with experience in voting rights—whether in private practice or with experience in the Department of Justice—academic experts, representatives of minority groups, and interested citizens who had knowledge of voting discrimination.

All testimony was transcribed by court reporters, and various documents were entered into the hearings record, including not only prepared statements of some speakers, but election statistics, published articles on voting rights, court opinions, results of election protection programs, and summaries of voting rights-related activities prepared *pro bono* for the Commission by law firms.

This supplement to the Commission Report provides a brief summary of selected aspects of the hearings in each city. It cannot, however, do justice to the testimony rendered. The reader is therefore urged to go to the transcripts and hearings documents contained in the appendices of the Report, which can be found at the National Commission's Web site, www.votingrightsact.org, to get a better sense of the breadth and depth of opinions expressed. For a description of the provisions of the Voting Rights Act, the reader should consult Chapter 3 of the Report.

Southern Regional Hearing
Freewill Missionary Baptist Church
1724 Hill Street
Montgomery, Alabama
March 11, 2005

National Commissioners in Attendance:

Hon. John Buchanan

Chandler Davidson

Bill Lann Lee

Elsie Meeks

Guest Commissioners:

Hon. Denise Majette, Former U.S. Representative, 4th District, Georgia

Derryn Moten, Associate Professor, Alabama State University

Panelists:

James Blacksher, Law Offices of James Blacksher, Birmingham, AL

Vernon Burton, University of Illinois, Urbana, IL

Helen Butler, Georgia Coalition for the People's Agenda, Atlanta, GA

Raoul Cunningham, NAACP, Louisville, KY

Anita Earls, University of North Carolina Center for Civil Rights, Chapel Hill, NC

Richard Engstrom, University of New Orleans, LA

Hon. Frank Jackson, Mayor, Prairie View, TX

Victor Landa, Southwest Voter Registration Education Project, Laredo, TX

Leslie Lobos, Mexican American Legal Defense and Educational Fund, Atlanta, GA

Laughlin McDonald, ACLU Voting Rights Project, Atlanta, GA

Gwendolyn Patton, Montgomery, AL

Hon. Bobby Singleton, Alabama State Senate, Montgomery, AL

Public Testimony:

Fletcher Earl Cooley, Montgomery, AL

Claude Foster, NAACP National Voter Fund, Texas

Apostle James Jemison, Alabama Alliance to Restore the Vote and the Alabama Coalition on Black Civil Participation

Rev. Earl S. Wagner, Concerned Citizens' Organization

Efia Wangaza, South Carolina Chapter of the Malcolm X Grassroots Movement for Self-Determination

Willie Mae Whitlow, Montgomery, AL

The states covered included Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Texas. The hearing site was the sanctuary of the Free Will Baptist Church, 1724 Hill Street, Montgomery, Alabama. Panels consisted of those invited to appear and members of the public who volunteered their experiences. Invited panelists included voting rights lawyers, public officials, scholars of voting rights, and representatives of civil rights organizations. Seated in the audience were some of the participants in the Fortieth Anniversary Selma-To-Montgomery March, which at the time of the hearing had reached the outskirts of Montgomery and the next day would continue past the Rosa Parks Museum and the Dexter Avenue Baptist Church to the state capitol.

Vernon Burton, a historian at the University of Illinois who specializes in southern history and voting rights issues, described the Voting Rights Act as "one of the most successful civil rights statutes ever enacted by the United States Congress."[1] He relied on his expert testimony in the 2003 congressional redistricting case in Texas to remark on "how overt some racial appeals" are in that state.[2] He mentioned hearings held by the NAACP in Texas regarding the 2000 and 2002 elections, in which various kinds of intimidation and misinformation directed at African Americans were reported, as well as "late change of polling places; dropping individuals from poll lists without cause; not allowing individuals to file challenge ballots," as well as "a hate crime in Wharton [Texas]," where the home of a campaign staff treasurer for a black candidate for sheriff was burned. "[H]er husband, a former county commissioner," was inside, "and got [out] only because the dog was barking. And she had just received threatening calls saying what would happen to her if she did not get [that]—and we won't use the N word—sign out of her yard."[3]

Burton also referred to other forms of anti-black discrimination of which a judge took note in a recent Charleston, South Carolina, voting rights case, including "people making it hard for African-Americans to vote."[4] He introduced his expert witness reports in that case and another recent one in South Carolina. Examples of discrimination, he said, "can be documented [in the 1990s and 2000s], including "poll watchers, who make it hard for people [to vote]," among other things.[5] In Charleston, South Carolina, after the county was forced by the court to adopt single-member districts, the school board decided "after African Americans got elected . . . to change the method of elections and take away powers from them."[6] He cited this as a reason why the federal preclearance provision contained in Section 5 of the Act still needed.

Dr. Gwen Patton, a long-time Alabama voting rights activist and teacher, testified about recent instances of polling places being

relocated in Black Belt counties without voters knowing where the new sites were, as well as charges filed against people at the polls who "were simply assisting elderly people with the right to vote."[7]

Victor Landa, representing the Southwest Voter Registration Education Project, stressed the importance to Latino citizens of having election materials, especially registration cards, in Spanish:

> I've found that citizens who prefer Spanish registration cards do so because they feel more connected to the process. They also feel they trust the process more when they fully understand it. Many older citizens, new citizens, and first-time voters whose primary language is Spanish would not have registered to vote if not for the access to registration cards in Spanish. Without materials in Spanish, those citizens whose eagerness . . . to participate . . . would compel them to register even using a form with registration instructions they did not understand, would run the risk of making errors on the registration card that could prevent them from voting if those errors made them wrongly appear ineligible. Without materials in Spanish, many citizens not fluent in English would find the process too difficult to navigate and would not vote or would not necessarily vote in the way that they had intended.[8]

Landa went on to describe "strategic" efforts in the 2004 Texas election cycle to prevent some citizens from registering to vote. "In one county in South Texas, some of our Spanish-speaking volunteers were denied the eligibility to be deputized as registrars," he said, adding that in Texas only deputized registrars can register voters in the field. "Some officials who are employed by law to deputize registrars deliberately set obstacles to deputization for people who may have belonged to an opposing political party."[9]

Speaking of the difference Section 5 of the Act makes, Landa gave the example of an election in San Antonio "where early voting places were [going to be] changed in the west side and south side . . .that's predominantly Latino. . . . Early voting places were taken from there and put in the other parts of town. The reasoning [given] for this was that more people vote in the other parts of town than they do on the south side and the west side." But because the changes had not been submitted to the Department of Justice for Section 5 preclearance, "it was very easy to stop it before it even happened, while it was still in the planning stages . . .[10]

Frank Jackson, currently the mayor of Prairie View, Texas, the site of a historically black university, Prairie View A & M, testified about the efforts of the white District Attorney to disqualify black students from voting during the 2004 presidential election year, on the grounds they were not legal residents of the county. This was in spite of lawsuits in the late 1970s growing out of vote-suppression efforts in the surrounding county that settled the question of whether students were county residents. The mayor asserted that the Voting Rights Act "provides us with some necessary safeguards, because if it was not for that looking-over-the-shoulder, somebody watching the process, then we would have been at the mercy of the powers that still advocate states rights."[11]

Raoul Cunningham with the Kentucky NAACP compared the problems faced by minorities in his state, which is not covered by Section 5, with problems in states that are covered. Officials in Kentucky do not have to consider the views of the black community when making voting changes, he said. He also asserted that the legislature "has never given African Americans . . . an opportunity to elect candidates of choice across the board across the state." Referring to methods of racial gerrymandering, he added, "They have packed us; they have cracked us." With Section 5 coverage, he said, districting proposals in his state would have had to be reviewed and precleared by the Department of Justice before implementation.[12]

The same type of comparison was made by *Anita Earls*, former Deputy Assistant Attorney General for Civil Rights who oversaw the Voting Section. Earls spoke of the situation in certain covered and uncovered counties in North Carolina. In the covered ones, Section 5's non-retrogression standard prevents efforts to "get rid of the court orders that were established to create opportunities for black voters." In the uncovered counties, however, it does not.[13]

In measuring the Department of Justice's impact under Section 5, Earls stressed the importance of tallying jurisdictions' withdrawals of their submissions to the Department of Justice as a measure of their attempts to discriminate. Objections alone, she noted, do not tell the whole story. "Below the surface, what you don't see are all the times that the Justice Department writes letters requesting more information on a submission, and as a result of that, the jurisdiction changes its plans and brings them into compliance. . . . It doesn't even have to rise to the level of a written letter for more information. [The Justice Department] gets a submission; they make phone calls; make inquiries; the jurisdiction says, 'Oh, you're right.' . . . They change what they're planning to do."[14] Earls also stressed the important role federal observers play, as provided for under the Voting Rights Act, in preventing discrimination because of their ability to get

inside polling places—something election protection volunteers are unable to do.[15]

Professor Richard Engstrom of the University of New Orleans, a noted expert on voting who has testified in numerous voting rights cases, spoke at length about his findings regarding the widespread phenomenon of racially polarized voting, which he called "a central concept which we deal with in Section 5 of the Voting Rights Act." He noted, "If voting isn't racially polarized, we no longer need these protections [against vote dilution offered by the Voting Rights Act]." His data, he said, revealed that much polarization still exists.[16]

> Today I want to tell you race remains the central demographic division in American politics. Don't trust me; read the literature. Read the recent books on southern politics. Race is still the major demographic division in southern politics and, indeed, politics across the country. And racially polarized voting persists. I know this because I study it.[17]

Since the 2000 census, Engstrom has worked in seven states conducting studies of racially polarized voting, "or at least what it takes to elect minority-choice representatives." As an example of his findings, he presented several data sets measuring polarization in different ways in various types of Louisiana elections. Specifically, he focused on ninety elections using three measures of polarization for each. "Almost every election analysis in those tables," he testified, shows "racially-polarized voting in that election. . . . There are a few exceptions, usually when African Americans themselves may not be supportive of the African-American candidate. But . . . rarely is that the case." Engstrom analyzed elections for at least ten types of office in his study—from governor to the recorder of mortgages. "It doesn't matter what office is at issue; it doesn't matter whether it's high profile or low profile; it doesn't matter whether it's top of the ballot or down on the ballot. Time, place, and office do not matter. What we find consistently in almost every instance" is racially polarized voting.[18]

Engstrom claimed there was nothing unique to Louisiana in this respect. He pointed to other states in which he had recently conducted polarization analyses—South Carolina, Georgia, Florida, Alabama, and North Carolina (regarding African Americans and whites), and Texas (regarding Hispanics and Anglos [non-Hispanic whites]). He also noted that, in voting cases, he has worked as an expert for defendants and plaintiffs, for states, for civil rights organizations, and for the Department of Justice. He believes, as a

consequence of his research, that Section 5 is still needed to protect against vote dilution.[19]

Engstrom's views on polarized voting were echoed by *Laughlin McDonald*, Director of the Southern Regional Office of the ACLU, who discussed the phenomenon and pointed to court findings of polarized voting as recently as 2002.[20]

The impact of the Voting Rights Act on Hale County, Alabama, and its county seat of Greensboro, deep in the state's Black Belt, was discussed by *State Senator Bobby Singleton.* Singleton ran for city council in 1984 in an at-large system. In spite of the fact that the city was 63 percent black, it had no black elected officials. Singleton lost by fifty votes. A suit he subsequently filed against the city's election system became part of a larger suit which eventually mandated single-member districts. The plan, in turn, had to be precleared under Section 5. The district system led in 1992 to the election of the city's first black council members in a century. In 1997, the city also elected its first African-American mayor, an event which Singleton attributed to the political mobilization of the city's black population as a result of the creation of single-member districts.[21] Racial tensions in the city's politics have been noteworthy. Singleton mentioned one especially tense situation in 1992, during the elections of the first blacks in the city:

> 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 . . .[22]

The Department of Justice, Singleton added, was contacted many times to prevent efforts to change voting hours and to prevent "intimidation of black voters going to the poll." As a result of Department intervention and the presence of federal observers, blacks in the county are now a majority on many if not most of the elected governments in Hale County—school boards, the county government, "most of the cities in the area," and, Singleton added, "we were able to elect a black circuit judge, black circuit clerk, myself as a state representative . . ."[23]

James Blacksher, a noted voting rights lawyer who, with colleagues Larry Menifee and Edward Still, litigated most of the Section 2 cases that have changed the face of Alabama politics over the last thirty years, spoke about the continuing struggle for black voting rights in his native state and the importance of Section 5 coverage. He pointed out that, thanks to Section 5, the Alabama legislature in 2001 redistricted its congressional, legislative, and state board of education districts in a racially fair manner, and, he added, "We were able to defend those districts in a series of collateral attacks that were brought in federal and state courts against those districts. And they stand to this time."[24] He continued:

> And the point I want to make . . . is that what made that legislative process successful was . . . the requirement of Section 5 that there be no retrogression in the electoral strength of blacks. That was at the top of the list of the legislative guidelines for redistricting . . . [which] gave African-American legislators the leverage they needed to negotiate district plans in both houses . . .[25]

When asked by Commissioner Meeks what they would like to see changed regarding Section 5, panelists Blacksher and Earls advocated restoring the meaning of the section to its 1982 definition, prior to the Supreme Court's decisions in *Reno v. Bossier Parish School Board*[26] and *Georgia v. Ashcroft*.[27] Blacksher mentioned as a possibility extending coverage to more jurisdictions, such as Kentucky.[28]

Southwest Regional Hearing
Carson Ballroom, 3rd Floor, Old Main Building
Arizona State University
Tempe, Arizona
April 7, 2005

National Commissioners in Attendance:

Hon. John Buchanan

Chandler Davidson

Bill Lann Lee

Guest Commissioners:

Hon. Rebecca Vigil-Giron, Secretary of State of New Mexico and President of the National Association of Secretaries of State (NASS)

Hon. Penny Willrich, Judge, Superior Court of Maricopa County, AZ

Hon. Ned Norris, Jr., Vice Chair of the Tohono O'odham Nation, and Representing the Intertribal Council of Arizona.

Panelists:

Adam Andrews, Tohono O'odham Tribe, Sells, AZ

Rogene Calvert, Houston Chapter of the Organization of Chinese-Americans, Houston, TX

Paul Eckstein, Perkins, Coie, Brown & Bain, Phoenix, AZ

Richard Ellis, Fort Lewis College, Durango, CO

Rodolfo Espino, Arizona State University, Tempe, AZ

Claude Foster, NAACP National Voter Fund, Sugarland, TX

Lydia Guzman, Clean Elections Institute, Inc., Phoenix, AZ

John R. Lewis, Intertribal Council of Arizona, Phoenix, AZ

Alberto Olivas, Maricopa Community Colleges, Mesa, AZ

Daniel Ortega, Roush, McCracken, Guerrero, Miller & Ortega, Phoenix, AZ

Nina Perales, Mexican American Legal Defense & Educational Fund, San Antonio, TX

Penny Pew, Elections Director, Apache County, AZ

Andres Ramirez, Clark County, NV

Shirlee Smith, Native American Election Information Program, Office of the Secretary of State, Albuquerque, NM

Rev. Oscar Tillman, Maricopa County Branch of the NAACP, Phoenix, AZ

James Tucker, Arizona State University, Phoenix, AZ

Hon. Robert Valencia, Tribal Council, Pascua Yaqui Tribe, Tucson, AZ

The Southwest Regional hearing was held on the campus of Arizona State University, Tempe. It was held on the 2nd day of a conference sponsored by the Barrett Honors College of Arizona State University entitled, "One Nation with Many Voices: The Language Assistance Provisions of the Voting Rights Act." On the first day, panelists presented preliminary findings of a major survey of the effectiveness of Sections 4(f)(4) and 203 of the Act in securing language assistance for covered language minorities. The survey was coordinated by Professors James Tucker and Rodolfo Espino of Arizona State University and conducted by a team of students in the University's Barrett Honors College. States covered by the Commission's hearing included Arizona, Colorado, Nevada, New Mexico, and Texas.

Guest Commissioner Penny Willrich noted that until 1972 a literacy test was required by an Arizona statute, even though the Voting Rights Act had prohibited such tests in 1965; and that the state's Native American population was prohibited by law from voting until 1948, when Native American veterans of World War II challenged the provision in court and won.[29] Various panelists also commented on the recent passage in Arizona of Proposition 200, which requires anyone registering to vote to present proof of citizenship, and anyone voting to present a photo ID or two non-photo IDs bearing the voter's name and address.[30] The speakers expressed concern that passage of the new law reflected a hostile sentiment toward minority voters.[31] They also commented on how difficult it is for some minority citizens to comply with the new law.[32]

Guest Commissioner Ned Norris, a representative of the Intertribal Council of Arizona, described the difficulty posed by the new law for elderly Native Americans:

> [F]or many tribal communities, and I know for a fact in my tribal community, that there are a number of members of the Tohono O'odham Nation and other tribes that . . . would not be able to document proof of citizenship because they were born in their tribal community, a remote village within the community, under a mesquite tree somewhere, and there's no record of that. . . . [T]hey were born in the United States of America, but born at home, and don't have proof of citizenship . . . [33]

John Lewis of the Intertribal Council of Arizona sketched the history of the fight for Native American voting rights in the Twentieth Century, linking the problems Indians in Arizona face today both with

the heritage of anti-Native American attitudes and the vast distances that often separate Native Americans from urban centers and from polling places. He also mentioned problems concerning redistricting and access to information about polling sites. Of particular importance, he said, was the language barrier, and he mentioned the need for Section 203. [34]

Penny Pew, Elections Director of Apache County, Arizona since 2001, gave a detailed account of the difficulties of providing language assistance to the 35,000 Native American registered voters in a county of 11,000 square miles. In spite of these challenges, Pew described the wide variety of means her office has employed to ensure Native Americans in Apache County are able both to understand their rights and to vote easily, using ballots in Navajo. These efforts include training poll workers in bilingual assistance, translating English materials into Navajo—a "time-consuming" task—constructing pamphlets, making power-point presentations to poll workers, ensuring that transportation is available to those who need it, sending out early-voting trailers to remote areas, clearly identifying the large precinct boundaries through the use of special mylar maps, and explaining issues on the ballot, when necessary. Pew was enthusiastic about the language assistance her office provided to Navajos and assured the Commission that "reauthorization [of Section 203] will help us continue with our program." She included in her packet of materials submitted at the hearing a graph indicating increased turnout in presidential elections among Apache County residents between 2000 and 2004, which she believes resulted in part from her staff's efforts.[35]

Barriers to voting confronted by African Americans were described by *Claude Foster*, national field director for the NAACP National Voter Fund. He summarized complaints voiced at a Voter Irregularity Hearing held by the Houston Coalition for Black Civic Participation in Harris County (Houston) Texas on December 12, 2001, shortly after a nonpartisan mayoral run-off election. Among those attending were the county tax assessor-collector, a U.S. Department of Justice official, and an official from the county clerk's office, as well as representatives of black and Latino organizations.

In his written testimony Foster listed some of the complaints voiced by voters at the Texas hearing in 2001:

- "[Officials] said they could not vote because they were not [registered] in that county. They [officials] claimed they ran out of ballots."

- "Tried to vote and the precinct judge told him he was not on rolls. Told he could not vote in elections."
- "Was told by precinct judge that she could not vote because she was not in city limits. She voted at that same place for 12 years."
- "[She was] showed a list of signed names of the only people who could vote. White people of same zip code were allowed to vote."
- "The woman would not let her vote, did not try to help her find out what precinct to vote in, and ultimately was discouraging."
- "Drove 30 miles to vote from original precinct and was again told she couldn't vote. Never allowed to vote."
- "They asked her name without asking for ID, and told her she was not eligible to vote. She received a challenged ballot and when she tried to submit the ballot, they rejected it saying she could not vote."
- "Told she could not vote because she wasn't [registered] in the county. White people were allowed to vote though."
- "Saw a list of handwritten names and was told that those people's votes wouldn't count. Also her husband was on the list, and she was told she was not allowed to vote. The precinct or school called the police. Black people were not being allowed to vote."[36]

Foster introduced additional documents which in his words "clearly show the continued disenfranchisement of African-Americans in Texas." He then addressed the chair as follows:

> Mr. Chairman, without the Voting Rights Act, what other tool would minority communities have for redress if a state, county, city, or town adopted a discriminatory new procedure or changed voting locations without adequately notifying the community? This was done in the Houston mayoral election in 2001 when over 166 precincts were changed without the African American Community being notified . . . until the civil rights community challenged election officials under Section 5 . . .[37]

Foster also alluded to the events in 2004 at predominantly black Prairie View A&M University, mentioned above, whereby efforts by white officials to suppress black students' votes were thwarted by a

Section 5 enforcement action—a suit brought by the student NAACP chapter to prevent Waller County from implementing unprecleared voting changes.[38]

Harris County, Texas, was also the subject of testimony given by *Rogene Calvert*, past president of the Houston Chapter of the Organization of Chinese Americans. Calvert spoke about the difference to Vietnamese voters that Section 203 coverage beginning in July 2002 has made. As a result of an agreement between the county and the Department of Justice, the county's ballot is translated in Vietnamese; the county has hired a Vietnamese staff member in the county clerk's office; and it has staffed precincts with a significant number of Vietnamese poll workers who speak the language.[39] These measures had a direct impact on the participation of Vietnamese voters and are probably responsible, in part, for the election of Hubert Vo, the first member of the Texas legislature of Vietnamese descent, who won election by 16 votes.[40]

Nina Perales, regional counsel of the Mexican American Legal Defense and Educational Fund (MALDEF), then testified regarding Latino populations in various Southwestern states. She pointed both to recent examples of attempted Latino vote dilution during redistricting as well as to ballot access problems this sizable minority group faces. For example, a Section 2 lawsuit in Colorado was necessary in the 1990s redistricting process to ensure the drawing of a house district containing a sufficient number of Latinos to enable them to elect a candidate of their choice to the legislature in the San Luis Valley, where Latinos constituted a community of interest. She also mentioned past ballot access problems in the state:

> Voting registration branches being placed in Anglo homes, limited hours for farm workers to register to vote, and a system where Anglo county commissioners tapped their friends for election judge, resulting in an all-Anglo election judge pool. We also have significant issues of access to the ballot in Colorado related to language.[41]

With regard to Section 203, Perales pointed out that only eight Colorado counties are covered, and, in New Mexico, where Latinos compose more than 42 percent of the population, coverage in the northern counties is inadequate. "As the Latino community grows and becomes more a presence in non-covered counties," she argued, "it is vitally important that we have Section 203 in place to provide language access to the ballot in this northern region . . ."[42] Perales mentioned voter harassment in November 2004, where Anglos standing outside polling places in Dona Ana County (Las Cruces),

New Mexico, videotaped the license plates of Mexican Americans as they went to vote. According to the voters who complained, "it is very intimidating . . . to be videotaped and to have their license plates videotaped by Anglos standing outside the polling place."[43] Such videotaping sometimes occurs in minority precincts in other places in the nation, and Department of Justice officials discourage videotaping when it is called to their attention, pointing out that videotaping could violate Section 11(b) of the Voting Rights Act, which forbids intimidation of voters.[44] In addition to this practice Perales mentioned relocation of polling places in New Mexico, "one of the time honored and classic mechanisms for defeating the minority vote."[45] She expressed the belief that in Texas there "is widespread noncompliance with both Section 203 and Section 5." As an example of the former, she pointed to Tarrant County (Fort Worth) where the Spanish translation of the ballot was "utterly incoherent, because it had been done by a non-Spanish-speaking staff in the county elections administrator's office," and as an example of the latter, she mentioned Bexar County (San Antonio), where in the spring of 2003 a "very large number" of early polling places were closed in heavily populated Latino areas, without a timely submission of the changes for preclearance. Only after MALDEF filed an enforcement action under Section 5 were these changes enjoined. In 2001 her organization helped obtain a statewide Section 5 objection to a Texas legislative redistricting plan, and spearheaded efforts to successfully prevent a Latino-majority congressional district in Phoenix from being removed in 2003. "Even today, Section 5 prevents retrogressive changes from being put into place," Perales asserted.[46]

Andres Ramirez, a voter empowerment activist in Clark County, Nevada, discussed the positive impact on limited-English-proficient Latino voters that Section 203 coverage has had since its implementation there in 2002. Among the resulting innovations are the creation of a Latino advisory board, the designation of an employee in the elections division as a liaison to the Latino community, the creation of a ballot printed in Spanish, and the development of an election hotline in Spanish. Ramirez stated that if Section 203 were not reauthorized, many of these enhancements would be taken away. He based his view on the voter backlash the elections division was faced with when it implemented measures to comply with Section 203.[47] He added: "Without the [Section 5] preclearance provision and [Section] 203, minority and small [town] and rural citizens would have great disadvantages placed upon them to have access to their voting rights and to election information. [Without these provisions] I can't foresee that our legislative powers would continue to fund and allow these activities."[48]

The importance of Section 203 was also underscored by *Shirlee Smith*, a Navajo who serves as the Voting Rights Act coordinator for Bernalillo County, New Mexico. Smith discussed her work, which involves providing assistance and outreach to four Indian tribes located in the county. She described how because of Section 203, and the creation of her position, elderly Indian voters were able to participate in the elections process for the first time. "It's really touched my heart to see our people," Smith said, "not knowing what the process is and how much their voice can be [heard], it's important to them, and it's important to us, . . . that they can make a difference."[49]

Lydia Guzman, Policy Director of the Clean Elections Institute, sounded a similar theme. Guzman has been involved in several voter registration efforts in the Latino community. She emphasized the importance of Spanish-language election materials and described how Spanish-language registration materials and ballots empowered limited-English-proficient citizens. She also described the difficulty her mother had in casting her first vote ever in the 2004 election because there was nobody able to assist her in Spanish. At the polling place, "there were no bilingual assistants outside," and so Guzman explained the voting procedure to her mother. "I thought I did a wonderful job explaining to her for the first time. [However], I forgot one important thing. So when she went in, she was lost. The poll workers, they didn't deny her the right to vote, but they did deny her the opportunity of being properly instructed in how to vote. It was a terrible experience for her. She was heart-broken because she thought maybe her vote didn't count."[50]

Professor Richard Ellis is chair of Southwest Studies at Fort Lewis College in Durango, Colorado. He served as an expert in *Cuthair v. Montezuma-Cortez School District*,[51] a successful Section 2 case brought on behalf of Ute Indians in Colorado in 1998. Dr. Ellis discussed the hostility and discrimination encountered by the Utes both generally and in voting. As recently as 1968, he said, a county clerk had sought but failed to obtain an opinion from the Attorney General that Indians living on reservations should not be allowed to vote.[52]

Daniel Ortega and *Paul Eckstein*, two lawyers who have often worked together on redistricting cases in Arizona since the 1980s, presented opposing views on Section 5 based on their experiences. Ortega stated that Section 5 has been, and continues to be, an important protection for minority voters, and that without Section 5 the position of minority voters would be worse. Prior to Section 5 coverage, he maintained, the political parties disregarded the views of minority voters in the redistricting process. On the other hand,

Eckstein stated that Section 5 is too "blunt a tool" because it applies to every voting change, no matter how inconsequential, and that Section 5 has been improperly manipulated by the political parties, by the Department of Justice, and by candidates to serve their own political interests. In Eckstein's view, Section 2 and the Fourteenth Amendment provide sufficient protection for minority voters.[53]

Adam Andrews, executive assistant to the Chair of the Tohono O'odham Nation, stated that the elderly members of his tribe needed language assistance and that Pima County, because of the Section 203 requirements, has made affirmative efforts to work with the tribe, including hiring tribal members to serve as poll workers. He said that these efforts have resulted in unprecedented turnout of tribal members in the 2002 and 2004 elections.[54]

Northeast Regional Hearing:
Association of the Bar of the City of New York
42 West 44th Street
New York, New York
June 14, 2005

National Commissioners in Attendance:

Chandler Davidson

Bill Lann Lee

Hon. Joe Rogers

Guest Commissioners:

Juan Cartagena, Community Service Society of New York, New York, NY

Kimberle Crenshaw, Columbia University and UCLA Schools of Law

Miles Rapoport, Demos, A Network of Ideas and Action, New York, NY

Panelists:

Nadine Cohen, Boston Lawyers' Committee for Civil Rights Under Law, Boston, MA

Hon. Marcos Devers, City Council, Lawrence, Massachusetts

Hazel Dukes, New York State Conference of NAACP Branches, New York, NY

Walter Fields, Community Service Society of New York, New York, NY

Margaret Fung, Asian American Legal Defense and Education Fund, New York, NY

Jose Garcia, Institute for Puerto Rican Policy & the Latino Voting Rights Network, New York, NY

Joan Gibbs, Center for Law and Social Justice, Medgar Evers College, The City University of New York, Brooklyn, NY

Veronica Jung, Korean American League for Civic Action, New York, NY

Randolph McLaughlin, Hale House Center, Inc.; Professor, Pace University Law School, New York, NY

Ozzie Maldonado, Passaic, NJ

Hon. David Paterson, New York State Senate, Albany, NY

Martin Perez, Latino Leadership Alliance of New Jersey, New Brunswick, NJ

Joseph Rich, Lawyers' Committee for Civil Rights Under Law and former Chief of Voting Section, Department of Justice, Washington, DC

Theodore Shaw, NAACP Legal Defense and Educational Fund, New York, NY

Hon. Charles Walton, Community College of Rhode Island; former Rhode Island State Senator, Providence, RI

Carlos Zayas, voting rights activist and lawyer, Reading, PA

Public Testimony:

Kevin Peterson, New Democracy Coalition, Boston, MA
Colombina Santiago, ACORN, Passaic, NJ
Mr. Thuy, New York, NY
Dolores Watson, Long Island, NY
Joanne Wright, ACORN, Long Island, NY

20 *Northeast Regional Hearing*

The Northeast Regional Hearing was held in New York City on June 14, 2005. While the Voting Rights Act's temporary provisions are often associated in the public mind with the South and, to a lesser extent, the Southwest, the six states covered in this regional hearing have been the focus of extensive voting rights enforcement efforts for a number of years. Bronx, Kings, and New York County have all been covered by Section 5 since the 1970s. In addition, the diverse immigrant populations in New York, Connecticut, Massachusetts, New Jersey, Pennsylvania, and Rhode Island have brought Section 203 into play in this region as well. The year Section 5 was last reauthorized, for example—1982—organizers of a Latino festival were denied their request to the Board of Registrars in Lawrence, Massachusetts, to hold a voter registration drive. After the organizers sued the board, a preliminary injunction required it to hold the drive.[55] Virtually all the states in the region targeted by the Northeast Regional Hearing have areas covered by Section 203, have experienced the presence of election observers sent by the Department of Justice (Rhode Island is the exception), and have been the site of at least one Section 2 action.[56] In some areas, such as Newark and Passaic, New Jersey; Boston; and New York City, sharp ethnic conflicts remain a constant reality and have led to voting rights problems over a considerable period of time.

Theodore Shaw, Director-Counsel and President of the NAACP Legal Defense and Educational Fund, Inc. (LDF), presented testimony focusing on New York. He began by noting that New York's English literacy test, in effect from 1923 to 1966, prevented large numbers of the state's citizens of Puerto Rican origin from voting. Section 4(e) of the Act banned such tests in 1965, but the state tried to preserve its literacy test, losing its case in the U.S. Supreme Court in 1966.[57] The triggering formula for Section 5 coverage—having had a literacy requirement and having fewer than 50 percent of voting-age citizens registered at the times specified in the Act—led to Kings (Brooklyn), Bronx, and New York (Manhattan) Counties becoming covered.[58] Shaw stated that in New York City since 1982,

> Section 5 objections have helped prevent minority vote dilution in three broad areas: redistricting, non-geographical election procedures (voting rules, election control, suspension of elected bodies, etc.), and barriers to political access for linguistic minorities. The scope of these categories is significant: their breadth touches virtually every aspect of the vote.[59]

Since 1983, the Department of Justice has objected six times to submissions from New York jurisdictions, involving "dozens" of changes that would have diluted the minority vote in widespread areas of the city, said Shaw. Among the neighborhoods in which minorities would have been harmed were "Williamsburg, East Heights, Inwood, Washington Heights, Williamsbridge, Wakefield, University Heights, and Union Port." Thanks to Section 5 coverage, however, "many of these neighborhoods have become important bases for minority voting power."[60]

Shaw pointed to the fact that since three New York City counties are covered and one, Queens, is not, this situation provides the opportunity for a natural experiment in which the impact of Section 5 can be measured. "In Queens, where redistricting plans are not subject to the scrutiny of preclearance review, pressure to protect white incumbents from dramatic demographic changes has wrought a districting pattern that, according to former Assistant Attorney General John R. Dunne, 'consistently disfavored the Hispanic voters.' Additionally, though all State Senate districts in New York City are overpopulated (i.e., individual votes are diluted), Queens County districts are twice as overpopulated as Kings, Bronx, and New York Counties. If Section 5 is allowed to expire, we could expect that pattern to become the norm across all of New York City." Shaw claimed that even with Section 5 coverage, "minorities still hold a disproportionately low number of political seats in New York."[61]

Asian Americans, too, have faced barriers to voting in recent years. The Asian American Legal Defense and Education Fund (AALDEF) conducted exit polls during the 2004 presidential election in various locales. Their report, submitted to the Commission, noted that while in most jurisdictions identification was not a voting requirement (aside from the HAVA requirement that first-time voters who registered by mail must provide identification), "two-thirds (66%) of New York and New Jersey [Asian-American] voters who had registered prior to January 1, 2003 were required to show identification, even though it was not legally required by HAVA." [62] There were a number of other problems reported by Asian Americans in the exit polls. (The total sample consisted of 10,789 voters in twenty-three cities in eight states.)

- The names of 371 voters were not on the lists of registered voters.
- 126 voters complained that poll workers were discourteous or hostile.
- 239 voters said that poll workers were poorly trained.

- 185 voters were directed to the wrong poll site or election district.
- 385 voters encountered other voting problems.[63]

Apart from the results of the poll, "more than 600 voters called AALDEF's election hotline or complained to poll monitors to report voting problems."[64] *Margaret Fung*, the organization's executive director, expanded on the experience of Asians in New York. While deeming Section 203 a "success story" and describing her organization's role in its 1992 reauthorization, whereby the trigger formula was amended to expand coverage, she pointed to continuing problems with language assistance. The problems included inaccurate translations, an insufficient number of interpreters, poorly trained election workers, and wrong information about polling sites. Fung also described racist remarks by two talk-show hosts on a New Jersey radio station about Jun Choi, a Korean-American candidate for mayor in Edison before the 2005 primary elections. Following widespread protest in the large Asian community, the radio station issued an on-air apology. Choi went on to win the Democratic nomination.[65]

Joseph Rich, former Chief of the Voting Section in the Department of Justice, based his observations in part on his more than thirty-six years in the Department's Civil Rights Division. According to Rich, the Voting Section annually receives over 4,000 submissions containing about 20,000 proposed voting changes. While the Attorney General objects to less than 1 percent of the submissions, he believes that Section 5 has a significant deterrent effect. "Because the Department has built a tradition of excellence and meticulousness in its Section 5 review process, jurisdictions will think long and hard before passing laws with discriminatory impact or purpose," according to Rich. As a result of this deterrent effect, Section 5, in his view, has "probably" been the Act's "most important and effective provision."[66] And given this fact, Rich judged the Supreme Court's 2000 *Bossier II* decision, mentioned above, to have "significantly narrowed the ability to object to and deter discriminatory [behavior] when compared to the pre-*Bossier Parish* standard." He added, "It is truly anomalous to me that a voting change which intentionally discriminates against minority voters in a manner that violates the constitution is not objectionable unless it has 'retrogressive purpose.'"[67]

The former Department of Justice official also stressed the importance of the continued use of federal observers and monitors, and of Section 203. Regarding observers and monitors, he noted that

the Civil Rights Division "has developed very careful procedures for determining when to recommend to the Attorney General that federal observers be sent to cover an election"—the most important factor being the potential for vote discrimination in contests pitting minority candidates against white ones, "resulting in increased racial or ethnic tensions." The presence of these observers on Election Day has "consistently . . . had a calming effect during highly charged elections in which there have been allegations of possible Voting Rights Act violations and has helped deter discriminatory acts." Rich cited the presence of observers at several elections in Passaic County, New Jersey, as an example of their importance.

> The county was under a consent decree which required specific actions to bring the county into compliance with Section 203 . . . On the basis of information gathered [by the observers], the Department took legal action to ensure full implementation of Passaic's court-mandated language assistance program.[68]

Federal involvement relating to language assistance on behalf of minority voters led to the first election of a Latino mayor in the city.[69]

Rich also pointed to the increased federal oversight of elections in recent years as indicating a need for the Attorney General's continued authority to send them. In 2004 alone the Department dispatched a total of 898 federal observers and monitors to 85 jurisdictions.[70]

Charles D. Walton, the first African American to serve in the Rhode Island senate, was elected to that body in 1983 after a court found that the legislature's redistricting plan discriminated against African Americans. He noted that while progress in electing minorities in his state was evident since 1983, there is still significant racial discrimination as well as litigation attacking it—including the legislature's 2002 senate redistricting plan that was only changed as a result of a legal challenge supported both by Latino and black organizations. Walton's review of events in his own state led him to conclude that "across New England racial discrimination exists in the electoral systems for local and state government. Voting patterns are racially polarized, and black voters do not have an equal opportunity to elect candidates of their choice."[71]

José A. Garcia, representing the Institute for Puerto Rican Policy and the Latino Voting Rights Network, reiterated some of the points made by Theodore Shaw regarding the impact of Section 5 on New York counties. "In New York City alone," he stated, "there are 23 Latino elected officials at the local, state and federal levels, most

elected in the three counties of the city covered by Section 5 . . ." He suggested that the absence of coverage in Queens County hindered election of minority candidates in "the newer and fastest-growing Latino communities" there.[72] Garcia also pointed to numerous problems in the area as seen over time in the Latino community, including racial gerrymandering of districts, "the exclusion of Latinos from the decision making process in the setting of redistricting rules, procedures, and practices; . . . the lack of notices in poll places in Spanish and the lack of Spanish-language poll workers"; lack of adequate training of poll workers; "the use of off-duty police and other law enforcement personnel as poll watchers in Latino areas"; scare tactics in the media intended to frighten Latinos away from the polls; harassment of Latino voters by poll officials; refusal to register legitimate Latino voters; and moving of polling places, without notice, to locations inconvenient to Latinos.[73]

Pennsylvania has also had its problems with language assistance, according to voting rights activist and lawyer *Carlos A. Zayas*, whose testimony focused on election practices in Berks County. Those practices led to a permanent injunction issued by a federal judge. He summarized the court's finding in *U.S.* v. *Berks County*[74] that use of English-only election processes violated Section 4(e) of the Act by conditioning "the right to vote for the county's sizeable Puerto Rican community, many of whom attended schools in Puerto Rico, on ability to read, write and understand English . . ." The court also found the English-only process violated both Sections 2 and 208. Among the election practices Zayas enumerated as occurring in Berks County were "hostile and disparate treatment of Hispanic and Spanish-speaking voters . . . lack of bilingual poll workers . . . lack of bilingual materials . . .denial of assistor of choice . . .," and county officials' refusals to remedy voting rights violations.[75]

Midwest Regional Hearing
Dorsey & Whitney
50 South Sixth Street, Ste. 1500
Minneapolis, Minnesota
July 22, 2005

National Commissioners in Attendance:

Chandler Davidson

Bill Lann Lee

Elsie Meeks

Hon. Joe Rogers

Guest Commissioner:

Matthew Little, Chairman of Minnesota NAACP

Panelists:

Ihsan Ali Alkhatib, Arab American Anti-Discrimination Committee, Detroit Chapter, Dearborn Heights, MI

Gwen Carr, Native Vote, Madison, WI

Kat Choi, Korean-American Resource & Cultural Center, Chicago, IL

Hon. W. Patrick Goggles, State Representative, Wyoming

Hon. Carol Juneau, State Representative, Montana

Ellen D. Katz, University of Michigan Law School, Ann Arbor, MI

Maggie Kazel, Fond du Lac Tribal and Community College, Duluth, MN

Judson Miner, Miner, Barnhill & Galland, Chicago, IL

Gregory Moore, NAACP National Voter Fund, Washington, DC

Hon. Gwen Moore, U.S. House of Representatives, 4th Congressional District, Wisconsin

Hon. Michael Murphy, Michigan House of Representatives, 7th District

Mark Ritchie, Center for Agriculture & Trade Policy, Minneapolis, MN

Janet Robideau, Montana's People's Action and Indian People's Action

Jorge Sanchez, Mexican American Legal Defense and Educational Fund, Chicago Regional Office

Michael Sayers, Red Lake Band of Chippewa Indians and Urban Liaison, Duluth, MN

Elona Street-Stewart, St. Paul Board of Education, St. Paul, MN

Alice Tregay, Rainbow Push Coalition, Chicago, IL

Public Testimony:

Sunday Alabi, ACORN

Kathy Dopp, US Count Votes

Shade Buyobe-Hammond, ACORN

Cheryl Morgan-Spencer, Minneapolis Urban League, MN

Submitted Statements:

Hon. William Lacy Clay, U.S. House of Representatives, 1st Congressional District, Missouri

Hon. Emanuel Cleaver, U.S. House of Representatives, 5th Congressional District, Missouri

Hon. Jesse L. Jackson, Jr., U.S. House of Representatives, 3rd Congressional District, Illinois

Stephen Laudig, private practitioner, Indianapolis, IN

Hon. Barack Obama, U.S. Senator, Illinois

Dr. Janine Pease, Crow Indian Educator and Voting Rights Activist, Billings, MT

This regional hearing focused on the fourteen Midwestern states of Idaho, Illinois, Indiana, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, South Dakota, Ohio, Wisconsin, and Wyoming. The situation of Native Americans, African Americans, and Latinos figured most prominently in the day's testimony, although important information on Arab-American voter harassment also came to light, as did the need for Asian-American language assistance. The variety and extensiveness of data collected for these states almost defies a brief summary. A useful overview is provided by a report prepared for the hearing by the law firm of Dorsey & Whitney LLP.[76] This report not only summarizes each state's demography, Voting Rights Act coverage, and "minority issues," but gives examples of voting problems and allegations of misconduct or unfairness in various recent elections that warrant concern.

At least sixty-eight lawsuits were filed in these Midwestern states since 1982 alleging discrimination against minority voters, including several decided in the 1990s or later. Of these, thirty-two had results favorable to Native Americans, Latinos, or African Americans. Most were filed under Section 2.[77] Also noteworthy were the various attempts and alleged attempts by officials, poll challengers, or others to harass or suppress the votes of minorities in numerous venues throughout the region. According to the report, such allegations were made in at least ten of the fourteen states within the past few years, and in some of these states many allegations were made. These typically involved false information about election timing or voter qualifications purveyed in minority neighborhoods, aggressive challenging of voters at the polls, unduly restrictive and illegal identification requirements announced by election officials, and rudeness to people of color by election workers.[78]

One of the most remarkable incidents involved discrimination against Arab-American voters in a 1999 mayoral election in Hamtramck, Michigan—almost two years before 9/11. Historically a heavily Polish city surrounded by Detroit, Hamtramck's Muslim population has grown sharply in recent years and the Polish population has declined. *Ihsan Ali Alkatib* described events in 1999 as follows. Poll challengers from "Citizens for a Better Hamtramck," a group seeking to "keep the election pure" accosted Arab-American and other dark-skinned voters in the city's general election. Because of the challenges, election officials required many Arab-American voters to take a citizenship oath as a requirement for voting. Some Arab Americans apparently decided not to vote after they heard of the harassment. The Department of Justice filed suit against the city under Section 2 of the Voting Rights Act. The Department and the

City ultimately entered a consent decree, providing for bilingual, Arabic- and Bengali-speaking inspectors at all polling stations and for federal observers to monitor elections.[79] In 2003, a Bangladeshi-American was elected to the city council for the first time.[80] Even so, in 2004, "several Bangladeshi voters" at one polling place complained that they were given incorrect information about poll sites. According to written testimony submitted at the Northeast Regional Hearing by *Margaret Fung* of the AALDEF, "Bangla interpreters are still needed in this location."[81]

Other examples of techniques falling under the heading of vote suppression or harassment include but are by no means limited to the following: voters in Saginaw, Michigan being asked in 2000 if they were felons; a white Republican Michigan state legislator telling supporters in July 2004 that their party would have a tough time in November unless they "suppress[ed] the Detroit vote," referring to the predominantly black city; a 2004 complaint "that a police officer outside a polling location in Cook County [Chicago, Illinois] asked voters for photo identification and told them they could not vote if they had ever been convicted of a felony"; and complaints from several Minnesotans that they had received telephone calls instructing voters to go to the wrong precinct or giving an incorrect election date.[82] These examples represent a small number of the allegations of vote suppression efforts in recent years in the Midwest. Hundreds of such complaints were reported.[83]

Testimony at the hearing echoed the concerns described in the report. Montana State Representative *Carol Juneau*, member of the Mandan and Hidatsa Tribes on the Blackfeet Reservation, spoke about her role as a plaintiff in a vote-dilution suit filed after the 1992 redistricting process and encouraged the Commission to familiarize itself with the case. In a written statement, *Dr. Janine Pease*, a Montana Crow Indian educator and voting rights activist, pointed to the practice of county clerks often "tossing" the names of potential Indian registrants who lack addresses in rural tribal areas; purges that unnecessarily remove registered voters from the voter lists, especially affecting first-time and younger voters; and at-large election systems that dilute Indians' voting strength. She also voiced the need for Indian judges at the polls.[84]

U. S. Rep. William Lacy Clay of St. Louis, an African-American Democrat, accused the city's election officials of "routinely" violating state and federal election law by misusing "inactive voters" lists to purge the rolls of inactive voters prior to the 2000 election. He also criticized the provisional ballot law, which he called "confusing," lending itself to misinterpretation by "ill-informed election officials."

He said that "Missouri voters should not be turned away at the polls because of a misinterpretation of law."[85]

Alice Tregay, a member of the Rainbow-PUSH Coalition, spoke about the racial gerrymandering to dilute black and Latino votes by the Democratic machine in Chicago since the last reauthorization of the Voting Rights Act. She also spoke of racially unfair administration of voter identification procedure at the polls and unfair removal of voters' names from the voter rolls.[86]

Kat Choi, with the Korean-American Resource & Cultural Center in Chicago, pointed out that approximately 7,000 registered Korean Americans live in Cook County, fewer than the 10,000 needed to trigger that group's coverage by Section 203. Cook County does not provide much-needed bilingual materials, including sample ballots, to those voters, many of whom are recent arrivals with limited English proficiency. She also spoke of a dearth of Korean-American election judges, and asked that the Section 203 trigger be changed to accommodate her community's needs.[87]

Jorge Sanchez, a staff attorney with the Mexican American Legal Defense and Educational Fund's Chicago office, echoed Choi's concern about the lack of language assistance. "MALDEF has found that even sympathetic county registrars and clerks have dragged their feet in . . . translating election materials," he said. He then asserted that in Cook County, which he termed "fairly friendly" to both immigrants and Latinos, "it was only after litigation that the clerk of Cook County ordered all materials to be translated" for Latinos, who are numerous enough there to be covered by Section 203. Other jurisdictions in Illinois, he said, were even more difficult to convince—King County, for example. From 2001 through 2004 the county did little to prepare for their obligation to provide language assistance. "Even after they agreed that they were covered, that they had the obligation to translate everything, we found them fighting about what needed to be translated. 'Well, does it really have to be everything?'" According to Sanchez, it was only after the threat of litigation that King County finally did what was required.[88]

Another insight into the problems Native Americans face was provided by *Elona Street-Stewart*, the first Native American elected to the St. Paul school board and currently its chairwoman. Street-Stewart spoke of events on the Red Lake Nations reservation in Minnesota in 2004—the "most blatant" of "several attempts to suppress Native American votes in Minnesota." As a "closed" reservation, non-tribal members are required to obtain permission from the tribe before entering it. On Election Day, however, several "party-sponsored" challengers (from both major parties) arrived on the reservation before the polls opened:

> A Republican challenger showed up in Ponemah; first he started questioning and intimidating the election judges [all of whom were Indians], . . . he then started to intimidate the voters by arbitrarily challenging individuals who were standing in line to vote. Some potential voters left the precinct because of this challenger's antics. The Red Lake Tribal Police Department was called to observe the situation. However, this challenger's behavior worsened once the officers arrived. He continued to disrupt the voting process and eventually the Tribal Officers were forced to remove him from the precinct and escort him to the reservation's border.[89]

In summary, from the hearing a portrait emerged of the Midwest as an area in which minority voting rights, including those of Native Americans, African Americans, Asian Americans, Latinos, and Arab Americans, are a matter of continuing controversy and of concern to minority leaders and activists.

South Georgia Hearing
Sumter County Courthouse
Americus, GA
August 2, 2005

National Commissioners in Attendance:

Chandler Davidson

Hon. Joe Rogers

Panelists:

Hon. Floyd Griffin, Mayor, Milledgeville, GA

Daniel Levitas, ACLU Voting Rights Project, Atlanta, GA

Charles Sumblin, SCLC City of Wrightsville, GA

Tisha Tallman, MALDEF, Atlanta, GA

Johnny Vaughn, District One Voter's Association, GA

32 ***South Georgia Hearing***

A "mini-hearing" in the Georgia town of Americus was held in the late afternoon of August 2, 2005, in the Sumter County Court House, at the invitation of State Senator Robert Brown, who also chairs the Community Connections Committee of the Georgia Legislative Black Caucus. Americus, located a few miles east of Plains and north of Albany, was the site of intense conflict over civil rights in the 1960s. It was here that John Lewis (now a U.S. Representative from Georgia) was arrested for demonstrating in support of black women arrested earlier for refusing to accept racially separate registration lines at the court house. His arrest occurred two days after the Voting Rights Act was signed. (More than thirty-five years later Lewis would write, "As always, when it came to the Deep South, passing laws was one thing; enforcing them was another.") [90]

The South Georgia hearing was held in the same Sumter County Court House. *Senator Brown* described events in Georgia as representing "the best of times and the worst of times." He expanded on that point by saying, "We in this state have probably the largest African American caucus in the state legislature of any in the states, all 50 states. . . . Yet, we are also a state where we recently have seen the law passed that's one of the [most] restrictive laws in the nation as far as voter identification is concerned. And we really are concerned that without the Voting Rights Act being renewed, that we will see even more injurious and onerous kinds of legislation." If the legislature would pass such laws with Section 5 in effect, he suggested, "it certainly would stand to reason that they would go even further" without it.[91] (The Georgia voter ID law the senator was referring to was later precleared by the Department of Justice in spite of a recommendation to the contrary by most of the Voting Section staff handling the case. Federal Judge Harold Murphy issued a preliminary injunction on October 18, 2005, enjoining its enforcement.)[92]

Later in the hearing, Senator Brown again discussed the good and bad trends in his state. There is still a significant amount of racially polarized voting, he said. Even so, four African Americans have so far won statewide office—as Attorney General, Chief Justice of the Supreme Court, a member of the Public Service Commission, and a Labor Commissioner, but only after they were first appointed to these positions.[93] Whites will vote for such candidates, according to the senator, "after they have had an opportunity to demonstrate their capacity to govern . . . and you often don't get that opportunity except for starting in a predominantly African American district."[94]

Senator Brown's Dickensian theme of "the best of times and the worst of times" was picked up by *Floyd Griffin*, the mayor of Milledgeville, which was Georgia's capital before the Civil War. He is

also president of the Georgia Conference of Black Mayors. Griffin, a retired Army colonel, said he was the first African-American mayor to be elected in the city's 199-year history. Moreover, according to him, the city is predominantly white, consisting of "about . . . 43, 44 percent" registered black voters. He said the voting in his contest was almost entirely along racial lines—although he admitted some blacks did not vote for him—but he got enough white support to win by twenty-one votes. However, after nine months in office, "the [city] council voted to change the form of government and it went to the legislature and the legislature approved that . . ." The change was from a strong mayor to a city manager system, in which, as Griffin put it, the manager would be "carrying out the responsibilities, the day-to-day responsibilities of the city." Under the new system, as he described it, the mayor is "more of a figurehead." According to Mayor Griffin, the city from its beginning had had a strong mayor form until the first African American was elected to the post.[95] The Department of Justice precleared the change, he said, in part because the six-member council was unanimous in supporting it and three were African Americans elected from districts. He believed, however, that the change should have been made only after a referendum "or anything of that nature." He filed suit in both federal and state courts challenging the change, lost in both, and appealed the state court ruling, which had not been decided at the time of the hearing.[96]

Mayor Griffin pointed out, again on a positive note, that there are now forty black mayors in the state, although perhaps only "two or three" represent majority-white cities. He also expressed the view that almost all African Americans in the Georgia legislature were elected from majority-black districts, although Griffin himself, who had also served in the state senate, had been elected from a majority-white seat.[97] "I went to Tuskegee back during the 60s and marched in Tuskegee, was on the march from Selma to Montgomery and so you know and understand and appreciate where we have come from, but we still have a long way to go, and if we start taking away some of the remedies that are put in place to help try to make the field level, then we're going to be in tough shape," the mayor averred.[98]

Apparent discrimination against Latinos, a growing segment of Georgia's population, was described by *Tisha Tallman*, regional counsel for MALDEF. This discrimination is part of a larger negative response to the rapid influx of Latino immigrants in the South.[99] She spoke of individuals who, prior to the 2004 primary elections, challenged the citizenship of Latino registered voters at the Registrar's office in Long County, Georgia, on the basis of nothing more than their Spanish surname, so far as MALDEF could determine. The office required that the voters attend a hearing for the purpose of

establishing their citizenship. Tallman believed this had a "chilling effect" on Latino turnout in the primary. "We believe that this process was in violation of Georgia law and potentially in violation of Section 2 of the Voting Rights Act," Tallman said. She had protested this behavior to the State Election Board a week before her testimony to the Commission, but, she said, "nothing has been done to date in regard to action by the State of Georgia." The Department of Justice was still investigating.[100]

She also mentioned an event in Alamance County, North Carolina, in which a sheriff obtained a list of Latino registered voters and "publicly stated that he was going to go door-to-door to the house of every single registered Latino voter and determine whether or not they were U.S. citizens and to systematically arrest every single person he did not believe to be a U.S. citizen." Resulting publicity and MALDEF's notification of the Department of Justice, however, caused the sheriff not to carry out his plan.[101]

Danny Levitas represented the American Civil Liberties Union Voting Rights Project in Atlanta at the South Georgia hearing. He told of events sixteen years ago in "the modern era here in the State of Georgia."

> I moved to Georgia in 1989 to work for a nonprofit civil rights organization whose mission was to assist . . . victims of racial violence and I received a phone call at the office one day from some folks who lived not too far from here [the town of Blakeley in Early County] . . . who told me . . . they needed help because the Ku Klux Klan was running the fire department in their town and had what they believed was a habit of letting homes in the black community burn for . . . a long period of time before they intervened. We investigated. To make a very long story short, we interviewed members of the Klan who provided . . . the membership records [of the Klansmen]; we subpoenaed, subject to the Federal District Court civil rights lawsuit filed in the Southern District of Georgia, the telephone records of the fire chief and we proved in fact that the city fire chief, . . . Franklin Brown, was indeed a dues paying member of the Ku Klux Klan, that he had hired other Klan members to . . . [work] in the Fire Department . . . [W]hat was notable about this case was that the city put on an extraordinarily vigorous defense and retained none other than the president of the Georgia Trial Lawyers Association to defend the city and during depositions, one in which I was present, during a break .

> . . the president of the Georgia Trial Lawyers turned to our counsel and said, well, the way I see it the black folks have the NAACP and the white folks have the Klan and that's about equal.
>
> The city vigorously defended this gentleman Franklin Brown until the telephone records that we produced by way of subpoena proved they had the unfortunate habit of making frequent phone calls to the state headquarters of the . . . Ku Klux Klan and their defense fell apart. The result was the Klan was purged from the Fire Department and as part of that case, the American Civil Liberties Union, through cooperating attorney Christopher Coates, who now works as the Deputy Chief of the Voting Section in Washington . . . [was able to effect the creation of] single member districts in the City of Blakeley [and black representation on city council].[102]

Levitas also discussed some of the voting rights suits in Georgia brought by the ACLU Voting Rights Project. He said the Project had filed "more than 300 separate legal actions to enforce the 1965 Voting Rights Act"— more, he said, than the Department of Justice had brought. Between 1974 and 1990 alone the ACLU sued 57 of Georgia's 159 counties for minority vote dilution, as well as 40 cities— including the city of Milledgeville mentioned earlier by its mayor, Mr. Griffin. He then mentioned various Section 2 cases the ACLU had filed in Georgia during the 1990s. "[T]he overwhelming bulk of enforcement and the burden and cost of that [Voting Rights Act] enforcement has fallen to private organizations like the ACLU, like MALDEF, like the Lawyers' Committee for Civil Rights Under Law, like the NAACP Legal Defense Fund and others," he asserted.[103]

Dr. Johnny Vaughn from Dublin, Georgia, is president of District One Voters Association and one of the plaintiffs in a successful Section 2 case challenging at-large elections in Laurens County, a suit which led to the creation of two majority-black county commissioner districts.[104] One of his complaints concerned the recently passed Georgia voter ID law and the burden it placed on the elderly. "Can you imagine an 85-year-old lady standing in line in Fulton County waiting to get an ID card where you're standing in line waiting to get a driving license?" he asked.[105]

The new ID law was also criticized by *Charles Sumblin*, past president of the Southern Christian Leadership Conference (SCLC) of Wrightsville. Sumblin said he was arrested and beaten in 1982 by "Sheriff Attaway . . . because we were standing for civil rights in

Johnson County." Later he declared his candidacy for public office and made the runoff, but claimed there was "illegal use of absentee votes" that was "rampant and widespread." He claimed that a letter of complaint from him and the local chapter of the SCLC "did not result in any corrective action on the part of [the] Election Division of the State of Georgia."[106] He went on to say he was "saddened by the fact that even now we live with the question of whether or not the Department of Justice is going to embrace or endorse the newly passed" voter ID law. "It's unbelievable that they would try to undo all the hard work that . . . has gone into voter rights and just make a mockery of the lives of all those people that died for voter rights here in the State of Georgia and across this country" by passing such a law.[107]

Florida Hearing
80th Annual Convention of the National Bar Association
J.W. Marriott Orlando
4040 Central Florida Parkway
Orlando, Florida
August 4, 2005

National Commissioners in Attendance:

Hon. John Buchanan

Chandler Davidson

Hon. Joe Rogers

Guest Commissioners:

Kim Keenan, National Bar Association, Washington, DC

Fred Gray, Gray, Langford, Sapp, McGowan, Gray & Nathanson, Tuskegee, AL

Panelists:

Debo Adegbile, NAACP Legal Defense and Educational Fund, New York, NY

Brad Brown, NAACP, Miami-Dade, Miami, FL

Hon. G.K. Butterfield, US House of Representatives, 1st Congressional District, North Carolina

Monica Dula, National Bar Association Election 2004 Task Force, New York, NY

Iris Green, National Bar Association, Washington, DC

Reggie Mitchell, People for the American Way Foundation, Inc., Tallahassee, FL

Regine Monestime, Florida Haitian Bar Association, Miami, FL

J. Goodwille Pierre, National Bar Association, Region 5, Houston, TX

Meredith Bell Platts, ACLU Voting Rights Project, Atlanta, GA

Marlon Primes, National Bar Association, Cleveland Heights, OH

Marytza Sanz, Latino Leadership, Orlando, FL

Constance Slaughter-Harvey, Elections, Inc. and adjunct professor, Tougaloo College, Tougaloo, MS

Courtenay Strickland, ACLU of Florida, Miami, FL

Reginald Turner, National Bar Association, Detroit, MI

38 ***Florida Hearing***

The Commission's Florida hearing was in Orlando, in conjunction with the annual meeting of the National Bar Association, whose president, Kim Keenan, was a guest commissioner, along with Fred Gray, an Alabama attorney who had represented Rosa Parks during the Montgomery bus boycott and who was the first civil rights attorney of the Rev. Martin Luther King, Jr. (Gray's fifty-year career was also marked by service in the Alabama legislature and as president of the National Bar Association.) The Florida hearing involved witnesses from Florida and members of the National Bar Association from throughout the country.

Congressman G. K. Butterfield, representing North Carolina's 1st District, struck a note that was often heard in the hearings, namely, that while much progress in minority voting rights had been made in his state, thanks to the Voting Rights Act, the resistance of many whites—including those in the "power structure"—to minority gains warranted continuation of Section 5.

He recounted a bit of personal history that informed his fear of what might happen if Section 5 were not extended. His father was the fourth black elected official in North Carolina in the twentieth century, he said, and the first in the eastern part of the state. The senior Butterfield ran from a district in which African Americans were registered in large numbers, and after a tie vote, he was declared the victor after his name was drawn from a hat. "Prior to the next election, my family was on vacation in New York, and while we were away, the city council called an emergency meeting and changed . . . from district elections to at-large elections. And so at the next election he was defeated. Had we had a Section 5, that would not have happened." He continued:

> And so I say all of that to say that if we eliminate Section 5, you will begin to see a mass movement to revert to at-large elections in the South. And at-large elections would, I suppose, be fine if we did not have racially polarized voting. But racially polarized voting continues to be a very, very serious problem in the rural South.[108]

Several issues were addressed by the speakers who followed. *Marytza Sanz*, president and CEO of Latino Leadership, spoke of the special needs of Puerto Ricans in Florida; and *Regine Monestime* of the Haitian Bar Association, talked about the language-assistance needs, in particular, of Haitian-born Florida citizens who are not covered by Section 203.[109] *Brad Brown*, Political Action Chair of the Miami-Dade NAACP, spoke of political conflicts and polarization between Cuban Americans and African Americans in that area of the

state—conflicts in which, he said, the rights of African Americans were often ignored regarding ballot access. Department of Justice intervention has sometimes been necessary, he said, to protect the rights of African Americans.[110] He also spoke of efforts by whites to undercut the impact of a lawsuit in the 1990s that successfully challenged the dilutive impact of at-large elections to the Miami-Dade County Commission. Now that there are four blacks among the thirteen commissioners, a referendum is scheduled to amend the charter, he said, "to remove the executive power of that commission and give them to the county mayor." The mayor, Brown said, would have sole authority to select persons to fill the more than 100 advisory boards and committees in the county. This shift of authority, he claimed, would remove "the ability of the current four black out of thirteen total commissioners to ensure that their constituents have a voice."[111]

Iris Green, chair of the National Bar Association's Civil Rights Section and former Department of Justice attorney, spoke of her experience in the 2004 national Election Protection program, and echoed concerns expressed by others both at this hearing and those at the Southern Regional and Southwest Regional hearings about the rights of black college students. Working on Election Day, she said,

> I got quite a few calls from the state of Florida. One in particular came from a . . . student [at historically black Florida A&M], in fact, a number of students who, even though there was a polling place on the campus . . . they were told that they were to vote some place that was off campus. They went to the polling place that was off campus only to be told that, no, your polling place is . . . the precinct on the Florida A&M campus. They came back to the Florida A&M campus and were once again told, no, your polling place is off campus. By that time they were really, really frustrated and desperately wanted to vote. For most of them, it would be their first time ever voting in a national election. . . .
>
> But since we had people located on the ground, I referred them to our local persons . . . and hoped that they were able to help them. But those students were being denied the right to exercise their franchise, and they were right there on the campus where they had a polling place. And these were not students who lived in the city. These were the students who actually lived on the FAMU campus. There still exist many impediments

to voting, and the Voting Rights Act should be strengthened along with being extended.[112]

The situation of blacks in South Carolina was addressed by *Meredith Bell Platts*, attorney with the Voting Rights Project of the ACLU Southern Regional Office. "We've heard of the great changes, the quiet revolution that has taken place in minority representation due to the Voting Rights Act," Bell Platts stated. "I have also observed, however, how much work remains and how discriminatory tactics may be less overt, but no less palpable today."[113]

In particular, she spoke of the extreme disparity in socio-economic status between blacks and whites in South Carolina, and "the high levels of racial polarization," with the result that "black voters are rarely able to elect their candidates of choice in majority-white districts." One result of this situation is the need for heavily black districts, which in some cases appear to depress the number of Democratic seats in the legislature. To address this problem, a Democratic governor, Jim Hodges, argued that black percentages in such districts should be reduced, "to ward off further electoral failures for the Democratic party in senatorial elections." This was rejected by a three-judge court. As an illustration of the intensity of racial feelings, Bell Platts noted that during the trial, "it was reported that a group of citizens in Lexington County . . . which is slightly outside the City of Columbia, informed one of their Republican representatives that they didn't want any, and they used a racial epithet, the 'n' word, on the Lexington County delegation, referring specifically to a plan that had drawn a black representative into portions of Lexington County."[114]

Bell Platts also summarized the recent history of racial animosity in Sumter County, South Carolina, by mentioning the various Section 5 objections interposed to electoral arrangements in the county. The fact that Sumter County in 2000 was almost 50 percent black undoubtedly added to the racial tensions surrounding redistricting in recent years. Bell Platts described angry editorials in the local papers and tense public meetings in county council chambers during the most recent round of redistricting, which ultimately led to a four-three black majority on the council.[115]

The situation of African Americans in Louisiana since 1982 was described in detail by *Debo Adegbile*, Associate Director of the NAACP Legal Defense Fund, who concluded on the basis of his legal experience in the state that "voting discrimination in Louisiana persists and . . . if Section 5 is not renewed, the state will experience a sudden and avoidable reduction of African-American access to the political process at every level of government."[116] This testimony was

given before Hurricane Katrina caused numerous problems of voter access in the state's next election cycle.[117]

Adegbile gave a brief overview of Department of Justice Section 5 enforcement efforts in the state since 1982. He said that 66 percent of the objections interposed since passage of the Voting Rights Act have occurred since that date. "These blocked changes have impacted every aspect of African-American voting," he noted, "including redistricting, polling place relocation, changes in voting procedures, voter registration, annexations, and other alterations of elected bodies, and even an attempted suspension of a presidential primary election."[118]

He also noted that the proposed changes objected to under Section 5 occurred "at every level of government, including the state legislature, the state court system, the state board of education, parish councils, school boards, police juries, city councils, and boards of aldermen." Moreover, he added, these objections were not concentrated in a small part of the state. "Thirty-three, more than half of Louisiana's 64 parishes and 13 of its cities and towns have proposed discriminatory voting changes since 1982—many, more than one time."[119] Adegbile continued:

> The DOJ was also compelled to object 17 times to attempts by the state itself to make changes that would set back minority voting rights in congressional, state legislative, state board of education, and state court elections. And in a stark, statewide illustration of the persistence and hostility toward equal African-American participation in Louisiana's political process since the VRA was passed in 1965, every proposed Louisiana State House of Representatives' redistricting plan has been objected to by the DOJ, including three since 1982.[120]

Adegbile stressed to the Commission that "these consistent efforts to diminish black voting power are not inconsequential remnants of the past . . ." He pointed out that Assistant Attorneys General for Civil Rights over the past three decades—individuals who have been appointed under both Democratic and Republican Administrations—"have consistently noted evidence of Louisiana officials' continuing intent to discriminate, including rejection of readily available non-discriminatory alternatives, inconsistent application of standards, drastic voting changes immediately following attempts by black candidates to win public office, and even candid admissions of racism by state and local officials as recently as 2001."[121]

Constance Slaughter-Harvey, president of Elections, Incorporated, past president of the Magnolia Bar Association (the predominantly African-American lawyers association of Mississippi) and former Assistant Secretary of State for Elections in Mississippi, also testified. Among her many accomplishments, Slaughter-Harvey was the first African-American woman to receive a law degree from the University of Mississippi, in 1970, five years after passage of the Voting Rights Act.

Like some others who participated at the Florida hearing, Slaughter-Harvey presented a poignant reminiscence.

> I was introduced to problems in voting when I was in the eighth grade. I was cleaning out my father's wallet, without his permission, of course, and came across a poll tax receipt, and it bothered me. I have the poll tax receipt in my office now and it's been with me since I graduated from law school in 1970. Every time I look at that receipt it reminds me that I have work that still needs to be done.[122]

During her testimony, Slaughter-Harvey expressed pessimism about the prospects for the "work that still needs to be done," causing Commissioner Joe Rogers to probe her on that issue, inquiring whether she considered her pessimistic statement "to be an overstatement on your part." He said, "You've had extraordinary gains that have taken place in Mississippi as a result of the Voting Rights Act, but . . . you say, 'I'm concerned now more than ever.'"[123]

She replied as follows:

> And I mean it. . . . I feel more pain now than when a judge called me a nigger from the bench in 1970. I feel pain because I sense that young African Americans . . . think that we have overcome. . . . See, when I was in Florida, I understood that the Klan does not have to wear a sheet. I know that. Now, I'm not certain young folks understand that you don't have to wear a sheet. . . . So yes, at my age, I'm 58 years old and I have never been more concerned about the survival of this country and the mean-spiritedness that's hit.[124]

South Dakota Hearing
Journey Museum
222 New York Street
Rapid City, SD
September 9, 2005

National Commissioners in Attendance:

Elsie Meeks

Hon. Joe Rogers

Guest Commissioners:

Hon. Thomas Daschle, former U.S. Senator, Special Policy Advisor, Alston & Bird, Washington, DC

Jacqueline Johnson, National Congress of American Indians

Hon. Chris Nelson, Secretary of State, South Dakota

Jennifer Ring, ACLU of the Dakotas

Panelists:

Brenda Blue Arm, Cheyenne River Sioux Tribe, SD

Jesse Clausen, Oglala Lakota, Pine Ridge, SD

Hon. Craig Dillon, Councilman, Oglala Sioux Tribal Council, LaCreek District, Pine Ridge, SD

Adele Enright, County Auditor, Dewey County, Timber Lake, SD

Richard Guest, Native American Rights Foundation, Washington, DC

Dan McCool, Director, American West Center, University of Utah, Salt Lake City, UT

Laurette Pourier, Society for Advancement of Native Interests—Today, Rapid City, SD

Bryan Sells, ACLU Voting Rights Project, Atlanta, GA

O.J. Semans, Rosebud Sioux Tribe, Mission, SD

Hon. Theresa Two Bulls, State Senator, SD

Hon. Raymond Uses the Knife, Cheyenne River Sioux Tribe, Eagle Butte, SD

Public Testimony:

Patrick Duffy, Rapid City, SD

Tom Katus, Standing Rock Sioux Reservation, SD

The Commission met in Rapid City on September 9 for the seventh hearing, focusing solely on problems of Native Americans in South Dakota, who in 2000 made up 8.3 percent of the state's 755,000 people. Whites made up 88.0 percent. In 2005 there were 4 Native Americans in the 105-member state legislature.[125] Eighteen counties are covered by Section 203. Two counties—Todd and Shannon, 86 and 94 percent of whose population, respectively, is Native American—are covered by Section 5 as well.[126] There is a long history of conflict between whites and Native Americans in South Dakota, the state in which thousands of Oglala Sioux died in 1890 in the Wounded Knee massacre. The most recent *Almanac of American Politics* describes the current situation of the Sioux in the state as follows:

> They are isolated far from the mainstream economic marketplace, beset by high rates of crime, alcoholism and suicide, with life expectancy and disease rates like those of sub-Saharan Africa; on the Pine Ridge Reservation in Shannon County unemployment is 70% and incomes average $3,500 a year. But infant mortality has been reduced and the American Indian population has been growing—by 23% in the 1990s.[127]

From the testimony at the hearing, it appears that many Native American voting problems stem from longstanding white prejudice combined with Native Americans' poverty, growing population, and increasing voter turnout in recent years. In addition, narrowly decided races for the U.S. Senate in 2002 and 2004 in a traditionally Republican state where Indians typically vote Democratic has led to intense partisan conflict as well. In 2002, Democratic incumbent U.S. Senator Tim Johnson narrowly defeated Republican John Thune. The victory was assured only after the votes came in from Shannon County, home of the Pine Ridge Reservation, early in the morning following Election Day. This led to unproven charges by Republicans of vote fraud. Other charges of "massive" Native American vote fraud earlier in the campaign—spread by the national conservative media but strongly denied by the state's Republican Attorney General, Mark Barnett—also symbolized the tension between Native Americans and at least some South Dakota whites.[128]

Professor Dan McCool, a political scientist and director of the American West Center at the University of Utah, provided an overview of Native American voting rights nationally and in South Dakota. McCool, who has testified as an expert in South Dakota voting rights suits, pointed out that of the sixty-six such suits involving Native

Americans filed since 1966, South Dakota and New Mexico were tied, at seventeen cases each, for the largest number filed within a state's borders.[129] McCool is co-author of a forthcoming book on the subject of Native American voting rights, the final chapter of which focuses on the 2002 and 2004 elections. He told the Commission that:

> [T]here are continuing problems . . . in South Dakota. So we see some problems have been resolved and other problems continue to arise, and there are still challenges to American Indians in their efforts to try to vote. There were also a number of widespread accusations about, quote, Indian voter fraud which proved to be inaccurate, and I think the level of accusations is indicative of the level of animosity and the hostility that has been created when American Indians register and try to vote. . . . And in South Dakota, there is still a high level of racial polarization in a number of areas. . . . [While not true everywhere in the state] this is especially true when Indians run against Anglos . . .[130]

Among the problems Indians face, McCool said, were the false but "widespread perception" that Indians are not taxpayers, and thus shouldn't be allowed to vote, "especially in state and local elections"; the long distance from residence to polling stations, "especially over bad roads; polls that are not located conveniently or not on Indian reservations; hostility among election workers and public officials; the purging of voter lists; a poor understanding of election laws and procedures; difficulties and resistance when attempting to register to vote; and efforts to dilute the impact of Indian voting."[131]

McCool's concluding opinion was that while Indians are achieving "remarkable gains" in some places, the "Voting Rights Act . . ., including Sections 5 and 203, has played a pivotal role in providing American Indians with an opportunity to vote and elect candidates of their choice. The impact is enormous."[132]

Bryan Sells, staff attorney with the Voting Rights Project of the American Civil Liberties Union, elaborated on the Act's impact by describing two of the seven cases over the past six years in which the ACLU has represented tribal plaintiffs in voting matters. "Our clients' litigation," he said, "has challenged virtually every level of government in this state from the state legislature and the Secretary of State on down to county commissions, city councils, and school boards." He added that his clients have so far prevailed in five of the seven cases, with two still pending.[133] Sells continued:

> Any discussion of Section 5 compliance in South Dakota has to begin with William Janklow. On August 23, 1977, then State Attorney General Janklow issued an official opinion in which he assailed Section 5 as a, quote, absurdity, end quote, that imposed an unworkable solution to a nonexistent problem. Janklow advised the South Dakota Secretary of State, Lorna Herseth, that he intended to pursue both litigation and legislation that would exempt South Dakota from the Voting Rights Act and that Herseth should therefore disregard the preclearance mandate in the meantime. Janklow never did file a bailout lawsuit. Legislation was never passed exempting South Dakota from the Voting Rights Act, but Secretary Herseth and her successors in office followed Janklow's advice for more than a quarter century.[134]

When the ACLU Voting Rights Project first learned of the state's noncompliance with Section 5, the staff over a period of months was able to identify "more than 600 unprecleared voting changes at the state level." The ACLU then brought suit in 2002 against the secretary of state on behalf of tribal members. "The parties negotiated a consent order and a remedial plan in which the secretary eventually admitted to more than 800 separate violations of Section 5," and his office is currently bringing the state into compliance.[135] However, in response to Sells's statement, current Secretary of State *Chris Nelson*, who has been a defendant in the case and was invited to serve as a guest Commissioner at the hearings, pointed out that in spite of these violations, none of South Dakota's non-precleared changes in voting law so far examined by the Department of Justice had resulted in an objection.[136]

Sells also described two recent cases brought by Native American plaintiffs alleging dilution of votes, one of which is pending. The other, which plaintiffs won, targeted county commissioner districts in Buffalo County. Buffalo County is said to be the poorest county in the United States in 2000, 85 percent of whose population is Indian. The three districts had existed for almost a decade, Sells said, and they contained populations of approximately 1,700, 300, and 100. "Virtually all of the 1,700 people in Commissioner District 1 were Native American while not a single Indian lived in the under-populated District 3. The result was that the county's minuscule non-Indian minority had effective control of the county commission." The districts were not only malapportioned in violation of the one-person-one-vote principle, but as drawn, they diluted Indian votes. The case was settled in 2004, when two of the three districts were re-

drawn and special elections were held for two of the three seats. In addition, the county "agreed to relief under Section 3(c) of the Voting Rights Act, which effectively means that Buffalo County is now subject to the preclearance requirements of Section 5 along with Shannon and Todd Counties . . ."[137] The fact that all seven of the voting rights suits Sells mentioned were filed in the last six years, including the Section 5 enforcement action requiring South Dakota to submit more than a quarter-century's worth of un-precleared changes, suggests continuing discrimination against Indians by the state as a whole and some of its subdivisions.[138]

Much of the subsequent testimony was presented by Native Americans and provided a corroborating overview of problems they and their fellow citizens and kinsmen encounter in trying to vote. *State Senator Theresa Two Bulls* said she "really [felt] bad that . . . after all these years there's still prejudice and discrimination; . . . it isn't right to be taking it out on Native Americans just because we're a minority."[139] She mentioned the need for redistricting to give her people a chance to elect candidates of their choice, and she mentioned various "roadblocks" whites used to deny Indians ballot access, including unfair burdens in the registration process and turning potential voters away at the polls without giving reasons. "[I]t's still ongoing today in the twenty-first century, and I think we need to change that," Two Bulls asserted.[140]

Raymond Uses the Knife, a member of the Cheyenne River Sioux and, in his words, a representative of "probably nineteen communities on my reservation," spoke of the voting problems his people, many of whom speak Lakota, have as a result of limited English proficiency:

> I've . . . witnessed one of our tribal members didn't know how to read or write and he needed help from his wife. His wife was proficient in the English language, and that's what his request was, but it was denied. So he was so upset with this situation that he picked up his ballot and just tore it in half and threw it in the trash can. He said this is the second time that this is the way he was treated at the polls. . . . [Limited English proficiency] also causes a lot of our people to have mistrust in the non-Native elections. A lot of the comments that I hear is that our Lakota people feel they have no chance in the system that is there already, whether it's the state system or the federal system.[141]

Uses The Knife, however, took the opportunity to commend Guest Commissioner Nelson, because "Mr. Nelson's been at Cheyenne River working with us, and he's offered his hand to help us to work some of these things out, so I'm glad to see that," he said. On a positive note, he mentioned the creation of the Cheyenne River Sioux Tribal Voters' Rights Commission "that was established just within the last three years." The main focus is to educate Indians because "our people feel disenfranchised, and they feel they have no say-so in the governments. They . . . feel they may have a little say-so in the tribal governments because they get to vote for their tribal officials every two years, but they feel that the state elections and the county elections, sometimes they call it—these are white elections and they don't belong to us," he said.[142]

Uses The Knife also mentioned "limited tribal resources. . . . When election time comes, people can't find rides. . . . It costs $50 just to get a ride to the hub of the reservation in some places. Eighty miles from Bridger to the middle of the reservation." To help overcome this problem, he said, "we have changed our Tribal Constitution to allow for the national elections to coincide with our tribal elections. . . . We've had examiners come out, thankfully, to the reservations helping us, letting us know what our rights are—what our rights are under the Voters Rights Act."[143]

One of the most subtle accounts of voting experiences in any of the ten hearings was given by *Laurette Pourier*, a Native American who heads the Society for the Advancement of Native Interests—Today (SANI-T). Pourier gave voice to a feeling, apparently widespread among Native American voters, that in polling places staffed by whites, Native Americans are often made to feel unwelcome and uncomfortable—a feeling that might very well discourage timid or older people from voting:

> [A]s a voter myself, what I had experienced when going to vote was being confronted by little old white ladies—excuse the term, not to offend anyone, but that's what I saw—and being questioned and being treated poorly. [When I participated in the 2004 Native Vote election protection program] . . . we just spread the word amongst the people, the women that were doing it, is we're going to be the little old brown ladies sitting there and at least make a statement that way. But our purpose was to help the Native American voters feel more comfortable, to have a recognizable friend or at least a greeter that they'd feel okay about, that they wouldn't have to be afraid or nervous. [I had another earlier experience as an observer.] I did it for one full day, and, of course, the little old white ladies that were

> there gave me attitude, and I—that's the only way to say it, and it was attitude. There wasn't specific words of put-downs or attitudes, but it was in a look or gesture or a tone of voice. And being somewhat frustrated by that and talking about it later, I told one of the other workers, I said, "You know, but it's nothing—yes, it was racism, but it—you know, it's nothing tangible that I can actually document. . . .[But as my late friend Carol Maiki always told us] "If you feel it, it's real," and . . . we were talking about racism. So it was definitely there.[144]

Pourier went on to describe less subtle problems Native Americans faced, including what seemed to her to be misinformation about provisional ballots and the lack of translators in cities to accommodate the large urban Native American population, and the new photo identification requirement, which several witnesses mentioned.[145] This requirement was passed in the regular 2003 legislative session—the first one after the narrow defeat of senatorial candidate John Thune in 2002 under the circumstances described above.[146]

Efforts at intimidation at the polling place were described by *Jesse Clausen*, an Oglala Lakota tribal member. Compared to the elderly Native American poll watchers, whites stationed large, intimidating men as poll watchers:

> [O]n the non-Indian side of the deal, Danny O'Neill, which makes me look real scrawny, Bob Bucholtz, which makes me look scrawny again, five or six of these guys standing at the door of the polling place, and when our people came in, they had to say, "Excuse me," and then they [the whites] wouldn't move; they'd have to walk around them. When the white people come in, it's, "Hi, how you doing?" shake their hand and step aside and let them come in. That was just blatant intimidation.[147]

Richard Guest, staff attorney for the Native American Rights Fund, summarized the main problem areas uncovered by Native Vote 2004, the Native American Election Protection project, as being of three main kinds: "allegations of voter intimidation and fraud," absentee ballots that were applied for but not received by Indians, and discriminatory election laws.[148]

Guest pointed to New Mexico as a model for a state's conforming to Section 203. "They have an entire program set up under the state law," he said, "where . . . a language interpreter is in every polling place. That's required under state law where they have

an agency that's staffed that's specific to target Native American communities for education . . . as a result of lawsuits that were filed in the mid-1980s around language assistance." He asked the rhetorical question whether those programs would continue without Section 203, and answered that "they would be at the whim of whoever's in the governor's office or of the makeup of a particular legislature, and that's where the danger lies . . ."[149]

While Native Americans tend to vote Democratic, various witnesses testifying at the South Dakota hearing noted that discrimination against Native Americans was bipartisan. *O. J. Semans*, of the Rosebud Sioux Tribe, averred that "racial discrimination in South Dakota is alive and well. It's not divided by political parties, whether it's a Democrat or whether it's a Republican. Since becoming involved in this, I have butted heads in Charles Mix County, a Democratic stronghold, and we've butted heads in, you know, Republican strongholds. . . . There's no party lines."[150] In later testimony, *Craig Dillon*, a councilman in the Oglala Tribal Council, LaCreek District, provided an illustration of Semans' point by describing events in a Democratic primary in Bennett County, where Native American challengers unseated incumbent white county commissioners. The county Democratic chair then recruited Independent whites to oppose the Native American Democratic nominees in the general election.[151]

Several witnesses strongly advocated reauthorization of the nonpermanent features of the Voting Rights Act, perhaps none more so than *Patrick Duffy*, a Rapid City attorney who has been extensively involved in recent South Dakota voting rights litigation. "The racial tension in South Dakota that still exists is unlike anything anybody from the outside looking in can imagine. . . . Thank God for the people at the Department of Justice who helped us set up those satellite voting offices, and thank God for Chris Nelson who helped us do it, too. But without the Voting Rights Act, without my friends at the ACLU, and to be really honest with you, without a heck of a banker because I've gone eight years now with this [voting rights litigation], we couldn't get anything done."[152]

Western Regional Hearing
California African American Museum
600 State Drive
Los Angeles, CA
September 27, 2005

National Commissioners in Attendance:

Hon. John Buchanan

Chandler Davidson

Bill Lann Lee

Hon. Joe Rogers

Panelists:

Joaquin Avila, Seattle University School of Law, Seattle, WA

Kathay Feng, Common Cause, Los Angeles, California

Rosalind Gold, Policy Research & Advocacy, NALEO Educational Fund, Los Angeles, CA

J. Morgan Kousser, California Institute of Technology, Pasadena, CA

Eugene Lee, Voting Rights Project, Asian Pacific American Legal Center, Los Angeles, CA

Eun Sook Lee, National Korean American Service & Education Consortium, Los Angeles, CA

Conny McCormack, Registrar-Recorder/County Clerk, Los Angeles County, Norwalk, CA

Robert Rubin, Lawyers' Committee for Civil Rights of San Francisco, San Francisco, CA

Debbie Hsu Siah, Chinese Information and Service Center, Seattle, WA

Public Testimony:

Carolyn Fowler, Los Angeles, CA

Submitted Statements:

Wing Tek Lum, Voter Registration Committee, Chinese Community Action Coalition, Honolulu, HI

Patricia McManaman, Na Loio, Immigrant Rights and Public Interest Legal Center, Honolulu, HI

The Commission met in Los Angeles on September 27 for the Western Regional hearing, focusing on voting problems on the West Coast. This hearing, like the Midwest Regional and Northeast Regional hearings in particular, brought home to the Commission the ethnic diversity that exists in many regions of the nation, the different as well as the common problems faced by ethnic groups and, indeed, the different problems that voters within an "umbrella" ethnic group such as Asian Americans may confront. The diversity was discussed in a report entered in the record by the Asian Pacific American Legal Center, *The Diverse Face of Asians and Pacific Islanders in California.* In the introduction, *Steward Kwoh*, president and executive director of the Center, writes that "while Asians and Pacific Islanders are often thought of as a homogenous group, the reality is that our communities represent dozens of ethnic groups, cultures, and languages. While groups like Cambodians, Filipinos, Bangladeshi, Koreans, and Tongans share many common issues and values, they are different from one another in many ways."[153] The demographic analyses in the report include twenty-two separate Asian/Pacific Islander nationality groups, ranging alphabetically from Asian Indian to Vietnamese.

The different problems of sub-populations among Asian Pacific Islander Americans (APIAs) were discussed by *Eugene Lee*, staff attorney in the Voting Rights Project at the Asian Pacific American Legal Center of Southern California. Among various groups in the state, 62 percent of Vietnamese are limited in English proficiency, as are 61 percent of Hmong, 56 percent of Cambodians, 55 percent of Laotians, 52 percent of Koreans, and 48 percent of Chinese. The overall percentage of APIAs of limited-English proficiency is 39 percent—as compared, for example, to Latinos' 43 percent and to all Californians' 20 percent.[154]

In Lee's view, Section 203's language-assistance provisions have been very useful to Californians who have problems with English. He pointed out that the number of APIAs elected to the state assembly had increased from zero in 1990 to nine, with the recent election of Ted Lieu due in part to Section 203. "Eight of these nine legislators represent legislative districts located in counties that are covered under Section 203 for at least one Asian language." Their home districts range from San Diego in the south to San Francisco in the north.[155] Lee also attributes the extraordinary growth in both APIA registration and turnout rates to Section 203. The total turnout rate among APIA registered voters increased 98 percent between 1998 and 2004, according to his statistics.[156] The efficacy of Section 203, he believes, can partly be attributed to outreach efforts in some areas by election officials:

> According to data gathered by the Los Angeles County Registrar of Voters, the total number of voters in Los Angeles County who have requested language assistance has increased by 38% from December 1999 to August 2005. This increase reflects increased outreach by Los Angeles County and illustrates language minority voters' reliance on language assistance.[157]

An illustration of the variety of creative "outreach instruments" is contained in a packet of documents submitted to the Commission by *Los Angeles County Registrar-Recorder/County Clerk Conny McCormack*. These include such things as an instructional DVD created by her office, entitled "An All American Polling Place"; a printed election guide explaining the various kinds of voting machines; an analysis of the general election ballot, with arguments for and against propositions on the ballot; special instructions concerning language assistance in six languages; a colored brochure entitled "Voters' Survival Guide," including specific instructions on language assistance and information on the voter Web site; information on multilingual targeting; information on the "voter outreach committee"; an instructional pamphlet entitled "Cultural Interactions: Precinct Coordinator Continuing Enhancement Program"; and, among other things, examples of multilingual signs used in polling places and ads in various non-English-language newspapers in the county, giving advice to voters on when and where to vote.[158]

In light of the numerous comments made during the Commission's hearings regarding the lack of enthusiasm among voting officials in some venues, McCormack's advocacy for effective use of bilingual materials and language assistance in general is noteworthy. Indeed, she made clear in her testimony that her office went beyond the requirements of Section 203, in that poll workers were recruited who spoke the language of some groups that were not covered by the Voting Rights Act, including Russian and Armenian.[159] McCormack gave the Commission an overview of her office's three-pronged multilingual program—"provision of translated written material; oral assistance; and collaboration with key community-based organizations." She also spoke about various measures of effectiveness of the program, which include tallying multilingual voter requests received by her office per year (requests have increased more than twentyfold from 6,227 in 1993 to 135,129 through August 2005). Most of the requests have come from Latinos, followed in number by Chinese and Koreans.[160]

Another measure of effectiveness, McCormack said, was the relationship between her office and the Department of Justice:

> [I]n both pre- and post-election meetings with attorneys from the U.S. Department of Justice (USDOJ), L.A. County's ML [multilingual] services program has been described as very good and comprehensive. Indeed, from feedback from other counties covered by Section 203 of the VRA, we have learned that the USDOJ has held L.A. County's multifaceted program as a model for other jurisdictions to follow. Also, our commitment to the permanence of our extensive, successful ML program is demonstrated by assigning specified staff to this program including a designated ML Coordinator, an Executive Liaison Officer and several additional full- and part-time staff."[161]

Attorney Lee also spoke enthusiastically about the Act's observer provision, pointing out that earlier in 2005 the Department of Justice had brought successful enforcement actions against cities in Los Angeles County, leading to consent decrees whereby federal observers will in the future monitor these cities' conformity with Section 203 requirements.[162] He also discussed various ballot access problems APIA voters sometimes confront: "Despite electoral gains and improvement in poll worker training, racial discrimination against APIA voters still occurs in the polling place." As examples, he noted rudeness and racism among some poll officials in 2000 and 2004 elections.[163]

Another witness who spoke of polling place discrimination was *Rosalind Gold*, Senior Director of Policy Research and Advocacy with the National Association of Latino Elected and Appointed Officials (NALEO). Her organization's survey and monitoring of 89 polling sites in the 2005 Los Angeles municipal elections found that "about 15 percent of the polling sites did not have Spanish language sample ballots available, and a larger percentage also lacked other important informational forms [and] materials." In addition, about one-third of the sites did not have a Voter's Bill of Rights posted—a document that the California secretary of state is supposed to make available at every polling place. Moreover, "about one-half of the sites" lacked "Spanish language information on provisional voting and 80 percent of the sites had no information on how to contact election officials if you had complaints or concerns."[164] She strongly recommended renewal of the nonpermanent features of the Voting Rights Act.[165]

Statements on voting problems in Hawaii were offered by *Wing Tek Lum*, a representative of the Chinese community in Honolulu, and *Patricia McManaman*, lawyer and chief executive officer of Na Loio, the Immigrant Rights and Public Interest Legal Center in the same city. Lum spoke of problems Chinese voters encountered with mail-in voting. McManaman addressed both the lack of bilingual ballots at some polling places in Hawaii and, as did Lum, problems of mail-in voting. "Hawaii law needs to be amended," she said, "to allow earlier mail-out of absentee ballots to ensure that those who live abroad or in remote areas of the United States have the ability to cast a timely ballot."[166]

Eun Sook Lee is executive director of the National Korean American Service and Educational Consortium, which represents the more than 1.2 million Korean Americans in the United States today. Over 70 percent of them are immigrants, many of whom do not speak or read English well. Lee attributed the noticeable increase in voting within the Korean community to Section 203 and strongly urged its renewal. Moreover, she advocated a change in the coverage trigger. "Currently," Lee said, "Section 203 covers counties that have 5 percent or 10,000 voting age citizens who speak the same language, are limited-English proficient and, as a group, have a higher illiteracy rate than the national illiteracy rate. In our opinion, measures that would allow counties to capture as many language-minority voters as possible are both meaningful and necessary." She mentioned suggestions that had been made to drop the threshold for coverage "from 10,000 voters to 7,500 or 5,000 voters."[167]

Kathay Feng, executive director of California Common Cause and, prior to her current job, head of the Voting Rights Project of the Asian Pacific American Legal Center, testified about the progress that has been made by minority voters as a result of the efforts of groups she has been affiliated with. In particular, she pointed to the problems minority voters faced with pre-scored punch card machines, a type of machine, she said, that accounted for 74.8 percent of all ballots that did not register a vote for President in the 2000 elections. "Common Cause investigated [high rates of overvotes and undervotes in California] and found that their rate of error from punch card voting had a disproportionate effect on African American, Latino and Asian American communities." She continued:

> Using the Voting Rights Act and the Fourteenth Amendment of the U.S. Constitution, California Common Cause challenged the certification and use of punch card voting machines in California and won. As a result, California became one of the first states to require all of

> its counties to switch to new, more accurate voting machines by the 2004 elections.[168]

Feng also pointed to her group's efforts to work proactively with the California secretary of state to avoid violations of the Voting Rights Act in implementing the mandates of the Help America Vote Act of 2002. Among the goals they achieved were a "state plan that would soften the potential disenfranchisement of the new voter identification requirements"; establishing "standards for the implementation of a statewide database and uniform purging standards that protected against discriminatory purging of voters"; allocation of adequate federal funding for "voting technology improvements to ensure language and disability accessibility"; creation of "uniform poll worker trainings and outreach standards"; and creation, through cooperation with the Secretary of State, of "multi-lingual education about the new voting changes."[169]

In contrast to these achievements, however, Feng pointed to flagrant anti-Asian racism that still exists. "There . . . were a couple of examples of Vietnamese Americans who ran for elected office and who faced incredible discrimination. Some of the campaign signs that they had up would have swastikas drawn on them. And this was in the late nineties, so it's not like it was . . . fifty years ago or a hundred years ago. . . . [P]eople would show up at the poll sites and they would be told, you know, if you're an American, you should be voting in English. If you can't speak English, you shouldn't be voting." However, her organization's increased poll monitoring led to "a big change . . . around the late nineties and the 2000s."[170]

While acknowledging that "much remains to be done to improve voter participation by minority and language-minority groups," Feng concluded that

> The Voting Rights Act has had [an] immeasurable positive impact on all facets of civic engagement in California. It has protected against the worst kind of discriminatory behavior, whether intentional or in effect. It has been instrumental in pushing our election officials and lawmakers to create electoral processes and standards that are responsive to our tremendous racial and language diversity.[171]

Four counties in California are covered by Section 5 of the Act. *Robert Rubin*, an attorney with the Lawyers' Committee for Civil Rights Under Law of the San Francisco Bay Area, discussed recent noteworthy cases filed under that section involving Latino voters.

One, *Lopez v. Monterey County*,[172] went to the U.S. Supreme Court twice on different issues. Latino plaintiffs had challenged the implementation of an at-large system for the election of municipal judges that had not been precleared by the Department of Justice. "Pending final resolution of the case, and with an election upcoming," the district court said it could not reconcile a recent Supreme Court decision and Section 5 law, and thus ordered the pending elections to be held although the at-large system had not been approved by the Department of Justice. The Supreme Court reversed and remanded the case, holding that even as an interim measure, the at-large election must be precleared. The district judge then dismissed the case because the change to an at-large system did not originate in Monterey County but was instead the product of California law. "The Supreme Court once more reversed the district court, holding that the Act's preclearance requirements apply to measures mandated by a non-covered state to the extent that these measures will effect a voting change in a covered county."[173]

Rubin also explained the facts behind a Department of Justice objection in Monterey County as due to an effort to change the Chualar Union Elementary School District Board elections from district to at-large ones. The Department found that the measure "was motivated, at least in part, by a discriminatory animus," and that it would have a retrogressive impact on Latino voting strength. Another Monterey County incident leading to Department of Justice intervention involved changing Latino polling places in order to accommodate an abbreviated election schedule for the 2003 gubernatorial recall. Plaintiffs sought an injunction, noting "at least 17 instances in which the proposed change in polling places would have a retrogressive effect on the Latino community. One . . . would move a polling place almost 5 miles away from a predominantly Latino community to a new site without easy access to public transportation." A proposed consolidation "would close two school-site polling places in predominantly Latino communities and force voters to cast their ballots at the Sheriff's Posse Club House, a hunting club in a predominantly Anglo area and clearly a site that would discourage Latino voters." In response to a temporary restraining order issued by the district court, the county reinstated most of the polling places and then obtained Department of Justice preclearance for the remaining changes.[174]

Rubin also discussed cases involving the California Voting Rights Act of 2001, which is in some respects similar to the federal Act, and is designed to confront the widespread degree of racially polarized voting in the state and the inability of many Latino voters to elect candidates of their choice, given that "upwards of 80 percent of

all local jurisdictions [in the state] conduct their elections pursuant to an at-large system."[175]

Voting Rights attorney *Joaquin Avila* testified on various problems litigators have faced trying Section 2 cases. After some notable successes in the period following the 1982 amendment to Section 2, adverse decisions in two major cases brought a halt to challenges to at-large election systems in the state. Regarding the California Voting Rights Act mentioned by Rubin, Avila described its purpose as overcoming "often insurmountable evidentiary burdens" in federal court. But he noted that it has been declared unconstitutional by a state court. The decision is now on appeal. To add to the difficulties of minority voters, Avila added that currently "Section 2 has been ineffective in eliminating discriminatory at-large methods of elections in California [with one recent notable exception]. . . . Section 2 cases consume a significant amount of financial resources [in addition to the evidentiary burdens]. . . . [U]nless there are significant amendments to Section 2, this particular provision will not provide the means for eliminating discriminatory at-large election methods in California."[176]

In light of these developments, Avila strongly supported extension of Section 5. "The most significant feature of Section 5 is the reversal of the burden of proof," he stated, and pointed to the differences that objections by the Department of Justice since 1982 had made in his state. "Two of the letters [of objection] involved redistrictings of county supervisorial districts in Merced County and in Monterey County. In both of these instances the ultimate result was the election of a Latina/o candidate for the board of supervisors. In Monterey County, the last time a Latina/o had been elected was over a hundred years ago."[177]

There were, however, only a total of four objections since 1982, and one might conclude that such a small number in the four covered counties indicates that Section 5 is no longer needed in California. Avila argued against this conclusion on two grounds. First, the objections discourage officials from adopting discriminatory practices. Second, it is a mistake to conclude that the objections are indicators of all the discriminatory behavior engaged in by jurisdictions. "In reality, many Section 5 covered jurisdictions are delinquent in the timely submission of their voting changes [for preclearance]," Avila claimed. "Some jurisdictions, but for litigation, would not have submitted any voting changes," he said, and added that "this sordid record of non-compliance" had been noted "several times by the United States Commission on Civil Rights, by congressmen and witnesses in testimony when the Act was reauthorized [from 1970 onward] . . . by the Government Accounting Office, and by Supreme

Court precedent. Also as a result of independent reviews of voting changes in selected jurisdictions, the record demonstrates that non-compliance is a significant problem. For example, in Merced County, California, there are special election districts that have not submitted their annexations for Section 5 approval."[178]

The last speaker to testify was *Carolyn Fowler* of Los Angeles, representing the California Election Protection Network, an umbrella organization with more than 300 units statewide. As did many who testified at the ten hearings around the country, she spoke of the difficulties faced by people who were limited in their English proficiency. "People—if they have a language problem," she said, "are kind of pushed to the side" or treated like, "'You don't know what you're doing.' And I think I'm going to . . . translate that into intimidation: intimidation as a senior, intimidation as a person of another language. . ." Thus people come to the polling place "not feeling comfortable about knowing what to do . . . with that voting system." She predicted that as language diversity increases, more training of poll workers will be required, and she advocated additional funding for such training.[179]

Fowler also criticized the state's fair political practices commission. She urged the audience to look at the complaints the commission receives. She believed many of them concerned discrimination. "I think we have maybe four or five people to handle the volume of complaints for the State of California," she said, "and that is ludicrous. They cannot get back to you. . . . [I]f you're lucky in two weeks, you get a letter saying, 'We did receive your complaint.' And in many instances, people that have complained—and they've testified to this at the secretary of state—they never get a response. Well, that's because they've got a few people trying to manage volumes of information and complaints."[180]

Among the legitimate complaints voters have, Fowler asserted, are those concerning polling site accessibility. She spoke particularly of a lack of parking space near some sites, requiring voters to walk "at least five or six blocks." Another complaint, particularly in the African-American community, is lack of proper notification of polling site changes, especially in elections where polling sites are consolidated. While it may not be intentional, she says, it gives "the appearance of disenfranchising."[181]

Mid-Atlantic Regional Hearing
Arnold & Porter, LLP
555 12th Street, NW
Washington, DC
October 14, 2005

National Commissioners in Attendance:

Chandler Davidson

Hon. Charles McC. Mathias, Jr.

Charles Ogletree

Hon. Joe Rogers

Guest Commissioners:

Karen Narasaki, Asian American Justice Center, Washington, DC

Robert Raben, The Raben Group on behalf of the National Council of La Raza, Washington, DC

Panelists:

Juan Aguilar, Sunnyside Voter Registration Project, Sunnyside, WA

J. Gerald Hebert, The Campaign Legal Center, Washington, DC

Sam Hirsch, Jenner & Block, Washington, DC

Margaret Jurgensen, Elections Director, Montgomery County, MD

Robert Kengle, former Deputy Chief, Voting Section, Department of Justice, Washington, DC

Mark Posner, American University, Washington College of Law, Washington, DC & University of Maryland Law School, College Park, MD, and former Voting Section attorney

Richard Valelly, Swarthmore College, Swarthmore, PA

Hon. Melvin Watt, U.S. Representative, 12th Congressional District of North Carolina

Jeffrey M. Wice, Touro Law School, Huntington, NY

Kent Willis, ACLU of Virginia, Richmond, VA

The Mid-Atlantic Regional Hearing was held in Washington, D.C. on October 14. The Honorable Charles Matthias, former U.S. Senator from Maryland and honorary chairman of the Commission, was present part of the day. Among those giving testimony were three former Department of Justice lawyers with considerable experience in the Voting Section: Gerald Hebert, Robert Kengle, and Mark Posner.

The first witness was *U.S. Representative Melvin Watt* who, when elected in 1992, became one of the first two African Americans elected to Congress from North Carolina in the Twentieth Century. Many of the state's 100 counties have been covered by Section 5 since 1965, and today 40 of them are. Representative Watt is chair of the Congressional Black Caucus and a member of the House Judiciary Committee, among several other House committees. Watt asserted that "the majority of our members . . . would not be members of the Congressional Black Caucus, would not be serving in the Congress of the United States but for the provisions of the Voting Rights Act. And most of them are there because of the aggressive enforcement that has occurred since 1990 when the Voting Rights Act started to be . . . enforced more vigorously."[182]

Watt included himself among those black congressmen who would not have been elected without the Act. "If you look at the history of the districts in North Carolina, if . . . the Voting Rights Act were not in place, there simply would never have been created the opportunity for African Americans to be elected."[183] He went on to explain that if North Carolina's black population—20 percent of the total—were dispersed across many districts so that they became an "ineffective minority," it would not be possible for "the African-American community [to] elect the representatives of their choice," because of the "very high degree of racially polarized voting." The congressman gave an example of a North Carolina contest for an appellate judgeship, a post that at the time of the election did not have to be filled by a lawyer. "We had an African-American lawyer who had practiced law, distinguished record. And a [white] fireman ran against him. No legal background, no experience, nothing to commend him for the court except that he was white . . . [T]he fireman won the election. And, I mean, there is just no more dramatic example of the impact of racially polarized voting."[184]

The Voting Rights Act, Watt said, ensures that "you can take race into account . . . to balance the equation . . . . And as long as there are still people out there who are saying, I won't vote for a minority candidate under any circumstances, the Voting Rights Act will always be needed."

When questioned, Watt expressed the belief that racially polarized voting occurred in both partisan and nonpartisan elections.

He opined that in his state's nonpartisan elections, blacks "don't fare well in those except in minority voting rights districts."[185] Regarding partisan elections, he pointed to the case of Allyson Duncan, a black Republican who was appointed to the North Carolina Court of Appeals, a body elected statewide. As an incumbent, she then ran for election against a white and lost. She was later appointed to the U.S. Fourth Circuit Court of Appeals—an indication of her judicial qualifications. "But because she was black, [Watt said] she wasn't qualified enough for the voters, Republican or Democrat." He added that while partisan politics may play a role in North Carolina in determining whether blacks get elected statewide, "normally the decisive factor is race." He could only think of one black official elected statewide in North Carolina who is currently an officeholder.[186]

Sam Hirsch, a partner in the firm of Jenner & Block, spoke at length about the extent of racially polarized voting in the United States based on his experience and the evidence of experts in voting rights cases with which he is familiar. Hirsch's litigation practice focuses primarily on election law, redistricting, and voting rights. He said that in the last ten years he has worked in redistricting litigation in about twenty states, and many of his cases have involved Sections 2 or 5 of the Act. In his experience, "there are politically significant statistical levels of racial polarization between Anglos and Latinos, as between whites and blacks, in almost every locale which I have experienced." His focus was on two states—Texas and Maryland—and regarding the latter he introduced into the record an expert report on polarization by Richard Engstrom, who had testified at the first hearing in Montgomery the previous March. The Maryland example was particularly germane in light of Congressman Melvin Watt's observation that racially polarized voting was not simply a function of partisan differences between blacks and whites in his state. In Maryland the voting patterns of those two racial groups had been analyzed for purposes of litigation in Democratic primary elections only, in the heavily Democratic Prince George's County. The data indicated that racially polarized voting was very much in play. In four of the five primary elections for state legislators, all since 1994, "the preferences of white voters and the preferences of black voters diverge in 80 percent of the instances," he said.[187]

Regarding Texas, Hirsch introduced reports on congressional elections by Jonathan Katz, a political scientist at Caltech. "Dr. Katz studied 113 different general elections in the U.S. House alone in the 1990s," he said. These were in districts with large black or Latino populations. Katz found "a virtually universal pattern of racially polarized voting with the Latino and black voters overwhelmingly

preferring Democratic [candidates] . . . and Anglo [i.e., non-Hispanic white] . . . voters heavily preferring Republican candidates for Congress in Texas."[188]

But this polarization was not limited to partisan contests. A study by Allan J. Lichtman, a historian at American University, also found it to be common in numerous Democratic primary contests in which at least one black or Latino faced at least one Anglo. While acknowledging that in Texas the race of candidates alone was not always determinative of voting behavior, and that the states of Maryland and Texas "obviously . . . don't speak directly to the forty-eight [other] states," Hirsch nonetheless stressed the quality of the experts' reports, which were "comprehensive, . . . withstood the test of cross-examination . . . and are a rich source of very up-to-date and very carefully executed social scientific analysis and data gathering."[189]

J. Gerald Hebert has the distinction of being the only lawyer to have assisted jurisdictions covered by Section 5 in escaping coverage under the amended 1982 bail-out standards. He gave a brief history of the standards since 1965 and explained how nine jurisdictions, all in Virginia, had successfully bailed out since 1982. (Another one is pending.) The current standards, he believes, are neither as costly nor as onerous for many jurisdictions as is generally believed, and they reward good behavior in complying with Section 5. Hence, according to Hebert, they should probably be renewed as they now exist, with perhaps small modifications.[190]

On another topic, Hebert told of being retained in the 1990s by the Alabama Democratic Conference—a statewide black organization—to find out if local jurisdictions were preclearing their election changes with the Department of Justice. Hebert discovered that several had not, and so the Conference filed "ten or twelve" Section 5 enforcement actions against the jurisdictions. None of these local entities had made objectionable election-related changes, Hebert said—"although there were a couple that raised some serious issues." Nonetheless, "it illustrated to us . . . that there was a lack of compliance even with the fairly routine voting changes that everyone knew should have been submitted but hadn't been."[191]

Information on the impact of Section 203 in Maryland was provided by *Margaret Jurgensen*, elections director for the Montgomery County, Maryland, Board of Elections. The county saw 518,000 registered voters participate in the 2004 election. "The multicultural voter empowerment community engaged over 100 community representatives and volunteers as election information guides and we designed the election judge training module to incorporate the legal and technical voting system requirements, and

this program was unique as well as successful," she said. "Our election judge training was redesigned and delivered by experienced election-judge trainers. This program included hands-on experience, take-home videos, a quick reference guide and open-the-door refresher."[192]

Like her counterpart in Los Angeles, Conny McCormack, who spoke to the Commission at the West Coast hearing, and Penny Pew in Arizona Indian Country, Jurgensen was strongly supportive of language-assistance measures and expressed enthusiasm for implementing them. "In the process of recruiting approximately . . . 3,200 election judges necessary to conduct the election on November of 2004," she said, "our goal was to make certain that we had at least one individual that spoke Spanish in every precinct." The results were noteworthy: "We achieved that goal in all instances and it was the decision of our multicultural voter empowerment committee to also reach out to other members of our community that spoke other languages. And we ultimately represented seventeen different languages in our county that were placed at the polling place."[193] Like her counterpart in Los Angeles, Jurgensen's program extended beyond what was required by Section 203, for only the Latino population in Montgomery County was large enough to meet the Section 203 threshold.[194]

She expressed her philosophy of accommodating the needs of voters in this way: "I'm kind of on the street level. I have to make sure that the men and women that are serving in the polling place" give "every individual walking through that schoolhouse door or going through that recreation center the same equal opportunity that every other voter should have across the country. And that means making sure that there is equal access, that the signage is very clear, that they feel comfortable asking the questions and we have those languages available. Montgomery County was identified by the National Association of County Officials for their multicultural voter empowerment committee in 2005 and every dime we spent was well worth it," Jurgensen said. "[A]nd I think it's an effort that we need to continue reaching out toward."[195]

When asked what would happen if Section 203 did not exist, Jurgensen said that because she had invested the money in the translation program she would keep it going. But she recalled her days as election commissioner in Nebraska "in the '80s, early '90s," where "one of the very first things that I tried to do and [it] was very simple was to create a sample ballot in both English and Spanish. I was really met with a lot of resistance. That was considered not a good investment of the public money and all of the things that come with that. And so I think it would be harder on the local level to

convince the public policy makers, your county commissioners, your town councils, that that is an important investment in public dollars."[196]

Richard Valelly, a political scientist at Swarthmore College and author of a prizewinning monograph, *The Two Reconstructions: The Struggle for Black Enfranchisement*,[197] spoke about recent research he has conducted with Peyton McCrary, a historian with the Department of Justice, and attorney Christopher Seaman. The purpose of the research was to analyze over 1,000 Section 5 objections interposed "from the 1970s to 2004." In particular, they were interested in observing the trend in the number of objections by time periods. The authors were struck by the sharp drop in objections from 2000-2004 as compared to 1990-1993. Valelly pointed out that the Supreme Court's *Bossier II* decision, reinterpreting the intent prong of Section 5 to mean retrogressive intent, was announced in 2000. In a four- year period of the 1990s "there were 250 objection letters on the basis of intent under the prior [intent] standard," Valelly observed. "And after *Bossier II*, the number of objections which are issued under the new doctrine . . . dropped to some 25 objections. . . . So this was a huge shift. It's sort of like dropping off a cliff." He admitted that there might be other reasons for the precipitous drop, although he gave none. And he clearly believed that the drop "has very important implications for the reauthorization of the Voting Rights Act." Not only should Section 5 be reauthorized, but "*Bossier II* . . . actually weakens Section 5, and so the language of Section 5 has to also be amended in order to cope with and correct" the decision, he asserted.[198]

Mark Posner, who worked in the Voting Section from the mid-eighties until he left in 1995, and for three years served as the supervisor handling Section 5 submissions, expanded on the significance of the research Valelly and his colleagues had conducted:

> According to [their] analysis, about three quarters of all Section 5 objections in the 1990s were based by the Department in whole or in part on the finding of discriminatory purpose where the voting change was not retrogressive. Furthermore, among those purpose objections, about three quarters were to districting claims. So these redistricting purpose objections played a central and substantial role in the Justice Department's enforcement of the preclearance requirement in the 1990s.[199]

Posner averred that the *Bossier II* decision "essentially read the purpose test entirely out of the statute by keeping the purpose inquiry within the narrow confines of the retrogression analysis. . . . The authority of the Department and the District Court under Section 5 to bar the implementation of discriminatory changes is now highly circumscribed." he said.[200] Posner believes that *Bossier II* was an expression of the Supreme Court's majority that the Department of Justice had misused its authority in objecting to various redistricting plans in the 1990s. He also believes the Court was mistaken on that point, and in his testimony he noted the continuity in the rate of objections to redistricting plans from the time when William Bradford Reynolds in the Reagan administration oversaw Section 5 through the 1990s redistricting cycle. Posner argued that in light of this mistake by the Court majority, Congress, in reauthorizing Section 5, should reverse the holding in *Bossier II* and restore the authority to the Department of Justice and the D.C. Court to apply a non-retrogressive intent standard, in conformity with the intent standards of the Fourteen and Fifteenth Amendments. "And finally," Posner argued, "in order to provide further assurance that the Department and the district court will employ the purpose standard in an appropriate manner in the future, Congress should consider including statutory language and/or legislative history that will guide the Department and the district court much like Congress did when it enacted the Section 2 results test in 1982."[201]

Guest Commissioner Karen Narasaki asked Posner whether, given the frequent need for observers to investigate compliance with the minority language provisions, it might be a good idea to extend the Attorney General's authority to certify examiner/observer coverage to jurisdictions covered by Section 203. Posner replied that it would:

> [C]ertainly 203 is pretty much tied to the question of how elections are run and very much that has, of course, to do with a lot of things that go on before you actually vote, but has a lot to do with what goes on in the polling place. So it would seem like it would make a lot of sense to add and say that observers also can be assigned to 203 jurisdictions perhaps again pursuant to that certification process that the attorney general uses so it wouldn't be automatically all 203 jurisdictions but that would be a further qualification."[202]

Robert Kengle was Deputy Chief of the Voting Section at the time of his retirement in April 2005. He testified about *Georgia v.*

Ashcroft,[203] a case responding to the Department of Justice's objection to a Georgia Senate redistricting plan as having three retrogressive districts—districts in which black voters would have had a less opportunity than in the 1990s to elect their preferred candidates. The state of Georgia sought preclearance through a Section 5 declaratory judgment action in federal district court. The district court ruled in favor of the Department of Justice. Georgia then appealed directly to the Supreme Court, which in 2003 vacated the district court's decision and remanded the case.

> In its decision, [said Kengle] the Supreme Court touched upon numerous points. The main point, however, was its conclusion that in deciding whether effective black voting strength was being reduced in Georgia, the D.C. court should have looked at factors beyond the number of districts in which black voters had the ability to elect candidates of their choice. These factors included the creation of additional districts in which black voters could influence the outcome by, for example, helping to elect a white Democrat candidate, even if they could not elect the candidates of their choice, the candidates they would most prefer.
>
> The Supreme Court also held that the district court should consider whether helping Democrats retain control of the senate would help advance black voters' interests by maintaining the seniority of current black representatives, some of whom were committee chairs.[204]

Kengle noted that the Supreme Court did not overrule the district court. (The plan was later vacated as a result of another legal challenge in Georgia.) However, he added, "[M]y personal view is that the Supreme Court prematurely and unnecessarily, if not incorrectly, introduced factors into the retrogression analysis that make the Section 5 process more complicated and burdensome for everybody, not just for the Department of Justice but for the jurisdictions that have to comply with it as well." And he predicted that "decisions will become less predictable and more open to subjective judgments, individual preconceptions and even political biases as a result of the *Ashcroft* decision."[205]

An overview of voting rights in Virginia was provided by *Kent Willis*, executive director of the ACLU in that state. "I've witnessed, during my time in Virginia, a dramatic shift in the political landscape," he stated. "In the mid-1980s in Virginia," he noted that there were 75 minority elected officials in the state. No minorities

were in the congressional delegation. "By 1991, after a series of voting rights cases filed under Section 2 and after dramatic changes with redistricting" thanks to Section 5, "Virginia moved from 75 to 150 African-American elected officials by the mid-'90s. By the late '90s, that had moved to about 300," he stated. There would have been even more, he suggested, had school boards in Virginia been elected. Instead, until 1992 they were appointed, a practice traced to the state's disfranchising constitution of 1902 and having the purpose of ensuring that blacks were not elected. A Section 2 lawsuit attempted, and failed, to have this law abolished.[206] A few years later, however, the legislature allowed jurisdictions to have elective school boards if the voters approved it through a referendum.[207]

Willis submitted to the Commission a list of "all of the Section 2 cases in Virginia where racially polarized voting was found." He discussed a few of these cases, as well as the results of a redistricting suit filed in Henrico County by the ACLU that led to the abolition of a dilutive city council district and the election in 1996 of a black to office—one who, eight years afterwards, was elected by his fellow council members to be chairman of the board of supervisors. "A nice success story of the Voting Rights Act," Willis remarked.[208]

He also described another "success story" that illustrated the deterrent effect of Section 5.

> In Fredericksburg where I live, in 2002, the city had to redistrict because of changes in the population that came about as a result of the census. Fredericksburg has long had one African-American-majority district in its system and from that district, an African-American has been elected. But the discussion—and I attended these meetings—the discussion was entirely about how do we eliminate this district. And the instruction to the city attorney was, look at the recent Supreme Court case, you know, look at the cases that are taking place in the mid-'90s and early 2000, and tell us if there is a way we can eliminate the African-American majority district. And that was the thrust. All of the original plans produced by the planning department and by the planning commission were plans that eliminated the African-American majority district. Only when the city attorney said, listen, you can't do it, under Section 5, under any interpretation of it, even the most recent ones by the . . . Supreme Court, you have to draw this district or it's retrogressive. Then the city council drew the [African-American-majority district]. But what I'm indicating to

> you is, despite the successes of the Voting Rights Act, there are still strong forces looking to take us backwards. And Section 5 is one of the great powers of the Act that prevents us from moving backwards.[209]

Professor Valelly, in adding his support for Section 5, reprised one of the themes of his book on the two Reconstructions: "[W]e've only been a fully functioning democracy for 20 or 30 years and, ironically, we're the first country in the world to have created a mass electoral politics in the 1820s and 1830s with the Jacksonian party system, which was extraordinarily exclusionary. . . . And yet we're among the last of the major democracies, if not the last, to be at the business of fully including every single American citizen that is entitled to vote. So either we take the Constitution seriously or we don't."[210]

Posner took issue with a view expressed by some that because major impediments to minority voting have been overcome, the temporary features of the Act are no longer needed. "I have heard it described as . . . the Bull Connor problem," he said, referring to the infamous Birmingham police chief, Eugene "Bull" Connor, whose men attacked civil rights protesters with police dogs and fire hoses in the 1960s. The claim, he said, is "that Bull Connor is dead so there is no problem . . . There certainly has been quite a bit of change and I think we should celebrate that. . . . But the issue is never simply Bull Connor preventing people from registering to vote. The question has always been, from the beginning, the ability to have an effective voice in the political system."[211]

Mississippi Hearing
Jackson Marriott Downtown
200 East Amite Street
Jackson, MS
October 29, 2005

National Commissioners in Attendance:

Hon. John Buchanan

Chandler Davidson

Hon. Joe Rogers

Guest Commissioners:

Hon. Fred Banks, Jr., former Mississippi Supreme Court Justice, Phelps Dunbar, Jackson, MS

Armand Derfner, Derfner, Altman & Wilborn, LLC, Charleston, SC

Panelists:

Deborah McDonald, Natchez, MS

Robert B. McDuff, Law Offices of Robert McDuff, Jackson, MS

Carroll Rhodes, Law Offices of Carroll Rhodes, Hazlehurst, MS

Ellis Turnage, Turnage Law Office, Cleveland, MS

Brenda Wright, National Voting Rights Institute, Boston, MA

Public Testimony:

Lawrence Guyot, Washington, DC

Carlton Reeves, Magnolia Bar Association, Private Practitioner, Jackson, MS

The last hearing of the Commission focused solely on the state of Mississippi. It consisted of two panels, one of invited participants, the other of members of the public who wished to speak. The state with the highest proportion of blacks of voting age in the nation (33 percent), Mississippi has a reputation even among the former slave-holding states of the Deep South of having been most resistant to giving full citizenship rights to African Americans. The late Frank Parker's book on the struggle for voting rights in Mississippi from 1965 to 1989 told the story of fierce white resistance after the Voting Rights Act was originally passed.[212] The Commission was eager to gauge the progress in minority voting rights that had been made there over the past forty years, and particularly since 1982.

The statistics on black elected officials certainly pointed to progress. In 2005, one of the state's four U.S. Representatives, Bennie Thompson, was black, as were 11 (21 percent) of its 52 state senators and 34 (28 percent) of its 120 state representatives.[213] However, testimony indicated that racially polarized voting in the state was intense, and had majority-black districts not been drawn, there would be few black lawmakers in office there.[214] Testimony also pointed to the important role both Sections 2 and 5 have played, and continue to play, in ensuring that districts are drawn in a fashion that enables a significant number of the state's black voters to elect their preferred candidates. As Jackson civil rights lawyer *Robert McDuff* stated, speaking of twentieth century history:

> The first member of the Mississippi Legislature who was black was elected in 1967, and no additional black members . . . were elected until . . . 1975, . . . as a result of enforcement of Section 5 by the Justice Department and litigation in the federal courts under the Fourteenth Amendment. There was no black member of Congress in Mississippi for the first 85 years of the 20th century. The only reason [for] that change was because of the enforcement of Section 5 of the Voting Rights Act by the Justice Department and litigation under . . . Section 2, as it was amended in 1982 . . ., leading finally to the creation of the majority-black congressional district and the election of the first black Congressman . . . in 1986. That same year, . . . of the 100 Chancery, Circuit, and County Court judges in Mississippi—those are the trial courts of record . . . only one, Fred Banks, was African-American. As a result of the litigation filed under Section 2 and Section 5 and enforcement of Section 5 by the Justice Department, . . . judicial districts were redrawn,

> and a significant number of African-American judges . . . [were elected]. . . . The same story is true for city councils, county [boards of] supervisors, county election commissions. The integration of those bodies in any significant numbers resulted only after enforcement of Section 5 and litigation under Section 2 and the Fourteenth Amendment.[215]

McDuff, then, like several speakers who testified at this and other hearings, stressed that the undeniable progress in the number of minority elected officials was due in large part to the Voting Rights Act, both its permanent and nonpermanent features. Also like several witnesses who testified at the Mississippi hearing, McDuff argued that voter discrimination is on-going. He recalled, as a law student in the 1970s, attending U.S. Supreme Court oral arguments in a Mississippi legislative redistricting case in which the aforementioned Frank Parker was arguing on behalf of the state's black voters. McDuff continued, ". . . the attorney for the State of Mississippi kept saying, you know, 'That's all ancient history. That's all ancient history.' And that was before we had an African-American member of Congress. That was before we had any black judges in the state . . . And so, it wasn't all ancient history in 1977, and it's not all history now. There are no statewide black elected officials in Mississippi."[216] He went on to elaborate on this last point:

> In 2003, there was an election for state treasurer. One of the candidates, African-American, had been the director of the State Department of Economic Development. He had a number of qualifications for the job that made him clearly the best choice, and he was defeated by a 29-year-old white man who had no relevant experience in the area in an election that was characterized by severe racially polarized voting. Until elections in Mississippi are not characterized by the extreme levels of polarization that exist here, Section 5 must remain in place.[217]

Another witness, Jackson attorney *Carlton Reeves*, secretary of the predominantly black Magnolia Bar Association, added his observation to McDuff's illustration of racially polarized voting in the 2003 race for state treasurer. It was true, he said, that the African American was a Democrat and the white who beat him was a Republican, which might lead the uninformed observer to infer that the outcome was determined by partisanship, not race. However, Reeves pointed to another race, for attorney general, in the same

election cycle between two white candidates of roughly the same age and experience for the job, in which the Republican "lost resoundingly," suggesting that race rather than party was the operative factor in the contest the black lost for statewide office. Moreover, Reeves claimed, even those races involving a Supreme Court judgeship that blacks have won have occurred after they were first appointed to the post. "All the black justices of the Supreme Court were first appointed. No justice has been elected first."[218] Reeves also pointed to the use of the phrase, "He's one of us," by white candidates opposing blacks. He added, "We know what those signals mean, 'being one of us'." [219]

The need for Sections 5 and 2 was reiterated by *Carroll Rhodes*, a lawyer from Hazlehurst, Mississippi, who enumerated several dilutive mechanisms, including at-large elections, changing elective posts to appointive ones, and the numbered-post system. Some of these mechanisms have been struck down in various contexts as a result of litigation under the Act.[220]

McDuff's and Rhodes's focus was on minority vote dilution and its prevention by the Act. *Brenda Wright*, managing attorney for the National Voting Rights Institute and a lawyer with extensive experience in Mississippi, focused on the issue of ballot access and white officials' continuing efforts to discriminate against black voters within the past decade. She spoke of the lengthy struggle blacks have mounted to abolish the state's dual registration systems. One system had its roots in the 1890 constitutional convention, whose overall purpose, according to a federal court finding, was, in Wright's words, "to disfranchise black citizens of Mississippi to the greatest extent possible."[221] In 1984, when a group of African Americans and two voter registration organizations filed suit challenging the system, Mississippi was the only state in which dual registration existed. In this system, the voter was required to register once for county, state, and federal elections and again for municipal elections. In 1987 the court found that, in violation of Section 2, the system was adopted for a discriminatory purpose and had a discriminatory effect, accounting, in part, for the 25 percentage-point difference in the registration rates of blacks and whites. The court cited an example of a then-recent Democratic primary election in which black candidates may well have lost because of the effects of the dual registration system.[222]

By the early 1990s, a fully unitary registration system had been implemented as a result of the Section 2 lawsuit. Within five years, however, events within the state subsequent to congressional passage of the National Voter Registration Act (NVRA), or "motor voter," as it is popularly called, led to the creation once more of a discriminatory dual registration system, as Mississippi became the only state in the

union to require people who registered to vote in federal elections at drivers' license offices and other NVRA-sanctioned offices to register yet again to vote in state and local elections. In contrast, people who registered with the circuit clerk were allowed to vote in all elections. Moreover, the state refused to submit the changed procedure to the Department of Justice for preclearance, even after the Department informed Mississippi that its new system had to be precleared.

Private citizens then filed a Section 5 enforcement action that was ultimately decided in their favor by a unanimous U.S. Supreme Court. "The fact that [this enforcement action had to be filed] 30 years after the Voting Rights Act was adopted speaks volumes about Mississippi's determined resistance to the clear requirements of the Act," Wright testified. When the change was finally submitted, the Department objected, finding that the state's new dual system was racially discriminatory both in purpose and effect.[223]

But that was not the end of the story. The state legislature subsequently passed a bill to create a unitary registration system in order to gain preclearance. Then-Governor Kirk Fordice vetoed the bill, and yet another legal action filed by private citizens was required to guarantee the voting rights of African Americans. Only in late 1998—thirty-three years after passage of the Act, eighteen years after Section 5 was last reauthorized, and more than a decade after the federal court struck down the first dual registration system—was the state's new dual registration system abolished.[224] Wright summarized her testimony by pointing to

> Mississippi's entrenched resistance to full voting rights, the persistence of state officials in finding new excuses to create barriers to the right to vote, and the continued need for reauthorization of Section 5 to protect the hard-won gains that have been made.[225]

The need for Section 5 was underscored by Cleveland, Mississippi, attorney *Ellis Turnage*, whose law practice has to a considerable degree concerned issues in the Mississippi Delta—the area of the state with the largest proportion of blacks. Turnage said he had been involved in many Section 2 cases as well as six Section 5 cases. His complaint regarding Section 5 was that, in his view, the Department of Justice sometimes does not review a submission in a timely fashion. He also believed that the current Department of Justice makes political decisions when responding to submissions—a belief also held by attorney Rhodes.[226]

Still other problems with the enforcement of Section 5 were seen by Natchez attorney *Deborah McDonald*, who also serves as a

part-time municipal court judge in Fayette and has a law practice in Natchez. In McDonald's view, there are interpretations of Mississippi law regarding felon disfranchisement (and what class of offenses are actually disfranchising) that seem to shift from time to time, as they are made by various administrative officials, and these shifts, which can have a disparate impact on blacks, are not precleared. Both Turnage and McDuff see these administrative changes as problematic as well.[227]

In summary, the overall tenor of the testimony at the Mississippi hearing was that while progress had been made, much discrimination in voting still occurs. *John Walker*, a Jackson attorney, put the latter point most dramatically. He called himself a "blue-collar, shirt-sleeve lawyer" involved in Mississippi elections since 1971, and a former city attorney of Bolton. Walker said:

> We've seen . . . the news about Hurricane Katrina. Well, I would say that the Voting Rights Act . . . [is] the levees that keep repression out of Mississippi. If not for the Voting Rights Act—if that levee—is broken, New Orleans would look like a Sunday school picnic compared to what will happen in Mississippi, because the oppression will rain down.[228]

ENDNOTES

[1] Vernon Burton, Southern Regional transcript, 71, Appendix 1A.
[2] *Ibid.*, 73.
[3] *Ibid.*, 94-95.
[4] *Ibid.*, 95.
[5] *Ibid.*, 73-74.
[6] *Ibid.*, 81.
[7] Gwen Patton, Southern Regional transcript, 49, 55, Appendix 1A.
[8] Victor Landa, Southern Regional transcript, 143-45, Appendix 1A.
[9] *Ibid.*, 147-48.
[10] *Ibid.*, 180.
[11] Frank Jackson, Southern Regional transcript, 106-20, Appendix 1A.
[12] Raoul Cunningham, Southern Regional transcript, 182-84, Appendix 1A.
[13] Anita Earls, Southern Regional transcript, 226-28, Appendix 1A.
[14] *Ibid.*, 228.
[15] *Ibid.*, 229-30.
[16] Richard Engstrom, Southern Regional transcript, 124, Appendix 1A.
[17] *Ibid.*, 125.
[18] *Ibid.*, 132.
[19] *Ibid.*, 128-37.
[20] Laughlin McDonald, Southern Regional transcript, 244-45, Appendix 1A.
[21] Hon. Bobby Singleton, Southern Regional transcript, 186-88, Appendix 1A.
[22] *Ibid.*, 189.
[23] *Ibid.*, 190-91.
[24] James Blacksher, Southern Regional transcript, 204-05, Appendix 1A.
[25] *Ibid.*, 204-05.
[26] 528 U.S. 320 (2000).
[27] 539 U.S. 461 (2003).
[28] Anita Earls and James Blacksher, Southern Regional transcript, 250-53, Appendix 1A.
[29] Hon. Penny Willrich, Southwest Regional transcript, 18, 21, Appendix 2A.
[30] Steven Reyes, Southwest Regional transcript, 94-97, Appendix 2A; Alberto Olivas, Southwest Regional transcript, 97-98, Appendix 2A; Penny Pew, Southwest Regional transcript, 98-99, Appendix 2A; Ned Norris, Southwest Regional transcript, 100-01, Appendix 2A; Rev. Oscar Tillman, Southwest Regional transcript, 105-06, Appendix 2A; Daniel Ortega, Southwest Regional transcript, 166-67, Appendix 2A; Paul Eckstein, Southwest Regional transcript, 179-81, Appendix 2A; John Lewis, Southwest Regional transcript, 207-08, Appendix 2A.
[31] See, for example, Rev. Oscar Tillman, Southwest Regional transcript, 105-06, Appendix 2A.
[32] See, for example, Steven Reyes, Southwest Regional transcript, 94-97, Appendix 2A; Penny Pew, Southwest Regional transcript, 98-99, Appendix 2A.
[33] Ned Norris, Southwest Regional transcript, 100, Appendix 2A.
[34] John Lewis, Southwest Regional transcript, 205-07, Appendix 2A.
[35] Penny Pew, Southwest Regional transcript, 27-36, Appendix 2A. See also materials Pew submitted at the hearing, Appendix 2D, Exs. 1-7.
[36] Written Statement of Claude Foster, Southwest Regional Hearing, 3-4, Appendix 2C.
[37] *Ibid.*, 5.

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[38] *Ibid.*
[39] Rogene Calvert, Southwest Regional transcript, 196-202, Appendix 2A.
[40] Lisa Falkenberg, "Heflin likes his odds in the House," *Houston Chronicle*, 16 Dec. 2005, B1.
[41] Nina Perales, Southwest Regional transcript, 46-47, Appendix 2A. See transcript for details of these problems.
[42] *Ibid.*, 47-48.
[43] *Ibid.*, 48.
[44] See, for example, letter from Deval L. Patrick, Assistant Attorney General for Civil Rights, to Edward S. Allen, Esq., Birmingham, Alabama, 2 Nov. 1994, which states that "an attempt to videotape areas where black voters are present at their polling places could constitute a violation of Section 11(b) of the Voting Rights Act, 42 U.S.C. 1973I(b)."
[45] Nina Perales, Southwest Regional transcript, 48, Appendix 2A.
[46] *Ibid.*, 49-52.
[47] Andres Ramirez, Southwest Regional transcript, 56-59, Appendix 2A.
[48] *Ibid.*, 85.
[49] Shirlee Smith, Southwest Regional transcript, 155, Appendix 2A.
[50] Lydia Guzman, Southwest Regional transcript, 157-64, Appendix 2A.
[51] 7 F. Supp. 2d 1152 (D. Colo. 1998).
[52] Richard Ellis, Southwest Regional transcript, 150.
[53] Paul Ecksein and Daniel Ortega, Southwest Regional transcript, 165-90, Appendix 2A.
[54] Adam Andrews, Southwest Regional transcript, 192-96, Appendix 2A.
[55] "Massachusetts Executive Summary," in Elissa Doyle, *et al.*, *Report to the Commissioners: Northeast Regional Hearing of the National Commission on the Voting Rights Act, June 14, 2005*, 1, Appendix 3O.
[56] *Ibid.* See Executive Summaries for each state.
[57] Section 4(e) states: "Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language." For a scholarly account of the provenance and impact of this section of the Act, see Juan Cartagena, "Latinos and Section 5 of the Voting Rights Act: Beyond Black and White," *National Black Law Journal* 18 (2005), 201-23.
[58] Written Statement of Theodore Shaw, Northeast Regional Hearing, 3, Appendix 3K.
[59] *Ibid.*, 5.
[60] *Ibid.*
[61] *Ibid.*, 7-8, 13.
[62] *The Asian American Vote: A Report on the AALDEF Multilingual Exit Poll in the 2004 Presidential Election* (New York: Asian American Legal Defense and Education Fund, 2005), 15.
[63] *Ibid.*
[64] *Ibid.*
[65] Written Statement of Margaret Fung, Northeast Regional Hearing, 2-4, Appendix 3E.
[66] Written Statement of Joseph D. Rich, Northeast Regional Hearing, 1-2, Appendix 3I.
[67] *Ibid.*, 2.

[68] *Ibid.*, 3.
[69] *Ibid.*, 5
[70] *Ibid.*, 3.
[71] Written Statement of Hon. Charles D. Walton, Northeast Regional Hearing, 1-5, Appendix 3L.
[72] Written Statement of José Garcia, Northeastern Regional Hearing, 3, Appendix 3F.
[73] *Ibid.*, 4.
[74] 250 F. Supp. 2d 525 (E.D. Pa. 2003).
[75] Written Statement of Carlos A. Zayas, J.D., Northeast Region Hearing, 1-2, Appendix 3N.
[76] Dorsey & Whitney LLP, *Report to the National Commission on the Voting Rights Act: Midwest Regional Hearing*, 22 July 2005, Appendix 4R.
[77] *Ibid.*, 27-29, 33-39, 44-46, 51, 55-57, 63-64, 68-73, 77-80, 84-85, 90-91, 93, 109-11, 115-18, 123. Not all of the thirty-two cases were won on their merits by minority plaintiffs, but some, whether settlements or other types of outcomes, ultimately benefited minority voters.
[78] *Ibid.*, 30, 40-42, 48, 53, 48-60, 65, 75, 82, 86, 91, 101-07, 112, 119, 124.
[79] Ihsan Ali Alkatib, Midwest Regional transcript, 62-66, Appendix 3A. See also Dorsey & Whitney LLP, *Report to the National Commission on the Voting Rights Act: Midwest Regional Hearing*, 59, Appendix 4R.
[80] Dorsey & Whitney, LLP, *op. cit.*, 59.
[81] Written Statement of Margaret Fung, Northeast Regional Hearing, 3, Appendix 3E. A disturbing account of recent discrimination against Arab Americans nationwide is found in Hussein Ibish and Anne Stewart, *Report on Hate Crimes and Discrimination Against Arab Americans: The Post-September 11 Backlash, September 11, 2001-October 11, 2002* (Washington, D.C.: American-Arab Anti-Discrimination Committee, 2003), Appendix 4B, Ex. 1.
[82] Dorsey & Whitney, LLP, *op. cit.*, 40, 58, 59, 65.
[83] See, for example, Election Protection Coalition, *Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections* (December 2004), available at www.lawyerscomm.org/preliminaryreport.pdf (last visited 18 Oct. 2005).
[84] Written Statement of Carol C. Juneau, Midwest Regional Hearing, 1, Appendix 4G. Written Statement of Dr. Janine Pease is included in the written testimony of Rep. Juneau, 2-3, Appendix 4G.
[85] Letter from the Hon. William Lacy Clay, Member of Congress, to National Commission on the Voting Rights Act, 20 July 2005, 1-2.
[86] Written Statement of Alice Tregay, Midwest Regional Hearing, 1, Appendix 4P. See also Tregay's spoken testimony, Midwest Regional transcript, 39-44, Appendix 4A.
[87] Written Statement of Kat Choi, Midwest Regional Hearing, 1, Appendix 4I. See also Choi's spoken testimony, Midwest Regional transcript, 268-71, Appendix 4A.
[88] Jorge Sanchez, Midwest Regional transcript, 176-79, Appendix 4A.
[89] Written Statement of Elona Street-Stewart, Midwest Regional Hearing, 2, Appendix 4O; and Midwest Regional transcript, 140-42, Appendix 4A.
[90] John Lewis (with Michael D'Orso), *Walking with the Wind: A Memoir of the Movement* (New York: Simon & Schuster, 1998).
[91]Senator Robert Brown, South Georgia transcript, 10, Appendix 5A.

[92] Dan Eggen, "Criticism of Voting Law Was Overruled; Justice Dept. Backed Georgia Measure Despite Fears of Discrimination," *Washington Post*, 17 Nov. 2005, A01.
[93] The chief justice is not elected statewide, but from a majority-white district nonetheless.
[94] Senator Robert Brown, South Georgia transcript, 78-79, Appendix 5A. The senator noted that of the four black statewide officeholders he mentioned, the state labor commissioner is an exception, having been originally elected from a white legislative district. *Ibid.*, 79.
[95] Floyd Griffin, South Georgia transcript, 27-28, Appendix 5A.
[96] *Ibid.*, 24-35.
[97] *Ibid.*, 35-38.
[98] *Ibid.*, 39-40.
[99] For a recent account of the increasing presence of Latino immigrants in the South and the response to it, see Clay Risen, "Immigration Migrates: Going South," *The New Republic Online*, post date 3 Oct. 2005 http://www.tnr.com/doc.mhtml?i=20051107&s=risen110705 (last visited 4 Oct. 2005).
[100]Tisha Tallman, South Georgia transcript, 13-21, Appendix 5A.
[101] *Ibid.* 19.
[102] Daniel Levitas, South Georgia transcript, 42-44, Appendix 5A.
[103] *Ibid.*, 45-47; 53-54.
[104] Johnny Vaughn, South Georgia transcript, 85.
[105] *Ibid.*, 89.
[106] Charles Sumblin, South Georgia transcript, 93-94.
[107] *Ibid.*, 94-95.
[108] Hon. R.K. Butterworth, Florida transcript, 45-47, Appendix 6A.
[109] Marytza Sanz, Regine Monestime, Florida transcript, 49-60, Appendix 6A.
[110] See particularly Brad Brown, Florida transcript, 118-24, Appendix 6A.
[111] *Ibid.*, 115-16.
[112] Iris Green, Florida transcript, 188-89, Appendix 6A.
[113] Meredith Bell Platts, Florida transcript, 106, Appendix 6A.
[114] *Ibid.*, 107-08.
[115] *Ibid.*, 108-13.
[116] Debo Adegbile, Florida transcript, 69, Appendix 6A.
[117] John Hill, "New Orleans Elections May Be Held in April," *Shreveport Times*, 18 Dec. 2005. http://www.shreveporttimes.com/apps/pbcs.dll/article?AID=/20051218/NEWS01/512180322/0/NEW01 (last visited 19 Dec. 2005).
[118] Debo Adegbile, Florida transcript, 69, Appendix 6A.
[119] *Ibid.*, 70. Louisiana whites' hostile attitudes toward sharing power with blacks are deeply entrenched, going back to slavery and Reconstruction. See Rebecca J. Scott, *Degrees of Freedom: Louisiana and Cuba After Slavery* (Cambridge, Massachusetts and London, England: The Belknap Press of Harvard University Press, 2005), Chaps. 2-3 for an account of the undermining of the First Reconstruction in Louisiana and the events leading to the disfranchisement of blacks, which continued long into the Twentieth Century.
[120] Debo Adegbile, Florida transcript, 70, Appendix 6A.
[121] *Ibid.*, 71. For a more detailed account of discrimination in Louisiana, see Written Statement of Debo Adegbile, Florida Hearing, Appendix 6B. See especially appendices containing material on Section 5 as it has been enforced in Louisiana.

[122] Constance Slaughter-Harvey, Florida transcript, 135, Appendix 6A.
[123] Commissioner Joe Rogers, Florida transcript, 166-67, Appendix 6A.
[124] Constance Slaughter-Harvey, Florida transcript, 168-70, Appendix 6A.
[125] Tom Katus, South Dakota transcript, 184, Appendix 7A.
[126] For an overview of Indian voting rights in South Dakota, see Laughlin McDonald, "The Voting Rights Act in Indian Country: South Dakota, A Case Study," *American Indian Law Review* 29 (2004), 43-74.
[127] Michael Barone with Richard E. Cohen, *The Almanac of American Politics* (Washington, D.C.: National Journal Group, 2005), 1516.
[128] David Kranz, Corrine Olson and Peter Harriman, "Fraud cases cloud S.D. elections," *Argus Leader* (Sioux Falls, S.D.), 20 Oct. 2002, 1A; Scott Waltman, "Scandal Should Pose No Trouble," *Aberdeen American News* (S.D.), 3 Nov. 2002, 1A.
[129] Dan McCool, South Dakota transcript, 30, Appendix 7A.
[130] *Ibid.*, 31-32.
[131] *Ibid.*, 32-33.
[132] *Ibid.*, 33.
[133] Bryan Sells, South Dakota transcript, 35-36, Appendix 7A.
[134] *Ibid.*, 36-37.
[135] *Ibid.*, 37-38.
[136] Hon. Chris Nelson, South Dakota transcript, 81-82, Appendix 7A.
[137] Bryan Sells, South Dakota transcript, 40-41, Appendix 7A.
[138] *Ibid.*, 35.
[139] Theresa Two Bulls, South Dakota transcript, 49-50, Appendix 7A.
[140] *Ibid.*, 45, 50-51.
[141] Raymond Uses The Knife, South Dakota transcript, 51-54, Appendix 7A.
[142] *Ibid.*, 54-55.
[143] *Ibid.*, 55-56.
[144] Laurette Pourier, South Dakota transcript, 58-59, Appendix 7A.
[145] *Ibid.*, 60-62.
[146] See wording of HB 1176 at http://legis.state.sd.us/sessions/2003/bills/HB1176enr.htm (last visited 7 Nov. 2005).
[147] Jesse Clausen, South Dakota transcript, 123-24, Appendix 7A.
[148] Richard Guest, South Dakota transcript, 104-05, Appendix 7A.
[149] *Ibid.*, 109-10.
[150] O. J. Semans, South Dakota transcript, 133-34, Appendix 7A.
[151] Craig Dillon, South Dakota transcript, 143, Appendix 7A. See also Jesse Clausen, South Dakota transcript, 144, Appendix 7A.
[152] Patrick Duffy, South Dakota transcript, 177, Appendix 7A.
[153] *The Diverse Face of Asians and Pacific Islanders in California* (Los Angeles: Asian Pacific American Legal Center, 2005), 1, Appendix 8D, Exhibit 1.
[154] Written Statement of Eugene Lee, Western Regional Hearing, 3, Appendix 8D.
[155] *Ibid.*, 2.
[156] *Ibid.*, 3.
[157] *Ibid.*, 4.
[158] Materials submitted by McCormack at the Western Regional Hearing, Appendix 8F, Exs. 1-38.
[159] McCormack, *op. cit.*, 4.
[160] Conny McCormack, "Multilingual Voter Requests on File," Appendix 8F, Ex. 22.
[161] Written Statement of Conny McCormack, 4, Appendix 8F.

[162] Lee, *op. cit.*, 5.
[163] *Ibid.*, 6-8.
[164] Los Angeles municipal elections are not administered by the county.
[165] Rosalind Gold, Western Regional transcript, 120-21, 123, Appendix 8A.
[166] Wing Tek Lum and Patricia McManaman, Western Regional transcript, 124-30, Appendix 8A.
[167] Eun Sook Lee, Western Regional transcript, 159-72, Appendix 8A.
[168] Written Statement of Kathay Feng, Western Regional Hearing, Appendix 8H.
[169] *Ibid.*, 3-4.
[170] Kathy Feng, Western Regional transcript, 234-35, Appendix 8A.
[171] Feng, Written Statement, *op. cit*, 4.
[172] 525 U.S. 266 (1999).
[173] Written Statement of Robert Rubin, Western Regional Hearing, 2-3, Appendix 8G.
[174] *Ibid.*, 4-5.
[175] *Ibid.*, 6-7; Robert Rubin, Western Regional transcript, 152, Appendix 8A.
[176] Written Statement of Joaquin G. Avila, Western Regional Hearing, 4-7, Appendix 8B.
[177] *Ibid.*, 8.
[178] *Ibid.*, 11-12.
[179] Carolyn Fowler, Western Regional transcript, 194-96, Appendix 8A.
[180] *Ibid.*, 198-99.
[181] *Ibid.*, 199, 223-24.
[182] Hon. Melvin Watt, Mid-Atlantic Regional transcript, 22, Appendix 9A.
[183] *Ibid.*, 25.
[184] *Ibid.*, 26-27.
[185] *Ibid.*, 28, 38.
[186] *Ibid.*, 38-40.
[187] Hirsch, Mid-Atlantic Regional transcript, 51-53, Appendix 9A.
[188] *Ibid.*, 57.
[189] *Ibid.*, 58-61.
[190] Gerald Hebert, Mid-Atlantic Regional transcript, 82-92, Appendix 9A.
[191] *Ibid.*, 104-05.
[192] Margaret Jurgensen, Mid-Atlantic Regional transcript, 127, Appendix 9A.
[193] *Ibid.*, 128.
[194] *Ibid.*, 132-33.
[195] *Ibid.*, 131.
[196] *Ibid.*, 134-35.
[197] Chicago and London: The University of Chicago Press (2004).
[198] Richard Valelly, Mid-Atlantic Regional transcript, 137-40, Appendix 9A.
[199] Mark Posner, Mid-Atlantic Regional transcript, 144-45, Appendix 9A.
[200] *Ibid.*, 145-46.
[201] *Ibid.*, 145-52.
[202] *Ibid.*, 212.
[203] 539 U.S. 461 (2003).
[204] Robert Kengle, Mid-Atlantic Regional transcript, 160-61, Appendix 9A.
[205] *Ibid.*, 163.
[206] Kent Willis, Mid-Atlantic Regional transcript, 170-71, Appendix 9A. The case was *Irby v. Virginia State Board of Elections*, 889 F.2d 1352 (4th Cir. 1989).

[207] Thomas R. Morris and Neil Bradley, "Virginia," in Chandler Davidson and Bernard Grofman (eds.), *Quiet Revolution the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton, New Jersey: Princeton University Press, 1994), 286.
[208] Kent Willis, Mid-Atlantic Regional transcript, 172-73, Appendix 9A.
[209] *Ibid.*, 173-75.
[210] Valelly, Mid-Atlantic Regional transcript, 191, Appendix 9A.
[211] Mark Posner, Mid-Atlantic Regional transcript, 192-93, Appendix 9A.
[212] Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* (Chapel Hill and London: The University of North Carolina Press, 1989).
[213] *Mississippi Report for the National Commission on the Voting Rights Act*, 29 Oct. 2005, 1, Appendix 10E.
[214] See, for example, the testimony of Robert McDuff, Mississippi transcript, 28, Appendix 10A, on how few blacks are elected from majority-white districts; and that of Carroll Rhodes, Mississippi Hearing transcript, 72-73, Appendix 10A.
[215] Robert McDuff, Mississippi transcript, 26-27, Appendix 10A.
[216] *Ibid.*, 29.
[217] *Ibid.*, 29-30.
[218] Mississippi Supreme Court justices are not elected statewide, but from three three-member districts.
[219] Carlton Reeves, Mississippi transcript, 117-19, Appendix 10A.
[220] *Ibid.*, 32-37.
[221] Written Statement of Brenda Wright, Mississippi Hearing, 2, Appendix 10D.
[222] *Ibid.*, 3. See also Parker, *Black Votes Count, op. cit.*, 206, on the impact of dual registration on blacks: "Substantial numbers of black voters apparently were not informed of the dual registration requirement when they registered to vote with the circuit clerks or were otherwise unaware of the requirement, and disproportionate numbers of black voters have been denied the ballot in municipal elections in Mississippi because they had failed to register again with their municipal clerks."
[223] Wright, *op. cit.*, 5-7.
[224] *Ibid.*, 8-9.
[225] *Ibid.*, 9.
[226] Ellis Turnage, Mississippi transcript, 55-57, Appendix 10A; Carroll Rhodes, Mississippi transcript, 63-64, Appendix 10A.
[227] Deborah McDonald, Ellis Turnage, Robert McDuff, Mississippi transcript, 101-05, Appendix 10A.
[228] John Walker, Mississippi transcript, 109, Appendix 10A.

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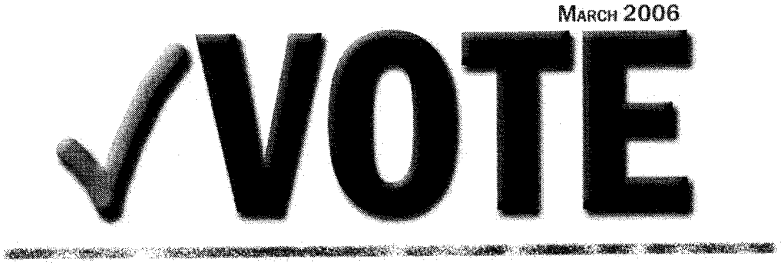
APPENDIX TO THE STATEMENT OF NADINE STROSSEN, "VOTE: THE CASE FOR EXTENDING AN AMENDING THE VOTING RIGHTS ACT, VOTING RIGHTS LITIGATION, 1982–2006," A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION

MARCH 2006



THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT

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INTRODUCTION

Five Presidents - Lyndon Johnson (1965), Richard Nixon (1970), Gerald Ford (1975), Ronald Reagan (1982), and George H. W. Bush (1992) - have supported the enactment or reauthorization of key parts of the Voting Rights Act. Dr. Martin Luther King, Jr. said that President Johnson's support of the Voting Rights Act had helped transform the bloody assault on civil rights marchers by state troopers at the Edmund Pettus Bridge in Selma, Alabama, into a "shining moment in the conscience of man."[1] On signing the 1982 extension of the Act, which passed Congress by a vote of 389 to 24, President Reagan called the right to vote the "crown jewel of American liberties."[2]

This report describes the voting rights litigation brought, or participated in, by the Voting Rights Project of the American Civil Liberties Union after the amendment and extension of the Voting Rights Act on June 29, 1982. It documents continuing purposeful discrimination in voting against racial

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[1] Nick Kotz, Judgment Days. Lyndon Baines Johnson, Martin Luther King, Jr., and the Laws that Changed America (Boston: Houghton Mifflin, 2005), p. 324.

[2] President Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982, June 29, 1982, Ronald Reagan Presidential Library, published at: http://www.reagan.utexas.edu/archives/speeches/1982/62982b.htm

minorities in the South and against American Indians in the West. It also demonstrates the urgent need for extension of the special provisions of the Act scheduled to expire in 2007: (1) Section 5 preclearance; (2) the minority language assistance provisions of Section 203; and (3) the federal examiner and election observer provisions.

Section 5 requires jurisdictions with significant histories of discrimination in voting to preclear, or get federal approval of, any new voting practices or procedures and to show that they do not have a discriminatory purpose or effect.[3] Preclearance may be granted by the Attorney General or the Federal District Court for the District of Columbia. The Senate Report that accompanied the 1982 extension of Section 5 warned that without the preclearance requirement, "many of the advances of the past decade could be wiped out overnight with new schemes and devices."[4] The minority language provisions of Section 203 require jurisdictions with significant numbers of American citizens who are limited in their ability to speak English to provide bilingual oral and

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[3] 42 U.S.C. § 1973c. A voting change has a discriminatory effect under Section 5 if it causes a "retrogression" in minority voting strength. Beer v. United States, 425 U.S. 130, 141 (1976).

[4] S.Rep. No. 97-417, 97th Cong., 2d Sess. 10(1982).

written assistance in voting.[5] The special provisions also authorize the Attorney General to assign federal examiners and election observers to insure that minorities are allowed to register and vote without intimidation or discrimination.[6] Appendix A to this report describes in more detail the special provisions set to expire in 2007, as well as the permanent provisions of the Act. Appendix B lists the jurisdictions covered by the special provisions. Appendix C contains two tables showing those local jurisdictions required to provide minority language assistance in voting pursuant to Section 203 because of their American Indian populations, and displays which of these jurisdictions are also covered under Section 5.

[5] 42 U.S.C. §§ 1973b(f)(4) and aa-1a.

[6] 42 U.S.C. §§ 1973d, e, f & k.

EXECUTIVE SUMMARY

This report discusses the involvement of the ACLU Voting Rights Project in 293 cases brought in 31 states since June 1982, the date of the last extension of the special provisions of the Voting Rights Act, challenging discrimination in voting and failure to comply with federal and state election laws.[7] The states and the number of cases brought were: Alabama (9); Arkansas (2); California (1); Colorado (1); Connecticut (1); Florida (15); Georgia (145); Illinois (1); Kansas (2); Louisiana (4); Maryland (4); Michigan (1); Minnesota (2); Mississippi (3); Missouri (2); Montana (6); Nebraska (2); New Jersey (1); New Mexico (1); New York (1); North Carolina (17); Ohio (1); Pennsylvania (1); Rhode Island (2); South Carolina (38); South Dakota (6); Tennessee (3); Texas (3); Virginia (15); Washington (2); and Wyoming (1).

I. Section 5 Has Blocked Implementation of Discriminatory Voting Changes

There have been more than 1,000 objections under Section 5 by the Department of Justice since 1982, encompassing an even greater number of voting changes in the covered jurisdictions. These objections protected millions

[7] The report discusses only those cases initiated, or participated in, by the ACLU Voting Rights Project, and does not include litigation brought independently by ACLU state affiliates, unless specifically noted. This report also discusses non-litigation interventions engaged in by the ACLU to protect the ability of minority voters to elect representatives of choice.

of voters in thousands of elections over the past two decades. A few examples from the cases discussed in this report will suffice to illustrate the continuing importance of Section 5.

The City of Albany, Georgia: 2002-2003

Following the 2000 census, the City of Albany, Georgia, adopted a new redistricting plan for its mayor and commission to replace an existing malapportioned plan, but it was rejected by the Department of Justice under Section 5. The department noted that while the black population had steadily increased in Ward 4 over the past two decades, subsequent redistrictings had decreased the black population "in order to forestall the creation of a majority black district." The letter of objection concluded it was "implicit" that "the proposed plan was designed with the purpose to limit and retrogress the increased black voting strength in Ward 4, as well as in the city as a whole."[8] A subsequent court ordered plan remedied the vote dilution in Ward 4.[9] But in the absence of Section 5, elections would have gone forward under a plan in which purposeful discrimination was "implicit," and which could only have been

[8] J. Michael Wiggins, Acting Assistant Attorney General, to Al Grieshaber Jr., September 23, 2002.

[9] Wright v. City of Albany, Georgia, 306 F. Supp. 2d 1228 (M.D. Ga. 2003).

challenged in time consuming vote dilution litigation under Section 2, in which the minority plaintiffs would have borne the burden of proof and expense.

Charleston County, South Carolina: 2003-2004

In 2003, South Carolina enacted legislation adopting the identical method of elections for the board of trustees of the Charleston County School District that had earlier, in a case involving the county council, been found to dilute minority voting strength in violation of Section 2.[10] Under the pre-existing system, school board elections were non-partisan, multi-seat contests decided by plurality vote, which allowed minority voters the opportunity to "bullet vote," or concentrate their votes on one or two candidates and elect them to office. That possibility would have been effectively eliminated under the proposed new partisan system.

In denying preclearance to the county's submission, the Department of Justice concluded "[t]he 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." The department noted further that:

[10] United States v. Charleston County and Moultrie v. Charleston County Council, 316 F. Supp. 2d 268 (D. S.C. 2003), aff'd 365 F.3d 341 (4th Cir. 2004), cert. den'd, 125 S. Ct. 606 (2004).

> 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.[11]

Section 5 thus prevented the state from implementing a new and retrogressive voting practice, one which everyone understood was adopted to dilute black voting strength and insure white control of the school board.

Georgia Redistricting: 1982-1983

A three-judge court in the District of Columbia denied preclearance to Georgia's infamous 1980 congressional redistricting plan finding that it was adopted with "a discriminatory purpose in violation of Section 5."[12] The decision was affirmed by the Supreme Court.[13]

Other Examples

Numerous other Section 5 objections are discussed in detail in this report. The objections in Florida include: state restrictions on registration and voting (1998). The objections in Georgia include: Adel, annexations (1982); Augusta, high school diploma requirement & annexations (1987); Augusta, date of

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[11] R. Alexander Acosta, Assistant Attorney General, to C. Havird Jones, Jr., February 26, 2004.

[12] Busbee v. Smith, 549 F. Supp. 494, 517 (D. D.C. 1982).

[13] Busbee v. Smith, 549 U.S. 1166 (1983).

referendum (1988); Augusta, consolidation (1989); Bibb County, special election (1988); Butler, majority vote requirement (1992); Clay County, candidate high school diploma requirement (1993); College Park, redistricting (1983); East Dublin, numbered posts and majority vote requirement (1991); Glynn County, consolidation (1982 & 1984); Griffin, redistricting (1985); Hinesville, majority vote requirement (1991); Jesup, redistricting and numbered posts and majority vote requirement (1986); Kingsland, numbered posts (1983); La Grange, redistricting (1993 & 1994); Lamar County, redistricting (1986); Lumber City, numbered posts and majority vote requirement (1988 & 1989); Lyons, redistricting (1985); Macon, deannexation (1987); Marion County, redistricting (2002); Millen, relocation of polling place (1995); Newnan, redistricting (1984); Newton, numbered posts (1997); Putnam County, redistricting (2002); Randolph County, redistricting (1993); Rome, staggered terms (1987); Sumter County, redistricting (1982); Tignall, numbered posts, staggered terms, and majority vote requirement (2000); Waynesboro, majority vote requirement (1994); Wrens, majority vote requirement (1986); and Wrightsville, relocation of polling place (1992). Objections in Louisiana include: state photo ID requirement (1994); and St. Francisville, redistricting (1993). Objections in Mississippi include: statewide dual registration (1997); and Perry County, redistricting (1991). Objections in North Carolina include: Ahoskie, annexations (1989); Edgecomb County,

residency districts (1984); Laurinburg, annexations (1994); Martin County, residency districts (1986); Mt. Olive, redistricting (1994); and Rocky Mount, annexations (1984). The objections in South Carolina include: state legislative redistricting (1994); Batesburg, majority vote requirement (1986); Batesburg-Leesville, majority vote requirement (1993); Clinton, annexations (2002); Edgefield County, redistricting (1984); Edgefield County school district, redistricting (1987); Elloree, staggered terms and majority vote requirement (1984); Hemingway, annexations (1994); Johnston, redistricting (1992 & 1993); Orangeburg, redistricting (1985 & 1992); Sumter County, annexations (1985 & 1986); and Sumter County, redistricting (2002).

II. There Is a Continuing Pattern of Bloc Voting and Racial Polarization in the Covered Jurisdictions

One of the most sobering facts to emerge from this report, as well as from the decisions in other cases, is the continuing presence of racially polarized voting. While much progress has been made in minority registration and office holding, the persistence of racial bloc voting shows that race remains dynamic in the political process, particularly in the covered jurisdictions. A few examples will suffice.

Racially Polarized Voting in South Carolina: 1984-2004

The three-judge court in Burton v. Sheheen, decided in 1992, relied upon the stipulation of the parties "that since 1984 there is evidence of racially polarized voting in South Carolina."[14] A subsequent three-judge court in Smith v. Beasley, decided in 1996, found that "[i]n South Carolina, voting has been, and still is, polarized by race. This voting pattern is general throughout the state."[15] In Colleton County Council v. McConnell, decided in 2002, the three-judge court made similar findings: "[v]oting in South Carolina continues to be racially polarized to a very high degree in all regions of the state and in both primary and general elections."[16] In 2004, the court of appeals affirmed the finding of a district court in South Carolina "that voting in Charleston County Council elections is severely and characteristically polarized along racial lines."[17]

Racially Polarized Voting in Indian Country: 1986-2004

In invalidating South Dakota's 2000 legislative redistricting plan as diluting Indian voting strength in the area of the Pine Ridge and Rosebud Sioux Indian Reservations, the court found "'legally significant' white bloc voting."[18]

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[14] Burton v. Sheheen, 793 F. Supp. 1329, 1357-58 (D. S.C. 1992).

[15] Smith v. Beasley, 946 F. Supp. 1174, 1202 (D.S.C. 1996).

[16] Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 641 (D.S.C. 2002).

[17] Moultrie v. Charleston County Council, 365 F.3d 341, 350 (4th Cir. 2004).

[18] Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1017 (D.S.D. 2004).

The court struck down at-large elections in Blaine County, Montana, finding that racially polarized voting "made it impossible for an American Indian to succeed in an at-large election."[19] In invalidating at-large elections in Big Horn County, the court made similar findings that "there is racial bloc voting," and "there is evidence that race is a factor in the minds of voters in making voting decisions."[20]

Racially Polarized Voting in Georgia: 2002

The District Court for the District of Columbia, in a Section 5 preclearance action involving Georgia's legislative redistricting plan, found there were areas of the state where "white voters consistently vote against the preferred candidates of African Americans."[21]

Racially Polarized Voting in Tennessee: 1993-1994

A three-judge court found that in West Tennessee there is "a high level of white bloc voting which usually enables the majority to defeat the black community's candidate of choice," and that racial polarization is so extreme that "black candidates cannot expect to succeed in majority-white districts."[22]

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[19] United States v. Blaine County, Montana, 363 F.3d 897, 914 (9th Cir. 2004), cert. den'd, Blaine County v. United States, 125 S. Ct. 1824 (2005).

[20] Windy Boy v. County of Big Horn, 647 F. Supp. 1002, 1013 D. Mont. 1986).

[21] Georgia v. Ashcroft, 195 F. Supp. 2d 25, 31 (D. D.C. 2002).

[22] RWTAAAC v. McWherter, 836 F. Supp. 453, 458, 462 (W.D. Tenn 1993).

Another court found in 1994 that "the level of racial bloc voting is increasing in Hamilton County making it more difficult than ever for a black to win a countywide judicial office."[23]

[23] Cousin v. McWherter, 840 F. Supp. 1210, 1215 (E.D. Tenn. 1994).

Other Examples

This report is replete with other findings by courts, and the Department of Justice in Section 5 objection letters, of continuing racial bloc voting, e.g., in Alabama (Chambers County, 1976); Colorado (Montezuma County, 1998); Connecticut (Bridgeport, 1993); Florida (DeSoto County, 1994; Escambia County, 1982; Glades County, 2004; and Fort Pierce, 1993); Georgia (Adel, 1982; Augusta, 1989; Baldwin County, 1983; Bleckley County, 1991; Charlton County, 1971; Clarke County, 1991; College Park, 1983; Cook County, 1982; Dooly County, 1980; Glynn County, 1982; Griffin, 1981; Hinesville, 1991; Jefferson County, 1986; Jesup, 1986; Kingsland, 1983; LaGrange, 1993; Lamar County, 1986; Long County, 1976; Lumber City, 1988; Lyons, 1985; Marion County, 2000; Newnan, 1984; Putnam County, 2002; Randolph County, 1993; Rome, 1987; Spalding County, 1981; Statesboro, 1980; Sumter County, 1983; Tignall, 2000; Wilkes County, 1978; Waynesboro, 1994; and Wrens, 1986); Maryland (Worcester County, 1994); North Carolina (Ahoskie, 1989; Edgecombe County, 1984; Laurinburg, 1994; Martin County, 1986; Mt. Olive, 1994; Rocky Mount, 1984; Sampson County, 1988; Wayne County, 1986); South Carolina (Batesburg, 1986; Batesburg-Leesville, 1993; Clinton, 2002; Edgefield County, 1986; Elloree, 1984; Johnston, 1992; Laurens County, 1987; Mullins, 1988; Orangeburg, 1992; and Sumter County,

1984); Virginia (Blackstone, 1986; Brunswick County, 1992); Louisiana (St. Francisville, 1993); Mississippi, 1987; and Nebraska (Thurston County, 1995).

III. Continuing Hostility to Minority Political Participation

Aside from patterns of polarized voting, this report and other evidence shows that the temptation to manipulate the law in ways that will disadvantage minority voters is as great and irresistible today as it was in 1982, when Congress last reauthorized Section 5. The recent Supreme Court brief filed by the State of Georgia in Georgia v. Ashcroft[24] provides a vivid, present day example of the willingness of one of the states covered by Section 5 to manipulate the laws to diminish the protections afforded racial minorities.

In its brief, the state resurrected the anti-Voting Rights Act rhetoric of prior years and argued that Section 5 "is an extraordinary transgression of the normal prerogatives of the states." State legislatures were "stripped of their authority to change electoral laws in any regard until they first obtain federal sanction." The statute was "extraordinarily harsh," and "intrudes upon basic principles of federalism." As construed by the lower court, the state said, Section 5 was "unconstitutional."[25] But the arguments the state made about the districts

[24] 539 U.S. 461 (2003).

[25] Brief of Appellant State of Georgia, pp. 28, 31, 40-1.

at issue were far more hostile to minority voting rights than even its anti-Voting Rights Act rhetoric.

One of the state's arguments was that the retrogression standard of Section 5 should be abolished in favor of an "equal opportunity" to elect standard, which it defined as "a 50-50 chance of electing a candidate of choice."[26] A 50-50 chance to win is also a 50-50 chance to lose. Given the fact that blacks are elected primarily from majority black districts, if the state were allowed under Section 5 to adopt a plan providing minority voters with only a 50-50 chance of electing candidates of their choice in the majority black districts, the number of blacks elected to the legislature could be reduced by half, or even more. The Supreme Court rejected the state's invitation to rewrite Section 5.

The state argued further that a district provided minority voters an equal opportunity to elect their candidates of choice when it contained only a 44% black voting age population. The adoption of that standard would have permitted the state to abolish all of its previously majority black districts. It would also have turned blacks into second class voters, with bloc voting white majorities controlling most, if not all, of the legislative districts.

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[26] Georgia v. Ashcroft, 195 F. Supp. 2d 25, 66 (D. D.C. 2002).

Georgia further demonstrated its disregard for minority voting rights in Georgia v. Ashcroft by arguing that minorities should never be allowed to participate in the preclearance process. Thus, the very group for whose protection Section 5 was enacted would have no say on how a proposed change might impact the minority community. The Supreme Court, once again, rejected the state's argument, an argument which can charitably be described as irresponsible.

Restrictive Photo ID Requirements for Voting

More recently, the Georgia legislature, in a vote sharply divided on racial and partisan lines, passed a new voter identification bill which had the dubious distinction of being the most restrictive in the United States. To vote in person - but not by absentee ballot - a voter would have to present one of five specified forms of photo ID. Those without such an ID would have to purchase one for $25. Not only are there laws on the books that make voter fraud a crime, but there was no evidence of fraudulent in-person voting to justify the stringent photo ID requirement. The new requirement would also have an adverse impact upon minorities, the elderly, the disabled, and the poor. A challenge to the photo ID law was filed by a coalition of groups, including the ACLU, and on October

18, 2005, the federal court enjoined its use on the grounds that it was in the nature of a poll tax, as well as a likely violation of the equal protection clause.[27]

States other than Georgia have also enacted new photo ID requirements for voting, and it has often been in response to the increased participation of a minority group in the electoral process. Following the 2002 elections in South Dakota, for example, which saw a surge in Indian political activity, the legislature passed laws that placed additional requirements for voting, including requiring photo identification at the polls. State Rep. Tom Van Norman, a member of the Cheyenne River Sioux Tribe, said the legislation targeted and retaliated against new Indian voters because they were a big factor in a close senatorial race. During legislative debate on another bill which would have made it easier for Indians to vote, an opponent of the measure said, "I, in my heart, feel that this bill . . . will encourage those who we don't particularly want to have in the system." Alluding to Indian voters, he said "I'm not sure we want that sort of person in the polling place."[28]

Other Examples

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[27] Common Cause/Georgia v. Billups, Civ. No. 4:05-CV-0201-HLM (N.D. Ga.).

[28] Bone Shirt v. Hazeltine, 200 F. Supp. 2d 1150, 1026 (D.S.D. 2002).

Other examples of discrimination against minority voters discussed in this report include: discriminatory annexations and deannexations;[29] challenges by white voters or elected officials to majority minority districts;[30] pairing black incumbents in redistricting plans;[31] refusing to draw majority minority districts;[32] refusing to appoint blacks to public office;[33] maintaining a racially exclusive sole commissioner form of county government;[34] refusing to designate satellite voter registration sites in the minority community;[35] refusing to accept "bundled" mail-in voter registration forms;[36] refusing to allow registration at county offices;[37]

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[29]Adel, Ga., 1982; Ahoskie, N.C., 1989; Augusta, Ga., 1987; Clinton, S.C., 2002; College Park, Ga., 1979; Emporia, Va. 1987; Foley, Ala., 1989 & 1993; Hemingway, S.C., 1994; Laurinburg, N.C., 1994; Macon, Ga., 1987; Rocky Mount, N.C. , 1984; Sumter County, S.C., 1985 & 1986.

[30] Cocoa, Fla., 1994; Ga., congressional, house, and senate redistricting, 1990; Georgetown County, S.C., 1983; La., congressional redistricting, 1994; Mont., legislative redistricting, 2003; N.C., congressional redistricting, 1991-2001; Perry County, Miss. , 1993; Putnam County, Ga., 1997; S.C., house and senate redistricting, 1996; S.C. congressional redistricting, 1996 & 1998; St. Francisville, La., 1995; Telfair County, Ga., 1986; Union County, S.C., 2002; Va., congressional redistricting, 1995; S.D. redistricting, 1996).

[31] West Palm Beach, Fla., 1990.

[32] Bossier Parish, La., 1992; Ga., congressional redistricting, 1982.

[33] Ben Hill County, Ga., 1988; Johnson County, Ga., 1983.

[34] Bleckley County, Ga., 1985; Wheeler County, Ga., 1993.

[35] Columbus/Muscogee County, Ga., 1984.

[36] Ga., 2004.

[37] Fulton County, Ga., 1986.

refusing to comply with Section 5 or Section 5 objections;[38] transferring duties to an appointed administrator following the election of blacks to office;[39] white opposition to restoring elections to a majority black town;[40] requiring candidates for office to have a high school diploma or its equivalent;[41] prohibiting "for sale" and other yard signs in a predominantly white municipality;[42] disqualifying black elected officials from holding office or participating in decision making;[43] relocating polling places distant from the black community;[44] refusing to hold elections following a Section 5 objection;[45] maintaining an all white self-perpetuating board of education;[46] challenges to the constitutionality of the NVRA;[47] failure to provide bilingual ballots and assistance in voting;[48] county

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[38] Ga., judicial elections, 1989; Charlton County, Ga., 1985; Ga., soil and water conservation elections, 2004; Douglasville, Ga., 1996; Greene County, Ga., 1985; Rochelle, Ga., 1984; La., 1995; S.D. , 1976-2002.

[39] Kingston, Ga., 1987.

[40] Keysville, Ga., 1990.

[41] Clay County, Ga., 1993; Augusta, Ga., 1987.

[42] Avondale Estates, Ga., 2000.

[43] Sumter County, Ga., 1998; Thomaston, Ga., 1986; Beaufort County, S.C., 1983).

[44] Millen, Ga., 1995; Wrightsville, Ga., 1992.

[45] Butler, Ga. 1995.

[46] Thomaston, Ga., 1981.

[47] La., 1995; Va., 1995; S.C., 1995.

governance by state legislative delegation;[49] challenges to the constitutionality of the Voting Rights Act;[50] packing minority voters to dilute their influence;[51] and using discriminatory punch card voting systems.[52]

IV. The Continued Need for Section 5

Much progress has been made in minority voting rights and office holding in recent times, but it has been made in large measure because of the existence of Section 5 and the other provisions of the Voting Rights Act. One of the principal conclusions of Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990, was that the increase in minority office holding was the result of "the Voting Rights Act of 1965 and its 1982 amendments. Quite simply, had there been no federal intervention in the redistricting process in the South, it is unlikely that most southern states would have ceased their practice of diluting

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[48] Michigan, Buena Vista and Clyde Townships, 1992; Bennett County, S.D., 2002.

[49] S.C., 1999 .

[50] Sumter County, S.C., 1982; Blaine County, Mont., 2005.

[51] Buffalo County, S.D., 2003; S.D., legislative redistricting, 2002.

[52] Ga., 2001; Fla., 2001; Calif., 2001; Ill., 2001; Oh. 2002.

the black vote."[53] The fact that Section 5 has been so successful is one of the arguments in favor of its extension in 2007, not its demise.

The persistent, widespread patterns of racial bloc voting found by the courts underscore the need for extension of Section 5, as do the continuing, well documented efforts of elected officials to dilute minority voting strength and deter minority political participation.

That is apparent from the findings of violations of Section 2 of the Voting Rights Act in cases discussed in this report, as well as the decisions of jurisdictions not to contest Section 2 claims and enter into consent decrees. The central role of Section 5 is further apparent from the redistricting that follows each decennial census. As the discussion of redistricting litigation in this report makes clear, in the absence of Section 5 minority voters would become increasingly marginalized during the redistricting process.

The right to vote is, indeed, "preservative of all rights."[54] As long as the tradition of racial discrimination in voting continues, the protection of Section 5 remains essential to the health of American democracy.

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[53] Lisa Handley and Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations," in Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990, Chandler Davidson and Bernard Grofman, eds. (Princeton; Princeton University Press, 1994), 336.

[54] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

Section 5 Has an Important Deterrent Effect

Aside from blocking the implementation of discriminatory voting changes, Section 5 has a strong deterrent effect. In 2005, the Georgia legislature redrew its congressional districts, but before doing so it adopted resolutions providing that it must comply with the non-retrogression standard of Section 5. The plan it drew maintained the black voting age population in the two majority black districts (represented by John Lewis and Cynthia McKinney) at almost exactly their pre-existing levels, and it did the same for the two other districts (represented by Sanford Bishop and David Scott) that had elected black members of Congress.[55] There was no objection by the Department of Justice when the plan was submitted for preclearance. That does not mean, however, that Section 5 did not play a critical role in the redistricting process. Rather, it means Section 5 encouraged the legislature to ensure that any voting changes would not have a discriminatory effect on minority voters, and that it would not become embroiled in the preclearance process.

V. The Courts Routinely Apply the Voting Rights Act

[55] HB 499 (2005)

Section 5 continues to play a critical role because it is routinely applied by the federal courts to prevent retrogression and protect the equal right of minority voters to participate in the political process.

South Carolina

The three-judge court in Colleton County Council v. McConnell, the litigation filed after the South Carolina governor and legislature deadlocked over redistricting in 2001, concluded that it was obligated to comply with Sections 2 and 5 of the Voting Rights Act and proceeded to draw plans that maintained the state's existing majority black congressional district and actually increased the number of majority black house and senate districts.[56]

Mississippi

In Mississippi, which lost a congressional seat as a result of the 2000 census, both the state court and the federal court became involved in the redistricting process and drew plans relying upon the non-retrogression standard of Section 5 which maintained one of the districts as majority black.[57]

Georgia

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[56] Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 655-56, 661, 666 (D.S.D. 2002).

[57] Smith v. Clark, 189 F. Supp. 2d 529, 535, 540 (S.D.Miss. 2002).

A three-judge court in Georgia appointed a special master to prepare court ordered plans after the state failed to enact remedial plans for the house and senate. Under the special master's plan, nearly half of the black house members were paired, or placed in a house district with one or more other incumbents. A number of the paired black incumbents were chairs or officers of house committees, and some were also senior members of the house. Their loss would inevitably have adversely affected the representation of the black community in the state legislature.

The Georgia Legislative Black Caucus, represented by the ACLU, sought leave to participate as amicus curiae, which was granted. It argued that the pairing of black incumbents caused a retrogression in minority voting strength within the meaning of Section 5, and created a discriminatory result within the meaning of Section 2. The three-judge court agreed that court ordered plans should "comply with the racial-fairness mandates of § 2 of the Act, as well as the purpose-or-effect standards of § 5," and instructed the special master to draw another plan taking into account the unnecessary pairing of incumbents. As the court found in adopting the new plan, there was "no retrogression" from the pre-existing benchmark plans.[58]

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[58] Larios v. Cox, 314 F. Supp. 2d 1357, 1360, 1366 (N.D. Ga. 2004).

Also in Georgia, in implementing a court ordered plan for the City of Albany in 2003, the court emphasized that "[i]n drawing or adopting redistricting plans, the Court must also comply with Sections 2 and 5 of the Voting Rights Act."[59] Under the court ordered plan, blacks were 50% of the population of Ward 4, and a substantial majority in four of the other wards.

South Dakota

The district court in South Dakota adopted a court ordered plan for the house and senate in 2005 to cure a Section 2 violation in a vote dilution suit by Native Americans. In creating new majority Indian districts, the court held it had adhered to the state's "redistricting principles," which included "protection of minority voting rights consistent with the United States Constitution, the South Dakota constitution, and federal statutes."[60] The area in question included Todd and Shannon Counties, both of which are covered by Section 5.

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[59] Wright v. City of Albany, Georgia, 306 F. Supp. 2d 1228, 1235, 1238 (M.D. Ga. 2003), and Order of December 30, 2003.

[60] Bone Shirt v. Hazeltine, 387 F. Supp. 2d 1035, 1042 (D.S.D. 2005).

POLICY RECOMMENDATIONS

I. Section 5 of the Voting Rights Act Should Be Extended for 25 Years

Section 5 should be extended for 25 years because there is still strong evidence of discrimination in voting, racially polarized voting, and manipulation of minority voters by covered jurisdictions. Section 5 has also blocked the implementation of numerous discriminatory voting changes, has a strong deterrent effect, and is routinely applied by the courts. Section 5 is still needed to protect the rights of minority voters.

II. Section 5 Should Be Amended to Provide that a Voting Practice Adopted with a Non-Retrogressive Discriminatory Purpose Should Be Denied preclearance

The Problem Created by Bossier II

Bossier Parish, Louisiana, adopted a redistricting plan for its 12 member school board in 1992. The parish was 20% black, but all of the districts were majority white, despite the fact that a plan could be drawn containing two majority black districts. No black person had ever been elected to the school board, and it was undisputed that the plan adopted by the parish split black communities purposefully to avoid creating a majority black district. One board member said he favored black representation on the board, but "a number of other board members opposed the idea." Another board member said "the Board was hostile to the creation of a majority-black district." The Attorney General

concluded she was "not free to adopt a plan that unnecessarily limits the opportunity for minority voters to elect their candidates of choice."[61]

The District of Columbia court, however, precleared the parish's plan. It held the 1992 plan was no worse than the preexisting plan, in that neither contained any majority black districts, and thus there was no "retrogressive intent."[62] The Supreme Court affirmed in a decision known as Bossier II.[63] It held "in light of our longstanding interpretation of the 'effect' prong of § 5 in its application to vote dilution claims, the language of § 5 leads to the conclusion that the 'purpose' prong of § 5 covers only retrogressive dilution."[64] Thus, an admittedly discriminatory plan, that was the product of intentional discrimination and had an undeniable discriminatory effect, was nonetheless granted preclearance under Section 5. The majority further held that denying preclearance to a voting change on the grounds that it was enacted with a discriminatory but nonretrogressive purpose "would also exacerbate the substantial' federalism costs that the preclearance procedure already exacts, . . .

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[61] This history is set out in Reno v. Bossier Parish School Bd., 528 U.S. 320, 324, 348 (2000) ("Bossier II").

[62] Reno v. Bossier Parish School Bd., 7 F. Supp. 2d 29, 31-2 (D. D.C. 1998).

[63] In Reno v. Bossier Parish School Bd., 520 U.S. 471 (1997), known as "Bossier I," the Court ruled that a voting practice could not be denied preclearance under Section 5 merely because it violated the results standard of Section 2, that a retrogressive effect was required.

perhaps to the extent of raising concerns about § 5's constitutionality."[65] The dissenters (Justices Souter, Stevens, Ginsburg and Breyer) concluded that:

> the full legislative history shows beyond any doubt just what the unqualified text of § 5 provides. The statute contains no reservation in favor of customary abridgment grown familiar after years of relentless discrimination, and the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles.[66]

Had the Bossier II standard been in effect in 1982, the District of Columbia court would have been required to preclear Georgia's congressional redistricting plan, which was found by the court to be the product of purposeful discrimination. In that instance, the state had increased the black population in the Fifth District over the benchmark plan, but kept it as a district with a majority of white registered voters. The remaining nine congressional districts were all solidly majority white. As Joe Mack Wilson, the chief architect of redistricting in the house told his colleagues on numerous occasions, "I don't want to draw nigger districts."[67] He explained to one fellow house member, "I'm not going to draw a honky Republican district and I'm not going to draw a nigger district if I

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[64] Bossier II, 528 U.S. at 328.

[65] Id. at 336.

[66] Id. at 366.

can help it."[68] Since the redrawn Fifth District did not make black voters worse off than they had been under the preexisting plan, and even though it was the product of intentional discrimination, the purpose was not technically retrogressive and so, under Bossier II, the plan would have been unobjectionable. Such a result would be a parody of what the Voting Rights Act stands for.

III. Section 5 Should Be Amended to Provide that Voting Practices that Diminish the Ability of Minority Voters to Elect Candidates of Choice Should Be Denied Preclearance

The Decision in Georgia v. Ashcroft

In Georgia v. Ashcroft,[69] the Supreme Court vacated the decision of a three-judge court denying preclearance to three state senate districts contained in Georgia's 2000 redistricting plan because, in its view, the district court "did not engage in the correct retrogression analysis because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts."[70] Although blacks were a majority of the voting age population in all three districts, the district court held the state failed to carry its

[67] Busbee v. Smith, 549 F. Supp. 494, 501 (D. D.C. 1982).

[68] Id., Deposition of Bettye Lowe, p. 36.

[69] 539 U.S. 461 (2003).

[70] Id. at 490.

burden of proof that the reductions in black voting age population from the benchmark plan would not "decrease minority voters' opportunities to elect candidates of choice."[71] The Supreme Court held that while this factor "is an important one in the § 5 retrogression inquiry," and "remains an integral feature in any § 5 analysis," it "cannot be dispositive or exclusive."[72] The Court held other factors, which in its view the three-judge court should have considered, included: "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;" and whether a plan achieves "greater overall representation of a minority group by increasing the number of representatives sympathetic to the interest of minority voters."[73]

The Supreme Court opined that "Georgia likely met its burden of showing nonretrogression," but concluded: "We leave it for the District Court to determine whether Georgia has indeed met its burden of proof."[74] But before the district court could reconsider and decide the case on remand, a local three-judge court

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[71] Georgia v. Ashcroft, 195 F. Supp. 2d 25, 89 (D. D.C. 2002).

[72] Id., 539 U.S. at 480, 484, 486.

[73] Id. at 482-83.

[74] Id. at 487, 489.

invalidated the senate plan on one person, one vote grounds,[75] and implemented a court ordered plan.[76] As a consequence, the preclearance of the three senate districts at issue in Georgia v. Ashcroft was rendered moot.

The dissent in Georgia v. Ashcroft (Justices Souter, Stevens, Ginsburg and Breyer) argued Section 5 had always meant "that changes must not leave minority voters with less chance to be effective in electing preferred candidates than they were before the change."[77] The dissenters also argued that the majority's "new understanding" of Section 5 failed "to identify or measure the degree of influence necessary to avoid the retrogression the Court nominally retains as the § 5 touchstone."[78]

The Problems with Georgia v. Ashcroft

The majority opinion introduced new, difficult to apply, and contradictory standards. According to the Court, the ability to elect is "important" and "integral," but a court must now also consider the ability to "influence" and elect "sympathetic" representatives. The Court took a standard that focused on the ability to elect candidates of choice, that was understood and applied, and turned

[75] Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), aff'd 124 S. Ct. 2806 (2004).

[76] Larios v. Cox, 314 F. Supp. 2d 1357 (N.D. Ga. 2004).

[77] Id. at 494.

it into something subjective, abstract, and impressionistic. The danger of the Court's opinion is that it may allow states to turn black and other minority voters into second class voters, who can "influence" the election of white candidates but cannot elect candidates of their choice or of their own race. That is a result Section 5 was enacted expressly to avoid.

Georgia v. Ashcroft was decided in 2003, after most of the redistricting following the 2000 census had been completed, but at least one case decided prior to Ashcroft applied an "influence" theory to the serious detriment of minority voters. In 1993, a three-judge court made extensive findings of past and continuing discrimination and extreme racial bloc voting in Rural West Tennessee, but refused to require a majority black senate district in that part of the state because of the existence of three "influence" districts in which blacks were 31% to 33% of the voting age population.[79] The court acknowledged that as a factual matter blacks did not have the equal opportunity to elect candidates of their choice under the existing senate plan, but it was also of the view that white elected officials were often responsive to the needs of blacks and that "adding an

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[78] Id. at 495.

[79] The court's findings, which are discussed in detail in this report, are at RWTAAAC v. McWherter, 836 F. Supp. 447, 457, 459, 460-61, 463, 466 (W.D.Tenn. 1993). The court's subsequent refusal to order a remedial plan is at RWTAAAC v. McWherter, 877 F. Supp. 1096 (W.D.Tenn. 1995).

additional majority-minority district in western Tennessee would actually reduce the influence of black voters in the Tennessee Senate." It found "most probative" for this proposition the testimony of a white senator, Stephen Cohen, from west Tennessee concerning passage of a bill to make the birthday of Martin Luther King, Jr. a state holiday. According to Senator Cohen, the bill passed the state senate by only one vote (17 to 16), with Senator Cohen and another white senator from west Tennessee voting with the majority. Senator Cohen concluded, and the district court found, that the creation of an additional black senate district would cause the election of "at least one more conservative white senator" who "would have been inclined to vote against the Martin Luther King holiday" ensuring that the measure would not have passed.[80] Senator Cohen and the court, however, were mistaken. According to the Senate Journal, only eight senators voted against the Martin Luther King, Jr. bill, with 18 "Ayes" and six "Present, not voting."[81] The bill would have passed without Senator Cohen's vote. What the court's "influence" theory in fact accomplished was to deprive African American voters in Rural West Tennessee of the opportunity to elect a candidate of their choice to the state senate.

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[80] Id., 887 F. Supp. 1096, 1106 (W.D.Tenn. 1995).

[81] Tennessee Senate Journal, May 24, 1984, p. 2831.

The inherent fallacy of the notion that influence can be a substitute for the ability to elect is apparent from the Shaw v. Reno[82] line of cases, which were brought by whites who were redistricted into majority black districts. Rather than relish the fact that they could "play a substantial, if not decisive, role in the electoral process," and perhaps could achieve "greater overall representation . . . by increasing the number of representatives sympathetic to the[ir] interest," white voters argued that placing them in "influence" districts, i.e., majority black districts, was unconstitutional, and the Supreme Court agreed.[83] In addition, if "influence" were all that it is said to be, whites would be clamoring to be a minority in as many districts as possible. Most white voters would reject such a suggestion out of hand.

IV. Federal Observers Are Needed to Prevent Voter Harassment

The appointment of federal examiners to register voters has been extremely important over the years. For example, from 1964 to 1967, the percentage of African Americans registered to vote in counties in Mississippi in

[82] 509 U.S. 630 (1993).

[83] See, e.g., Johnson v. Miller, 515 U.S. 900 (1995).

which examiners were appointed increased from 8.1% to 70.9%.[84] While the examiner provisions have been superseded by state and federal laws, such as the National Voter Registration Act of 1993 (NVRA), the observer provision of the Act remains important to ensure that minorities are not discriminated against or intimidated while voting.[85] Since 1966, a total of 25,000 non-partisan, impartial observers have supervised elections to ensure that minorities can exercise their fundamental right to vote. Congress should now renew the observer provision of the act to ensure that minorities continue to be protected from harassment at the polls.

V. Voting Assistance for Language Minorities Is Still Needed

The Voting Rights Act requires election officials in certain cities, counties, and states to provide assistance to those U.S. citizens who have difficulty speaking or reading English. Under Section 203 of the act, in those jurisdictions where language minority voters make up a significant portion of the population, U.S. citizens who are speakers of Spanish, Native American languages, Asian languages, and Alaska natives can get help voting.

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[84] U.S. Commission on Civil Rights, Political Participation (Washington; U.S. Government Printing Office, 1968), 247.

[85] 42 U.S.C. § 1973f.

As anyone who has voted can attest, there are sometimes complicated issues on the ballot, which can be difficult to understand, even for native speakers of English. The Voting Rights Act promotes fairness at the ballot box because it allows U.S. citizens with disabilities or difficulty speaking English the opportunity to get help at the polls. Congress should renew the expiring provisions of the act so all Americans have equal access to the ballot box.

VI. Recovery of Expert Fees Should Be Allowed in Voting Rights Cases

While the Department of Justice has an important role to enforce the Voting Rights Act, the vast majority of voting rights law suits have been brought by private lawyers and civil rights groups. Unfortunately, the Supreme Court has ruled that winning parties in civil rights cases cannot recover expert witness fees as part of the costs they are entitled to receive.[86] This decision has had a chilling effect on voting rights litigation because it requires lawyers and non-profit organizations to front tens of thousands of dollars in expert witness fees that can never be recovered. It also greatly undermines the purpose of fee awards in civil rights cases, which is to ensure that victims of discrimination can maintain access to the courts. Litigating voting rights cases is particularly expensive because expert witnesses are needed to present demographic

evidence, analyze and present statistical evidence of racial bloc voting, and testify about the "totality of circumstances" surrounding racial discrimination in the jurisdiction. For all these reasons, Congress should amend the attorney's fee provision of the Voting Rights Act to permit the recovery of expert fees and expenses.

[86] West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991).

ALABAMA

STATEWIDE ISSUES

1980 Redistricting

Figures v. Hunt

In 1980, Alabama had seven congressional districts, and despite the fact that African Americans wee a quarter of the population, all the districts were majority white. Ten years later, the 1990 census showed the districts were malapportioned. It also showed that the African American population was compact and contiguous enough to create two majority black districts, but the Alabama legislature adjourned in 1991 without enacting a new congressional redistricting plan, and the governor refused to call a special session to redraw the districts. Paul Wesch, an Alabama resident, filed a lawsuit challenging the malapportionment of the existing districting plan.[87] A three-judge district court undertook to create an interim redistricting plan for the 1992 congressional elections and considered several proposed plans, one of which created two majority black districts.

Meanwhile, the Alabama legislature reconvened and on March 5, 1992, adopted a congressional redistricting plan which created one majority black

[87] Wesch v. Hunt, Civ. No. 91-0787, (S.D. Ala.).

district (District 7 - 66.66% black). On March 6, 1992, Secretary of State Billy Joe Camp filed a motion asking the court to adopt the state's plan for purposes of the 1992 elections. On March 9, 1992, the court denied Camp's motion and ordered into effect a modified version of one of the six proposed plans. The court's plan was similar to the one the legislature had adopted, but its District 7 had marginally greater black population of 67.53%. The court also ordered the state to conduct the 1992 congressional elections in accordance with the court ordered plan unless the legislature's plan received preclearance no later than noon on March 27, 1992.[88]

On March 11, 1992, the state submitted the plan to the Department of Justice for preclearance. The ACLU, which represented intervenors in the Wesch lawsuit, wrote to the department and urged it to reject the state's redistricting plan because it divided concentrations of black residents among several majority white districts and failed to create a second majority black district. The Department of Justice expedited its consideration of the plan and, shortly before the March 27 deadline, entered an objection, determining that "the fragmentation of black population concentrations outside of the one district with a black voting age population majority was unnecessary," and it appeared "that the elimination

[88] Id, Order of March 9, 1992.

of this identified fragmentation would enhance the ability of black voters to elect representatives of their choice."[89]

The ACLU then filed a motion requesting the district court to modify its redistricting plan in light of the Attorney General's objection and find that a second majority black district should be created. The court summarily denied the ACLU's motion.[90] The ACLU appealed the district court's order to the Supreme Court, arguing that the district court ignored the requirements of Section 5 by refusing to modify its one-district plan. On February 22, 1993, the Supreme Court affirmed the judgment of the lower court without offering any reasoning for its decision.[91]

Selective Prosecution

Smith v. Meese

In 1984, the Department of Justice announced a shift in its policy regarding criminal investigations of election crimes. Prior to that time, the department focused mostly on crimes that affected the integrity of federal

[89] John R. Dunne, Assistant Attorney General, to Jimmy Evans, Attorney General of Alabama, March 27, 1992.

[90] Wesch v. Hunt, Order of April 2, 1992.

[91] Figures v. Hunt, 507 U.S. 901 (1993).

elections, rather than local elections, such as those for county commissioner, city council, etc. The new policy provided that the department would investigate "political participants" who "seek out the elderly, socially disadvantaged, or the illiterate, for the purpose of subjugating their electoral will."[92]

After the policy was announced, the department started an extensive investigation into voting activity in five counties in Alabama's black belt counties with black majorities, and in which blacks had gained control over some part of county government. Several dozen political activists were indicted, all involved with African American political efforts.

In 1985, the ACLU filed suit on behalf of nine individuals from these black belt counties against the Attorney General and other federal officials alleging that they were "engaged in a concerted and unlawful effort both to interfere with black citizens' associational and political activities in Alabama's 'Black Belt' and to discourage them from exercising their right to vote."[93] Plaintiffs asserted that black citizens had for years complained to federal officials of unlawful conduct by white officials and candidates, including withholding of absentee ballots from black voters, assisting in the casting of unlawful absentee ballots by white voters,

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[92] Quoted in Smith v. Meese, 821 F.2d 1484, 1487 (11th Cir. 1987).

[93] Smith v. Meese, 617 F. Supp. 658 (M.D. Ala. 1985).

intimidating black voters on or before election day, buying votes, multiple voting, and tampering with voting machines. Plaintiffs contended that the prosecutions against them were selective, in that the "crimes" the federal government now chose to investigate and prosecute were no different from those of local whites that the government had ignored for years.

The complaint further alleged that the federal government targeted well known black leaders who were largely responsible for a dramatic increase in black voter registration; that defendants intended the references in the new policy to "poor, elderly , and socially disadvantaged" to mean black voters; and that federal agents knowingly conducted "witchhunt-type" probes of constitutionally protected behavior. Among the people who had been indicted were Albert Turner and his wife. Albert Turner, the state director of the Southern Christian Leadership Conference (SCLC), had been an aide to Dr. Martin Luther King Jr. and had led one of the mules that pulled the carriage in Dr. King's funeral procession. The complaint also alleged that federal agents intensively interrogated poor, elderly, and social disadvantaged black voters concerning political organizations of which they were members; suggested that constitutionally protected activities were violations of federal law; misinformed black voters about their eligibility to cast absentee ballots; and warned black voters not to discuss the agent's questions with attorneys for black leaders who

were under criminal investigation. Among the evidence produced in one of the criminal cases was a statement a Department of Justice spokesperson was said to have made to a college student that the investigations were part of a "new policy . . . brought on by the 'arrogance on the part of blacks' in these counties."[94]

The plaintiffs in Smith v. Meese sought to represent a class of all black citizens in five Black Belt counties whose political activities had been interfered with, chilled, or made more difficult by defendants' conduct, who had been victims of voter fraud or intimidation committed by whites, or who intended to run for elective office, and whose electoral support would be diminished as a result of defendants' conduct. Plaintiffs did not seek to block or require the prosecution of any individual, or have the court review individual decisions to investigate and prosecute. Rather, plaintiffs asked the federal court to stop the federal government from following a deliberate policy of discriminatory investigations and prosecutions.

The district court dismissed the complaint, holding that plaintiffs lacked sufficient injury to have standing, and that the separation of powers doctrine precluded the court from reviewing defendants' investigative and prosecutorial

[94] Cited in United States v. Gordon, 817 F.2d 1538, 1540 (11th Cir. 1987).

decisions.[95] The plaintiffs appealed, and the court of appeals reversed and remanded for further proceedings.

The appellate court noted that in the past it had enjoined a policy of state prosecutions aimed at discouraging black citizens from registering to vote and freely exercising their right to vote.[96] It would be anomalous, the court said, if the federal Constitution protected citizens from violations of their rights by state but not federal officials. It held that the doctrine of separation of powers did not shield federal officials from suit challenging discrimination based on race. Acknowledging that the decision to prosecute is generally a matter for executive discretion, the court concluded that "[i]f the facts are as plaintiffs allege, this case presents one of those 'rare situations' in which federal court intervention in the prosecutorial and investigative process is appropriate."[97]

The court of appeals also held that plaintiffs had adequately pleaded an injury that was addressable in federal court. Plaintiffs had standing because the injury was not limited to selective prosecution, but "the broader harm from an unconstitutional pattern and policy of discriminatory prosecutions and

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[95] Smith v. Meese, 617 F. Supp. at 661..

[96] E.g., United States v. McLeod, 385 F.2d 734 (5th Cir. 1967).

[97] Smith v. Meese, 821 F.2d 1484, 1493 (11th Cir. 1987).

investigations."[98]

Albert Turner and his wife, along with another individual, were tried together and acquitted by a jury. Another SCLC activist, Spiver Gordon, was convicted of mail fraud and providing false information to election officials. The mail fraud convictions were set aside on appeal, and the case was vacated for consideration of Gordon's claim of selective prosecution and his challenge to the government's use of its six peremptory challenges to remove every black person from his jury.[99] Several others who were charged entered guilty pleas.

Following remand of the ACLU suit, the government elected not to pursue its case against Gordon and terminated further prosecutions of Black Belt political leaders. Plaintiffs accordingly dismissed their complaint.

The 1986 Democratic Gubernatorial Primary

Henderson v. Graddick

Curry v. Baker

The 1986 Democratic primary election for governor of Alabama resulted in a run off between Charles Graddick, the incumbent attorney general, and

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[98] Id., at 1495.

[99] United States v. Gordon, 817 F.2d 1538 (11th Cir. 1987), 836 F.2d 1312 (11th Cir. 1988).

William Baxley, the incumbent lieutenant governor. Alabama does not have party registration, but the rules of the state Democratic Party expressly prohibited voters who had voted in the first primary of another party from voting in the Democratic Party's run off primary. The party's rule, adopted in 1979, had been precleared under Section 5.

In the three week period between the first and second primary, the state Democratic Party made efforts to ensure that the anti-crossover rule was enforced, suggesting procedures for election officials to follow, such as questioning each voter if they voted in the Republican primary, not allowing persons to vote if they did, but allowing all to vote a challenge ballot if they so requested.

Graddick, however, openly called on those who had voted in the Republican primary to vote for him in the Democratic primary. And two days before the run off, he had a letter hand delivered to state election officials contending that the Democratic Party's anti-crossover rule was unconstitutional. These letters were written on the Attorney General's letterhead, signed by the chief of the voter fraud division, and warned that any attempt to enforce the party's rule could subject election officials to civil liability under state and federal law.

The result of the run off primary was the closest in Alabama history to

that point, with Graddick winning by 8,756 votes, out of about 930,000 cast. African American plaintiffs, represented by the ACLU, filed suit contending that Graddick's actions constituted new election procedures which violated the preclearance provisions of the Voting Rights Act, and sought to enjoin the outcome of the run off.[100]

The court heard evidence that about 13,000 of 33,000 persons who had voted in the first Republican primary had crossed over to vote in the Democratic Party run off, and that between 84% and 88% of those voted for Graddick. The testimony also showed that Baxley got 95% of the black vote. The court found that it was "absolutely clear that as a candidate and, more importantly, as the Attorney General, Mr. Graddick made every effort to get voters to violate the anti-crossover rule," and that he was "to a large degree successful in blocking election officials from attempting to enforce the rule."[101] The court concluded that the Voting Rights Act had been violated and turned to the question of remedy.

The court further found "[a] fair evaluation of this evidence makes clear that there is a likelihood that the net crossover votes cast for Mr. Graddick

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[100] Henderson v. Graddick, 641 F. Supp. 1192 (M.D. Ala. 1986).

[101] Id., at 1241.

exceeded his narrow margin of victory, and that he would not have been nominated except for the illegal crossover votes." The court held that "[t]o allow this election result to stand would reward the perpetrator who deliberately caused a violation" of Section 5, and prohibited the Democratic Executive Committee from certifying Graddick as the gubernatorial nominee based on the run off results. But reciting its limited authority pursuant to Section 5, it refused to declare Baxley the nominee. Instead, it directed the party to hold a new run off unless the Party determined, adhering to "the stringent rules under Alabama law for an election contest," that Baxley received the majority of legally cast votes.[102]

The Democratic Party subsequently determined that Baxley had won the run off, and certified him as the nominee. Graddick then asked the federal court to enjoin the certification, but it refused to do so, noting that it had taken the least disruptive remedy it could to vindicate plaintiffs' rights and ensure that Graddick did not benefit from his illegal acts. Citing Alabama law allowing state courts to review party contests, it held it had no authority to sit as a court of appellate review for decisions of the party.[103]

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[102] Id., at 1197-98, 1203, 1205.

[103] Id., at 1209.

Graddick and his supporters then filed an action in another federal district court in Alabama against the Democratic Party.[104] The plaintiffs in the first case, again represented by the ACLU, intervened. The second court held that the state party committee that heard the election contest violated due process and ordered a new runoff primary. The central holding of the district court was that because the precise number of illegal votes could not be determined, the only permissible remedy for the illegal votes was a new election.

The defendants appealed, and the court of appeals reversed. It rejected the district court's holding that proof was required of "the specific number of votes illegally cast." For multiple reasons, including the intentional violations of state and federal law and interference with subpoenas for the collection of election records, the court of appeals held that the Graddick plaintiffs were in a poor position to complain about the use of polling data and expert testimony to extrapolate the final figure. It held that the political party acted consistent with state and federal law in using "the most reliable evidence available to protect the fairness of the election process." And, notably, the case was remanded to the chief judge of the district - not the trial judge - with directions to dismiss the

[104] Curry v. Baker, Civ. Nos. 86-G-1617-S, 86-G-1626-S (N.D. Ala.)

complaint without further proceedings.[105]

Graddick sought a stay from the Supreme Court, and it was denied, bringing the litigation to an end. But the contested primary and Democratic intra-party rankling likely played a role in the outcome of the November general election. Guy Hunt, the Republican nominee, won, becoming the first Republican elected governor in Alabama's history.

[105] Curry v. Baker, 802 F.2d 1302, 1318-19 (11th Cir. 1986).

Challenging Alabama's Disfranchising Laws

Hunter v. Underwood

At the beginning of the 20th century, Alabama joined other former Confederate states in adopting state constitutional provisions specifically intended to deny former slaves the right to vote. These disfranchising provisions were part of the Redemption Period, the "redeeming" of white control and the end of Reconstruction. At Alabama's constitutional convention assembled in May 1901, the question was not whether to disfranchise blacks, but how to do so with the measures being upheld by federal courts.

John Knox, the president of the convention said in his opening address: "And what is it we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."[106] Delegate William A. Handley, III, was equally blunt: "Now we are not begging for 'ballot reform' or anything of that sort, but we want to be relieved of purchasing the Negroes to carry elections. I want cheaper votes."[107]

In enumerating crimes that would trigger disfranchisement, the suffrage committee chose offenses they believed were "peculiar to the Negro's low

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[106] Quoted in Underwood v. Hunter, 730 F.2d 614, 619 (11th Cir. 1984); see also Hunter v. Underwood, 471 U.S. 222, 229 (1985).

[107] Id.

economic and social status."[108] The disfranchising provisions included an eclectic list of specific crimes such as "assault and battery on the wife," "living in adultery," "being convicted as a vagrant or a tramp," and miscegenation, plus crimes of "moral turpitude," and all crimes punishable by imprisonment in the penitentiary (felonies). Some more serious non-felony offenses were not included, such as second-degree manslaughter and assault on a police officer.[109]

Represented by the ACLU, two voters who lost their right to vote for a misdemeanor which the registrars classified as a crime of moral turpitude - the offense of presenting a worthless check - challenged the disfranchisement of misdemeanors. A class of plaintiffs and of defendant election officials were certified. Plaintiffs established that the laws were racially motivated and continued to have a racially discriminatory impact. The evidence of racial impact included testimony of a defense expert witness that within a year of its adoption in 1901, the law had disfranchised ten times as many blacks as whites. And at the time of trial, in the two counties where plaintiffs lived, which included the

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[108] Id., 730 F.2d at 619.

[109] Hunter v. Underwood, 471 U.S. at 226-27.

cities of Birmingham and Montgomery, the evidence showed that blacks were at least 1.7 times as likely as whites to be disfranchised for misdemeanors.[110]

The district court initially rejected the claims, granted summary judgment on some points and dismissed the racial discrimination claim, holding that plaintiffs failed to state a claim on which relief could be granted. The court of appeals reversed, and on remand the district again ruled for defendants.[111]

On the second appeal the court held for plaintiffs on the merits. The court of appeals recited the extensive evidence, introduced through expert witnesses for both sides, of the discriminatory intent which motivated the suffrage provisions. That there was racial motivation was not in serious dispute. For example, the court of appeals noted that defendants' expert testimony that statements at the convention that the laws were designed to deny the vote to the "corrupt and the ignorant" referred specifically to blacks and lower-class whites.[112] The court did not credit an intent to discriminate against poor whites as a defense and found that the laws would not have been enacted but for the racial animus towards blacks. Similarly, the state's argument that disfranchising

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[110] Hunter v. Underwood, 730 F.2d at 620.

[111] Hunter v. Underwood, 604 F.2d 367 (5th Cir. 1979).

[112] Hunter v. Underwood, 730 F.2d at 620-21. See also, Hunter v. Underwood, 471 U.S. at 231-32.

persons for conviction of certain crimes is a legitimate interest was rejected, the court holding there was no evidence that the laws were actually intended to serve that interest, and further that if a "good government" purpose was the motivation for the law, all misdemeanors would have been included. The argument that registrars were currently implementing the laws with no discriminatory intent was also rejected. The court said "[n]either their impartiality nor the passage of time, however, can render immune a purposefully discriminatory scheme whose invidious effects still reverberate today."[113]

The state appealed and made the same arguments to the Supreme Court. In a 1985 opinion authored by then Associate Justice William Rehnquist, the Court unanimously held the court of appeals followed the correct constitutional analysis.[114] The Court held that in view of the proof of racial motivation and continuing racially discriminatory effect, the state law violated the Fourteenth Amendment. The Court's opinion is noteworthy is several respects. It found a Fourteenth Amendment violation based on current effects evidence that would not have been sufficient by itself to support an inference of an intent to

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[113] Hunter v. Underwood, 730 F.2d at 621.

[114] Hunter v. Underwood, 471 U.S. at 225.

discriminate. This suggests that if evidence of intent to discriminate is present, the racial impact may be fairly small yet still establish a constitutional violation. Second, the Supreme Court rejected the argument that events since 1901, including court decisions that had invalidated some of the disfranchising provisions, meant the law could be adopted today and be constitutional. The Court's response was that "[w]ithout deciding whether [the section of the 1901 constitution] would be valid if enacted today, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to that effect."[115] In short, discriminatory motive does not become of less legal significance by the mere passage of time.

Though this decision is a significant vindication of the right to vote and invalidated suffrage restrictions that were on the books for 84 years, it is also noteworthy that it took nearly seven years of litigation to vindicate plaintiffs' rights.

COUNTY AND MUNICIPAL LITIGATION IN ALABAMA

Autauga County

[115] Hunter v. Underwood, 471 U.S. at 233.

Medders v. Autauga

The ACLU had first represented black citizens in Autauga County, Alabama, in 1973, in a federal law suit which successfully challenged the malapportionment of the five county board of education election districts.[116] That lawsuit resulted in the creation of two multi-member districts, one electing three school board members and the other electing two members, but the plan was not submitted for Section 5 preclearance.

In March 1992, the attorney for the Autauga County Board of Education was notified by the Justice Department that the existing apportionment scheme that had been ordered by the federal court in 1973 was vulnerable to challenge because the plan had never been precleared, and the multi-member districts were likely objectionable. Not long thereafter, the school board received a letter from the Alabama Democratic Conference (ADC), a predominantly black political organization, threatening a lawsuit unless the board adopted a fair redistricting plan with five single member districts.

The school board responded by reopening the litigation and filing a complaint against the ADC and the Department of Justice, and seeking a declaratory judgment that the multi-member plan was constitutional. The court

[116] Medders v. Autauga County, No. 3805-N (M.D. Ala. February 22, 1973).

allowed two black citizens to intervene, and they and the ADC filed a counterclaim alleging that "the multi-member district plan is malapportioned, dilutive of the black vote, and violative of [the Voting Rights Act]."[117]

The litigation was resolved by a consent decree in which the existing plan was declared malapportioned and its further use enjoined. The school board also agreed to adopt the same five single member district plan used by the county commission which was favored by the plaintiffs. The court directed the school board to seek preclearance, and modified the election schedule so that the new plan could be implemented in the 1992 elections.

Baldwin County and the City of Foley

Dillard v. City of Foley

As a result of Section 2 litigation, the City of Foley, Alabama, was required to abandon its at-large elections in 1989, and adopted a form of government consisting of a mayor and five council members elected from single member districts.[118] Following the change to district elections, the first African American in history was elected to the city council.

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[117] Id., Consent Decree, June 17, 1992.

[118] Dillard v. City of Foley, Alabama, Civ. No. 87-T-1213-N (M.D. Ala.), Order of May 16, 1989.

Between 1975 and 1987, the city had annexed 12 areas, but failed to submit them for preclearance until 1989. The Attorney General precleared nine of the annexations, which contained no population and were not planned for residential development, but objected to the remaining three annexations. According to the Attorney General:

> The submitted residential annexations were adopted in 1983, 1984, and 1986, and include white residential areas contiguous to the city limits. It appears that the city took an active role in obtaining these annexations, by encouraging property owners to petition for annexation and by obtaining local legislation to adopt one of the annexations, and also obtained at least one federal grant to improve one of the annexed areas.[119]

The letter noted further that at the time the white areas were being annexed, a black residential area known as Mills Quarters sought annexation but was denied, and there was "no nonracial explanation for the rejection of the Mills Quarters petition."

In 1993, the city again annexed an area scheduled for residential development, and again the Department of Justice entered an objection:

> Our analysis of the submitted annexation reveals that it, like the annexations objected to in 1989, reflects a continuation of the city's previously noted practice of annexing areas that can be expected to contain predominantly white population, while discouraging the annexation of areas of predominantly black population.[120]

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[119] James P. Turner, Acting Assistant Attorney General, to Fred G. Mott, November 6, 1989.

[120] James P. Turner, Acting Assistant Attorney General, to A. Perry Wilbourne, August 30, 1993.

The Attorney General noted again the city's "continued failure to annex majority black areas, such as Mills Quarters or the area of Beulah Heights."

The plaintiffs in the original Section 2 lawsuit, represented by the NAACP Legal Defense and Educational Fund and the ACLU, filed a motion for further relief in September 1994.[121] They asked the court to require the city to adopt and implement a nondiscriminatory annexation policy, annex Mills Quarters and Beulah Heights, and fully comply with Section 5.

As a result of negotiations, the parties entered into a consent decree which, over the objections of several county residents and the neighboring city of Gulf Shores, was signed by the court on October 30, 1995. The decree found plaintiffs had established "a prima facie violation of § 2 of the Voting Rights Act and the United States Constitution."[122] It further provided for binding annexation referenda in areas adjacent to the city, including Mills Quarters and Beulah Heights, with areas receiving majority support being immediately incorporated into the city. Both Mills Quarters and Beulah Heights were

[121] Dillard v. City of Foley, Alabama, Civ. No. 87-T-1213-N (M.D. Ala. 1994).

[122] Dillard v. Foley, 926 F. Supp. 1053, 1059 (M.D. Ala. 1995).

subsequently annexed into the city, and the annexations were precleared on July 1, 1996.[123]

This case clearly illustrates the decisive role played by Section 5 in protecting the rights of minority residents in the Foley area, as well as the continuing significance of race in local politics.

[123] Deval L. Patrick, Assistant Attorney General, to A. Perry Wilbourne, July 1, 1996.

Chambers County

Reese v. Yeargan

Chambers County, Alabama, was created in 1832 from former Creek Indian territory. It is located in the east-central part of the state and is bounded on the east by the Chattahoochee River. In 1984, black residents of the county, represented by the ACLU, the ACLU of Alabama, and the Southern Poverty Law Center, brought suit challenging the method of elections for the county commission, the county board of education, and the city councils of LaFayette and Lanett, as violating the Constitution and Section 2.[124] No black person within living memory had ever been elected to any of the four governing bodies, despite the fact that blacks had run for office and were 36% of the county's population.

Chambers County also had a history of adopting voting procedures later found objectionable under Section 5. Historically, the county's five commissioners were nominated in primary elections from single member districts and elected at-large in the general election. Nomination in the primary was tantamount to election. In 1973, nomination by district primary was eliminated and replaced with elections at-large. The change was submitted for

[124] Reese v. Yeargan, Civ. No. 84 H-1081-E (M.D. Ala.).

preclearance and the Attorney General objected because it was "dilutive of minority voting strength":

> We reach this conclusion because two of the proposed districts, Districts 1 and 2, constitute or approximate black majorities, and thus not allowing these districts to select candidates for the county commission but having all candidates selected at-large reduces the minority voting strength in these districts.[125]

In response to the objection, the county commission adopted a plan providing for single member districts, one of which was majority (57%) black, while the other contained a black population of 49%. The plan was precleared.

The board of education, following the lead of the county commission, also had adopted at-large elections in 1975. Historically, the school board consisted of five members, four of whom were elected from single member districts with the fifth member elected at-large. The 1975 plan created two residency districts with all board members elected at-large, by numbered posts and majority vote. In objecting to the change, the Attorney General noted one of the proposed residency districts was approximately 54% black, and:

> to require candidates to run at-large county-wide decreases, from a 54% majority in proposed District 2 to a 34% minority in the county, the potential of blacks to elect a candidate of

[125] J. Stanley Pottinger, Assistant Attorney General, to John W. Johnson, Jr., March 8, 1976.

> their choice. In our view such minimization is dilutive of black voting strength.[126]

The Attorney General further found:

> In a county such as Chambers, which we understand has a history of racial discrimination and a pattern of racial bloc voting, such a dilution denies blacks a realistic opportunity to participate in the political process.

Following the objection, the board of education proposed a plan providing for five members, four of whom were elected from single member districts with the fifth elected at-large. One of the districts was 49.4% black, and another 46.2%. The plan was precleared by the Department of Justice.

Based on the 1980 census, the districts for the county commission were malapportioned with a deviation of 46%. The districts for the school board were also malapportioned with a deviation of 37%.

LaFayette, the county seat, was 57% black, and had a mayor and five council members, all elected at-large. The Town of Lanett was 31% black, and also had a mayor and five council members elected at-large.

The suit filed by black residents in 1984 alleged that at-large elections for LaFayette and Lanett diluted minority voting strength, and that the districting plans for the county commission and school board were malapportioned and

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[126] J. Stanley Pottinger, Assistant Attorney General, to John W. Johnson, Jr., March 10, 1976.

diluted minority voting strength. The defendants moved to dismiss the complaint as failing to state a claim, but the district court denied the motions. After discovery, all defendants agreed to settle and adopt remedial plans.

In September 1985, the court entered a consent decree in which the county commission and the two towns were required to increase the representation of blacks on appointed boards and commissions, as well as the number of black employees working in non-janitorial positions. The size of the county commission was increased to six members, with all elected from single member districts, two of which were majority black. The membership of the board of education was also increased to six, with all members elected from single member districts, two of which were majority black. LaFayette and Lanett were required to adopt single member districts, two of which were majority black, for election of their five member councils. The new plans were implemented in 1987.

Section 5 has played, and continues to play, an important role in Chambers County, where racial bloc voting and polarization are evident.

CONNECTICUT

The City of Bridgeport

Bridgeport Coalition for Fair Representation v. City of Bridgeport

In 1993, the ACLU and the ACLU of Connecticut filed a lawsuit against Bridgeport, Connecticut, challenging its method of city council elections as diluting Hispanic and black voting strength in violation of Section 2 and the Constitution.[127] At the time, 25% of the city's 73,000 residents were black, and 26.5% were Latino.

The city council consisted of 20 members elected from 10 two-member districts. Although it was possible to draw a plan in which blacks and Hispanics were a majority in two districts each (thus giving minorities a potential of four seats on the city council), the challenged plan contained only two majority-minority districts overall, one in which blacks were packed at the level of 85%, and another in which Hispanics were packed at the level of 82%. As a result, black and Hispanic candidates had realized only limited success in city elections, and primarily in the two majority-minority districts.

Bridgeport had a significant history of discrimination. In a 1979 consent degree, the city acknowledged the existence of racial segregation in its public

[127] Bridgeport Coalition for Fair Representation v. City of Bridgeport, Civ. No. 93-1476 (D. Conn.).

schools.[128] Three years later, in 1982, a federal court held that the city and its Board of Police Commissioners discriminated against minority police officers in job assignments, disciplinary proceedings, and terms of employment.[129] In another case, the court found the city has "a long history of and strong reputation for discriminating against black and Hispanic persons in its hiring of firefighters."[130]

The plaintiffs in the 1993 voting case filed a motion for preliminary injunction, which was granted. The court found:

> *Neighborhoods were largely segregated.
>
> *"White bloc voting is evident."
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> *"Officials have discouraged minority voting."
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> *"Voting in Bridgeport is markedly racially polarized."
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> *"There is evidence of discrimination in Bridgeport against Latinos and African-Americans in common. In part as a result, each have lower levels of income, employment and education."

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[128] Crumpton v. Chop, Civ. No. B-75-381 (D. Conn.) (consent decree).

[129] Bridgeport Guardians v. Delmonte, 553 F. Supp. 601, 607-618 (D. Conn. 1982).

[130] Association Against Discrimination in Employment v. City of Bridgeport, 479 F. Supp. 101, 104 (D. Conn. 1979).

> *"Of ten districts, two compact African-American majority and two compact Latino majority districts can be created, each with a minority VAP of 50% or more."
>
> *"A fifth, compact, combined majority-minority district can be created. It is preferable to create majority districts for each group."
>
> *"No minority committee members took part in drawing the map recommended to the Council. In several instances lines were drawn for political expediency, to accommodate individual's district preferences."[131]

As a remedy, the court ordered that:

> Defendants will, within 60 days herefrom, establish City Council districts which include two African-American majority-minority districts, two Latino majority-minority districts and one majority-minority district in which the combination of African-American and Latino voters constitutes a majority of all voters therein. Defendants will further, within 120 days hereof, conduct elections to the City Council in the voting districts established in compliance with this order.[132]

The city appealed and the Court of Appeals for the Second Circuit affirmed the district court's preliminary injunction. It remanded the case, however, for modification of the dates of compliance:

> Without intending to limit the district court's discretion on remand, we suggest that the timetable should provide for the municipal general election to be held on the date of the already scheduled general election on November 8, 1994,

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[131] Bridgeport Coalition for Fair Representation v. City of Bridgeport, 1993 WL 742750, at *3-4 (D. Conn. October 27, 1993).

[132] Id. at *7

> and that the next subsequent general election of City Council members should occur in November 1995.[133]

The city petitioned the Supreme Court for a writ of certiorari which was granted. It remanded the case with instructions to vacate the judgment of the district court for further consideration in light of the intervening decision in Johnson v. DeGrandy, which reaffirmed that a finding of minority vote dilution under Section 2 depended upon an analysis of the "totality of the circumstances."[134]

On remand, plaintiffs moved to reinstate the preliminary injunction, arguing that DeGrandy presented no new issues. The city opposed the motion, and itself moved for summary judgment, arguing that a lack of proportionality in the city's plan did not by itself prove vote dilution, and that the additional majority-minority districts proposed by plaintiffs were racial gerrymanders. On February 1, 1995, the district court denied the motions of both parties.

The case settled in March 1995, and the city implemented a plan that maintained 10 multimember districts, each electing two members, with numbered posts and a district residency requirement. The plan created two majority black districts, two majority Hispanic districts, and one coalition district

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[133] Bridgeport Coalition For Fair Representation v. City of Bridgeport, 26 F.3d 271, 278 (2d Cir. 1994).

[134] 512 U.S. 1283 (1994).

in which the combined black and Hispanic population comprised a majority of the district. The mayor is elected at-large.

FLORIDA

STATEWIDE ISSUES

Protecting Voter Privacy and Enforcing Section 5

Spencer v. Harris

In 1998 Florida enacted numerous election law changes.[135] Because five Florida counties are covered by Section 5, the legislation was submitted to the Attorney General for preclearance. The changes made extensive use of the voter registrant's social security number (SSN), requiring disclosure of the last four digits on several documents related to registration and voting. The Attorney General approved many of the changes, including one that required the four digit number on the application for an absentee ballot.[136] But the Attorney General objected to other sections, including four which involved absentee ballot procedures and the four digit SSNs.[137] The objection was based on the cumbersome nature of the procedures and the statutory mandate to reject ballots if the procedures were not followed.

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[135] 1998 Florida Laws, ch. 98-129.

[136] Id., Section 13.

[137] Id., Sections 14, 16 and 20.

One of the sections that was denied preclearance concerned the procedure for voting and returning an absentee ballot. Beyond requiring disclosure of the voter's four digit SSN on the return envelopes, which contain the voter's certificate, the certificate had to be witnessed, and, if the witness was not a notary or election official, the witness had to be a registered voter, had to place his or her voter registration number and other information on the return envelope, and could be a witness for no more than five voters. Failure to comply with these requirements could result in rejection of the ballot.

Because Florida had begun implementing some of those changes in covered counties without preclearance, the Attorney General was able to point to specific discriminatory effects:

> Our analysis has revealed that during the limited time the State chose to implement the unprecleared absentee voting requirements–where the covered counties sent absentee ballots to voters with the new state law requirements printed on the absentee voter certificate–the votes of minority electors would have been more likely than white voters to be considered "illegal" and thus not counted. Minority voters were more likely to fail to meet one of the State's new requirements than were white voters. For example, in Hillsborough County twice as many black absentee voters as white absentee voters failed to meet one of the State's new requirements.[138]

[138] Bill Lann Lee, Acting Assistant Attorney General, to Robert A. Butterworth, August 14, 1998, and on request for reconsideration, to George L. Wass, June 1, 1999.

The legal effect of the objections was that voters could be required to reveal their four digit SSN on an absentee ballot application, but they did not have to place it on the ballot return envelope, and election officials were not authorized to reject their ballot based on the absence of the number. And as a practical matter, the four digit number on the absentee ballot application was useless because election officials had nothing to match it against.

Norris and Grace Spencer were registered voters of Monroe County, Florida, one of the five counties covered by Section 5. The Spencers, who spent the summers in Tennessee, wanted to vote in the September 2000 primary and had applied for absentee ballots. Grace Spencer had been a victim of identity theft, and the couple had suffered severe financial difficulties as a result. The person who had stolen her credit identity had incurred hospital bills, unpaid loans, and other transactions.

The Spencers were informed, correctly, that under Section 13 of the new statute, they were required to disclose the last four digits of their SSNs in order to be issued an absentee ballot. That was one of the sections which had been precleared. The Spencers preferred to forego their right to vote rather than expose their SSNs on the absentee ballot request forms. Under Florida law, the numbers could be exposed to the public during the vote canvassing procedure.

The Spencers declined to reveal their numbers and their applications were denied.

Represented by the ACLU, the Spencers sued Secretary of State Katherine Harris, challenging the statute as violating the 1974 Privacy Act and the First and Fourteenth Amendments. [139] In particular, Section 7 of the Privacy Act makes it unlawful for "any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." [140]

Plaintiffs moved for a preliminary injunction so they would be able to vote in the primary and November general election. Because defendants claimed the statute was a fraud prevention measure, plaintiffs pointed out that Florida did not require SSNs for voter registration. Consequently, election officials had nothing to check the number against and disclosing any part of plaintiffs SSNs would not combat fraud or serve any other purpose.

Despite this evidence, the district court denied the motion, and plaintiffs' appeal of the denial was rejected by the court of appeals.[141] The district court

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[139] Spencer v. Harris, No. 4:00cv292-WS (N.D. Fla.).

[140] Public Law 93-579, 88 Stat. 1896.

[141] Spencer v. Harris, Order of August 31, 2000; unpublished opinion affirming denial of preliminary injunction, No. 00-14748, December 1, 2000.

subsequently granted the state's motion to dismiss, holding that plaintiffs could not sue under the Privacy Act and that the disclosure requirement was not sufficiently burdensome to violate the Fourteenth Amendment.[142]

While plaintiffs' motion for reconsideration was pending, the state legislature repealed the SSN requirements along with the other new procedures. It did so in part because the state could not get preclearance, but also because of the controversy surrounding irregularities association with the 2000 presidential election. The state then moved for the case to be dismissed as moot. Plaintiffs agreed and also moved that the prior opinion and judgment be vacated and set aside. The district court agreed and the opinion and judgment were vacated and set aside and the case dismissed as moot.[143]

This case clearly illustrates how Section 5 protected Florida voters from burdensome procedures which have a retrogressive racial effect and interfere with the ability of voters to cast their ballots and have them counted.

Inez Williams v. Snipes

[142] Id., Order of March 21, 2001.

[143] Id., Order of June 19, 2001.

Inez Williams, who was 77 years old and had been a naturalized citizen for 30 years, moved from New York to Broward County in 2004. She was a regular voter, and submitted an application to register to vote in her new home state of Florida in sufficient time to participate in the August 31, 2004 primary. Line 2 of the Florida registration form asks, "Are you a U.S. citizen?" and provides "Yes" and "No" check boxes. Line 17 of the form contains an oath with the statement, "I am a U.S. citizen." Ms. Williams signed the oath but did not check the box on line 2, which she regarded as redundant. Her voter registration application was not acted on by Broward County officials, and so she was unable to vote in the primary. On October 1, 2004, the county notified Ms. Williams that it had rejected her application because she had not checked the box on line 2, but the rejection came too late for her to submit a new application before the registration cutoff date for the general election.

On October 5, 2004, the ACLU of Florida wrote a letter to the election supervisor and secretary of state that their actions violated federal law and were a misinterpretation of state law. On October 12, 2004, the ACLU of Florida wrote another letter to the same officials with the same information and offered to resolve the matter without litigation. The letters got no response.

Represented by the ACLU and Florida Rural Legal Services, Ms. Williams then sued the secretary of state and the county supervisor of elections of

Broward County.[144] She asserted a claim under the Civil Rights Act of 1964, which prohibits election officials from denying a voter application for any omission that is not material to determining a person's qualifications.[145] Because Williams' application indicated - under oath - that she was a citizen, she claimed there could be no clearer example of an omission on a registration form not being material to the applicant's qualification. Williams made a similar claim under state law, which merely required "[a]n indication that the applicant is a citizen of the United States."[146]

After the suit was filed, the Broward County supervisor of elections agreed to register Ms. Williams, and she was eligible to vote in the 2004 general election. The litigation was voluntarily terminated.

The Counting of Provisional Ballots

AFL-CIO v. Hood

In 2001, Florida adopted a statute permitting voters whose names did not appear on the precinct list to cast a provisional ballot, but none of their votes

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[144] The case was filed as a motion to intervene in a related case, Florida Democratic Party v. Hood, No. 4:04 CV 405 (N.D. Fla.).

[145] 42 U.S.C. § 1971(a)(2)(B).

[146] Fla. Stat. § 97.053(5)(a).

would be counted unless officials later determined the voter was eligible to vote at the precinct where the ballot was cast.[147] Four individual voters, joined by several labor unions, filed a petition in Florida state court challenging that part of the statute which required the rejection of all votes cast by a legally registered voter.[148] They reasoned that even though a voter who cast a ballot in the wrong precinct might not have been eligible to vote in some local contests, the voter was nevertheless eligible to vote for all statewide offices. The petitioners contended that discarding votes cast by qualified and registered voters violated the state constitution which guaranteed the right to vote, and that no state interest justified rejecting those votes.

At the request of counsel for petitioners, the ACLU made available evidence to be presented to the trial court. The evidence was drawn from the ACLU's participation in litigation challenging election practices in 2000, as well as other research. This evidence showed that the confusion of voters and election officials about precinct location was inherent in almost any election structure and was certainly present in Florida. The ACLU of Florida had presented testimony about these problems to the U.S. Commission on Civil Rights, and while

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[147] Fla. Stat. § 101.048.

[148] AFL-CIO v. Hood, 885 So.2d 373 (2004).

supporting provisional ballots, opposed the restrictions on counting legal votes.[149] For example, after the 2000 census, Miami-Dade County increased the number of its precincts from 614 to 744, and otherwise changed precinct lines affecting more than 125,000 voters. Additionally, four hurricanes in 2004 caused additional confusion among voters about polling place relocations.

The ACLU brief also compared the state law to Florida's Eight Box Law adopted in 1889, which required voters to place their ballots for different offices in the correct box or the votes would not be counted. In the guise of election reform, the effect of the law was to reject legal votes. The Eight Box Law was both a memory and literacy test, and had been enacted by the state after Reconstruction to disfranchise black voters.

The trial court denied relief, and the petitioners appealed to the state supreme court. The ACLU, People for the American Way Foundation, and the Advancement Project submitted an amicus brief discussing the evidence and supporting the counting of all legal votes. The state supreme court refused to accept the amicus brief and affirmed the dismissal of the petition, holding that the state constitution authorized the legislature to regulate elections, and that electors were required to comply with election requirements. The court

[149] Testimony Before the United States Commission on Civil Rights, September 17, 2004, Courtenay Strickland, Voting Rights Project Director, ACLU of Florida.

concluded that the legislature reasonably may have determined that the challenged regulation was "necessary to ensure the integrity of the election process."[150]

The Counting of Absentee Ballots

Friedman v. Snipes

In October 2004, Miami-Dade and Broward Counties supposedly delivered thousands of absentee ballots to the post office, but for reasons that were never made clear they were never received by the voters. Broward County subsequently sent out some 4,300 replacement ballots, but many voters did not receive them in time to mark them and return them to the supervisor of elections by 7:00 p.m. on election day, the deadline for having them counted under state law.

Three voters who, though no fault of their own, did not receive their absentee ballots in a timely manner, but who mailed or sent them by courier on election day, had their ballots rejected for failure to comply with the state law deadline for receipt of ballots. Represented by the ACLU of Florida and Florida Rural Legal Services, with the assistance of the ACLU Voting Rights Project and

[150] AFL-CIO v. Hood, 885 So. 2d at 376.

the National Voting Rights Institute, they filed a class action suit to have their votes, and the votes of others similarly situated, counted.[151]

The secretary of state had carved out a major exception to the 7:00 p.m. election day rule in order to settle a lawsuit brought by the United States requiring Florida to comply with federal law regulating overseas voters. The settlement provided that overseas ballots would be counted if they were voted on election day and were received by election officials within ten days after an election. The ACLU plaintiffs contended the ten day rule should apply to all absentee ballots. They claimed that the rejection of their ballots violated the Civil Rights Act of 1964, which prohibits rejecting votes for an act or omission which is not material to the voter's qualifications, as well as the First and Fourteenth Amendments.

The court, narrowly construing the Civil Rights Act and the Fourteenth Amendment, denied the plaintiffs' motion for a preliminary injunction, which would have allowed their votes to be preserved and counted. It held the rejection of the ballots was reasonable, nondiscriminatory, and did not violate

[151] Friedman v. Snipes, No. 04-22787-CIV (S.D. Fla.).

federal law. It further held that to grant relief to the plaintiffs would deny equal protection to absentee voters in the other 65 counties in Florida.[152]

Following the court's order, plaintiffs dismissed their complaint without prejudice to explore other options, including whether other litigation could be brought or legislation enacted to remedy the problem of voters failing to receive absentee ballots in a time manner.

[152] Friedman v. Snipes, 345 F. Supp. 2d 1356, 1381 (S.D. Fla. 2004).

Brevard County and the City of Cocoa

Stovall v. City of Cocoa

Located in Brevard County, on Florida's east coast, the City of Cocoa is adjacent to the Kennedy Space Center, where many of its residents work. Twenty miles north is the community of Mims, where Harry and Harriette Moore founded the Brevard County NAACP in 1934. Harry Moore became executive director of the state NAACP and pursued equal pay for African American teachers, voter registration, and the investigation of lynchings. On Christmas night of 1951, the Moores were murdered by a bomb placed under their bedroom floor. Generally considered to be the first assassination of a civil rights leader in the country, the murders remain unsolved to the present day.

According to the 1990 census, the population of Cocoa was 17,722 and 28% African American. Despite this substantial minority population, only two African Americans had ever been elected to the five member city council, and none had been elected since 1981. In 1993, eight city residents, represented by the ACLU and the NAACP Legal Defense Fund, challenged the use of at-large voting and numbered posts to elect the city council.[153]

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[153] Stone v. City of Cocoa, No. 93-257-CIV-Orl-18 (M.D. Fla.).

After the lawsuit was filed one of the plaintiffs, Rudolph Stone, was appointed to fill a vacancy on the city council. He was then dropped as a plaintiff and substituted as a defendant in the litigation. Stone subsequently ran unopposed and was elected to a full three-year term.

While discovery was underway, the parties entered into settlement negotiations and ultimately agreed upon a system for the election of the Cocoa City Council whereby four members would be elected from single member districts and one member, who would also serve as mayor, would be elected at-large. The plan included one district that was 69.7% African American in voting age population. Because Cocoa's minority community was bounded on two sides by city limits and by the Atlantic Ocean on another, the majority-minority district was extremely compact. The plan and proposed consent decree were agreed to by a split vote of the city council, with council member Stone voting with the 3 to 2 majority.

Four white voters, as amici, filed objections to the proposed consent decree, claiming the plan was an unconstitutional racial gerrymander, and that Stone, as an African American and former plaintiff, should not have been allowed to vote on adoption of the plan under Florida's conflict of interest laws. After briefing and a hearing, the district court rejected the parties' proposed consent decree and held that Stone should have abstained from voting on the

proposed plan because "as an African-American candidate he stood to gain inordinately from the vote."[154] Plaintiffs appealed and the Eleventh Circuit reversed and remanded.

The Eleventh Circuit noted that "every one of the incumbents, not just Stone, had an interest in shaping districts favorable to his or her reelection." The court "decline[d] to believe" that the district court considered race as a disqualification for voting on the decree and instead "surmise[d] that the district court simply failed to think the matter through thoroughly."[155]

Following the decision of the court of appeals, the city sought to renege on its agreement and filed a motion in the district court to withdraw the consent decree. Defendants acknowledged they had entered into the agreement but took the position they were not bound by it because it had not been approved by the district court, and that the agreement violated the equal protection clause of the Fourteenth Amendment.[156] The district court, in a one word order, granted the motion. Plaintiffs again appealed, and again the court of appeals reversed and remanded.

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[154] Id., Order of October 25, 1994, quoted in George v. City of Cocoa, 78 F.3d 494, 497 (11th Cir. 1996).

[155] Id., 78 F.3d at 498, 499 n. 7.

[156] Motion filed April 25, 1996.

The court of appeals held the city was bound by its agreement, but was not foreclosed from challenging the plan under the Shaw v. Reno line of cases. The court adhered to prior law rejecting the need for full evidentiary hearings on settlements, which would defeat the purpose of settlements, but held the district court should hold a hearing on whether the defendants had reasonable grounds for believing the preexisting plan might have violated the Voting Rights Act.[157]

The district court, despite plaintiffs' repeated motions to set a trial date, did not hold the required hearing until August 1999, more than two years after being directed to do so by the court of appeals. The city called one witness. After hearing from the plaintiffs' demographic expert, and before the plaintiffs' expert on racially polarized voting testified, the court ended the hearing. Four days later the court entered an order finding that the consent decree did not violate the Shaw v. Reno line of cases. The court noted that "[a]lthough the City decided to adopt the consent decree to increase minority access to voting and to settle the present litigation, race neutral factors were the dominant considerations in the drawing of the districts." Based on the city minutes and the testimony of plaintiffs' expert, the court found the plan to be based on such race neutral criteria as population equality, contiguity, compactness, and respect for

[157] Stovall v. City of Cocoa, 117 F.3d 1238 (11th Cir. 1997).

existing precinct boundaries. The city council did not appeal, and the consent decree was implemented in the November 1999 election.

Though plaintiffs ultimately prevailed in Cocoa, the case illustrates too well the barriers that blacks still face in trying to gain equity in the electoral process. The agreed upon majority black district was extremely compact and regular in shape - it was virtually a square - and followed existing precinct lines. Yet, due to opposition from local whites and the intransigence of the city council and the trial court, it took two appeals, expenses exceeding $50,000, and five years to resolve the litigation.

DeSoto County and the City of Arcadia

In December 1990, the ACLU and Florida Rural Legal Services filed suit on behalf of black voters in DeSoto County in west central Florida challenging at-large elections for the five member board of commissioners and five member school board as diluting minority voting strength.[158] A year later, the ACLU and Florida Legal Services filed suit on behalf of black voters challenging at-large elections for the City of Arcadia, the DeSoto County seat.[159] The cases were

[158] Johnson v. DeSoto County Board of Commissioners and School Board, No. 90-366-CIV-FTM-17D (M.D. Fla.).

[159] Washington v. Arcadia City Council, No. 91-40-CIV-FTM-17 (M.D. Fla.).

consolidated.

Johnson v. DeSoto County Board of Commissioners and School Board

In 1990, the population of DeSoto County was 23,865, of whom 15.39% were black and 9.56% were Hispanic. Although the black population was relatively small, it was possible to draw a reasonably compact majority black district based on a five seat format. No African American had ever been elected to either board and blacks had a depressed socio-economic status, which was reflected in low levels of voter registration. In 1993, the black voter registration rate was 41.57%, compared to 59.67% for whites. Three years later, black voter registration had risen to 60.02%, but white registration had also risen to 81.54%.

The district court granted plaintiffs' motion for summary judgment as to the school board, finding that at-large elections violated Section 2. The court noted that two prior decisions of the court of appeals held the 1947 Florida law authorizing at-large elections for school boards had been enacted with discriminatory intent. The statute was passed in response to the abolition of the all white primary and to replace a preexisting system of single member district elections for school boards. According to the court of appeals, "the conclusion

that the change had an invidious purpose is inescapable."[160]

In granting the plaintiffs' motion for summary judgment, the district court also established that the at-large system had discriminatory effects, finding that:

> *There has never been an African American candidate for the board of commissioners.
>
> *Only two African Americans have run for county-wide public office in DeSoto County, losing both times.
>
> *There have been no African American applicants for DeSoto County Administrator or County Attorney, and no African American has served in either capacity.
>
> *75% of African Americans who are school board employees are aides or service workers.
>
> *African American teachers have decreased in number each year between 1987-90.
>
> *African American full-time school board employees have decreased in number each year between 1987-90.

"This evidence," the court concluded, "is more than minimally sufficient, in combination with Plaintiff's proof of discriminatory intent, to establish a § 2 violation."[161] The court ruled that plaintiffs' claims against the board of commissioners would have to be resolved after a trial on the merits.

The school board appealed and the appellate court reversed. Resorting to legal parsing, it held the findings of the appellate courts that the 1947 law had

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[160] McMillan v. Escambia County, Fla., 638 F.2d 1239, 1245 (11th Cir. 1981). Accord, NAACP v. Gadsden County School Board, 691 F.2d 978 (11th Cir. 1982).

[161] Johnson v. DeSoto County Board of Commissioners, 868 F. Supp. at 1380.

been adopted with an invidious purpose were findings of fact, and did not establish "as a matter of law that the 1947 Act was motivated by an intent to discriminate."[162] It also held that racially discriminatory intent alone could not establish a violation of Section 2 and directed the trial court to reconsider its ruling.

On remand, the district court again found the at-large system had been established with a discriminatory intent.[163] However, the case was assigned to a new judge for a final decision regarding the school board and the board of commissioners, who ruled that population changes since the 1990 census showed it was now impossible to draw a majority black district, and thus there could be no Section 2 violation. The plaintiffs appealed but the decision was affirmed.[164]

Washington v. Arcadia City Council

In 1990, the City of Arcadia had a population of 6,488, of whom 29.98% were black and 9.11% were Hispanic. The city's five member council was elected at-large, and the black population was sufficiently compact that two majority black districts could be drawn. Only one black person had ever won a seat under

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[162] Johnson v. DeSoto County Board of Commissioners, 72 F.3d 1556, 1561 (11th Cir. 1996).

[163] Johnson v. DeSoto County Board of Commissioners, 995 F. Supp. 1440 (M.D. Fla. 1998).

[164] Johnson v. DeSoto County County Board of Commissioners, 204 F.3d 1335 (11th Cir. 2000).

the at-large system.

The black community in Arcadia had been discriminated against in employment and had a depressed socio-economic status. By 1993, only 13 (12%) of the city's 107 full time employees were black. The Arcadia Housing Authority, which was appointed by the city council, had no African American members until 1980. On February 19, 1981, a federal court entered a judgment against the Arcadia Housing Authority finding that its executive director had "willfully maintained racially segregated housing."[165] In 1989, 41% of African Americans and 54.67% of Hispanics in the city lived below the poverty level, compared to 14.19% of whites. The majority of blacks (56.2%) and Hispanics (53.94%) over age 25 had no high school diploma, while more than two-thirds (67%) of whites did.

Seven months after the law suit was filed, a second black candidate was elected to the city council in September 1991. Two years later, the African American incumbent who had served for 22 years was forced into a runoff and was defeated. One year later, another black candidate - after having first been appointed - was elected. At the time of the trial, therefore, two (40%) of the five city council members were African American. The district court concluded that

[165] Brown v. Melton, CA No. 79-85-FTM-K (M.D. Fla.).

the candidates of choice of black voters were not now usually defeated by whites voting as a bloc and dismissed plaintiffs' Section 2 claim. Because blacks had acquired slightly more than proportional representation on the city council, plaintiffs decided not to appeal the decision.

Escambia County

Florida v. McMillan

Prior to the amendment of Section 2 in 1982 to incorporate a discriminatory results standard, minority plaintiffs, represented by private counsel, filed suit challenging at-large elections for the five member Escambia County, Florida, Board of Commissioners. The district court invalidated the at-large system as diluting minority voting strength, and the court of appeals affirmed.[166] Among the findings of the trial court were "a consistent pattern of racially polarized voting," no blacks elected to the commission, a history of racial discrimination, continuing racial segregation, a depressed minority socio-economic status, and that there were "two separate [racial] societies in Escambia County."[167] The Supreme Court agreed to review the case, and the ACLU filed

[166] McMillan v. Escambia County, Florida, 688 F.2d 960 (5th Cir. 1982).

[167] Id. at 962-67.

an amicus brief urging the court to affirm based upon the intervening amendment of Section 2, rather than sending the case back to the court of appeals for a resolution of the statutory issue. Amicus noted that the findings of the lower courts that the at-large system had discriminatory results and denied blacks equal access to the political process were sufficient to establish a Section 2 violation without remanding for further consideration. On March 27, 1984, the court issued a brief opinion vacating and remanding the case to the court of appeals for decision on the Section 2 issue.[168] On remand, the court of appeals again affirmed the decision of the district court, concluding that the at-large system violated amended Section 2.[169]

Glades County

Thompson v. Glades County

Glades County, located in south-central Florida, is huge in size but has a tiny population. According to the 2000 census, the total population is 10,576, 10.5% of which is African American. The county is about two-thirds the size of Rhode Island, though 204 of its 988 square miles are under Lake Okeechobee. It

[168] Escambia County, Florida v. McMillan, 466 U.S. 48 (1984).

[169] McMillan v. Escambia County, Florida, 748 F.2d 1037 (5th Cir. 1984).

lies at the southeastern edge of the lake and in 1928 was in the path of the first recorded Category 5 hurricane to hit the United States. The hurricane breeched the lake's dike and the flooding killed approximately 2,500 Floridians.

Glades County is extremely economically depressed, with employment dependent mostly on citrus farming. Typical of rural counties, African Americans do not fare well compared with whites: per capita income of blacks is half that of whites and the unemployment rate of blacks is double that of whites. Also, of adults age 25 or older, 70% of blacks do not have a high school degree, compared to 40% of whites.

In 1998, Billie Thompson became the first African American to run for the Glades County school board, and only the second African American to run for county-wide office. She got 42% of the vote in the Democratic primary against the incumbent, but was defeated. Thompson and other black residents of the county, represented by the ACLU, filed suit in 2000 challenging the at-large method of electing the five-member county commission and board of education, as diluting minority voting strength in violation of Section 2 and the Constitution.[170]

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[170] Thompson v. Glades County, No. 2:OO-cv-212 (M.D. Fla.).

A trial was held in October 2001, but a decision was not rendered for nearly three years. The court found "white voters in Glades County tend to vote as a bloc so as to usually defeat the candidates of choice of African American voters." It also found "the size of Glades County makes at-large campaigning for elective office difficult, and more so for African Americans," and that African Americans had far less income, education, and access to automobiles, and that black public employees were employed in lower paying jobs.[171]

Door-to-door campaigning is critical to success in a rural county like Glades, but according to Thompson, as "a black person and black female" she was "very apprehensive" about campaigning in some areas of the county.[172] A school board member who is part American Indian testified to the same effect that "[s]he felt uncomfortable campaigning in some of the very rural parts of the county where she did not know people."[173]

Despite its findings, the court ruled there was no Section 2 violation because there was no remedy. Plaintiffs had drawn an illustrative five member plan with one district containing an African American voting age population of

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[171] Id., Order of August 27, 2004.

[172] Id., Trial Transcript, p. 23.

[173] Id., Order of August 27, 2004.

50.23%. The district also had a Hispanic voting age population of 15.23%, and the evidence showed that African American and Hispanics voted cohesively. The plan had an overall deviation of 8.6%.

The court held it was not permitted to impose a plan with an 8.6% deviation, and African Americans would be a minority in an equal population plan. It further held a 50.23% African American voting age population was not viable: "To translate the statistical majority into reality would require that every voting-age African American be registered to vote, actually vote, and vote for the same person."[174] The court thus placed an unprecedented burden on Section 2 plaintiffs, because it effectively required them to prove it was impossible for a minority candidate to be outvoted in a remedial plan. Of course, no group - black, white, Hispanic or other - registers and turns out at 100%. The evidence of minority voter cohesion and racially polarized voting showed that in the illustrative district the white minority would not be able to defeat the choice of African American voters, and all the more so because of the presence of Hispanic voters. Plaintiffs' appealed the decision of the trial court to the Eleventh Circuit, where it is pending.

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[174] Id.

Hendry County

Robinson v. Hendry County Board of Commissioners

As a result of the 1970 amendments of the Voting Rights Act, Hendry County became one of five Florida counties subject to the preclearance provisions of Section 5. Located in rural, south central Florida, the county was 16.73% black, 22.34% Hispanic, and 72.14% white. However, because elections were at-large, and because of the prevalence of racial bloc voting, only one black candidate had run for the board of commissioners (in 1968), and none had run for the school board. And, no African American had ever been elected to, or served on, either body.

In January 1991, the ACLU and Florida Rural Legal Services filed suit on behalf of black voters challenging at-large elections for the five member board of commissioners and five member school board.[175] After a motion to dismiss filed by the defendants was denied, the parties reached a settlement in October 1991. Pursuant to the settlement, five single member districts were established for the board of education and school board, one of which was majority black. The Hispanic population in the county was very dispersed, and it was not possible to draw a majority Hispanic district. However, under the new plan one district

[175] Robinson v. Hendry County Board of Commissioners, No. 91-13-CIV-FTM-15 (D) (M.D. Fla).

contained a Hispanic population of 31%.

The consent decree acknowledged that the new plan "provides plaintiffs, as African-American residents of Hendry County, and all the African American voters of the county, a greater opportunity than previously existed to elect candidates of their choice through the creation of single-member districts."[176] Plaintiffs' attorneys prepared a joint submission for preclearance, and the voting change was approved by the Department of Justice on May 11, 1992.

The plan was implemented at the primary in September 1992. An African American was nominated for the county commission and for the school board from the majority black district. Neither had opposition in the general election, and they became the first blacks ever to serve on the commission and school board.

Palm Beach County and the City of Belle Glade

Burton v. Belle Glade

On Thanksgiving Day in 1960, Edward R. Murrow's CBS documentary on the plight of farm workers, "Harvest of Shame," traced migrant workers as they followed the crops up the eastern United States and contrasted the lives of the

[176] Id., Order of October 17, 1991.

workers and their families from small towns like Belle Glade and Immokalee with the affluence of coastal Palm Beach County. "Harvest of Shame" portrayed a reality that continues to the present. Palm Beach County produces a wealth of fruits and vegetables for the nation, and while the coastal side of the county includes extraordinary affluence, the farm workers mostly live in public housing.

The U.S. Department of Agriculture built two housing centers for farm workers in western Palm Beach County, adjacent to the City of Belle Glade. For decades the housing was racially segregated by official policy and ordinances. The centers, Okeechobee Center and Osceola Center, are now owned and operated by the Belle Glade Housing Authority (BGHA), though it is still funded by the Farmers Home Administration (FHA). The City Council of Belle Glade appoints housing authority members. One housing center, Osceola, was annexed into Belle Glade in 1961 when it was all white and segregated by law; the black center, Okeechobee, was not.[177] As cited in a memorandum in the authority's minutes, one of the reasons given by public officials for annexing the white center was that the annexation would enable the Osceola residents to "have the right to vote in the community; offer themselves as candidates for the office

[177] Burton v. Belle Glade, 178 F.3d 1175, 1190 (11th Cir. 1999).

of City Commissioner; and be able to be appointed to the various boards governing city operation."[178]

In 1977, the housing projects were compelled by litigation to desegregate. In response, the Belle Glade housing authority requested the city to deannex Osceola Center which would gain African American residents for the first time. The request was remarkable because deannexation would increase the cost to residents of some governmental services and the housing authority had the fiduciary responsibility to promote affordable housing for agricultural workers. The request to deannex Osceola Center was ultimately withdrawn due to opposition from the Florida Rural Legal Services attorneys who represented plaintiffs in the litigation.[179]

Okeechobee Center remained 92% black, 8% Hispanic and 0% white as of 1994. Over the years the city and the housing authority repeatedly refused to annex the formerly all black project, including a 1995 request from a center resident. As with Osceola, annexation of Okeechobee would have economically benefited the residents and the housing authority. But annexation would also

[178] BGHA Minutes, January 24, 1961.

[179] BGHA Minutes, May 25, 1977; City Minutes, July 19, 1977.

likely have turned Belle Glade, whose population was 50% black, into a majority black city.

In 1995, local residents, represented by the ACLU, sued the city and the housing authority.[180] Plaintiffs contended the decision to annex the white housing center but not the African American housing center was racially motivated, that the segregation of the two projects constituted de jure discrimination, and that continuing to keep Okeechobee residents out of the city was one of the effects of discrimination that was required to be dismantled or eradicated to the extent practicable.

At the end of discovery, plaintiffs moved for summary judgment on their vote denial and Fourteenth Amendment claims. The city moved for summary judgment based on a 1974 state statute which required annexed land to be contiguous to existing city boundaries. The Okeechobee Center was contiguous to a highway the city had annexed, and the city had annexed other areas after 1974 that were contiguous only to that same highway. The district court held that the 1974 statute provided "a perfectly good excuse not to annex," in 1995, and the "perfectly good excuse, and not racist reasons, caused the lack of

[180] Burton v. Belle Glade, 966 F. Supp. 1178 (S.D.Fla. 1997).

annexation."[181] As for the refusal of the city and housing authority to annex in 1973 and 1961, the court said those claims were barred by the state's four year "personal injury tort statute of limitations."[182] Although plaintiffs had not moved for summary judgment on their Section 2 vote dilution claim, the district court dismissed it on the grounds that Section 2 did not authorize annexation as a remedy.

The plaintiffs appealed but the court of appeals agreed with the district court that a discriminatory act had to have taken place within a four year statute of limitations.[183] The court of appeals' opinion would have made all challenges to Jim Crow laws impossible. Brown v. Board (1954) would have been dismissed for failure to file suit in the 19th century. The landmark one person, one vote decision of Reynolds v. Sims (1964) would have been rejected because the last time the Alabama legislature had been reapportioned was in 1900.

As for plaintiffs' Section 2 claim, the court of appeals held that the district court did not error in concluding annexation was an inappropriate remedy.[184]

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[181] 966 F. Supp. at 1185.

[182] Id. at 1182.

[183] Burton v. Belle Glade, 178 F.3d 1175 (11th Cir. 1999).

Seminole County

de Treville v. Joyner

In August 2004, David de Treville, a former Florida resident, was living in Germany when he submitted a voter registration application by fax to Seminole County, Florida. As his last permanent residence, Florida was the appropriate place for de Treville to register and vote, as specified by the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). Seminole County received the fax in early August, but it never got the signed original copy of the fax which de Treville had mailed. In October, after the voter registration deadline had passed, the county informed de Treville that his faxed application was not acceptable because the signature was not an "original."

In mid-October, the ACLU filed suit on de Treville's behalf, asserting that the county's rejection of his voter registration violated the National Voter Registration Act, the Constitution, and the Civil Rights Act of 1964, which forbids disqualifying potential voters for any error or omission in an application that is not material to determining eligibility.[185] This provision was intended to address

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[184] 178 F.3d at 1200.

[185] de Treville v. Joyner, Civ. No. 6:04 CV 01533 (M.D. Fla.).

the practice of disqualifying minority registrants on the pretext that their application forms were incomplete.

In his law suit, de Treville further contended that the county's failure to notify him of its refusal to accept his application prior to the registration deadline violated his right to vote. After suit was filed, the county supervisor of elections agreed to register de Treville, and the suit was voluntarily dismissed.

St. Lucie County and the City of Fort Pierce

Coleman v. Fort Pierce

Now a part of Florida's fast developing "Treasure Coast," Fort Pierce and its neighboring central Atlantic communities were long overshadowed by the bustling resorts to the south. Founded during the second Seminole War, Fort Pierce grew slowly with the encouragement of the United States Congress, which in 1842 offered settlers 160 acre plots, provided they were willing to bear arms and cultivate the land for five years. Over the next century, Fort Pierce was notable for its anti-integration activism. Three days after the Supreme Court's ruling in Brown v. Board (1954), a kerosene soaked cross burned on a ridge above the city's black neighborhood.

Fort Pierce was governed by a five member city commission, including one mayor-commissioner, elected at-large. Although African Americans were

42% of the city's population, no black person had ever served as mayor and no more than one black person had ever served at one time on the city commission.

In 1992, African American residents of Fort Pierce, represented by the ACLU and Florida Rural Legal Services Corporation, sued the city claiming that the at-large elections, with staggered terms and a majority vote requirement, diluted minority voting strength in violation of Section 2.[186] Following discovery, the city commission agreed to adopt a new election system dividing the city into two districts, one of which would be majority black. Each district would elect two commissioners, while the mayor would continue to be elected at-large.

The parties presented a consent order to the court, which conducted a hearing to determine the propriety of the proposed redistricting plan. Among the court's findings were:

> *[T]he minority community is extremely cohesive - minority candidates usually getting more than ninety percent of the African-American vote.
>
> *[W]hites usually vote as a bloc to defeat the candidate of choice of the minority, particularly when African-American candidates have run for city counsel positions when there is already an African-American incumbent.

[186] Coleman v. Fort Pierce, 92-14157-CIV-PAINE (S.D. Fla.).

> *White cross-over [voting] averaged less than twelve percent.
>
> *Plaintiffs have tendered evidence demonstrating the existence of the three Gingles elements to establish a Section 2 violation.[187]

The new plan was implemented, and as of 2006, two of the city's five commissioners are African American.

West Palm Beach

Anderson v. West Palm Beach City Commission

West Palm Beach was founded in 1894 by Henry Flagler, a pioneer of South Florida's resort industry, to house the workers that would service more upscale communities. Even before it became a center of controversy during the 2000 presidential election, West Palm Beach struggled with voting. By the early 1990s, the city had grown to more than 67,000 residents, with black and Hispanic citizens constituting 31% and 14% of the population, respectively. The city commission was composed of five members elected at-large, with candidates required to run from residency districts.

In 1990, the city redrew its residency districts and placed two black incumbents in the same district, but no white incumbents were similarly paired.

[187] Id., Order of September 24, 1993.

The city commission's vote on the redistricting plan was three in favor and two against, with African American commissioners casting the negative votes. The first black incumbent, a popular teacher and minister who had received a majority of both black and white votes in his district, then retired from city politics. Subsequently, the second black incumbent lost to another black candidate in a racially polarized election, with the winner getting a majority of white votes and the loser a majority of black votes. All prior successful black candidates had received a majority of black votes.

In 1994, African American residents of West Palm Beach, represented by Florida Rural Legal Services Corporation and the ACLU, brought suit against the city, challenging the at-large voting system as violating Section 2.[188] The complaint further alleged that other election features such as a majority vote requirement, staggered terms, and non-partisan elections also diluted African American voting strength. To bolster their claim of vote dilution, plaintiffs produced evidence from city commission minutes and newspapers showing that West Palm Beach adopted at-large elections immediately after the abolition of the white primary in 1946.[189]

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[188] Anderson v. West Palm Beach City Commission, 94-8135-CIV-ZLOCH (S.D. Fla.).

[189] 1947 Fla. Laws ch. 24981, Section 4 (8).

In a consent decree issued in January 1995, West Palm Beach adopted a plan containing five single member districts. Two of the new districts had African American majorities, while a third district included a Hispanic voting age population of 37.9%.[190]

[190] Anderson v. West Palm Beach City Commission, Order of January 27, 1995.

GEORGIA

STATEWIDE ISSUES

1980 Congressional Redistricting

Busbee v. Smith

Georgia's 1980 congressional redistricting was denied preclearance by the District Court for the District of Columbia in July 1982, a month before the scheduled expiration of Section 5 and shortly after Congress voted to extend the preclearance provisions of the Voting Rights Act for an additional 25 years. Had Section 5 been allowed to lapse, the court would have been without jurisdiction to enforce its objection, and nothing would have prevented the state from simply reenacting or implementing the objected-to plan.

When the state reapportioned its congressional districts after the 1980 census, it resorted to its old strategy of trying to minimize black voting strength in the Atlanta area. The 1980 census data showed that the state's 10 congressional districts drawn in 1972, while severely malapportioned, were still majority white with the exception of the fifth district. It contained a slight black population majority of 50.33%.

The new plan drawn in 1981 maintained white majorities in nine of the ten districts, and increased the black population in the Fifth District to 57%.

Although majority black in both total and voting age population, the district actually contained a 54% white majority among registered voters.[191]

The state submitted its plan for preclearance and argued that the Fifth District's configuration could not be discriminatory because it increased the black percentage over the 1972 plan. The attorney general did not agree and denied Section 5 approval.

The state then filed a declaratory judgment action in the District Court for the District of Columbia arguing that under the retrogression standard of Section 5 it was entitled to have its congressional reapportionment plan precleared. The Supreme Court had previously held that the purpose of Section 5 was to maintain the status quo in voting and that a plan that was either ameliorative or nonretrogressive, could not violate the "effect" standard of the statute.[192] The state, however, still had to prove that its plan was not the product of intentional discrimination against black voters. The Georgia Black Legislative Caucus, represented by the ACLU, sought and was granted leave to intervene to urge an objection to the state's plan.

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[191] Busbee v. Smith, 549 F. Supp. 494, 499 (D.D.C. 1982).

[192] Beer v. United States, 425 U.S. 130, 141 (1976).

Given Georgia's record of discrimination in voting, it would not have been surprising if the 1981 congressional redistricting process had been influenced by race.[193] What is surprising is how pervasive and overt that influence actually was.

Julian Bond, a state senator at that time, introduced a bill at the beginning of the legislative session creating a Fifth District that was 69% black. The Bond plan had the support of two white members of the senate, Thomas Allgood, the Democratic majority leader from Augusta, and Republican Paul Coverdell.[194] In large measure as a result of their endorsement, the final plan adopted by the senate contained a 69% black Fifth District.

The leadership of the house rejected the Bond plan for the Fifth District. State Representative Joe Mack Wilson, a Democrat from Marietta, was chair of the house reapportionment committee and the person who, by all accounts, dominated the redistricting process in the lower chamber. And as he was wont to say, he "hated" blacks and Republicans.

"Nigger" was an active, working part of Wilson's vocabulary. Blacks were simply "niggers," and he regularly denigrated legislation that benefited blacks as

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[193] For a discussion of that record, see Laughlin McDonald, A Voting Rights Odyssey: Black Enfranchisement in Georgia (Cambridge: Cambridge Univ. Press, 2003).

[194] Busbee v. Smith, Deposition of Thomas Allgood, p. 15-6.

"nigger legislation." During the redistricting fight, he told his colleagues on numerous occasions that "I don't want to draw nigger districts."[195] Bettye Lowe, a house member, recalls that Wilson told her in no uncertain terms that "I'm not going to draw a honky Republican district and I'm not going to draw a nigger district if I can help it."[196]

The speaker of the house, Tom Murphy, was also opposed to the Bond plan. "I was concerned," he said later, "that . . . we were gerrymandering a district to create a black district where a black would certainly be elected."[197] According to the District of Columbia court, Murphy "refused to appoint black persons to the conference committee [to resolve the dispute between the house and senate] solely because they might support a plan which would allow black voters, in one district, an opportunity to elect a candidate of their choice."[198]

After the defeat of the Bond plan in the house, the fragile coalition in the senate in support of the plan broke down. Several senators approached Allgood and said, "I don't want to have to go home and explain why I was the leader in getting a black elected to the United States Congress." Allgood acknowledged

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[195] Id., 549 F. Supp. at 501.

[196] Id., Deposition of Bettye Lowe, p. 36.

[197] Id., 549 F. Supp. at 520.

that it would put a senator in a "controversial position in many areas of [Georgia]" to be perceived as having supported a black congressional district. He finally told his colleagues to vote "the way they wanted to, without any obligations to me or to my position," and "I knew at that point the House plan would pass."[199]

Based upon the racial statements of members of the legislature, as well as the absence of a legitimate, nonracial reason for adoption of the plan, the conscious minimizing of black voting strength, and historical discrimination, the District of Columbia court concluded that the state's submission had a discriminatory purpose and violated Section 5. The court also held that the legislature had applied different standards depending on whether a community was black or white. Noting the inconsistent treatment of the predominantly white North Georgia mountain counties and metropolitan Atlanta, the court found that "the divergent utilization of the 'community of interest' standard is indicative of racially discriminatory intent."[200]

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[198] Id. at 510, 520.

[199] Id., Deposition of Thomas Allgood, pp. 42-5.

[200] Id., 549 F. Supp. at 517.

As for Joe Mack Wilson, the court made an express finding that "Representative Joe Mack Wilson is a racist."[201] The Supreme Court affirmed the decision on appeal.[202]

Joe Mack Wilson, who had been flogged by the court for his racism, took great umbrage. At a meeting of the all-white Rotary Club of Marietta he said he was just the "fall guy," and complained bitterly that "in modern times, if you don't condescend and give in to everything black people want, you're tagged a racist."[203]

Forced yet again by the Voting Rights Act to construct a racially fair plan, the general assembly in a special session enacted an apportionment for the fifth district with a black population exceeding 65% and the plan was approved by the court. John Lewis, one of the leaders of the Civil Rights Movement, was elected from the fifth district in 1986 and has served in Congress ever since.

1990 Redistricting

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[201] Id. at 500.

[202] Busbee v. Smith, 459 U.S. 1166 (1983).

[203] The Atlanta Constitution, August 3, 1982.

Following the 1982 extension of the Voting Rights Act and the amendment of Section 2, there was a significant increase in minority office holding, particularly at the congressional level. Seventeen of the majority-minority congressional districts in the South, most of them newly created, elected a black representative in the 1992 elections. There were also significant increases in the number of African Americans elected to state legislatures, again primarily from majority black districts.[204]

Social scientists and the courts have frequently commented on the "tipping phenomenon," a form of racial backlash that occurs when whites perceive there has been "too much" integration and flee a neighborhood, or take their children out of the public schools.[205] The 1992 elections were undoubtedly a tipping event for many whites who believed that their districts had become "too black." Many of them filed suit asking the courts to redraw their districts so that whites would again be in the majority with the ability to exercise their traditional privilege of electing members of Congress.

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[204] 1990 U.S. Census, Population and Housing Profile, Congressional Districts of the 103rd Congress, C.Q. Weekly Report, V. 51, 3473-87; David A. Bositis, Redistricting and Representation: The Creation of Majority-Minority Districts and the Evolving Party System in the South (Joint Center for Political and Economic Studies, 1995), 46-7.

[205] A. Leon Higginbotham, Jr., et al., "Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences," 62 Fordham L. Rev. 1593, 1632 n.194 (1994); Richard H. Pildes, "The Politics of Race," 108 Harvard L. Rev. 1359, 1392 (1995).

The first of the so-called "reverse discrimination" voting cases to reach the Supreme Court was Shaw v. Reno, in which the Court held that white plaintiffs had standing to challenge a majority black congressional district in North Carolina, which they characterized as being "dramatically irregular in shape."[206] Subsequently, in Miller v. Johnson, the Court invalidated the majority black Eleventh Congressional District in Georgia on the grounds that race was the predominant factor in drawing district lines, and the state had subordinated its traditional districting principles to race without having a compelling reason for doing so.[207] The ACLU's involvement in Shaw/Miller litigation in Georgia is discussed below.

Miller v. Johnson

Due to an increase in population between 1980 and 1990, Georgia was entitled to increase its number of congressional districts from 10 to 11. The existing plan contained one majority black district, the Fifth, represented by John Lewis. In August 1991, the Georgia legislature adopted a congressional redistricting plan based on the new census containing two majority minority

[206] 509 U.S. 630, 633 (1993).

[207] 515 U.S. 900 (1995).

districts--the Fifth and the Eleventh. A third district, the Second, had a 35.4% black voting age population.[208]

The state submitted the plan for preclearance, but the Attorney General objected to it. The legislative leadership, he concluded, was "predisposed to limit black voting potential to two black majority districts," and had not made a good faith attempt to "recognize the black voting potential of the large concentration of minorities in southwest Georgia" in the area of the Second District. He also found that the state had provided only pretextual reasons for failing to include the minority population in Baldwin County in the Eleventh District.[209]

Following another objection to a second plan, the state adopted a third plan which contained three majority black districts, the Fifth, the Eleventh, and the Second. The plan was precleared on April 2, 1992.[210] At the ensuing elections black candidates were elected from each of the three majority black districts, John Lewis from the Fifth, Cynthia McKinney from the Eleventh, and Sanford Bishop from the Second.

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[208] Miller v. Johnson, 515 U.S. 900, 906 (1995); Johnson v. Miller, 864 F. Supp. 1354, 1363 n.5 (S.D. Ga. 1994).

[209] Miller v. Johnson, 515 U.S. at 906-07; Joint Appendix, pp. 99, 105-07.

[210] Johnson v. Miller, 864 F. Supp. at 1366-67.

Following the decision in Shaw v. Reno, a lawsuit was filed by white plaintiffs claiming that the Eleventh Congressional District was unconstitutional. One of the plaintiffs was George DeLoach, a white man who had been defeated by McKinney in the 1992 Democratic primary. The plaintiffs claimed that the district was "segregated," and asked the court to redraw it so that DeLoach, in their words, could "run again without the outcome being predetermined on the basis of race."[211] The ACLU represented a bi-racial group of intervenors who sought to defend the constitutionality of the challenged plan.

Although the Eleventh District was not as irregular in shape as the district in Shaw v. Reno, the district court found it to be unconstitutional, holding that the "contours of the Eleventh District . . . are so dramatically irregular as to permit no other conclusion than that they were manipulated along racial lines."[212] Although it invalidated the state's plan, the three-judge court acknowledged the transcendent importance of race in the political life of the state. "No one can deny," the court said, "that State and local governments of Georgia in the past utilized widespread, pervasive practices to segregate the

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[211] Miller v. Johnson, Brief of Appellees, p. 29 n.28.

[212] Johnson v. Miller, 864 F. Supp. at 1378.

races which had the effect of repressing Black citizens, individually and as a group."[213]

The state, the intervenors, and the United States appealed the decision of the district court, but the Supreme Court affirmed. It did not find the Eleventh District was bizarrely shaped, but it held the state had "subordinated" its traditional redistricting principles to race without having a compelling reason for doing so. The court criticized the plan for splitting counties and municipalities and joining black neighborhoods by the use of narrow, sparsely populated "land bridges."[214]

The Supreme Court sent the case back to the district court for the adoption of a new plan. On remand the district court allowed the plaintiffs to amend their complaint to challenge the majority black Second District, which the court then held was unconstitutional for the same reasons it had found the Eleventh District to be unconstitutional.[215] The court gave the legislature an opportunity to enact a remedial plan, but after several weeks of wrangling and uncertainty over how to

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[213] Id., Statement of Judicial Notice.

[214] Miller v. Johnson, 515 U.S. at 908, 921.

[215] Johnson v. Miller, 922 F. Supp. 1552, 1553 (S.D. Ga. 1995).

apply the Court's decision, the legislature adjourned without adopting a congressional plan.

After the legislature failed to redistrict the congressional delegation, the district court issued its own plan on December 13, 1995. The court's plan was a complete remapping of the state and contained only one majority black district.[216] Because of racial bloc voting, the court held, a district containing "the percentage of black registered voters as close to fifty-five percent as possible was necessary . . . to avoid dilution of the Fifth District minorities' rights."[217]

Georgia had appealed the decision of the district court invalidating the Eleventh District. But it refused to appeal the court's redistricting order. The intervenors and the United States filed notices of appeal, and the state switched sides and joined the white plaintiffs in defending the court ordered plan.

No doubt believing that the Supreme Court would not require it to draw more than one majority black district, the state did a remarkable about face and reinvented the facts surrounding the first redistricting plan it had adopted in 1991, containing two majority black districts. In its brief in the Supreme Court in the first case involving the Eleventh District, the state had argued that the 1991

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[216] Id. at 1566, 1563-64.

[217] Id. at 1568, 1570-71 (Appendices A and B to the opinion of the district court).

plan was a reasonable expression of state policy and that race was not the predominant factor in redistricting:

> It is undisputed that the General Assembly as a whole found the initial [1991 congressional redistricting] plan enacted to be reasonable. It was not perceived as a 'racial gerrymander.' . . . There is, in fact, no evidence that any legislator or reapportionment staffer ever believed the initial plan to be offensive as a racial gerrymander.[218]

The state repeatedly stressed "the undisputed consensus of all of the legislators involved - both white and black, Republican and Democrat - that the first plan was reasonable."[219]

But in the case involving the new court ordered plan, the state took an entirely different view of things. To the extent that the legislature had initially drawn a plan containing two majority black districts, the state now argued, there was "uncontradicted evidence that that was the product of the perceived need to do so in order to satisfy the DOJ's demands." The 1991 plan, formerly described as "reasonable" and supported by "the undisputed consensus of all of the legislators," was now dismissed as the tainted product of "the illegal excesses of the DOJ."[220] The Supreme Court upheld the district court's remedial plan, but as

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[218] Miller v. Johnson, No. 94-631, Brief of Appellants Miller, p. 49.

[219] Id. at 18.

[220] Abrams v. Johnson, No. 95-1425, Brief of Appellees Miller, pp. 10, 25.

the four dissenters pointed out, the Department of Justice's direct involvement "took place after adoption of the 1991 Plan."[221]

Although they ran in majority white districts under the court ordered plan, both McKinney and Bishop were reelected. Their elections, however, were still racially polarized. Although McKinney got only 13% of the white vote in the Democratic primary, she won the nomination because she got most of the black vote, while whites mainly stayed home or voted in the Republican primary. White turnout was only 11% of registered voters compared to 31% for blacks. As a consequence, the electorate in the Democratic primary was majority black. In the general election, most black voters cast ballots for McKinney, while approximately 70% of whites voted for her white Republican opponent. A majority of whites similarly voted for Bishop's white opponent in the general election in the reconfigured Second district.[222]

McKinney, who describes herself as "a child of the Voting Rights Act," has credited her victory to the fact that she was initially elected in a majority black

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[221] Abrams v. Johnson, 521 U.S. 74, 106 (1977) (Breyer, J., dissenting).

[222] Allan J. Lichtman, Table I, Ecological Regression Estimates: Black versus White Elections 1996 U.S. House Elections, State of Georgia, Bloc Voting; Table 3, Ecological Regression Estimates: Black v. White Elections, 1996 U.S. House Elections, State of Georgia, Turnout.

district. "My victory says more about the power of incumbency than anything else," she has said.[223]

The legislature also adopted new state house and senate redistricting in 1991, and for the first time used all single member districts for both houses. The Attorney General precleared the change to districts but objected to certain features of the house and senate plans. He concluded that the legislature had fragmented concentrations of black population in a number of areas of the state to minimize the number of majority black districts and to ensure the reelection of white incumbents at the expense of black voters.[224]

Following an objection to a second plan on similar grounds,[225] the general assembly enacted a third plan in 1992, which was precleared. It created 13 majority black senate districts, an increase of five over the 1980 plan, and 41 majority black house districts, an increase of 11 over the 1980 plan.

The ink on the first decision in the congressional case had scarcely dried when the lawyers for the white plaintiffs publicly announced that they intended

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[223] Washington Post, November 26, 1996, p. A15.

[224] John R. Dunne, Assistant Attorney General, to Mark H. Cohen, January 21, 1992.

[225] John R. Dunne, Assistant Attorney General, to Mark H. Cohen, March 20, 1992.

to take the state to court over its legislative redistricting as well. They claimed that 17 house and five senate districts had been "racially gerrymandered."[226]

During its special session in 1995, the legislature had been unable to redistrict the congressional delegation, but it did redistrict the house and senate. Using the threat of litigation as an occasion, or an excuse, it reduced the black percentages in 13 districts.

Robert Holmes, a long time member of the Georgia House of Representatives and a political science professor at Clark-Atlanta University, has described redistricting as "a struggle for political survival" in which "everyone seeks to maximize his or her own position." Reducing the black population in the house and senate districts was an example of that struggle, he says, and was designed primarily to protect white incumbents, some of whom were among the leadership in the general assembly. According to Holmes, the "real agenda" of the house leadership was not concern that its plan might be challenged in court, but "to protect white Democratic committee chairs, the Majority Leader, and a few other close allies of [house] Speaker Murphy."[227]

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[226] Robert A. Holmes, "Reapportionment Strategies in the 1990s: The Case of Georgia," in Bernard Grofman, ed., Race and Redistricting in the 1990s (New York: Agathon Press, 1998), p. 212.

[227] Id. at 207, 214.

In the senate, the black percentages in two majority black districts represented by whites were reduced from 62% to 43% and from 59% to 42%. In the house, the black percentages were reduced in 11 majority black districts. In District 141, represented by white majority leader Larry Walker, the black percentage was dropped from 59% to 26%. In District 159, represented by white committee chair Bob Hanner, the black percentage was lowered from 62% to 43%. In District 178, represented by another white committee chair, Henry Reaves, the black percentage was reduced from 63% to 27%. The black percentages were also reduced to below voting age majorities in two districts with black incumbents, Districts 31 (Carl Von Epps) and 173 (E. C. Tillman).[228]

The total losses in majority black districts were two in the senate and eight in the house. The state submitted the new plan for preclearance, confident that this reduction in minority voting strength would be approved by the Department of Justice in light of the recent congressional redistricting decisions.

The plaintiffs in the congressional case, despite the fact that a new plan had been adopted and submitted for preclearance, filed suit challenging the 1992 legislative plan. Except that they now claimed that 12 of the state's senate

[228] Id. at 218.

districts and 26 of its house districts were unconstitutional.[229] The Attorney General initially objected to the special session plan but withdrew the objection on October 15, 1996.

Five months later, after court ordered mediation and the parties settled the law suit agreeing upon a plan which reduced the number of majority black senate districts from 11 to 10 compared to the 1995 special session plan, and the number of majority black house districts from 33 to 30.

From the point of view of black voters and the legislative black caucus, the settlement was an exercise in damage control based on the likelihood that the court would have abolished even more of the majority black districts. And though the total number of majority black districts was reduced, the number of black caucus members at the beginning of the 1998 legislative term stood at 44, an increase of four compared to 1993.[230] Most of the formerly majority black districts which had been converted into majority white districts had elected whites in the first place. And in those which elected blacks, the incumbents, such as Von Epps, were able to hold onto their seats. The 1990 redistricting showed that the state was not willing to protect majority black districts when it thought

[229] Johnson v. Miller, Civ. No. 196-040 (S.D. Ga.).

[230] Joint Center for Political and Economic Studies, Number of Black Elected Officials in the United States, by State and Office, January 1998 (www.jointctr.org).

the courts would not require it, that it was willing to abolish majority black districts to aid white incumbents, and that the process was driven significantly by partisanship to which the interests of minority voters were subordinated.

2000 Redistricting

Following the 2000 census, Georgia enacted redistricting plans for both houses of its legislature and congressional delegation and sought preclearance in the Federal District Court for the District of Columbia. The three-judge court precleared the house and congressional plans, but objected to three districts in the senate plan on the grounds that the state had not carried its burden under Section 5 of proving that the reduction of the black voting age population would not have a retrogressive effect on minority voting strength.[231]

The state enacted a remedial plan, which increased the black population in the three senate districts at issue, and it was precleared.[232] The state also appealed the decision denying preclearance to its original senate plan. On appeal, the Supreme Court vacated and remanded because the three-judge court

[231] Georgia v. Ashcroft, 195 F. Supp. 2d 25, 56 (D.D.C. 2002). Under the proposed plan, compared to the pre-existing plan, the black voting age population (BVAP) in SD 2 had been reduced from 60.58% to 50.31%, in SD 12 from 55.43% to 50.66%, and in SD 26 from 62.45% to 50.8%.

[232] Id., 204 F. Supp. 2d 4 (D.D.C. 2002).

had not considered the existence of so-called "influence districts" in denying preclearance to the original senate plan.[233]

A separate lawsuit had also been filed in federal court in Georgia challenging the state's plans on a variety of grounds, including that they were partisan gerrymanders and violated one person, one vote. After the decision of the Supreme Court, the federal court in Georgia dismissed the challenge to the precleared congressional plan, but invalidated the precleared house plan and the precleared remedial senate plan on the grounds that they violated one person, one vote.[234] The court gave the state an opportunity to propose remedial plans, but it failed to do so. The court then proceeded to draw and implement plans for the house and senate which rendered the proceeding in the District of Columbia court moot. The involvement of the ACLU in the litigation in the Supreme Court and in the federal court in Georgia is discussed below.

Georgia v. Ashcroft

The ACLU, representing a number of Georgia civil rights organizations, filed an amicus brief in the Supreme Court addressed primarily to the arguments

[233] Georgia v. Ashcroft, 539 U.S. 461 (2003).

[234] Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004).

the state had raised in its brief.[235] The state's brief provides a dramatic, present day example of the continued willingness of one of the states covered by Section 5 to manipulate the laws to diminish the protections afforded racial minorities.

In its brief the state resurrected its anti-Voting Rights Act rhetoric from prior years and argued that Section 5 "is an extraordinary transgression of the normal prerogatives of the states." State legislatures were "stripped of their authority to change electoral laws in any regard until they first obtain federal sanction." The statute was "extraordinarily harsh," and "intrudes upon basic principles of federalism." As construed by the three-judge court, the state said, the statute was "unconstitutional."[236] But the arguments the state advanced on the merits were far more hostile to minority voting rights than its anti-Voting Rights Act rhetoric.

One of the state's principle arguments was that the retrogression standard of Section 5 should be abolished in favor of a coin toss, or an "equal opportunity"

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[235] Brief Amicus Curiae of Georgia Coalition for the Peoples' Agenda in Support of Appellees. The coalition included the NAACP, Southern Christian Leadership Conference, RAINBOW/PUSH, Concerned Black Clergy, Georgia Association of Black Elected Officials, and Georgia Coalition of Black Women. In addition to the ACLU, the amicus was represented by the Lawyers' Committee for Civil Rights Under Law and the NAACP Legal Defense and Educational Fund.

[236] Brief of Appellant State of Georgia, pp. 28, 31, 40-1. For a discussion of the state's opposition to the extensions of the Voting Rights Act in 1970, 1975, and 1982, see McDonald (2003), pp. 139-40, 154-55, 175-76.

to elect, standard based on Section 2 of the Voting Rights, which it defined as "a 50-50 chance of electing a candidate of choice."[237] The Supreme Court rejected the state's invitation to rewrite Section 5 and held that "[w]e refuse to equate a §2 vote dilution inquiry with the §5 retrogression standard. . . . Instead of showing that the Senate plan is nondilutive under §2, Georgia must prove that its plan is nonretrogressive under §5."[238]

Had the state's proposed coin toss standard been adopted, it would have had a severe negative impact upon minority voting strength. A 50-50 chance to win is also a 50-50 chance to lose. If the state were allowed under Section 5 to adopt a plan providing minority voters with only a 50-50 chance of electing candidates of their choice in the existing majority black districts, the number of blacks elected to the Georgia legislature would by definition be cut essentially in half.

The state argued further that "the point of equal opportunity is 44.3% BVAP, which means that 'there's a 50-50 chance of electing a candidate of choice' in a district with an open seat and with 44.3% BVAP."[239] The adoption of

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[237] Georgia v. Ashcroft, 195 F. Supp. 2d at 66.

[238] Georgia v. Ashcroft, 539 U.S. at 478-79.

[239] Georgia v. Ashcroft, 195 F. Supp. 2d at 66. See also Brief of Appellant State of Georgia, p. 16 (blacks have "an equal chance of winning an open-seat election where the BVAP was 44%").

Georgia's standard for an equal opportunity would have permitted the state to abolish all of its majority black districts. While whites would have been able to control the outcome in the overwhelming majority of districts in the state, black voters would have been able to elect only half of the candidates of their choice--and as a practical matter far less than that--in the so-called "equal opportunity" districts. Blacks would have been turned essentially into second class voters; they could elect candidates of their choice, but only if they were white. One court likened such an electoral scheme to the comment attributed to Henry Ford that "[a]ny customer can have a car painted any color he wants so long as it is black."[240]

The arguments advanced by the state also failed to take into account the "chilling effect" upon black political participation, and the "warming effect" upon white political participation, caused by the transformation of a majority black district into a majority white district. Once a district is perceived as no longer being majority black, black candidacies and black turnout are diminished, or "chilled," while white candidacies and white turnout are enhanced, or "warmed."[241] Tyrone Brooks, a long time member of the Georgia legislature and

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[240] Citizens for a Better Gretna v. City of Gretna, La., 636 F. Supp. 1113, 1121 (E.D. La. 1986).

[241] See Colleton County v. McConnell, 201 F. Supp. 2d 618 (D.S.C. 2002), Supplemental Report of Prof. James W. Loewen, p. 2 ("[s]ocial scientists call the political impact of believing that one's

chair of the Georgia Association of Black Elected Officials, said that "when a district is changed from majority black to majority white it depresses the level of black political activity. The enthusiasm, the spirit, the sense that blacks have a chance are all diminished."[242] A formerly majority black district, particularly one without a black incumbent, would "perform" in a different way after being transformed into a majority white district.

A pattern of blacks winning almost exclusively from majority black legislative districts is particularly evident in Georgia. Under the 1992 plan, as under the 1982 plan, black electoral success was confined almost exclusively to the majority black districts. Of the 40 blacks elected to the house and senate under the 1992 plan, all but one was elected from a majority black district. The lone exception was Keith Heard from House District 89 (42% black) in Clarke County, the home of the University of Georgia. Whites, on the other hand, not only won all but one of the majority white districts, but also won 14 (26%) of the majority black districts.[243]

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racial or ethnic group has little hope to elect the candidate of its choice the 'chilling effect'").

[242] Laughlin McDonald interview with Tyrone Brooks, September 8, 2003.

[243] Members of the Georgia General Assembly, Senate and House of Representatives, Second Session of 1993-94 Term (1994); Johnson v. Miller, Civ. No. 194-008 (S.D.Ga.), trial transcript, Vol. 4, p. 237, Stipulations Nos. 61-63, Joint Ex. 11.

The same pattern of polarized voting has continued under the 2002 plan. Of the 10 blacks elected to the state senate, all were elected from majority black districts (54% to 66% black population). Of the 38 blacks elected to the state house, 34 were elected from majority black districts. Of the three who were elected from majority white districts, two (Keith Heard and Carl Von Epps) were incumbents. The third black (Alisha Thomas) was elected from a three-seat district (HD 33).[244]

Given the continuing levels of white bloc voting identified by the District of Columbia court,[245] white candidates are prohibitive favorites to win in most majority white legislative districts in Georgia, and indeed throughout the South. Abolishing majority black districts, or providing black voters an opportunity to elect candidates of their choice only in districts with reduced black populations that provide a 50-50 chance of losing, would have caused a significant reduction in the number of black office holders. The state's advocacy of such positions, and its attempt to implement them, are compelling reasons Section 5 should be extended.

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[244] Members of the General Assembly of Georgia, First Session of 2003-2004 Term.

[245] Georgia v. Ashcroft, 195 F. Supp. 2d at 69.

Georgia further demonstrated its disregard for minority voting rights by arguing in its Supreme Court brief that minorities should be excluded from the preclearance process. According to the state, "[n]ot a word in the Voting Rights Act hints that private citizens possess a right to intervene and arrogate to themselves the enormous responsibilities and power of the Attorney General."[246] The state's argument was audacious at the least, for it was directly contrary to decisions of the Court recognizing an implied cause of action to enforce Section 5, as well as subsequent acts of Congress making the right of a private cause of action to enforce the Voting Rights Act explicit. The Supreme Court rejected the state's argument, holding that "[p]rivate parties may intervene in §5 actions."[247]

The state also argued that no rights of minorities would be "impeded" by denying intervention because they could always challenge a precleared voting change under Section 2.[248] The state failed to note that the ability to challenge a voting practice on retrogression grounds does not exist under Section 2. In addition, the burden of proof is on the submitting jurisdiction under Section 5, but is upon minority plaintiffs in a Section 2 "results" case. Once a voting change

[246] Georgia v. Ashcroft, 539 U.S. 461, Brief of Appellant State of Georgia, p. 41.

[247] Georgia v. Ashcroft, 539 U.S. at 477.

[248] Brief of Appellant State of Georgia, pp. 41 n.11, 43.

is precleared, a presumption of legality attaches and minority rights and interests would by definition be "impeded" in their ability to challenge it. The very purpose of Section 5 was "to shift the advantages of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims,"[249] a purpose which the state chose to ignore.

Larios v. Cox

After the state failed to enact remedial plans for the house and senate, the Georgia three-judge court appointed a special master to prepare court ordered plans. Under the special master's plan, nearly half of the black house members, i.e., 18 (46.15%), were paired, or placed in a house district with one or more other incumbents. As a result of the pairing, a disproportionate number of African American house members would likely not have been returned to office following the next election.[250]

A number of the paired black incumbents were chairs or officers of house committees, and some were also senior members of the house.[251] Their loss

[249] South Carolina v. Katzenbach, 383 U.S. at 328.

[250] About a third (36.69%) of white house members were also paired with one or more other incumbents.

[251] See, Members of the General Assembly of Georgia, Senate and House of Representatives, First

would inevitably have adversely affected the representation of the black community in the state legislature.

The Georgia Legislative Black Caucus, represented by the ACLU, sought leave to participate as amicus curiae, which was granted. It argued that the pairing of black incumbents caused a retrogression in minority voting strength within the meaning of Section 5, and created a discriminatory result within the meaning of Section 2. The three-judge court agreed that court ordered plans should "comply with the racial-fairness mandates of § 2 of the Act, as well as the purpose-or-effect standards of § 5," and instructed the special master to draw another plan taking into account the unnecessary pairing of incumbents. A new plan was drawn and it unpaired all the black incumbents, except in one instance where pairing was unavoidable. As the court found in adopting the new plan, there was "no retrogression" from the pre-existing benchmark plans. Indeed, the number of majority black senate districts (13) was the same, while the number of majority house districts was actually increased from 39 to 44.[252] The state

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Session of 2003-2004 Term.

[252] Larios v. Cox, 314 F. Supp. 2d 1357, 1360, 1366 (N.D.Ga. 2004).

appealed, but the Supreme Court affirmed the decision of the three-judge court.[253]

In the absence of Section 5, the kind of plan adopted by the legislature would almost certainly have been far different from the one it adopted under federal oversight. In addition, the plan drawn by the three-judge court would likely have been different in its treatment of majority black districts in the absence of the non-retrogression standard of Section 5. The continued need and efficacy of Section 5 are apparent.

The partisan fight over redistricting, however, continued even after implementation of the court ordered plan. The Republican dominated legislature enacted a new congressional plan in 2005, but before doing so it passed formal resolutions that any redistricting had to comply with Section 5, and the new plan did exactly that. The black percentages in the majority black districts (represented by John Lewis and Cynthia McKinney), as well as the black percentages in the majority white districts that had elected blacks (Rep. David Scott and Rep. Sanford Bishop), were kept at almost exactly the same levels as under the plan that had been passed by the Democratic controlled legislature in 2002. The Republican controlled general assembly was obviously determined

[253] Cox v. Larios, 542 U.S. 947 (2004).

that it would not have a Section 5 retrogression dispute on its hands after it passed the new 2005 plan.

The Grand Jury Method of Appointing School Boards

During Reconstruction the legislature provided for locally elected school boards as part of a larger plan to establish a system of public education in the state. At the elections held in 1871 some blacks were elected, though the precise number is unknown. The following year the legislature, then under the control of white Redeemers, abolished the system of elected school boards and replaced it with a system of appointments by the grand jury. The grand jurors, who were required to be freeholders as well as "upright and intelligent persons," were in practice all white. Their selection of school board members insured that they would also be all white. As Representative Isaac Russell, an ardent Democrat and a white supremacist explained, "the old law often resulted in the election of ignorant men, and as the grand jury is most generally composed of the most intelligent men in the county, selections thus made would be good."[254]

[254] Atlanta Daily Sun, December 5, 1871.

The state constitution allowed counties to abolish the grand jury method of school board selection by a vote of a majority of the voters of the county.[255] Over the years, nearly all of Georgia's 159 counties had opted for elected boards; some of them spurred to action no doubt by the legally mandated desegregation of their grand juries. In a 1967 opinion, the Supreme Court had called into question the constitutionality of the state's entire "segregated system" of jury selection.[256] Recognizing that the courts would throw out indictments and convictions handed down by racially exclusive juries, Georgia enacted legislation in 1967 requiring jury lists to fairly represent "any significantly identifiable group in the county."[257] By the mid 1980s, only 27 of the state's county school districts still retained the grand jury appointment system.[258]

Johnson County - Grand Jury Appointment of School Boards

Wilson v. Powell

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[255] Article VIII, Section V, Paragraph IV.

[256] Whitus v. Georgia, 385 U.S. 545, 548 (1967).

[257] Ga. Laws 1967, p. 251.

[258] Georgia Department of Education, 1987-88, Georgia Public Schools, Georgia School Board Members and System Superintendents, Methods of Selection 4, 12 (November 1988).

The first challenge to the grand jury appointment of school boards was brought in 1983 by the ACLU on behalf of black voters in Johnson County, the home of Heisman Trophy winner Hershel Walker.[259] The county had a black population of 31%, but no black person had ever been appointed by the grand jury to serve on the board of education. The failure of the grand jury to appoint blacks was not surprising given that the county did not allow blacks to serve on juries until the mid-1960s, and then only within the limits of tokenism and Jim Crow. John Folsom, who worked for a local ice house before it was put out of business by the electric refrigerator, was the first black person to serve on a Johnson County grand jury, but he was made to sit upstairs in the balcony reserved for "colored" spectators. "I just sat up there," Folsom recalls. "I was just a figurehead."[260]

The board of education initially sought to have the suit dismissed, but the court refused. The parties subsequently agreed to replace the grand jury system with district elections, although they disagreed both on the specifics of the election plan and its method of implementation. In November 1984, the district court adopted the plaintiffs' proposed plan and ordered a special election held in

[259] Wilson v. Powell, Civ. No. 383-14 (S.D. Ga.).

[260] Atlanta Constitution, December 30, 1984.

January 1985. At the election, a black candidate was elected from a majority black district, the first African American ever to serve on the board of education.[261]

Two months later, Senator Culver Kidd of Milledgeville called for statewide legislation to abolish the grand jury appointment system. "The courts are going to demand it," he said. "So why not go ahead and get rid of that headache and save the taxpayers a lot of money."[262] It was not until five years later that the general assembly heeded Senator Kidd's advice.

Ben Hill County - Grand Jury Appointment of School Boards

Vereen v. Ben Hill County

A second challenge to the grand jury appointment system was brought in 1988 against Ben Hill, a sparsely populated county on the state's eastern coastal plain, halfway between Albany and Waycross and not far from the spot where Jefferson Davis, President of the Confederacy, was captured by Union troops on May 10, 1865. Although blacks were 30% of the population in Ben Hill County, the grand jury had never appointed a black person to serve on the board of

[261] Id., Order of October 2, 1984.

[262] Atlanta Journal, December 30, 1984.

education. Black residents of the county, represented by the ACLU, filed suit in federal court in 1988 alleging that the grand jury had systematically excluded them from service on the board of education, and that the 1872 grand jury law had been enacted with a racially discriminatory purpose in violation of Section 2 and the Constitution.[263] The plaintiffs asked the court to invalidate the grand jury appointment system in Ben Hill and the other counties in the state that still used it.

Both sides agreed to try the discriminatory purpose claim first, since if plaintiffs prevailed on it the more time consuming inquiry into the effect of the system in each county would have been minimized or avoided. Shortly after the complaint was filed the grand jury in Ben Hill broke with its 166 year old tradition of white only appointments, and put James Wilcox, an African American, on the board of education.

The contemporaneous record of the adoption of the grand jury selection statute made out a strong case that the legislature in 1872 had been motivated by a desire to exclude blacks from service on school boards. Four respected southern historians - Peyton McCrary, Dan Carter, Emory M. Thomas, and Edward J. Larson - who testified in the case agreed that the grand jury system

[263] Vereen v. Ben Hill County, 743 F. Supp. 864 (M.D. Ga. 1988).

had been adopted to ensure that blacks would not serve on local school boards. According to McCrary, one of the witnesses for the plaintiffs, race may not have the been the only motive for the legislature's adoption of the grand jury appointment system, but "that was the clearest motive of which I found evidence. . . . It is the most important motive."[264] Carter, another plaintiffs' witness, said "the evidence supports the belief that the grand jury system was adopted in order to either minimize or totally eliminate black representation on the school boards."[265]

Thomas, who testified on behalf of the defendants, said "race was a factor" in the decision to adopt the grand jury appointment statute, although he believed other factors were present as well and was not prepared to say which was "dominant." Since the chances of blacks serving on juries were slim, giving the grand jury the power to make appointments "further removed education from any chance of black participation, certainly in a supervisory capacity," a result which, according to Thomas, the legislature "intended."[266]

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[264] Vereen v. Ben Hill County, Declaration of Dr. Peyton McCrary, Plaintiffs' Exhibit 63, p. 106.

[265] Id., Deposition of Dan T. Carter, July 24, 1989, p. 33.

[266] Id., Deposition of Emory M. Thomas, July 25, 1989, pp. 8, 10-2, 55.

Larson, another witness for the defendants, generally shared Thomas's views. Based upon "the general activities of that particular legislature, of the timing, of the general context of the situation," he said, the legislature "certainly assumed that they were also consolidating white dominance. I don't think they would have adopted this bill unless they thought that it would also do that."[267]

The district court essentially ignored the testimony of the historians and ruled that the 1872 statute had not been enacted with a discriminatory purpose. Plaintiffs, in the court's view, had not presented "specific," or direct, evidence of racial purpose. While plaintiffs had shown the "discriminatory propensities and practices of the 1872" legislature, they failed to show that the statute "was specifically designed to carry out the discriminatory intentions" of the legislature.[268] Apparently, nothing less than overtly racist statements from legislators could meet the court's exacting standard of proof. But as Carter pointed out, during the Reconstruction period, with the continuing fear of federal intervention,

> the fact that there is an absence of an explicit racial reference to me is exactly what I would have expected, and I would be

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[267] Id., Deposition of Edward J. Larson, July 25, 1989, pp. 25, 27, 102.

[268] Id., 743 F. Supp. at 868-89.

> stunned as an historian if such an explicit purpose were stated in January of 1872.[269]

The opinion of the district court was soon overtaken by events. The general assembly, at the request of local officials, enacted a statute in 1990 abolishing the grand jury appointment system in Ben Hill County and adopting a seven member board of education elected from single member districts.[270] And at its 1991 session the legislature took the step that had been urged by Senator Culver Kidd five years earlier. It passed a statute to amend the state constitution in order to abolish the grand jury appointment system statewide and require all local boards of education, both county and city, to be elected by the voters residing in the applicable school districts.[271] The amendment also set December 31, 1993, as the date on which the terms of office of all appointed school board members would end. Georgia voters ratified the amendment in the 1992 general election.[272]

The passage of the local and statewide laws rendered the Ben Hill lawsuit moot. The district court, upon motion of the plaintiffs, "reluctantly" vacated its

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[269] Id., Deposition of Dan T. Carter, p. 36.

[270] Ga. Laws 1990, p. 4435.

[271] Ga. Laws 1991, p. 2032.

[272] Ga. Const. Art. VIII, Sec. 5, Para. 2.

opinion and dismissed the complaint, bringing the litigation and the racially exclusive era of grand jury appointments to a close.[273]

Georgia's Sole Commissioner Form of Government

Georgia is the only state which authorizes counties to use a sole commissioner form of government.[274] Under the sole commissioner system, all the legislative and executive powers of county government, including levying taxes, hiring and firing county employees, filling vacancies in office, supervising the county police, auditing county accounts, building roads and bridges, and controlling county property, etc., are combined in a single office holder elected from the county at-large.[275] The sole commissioner system is the ultimate form of majority-take-all elections. Whatever the theoretical, good government rationales for the system--that it is cost effective, efficient, and so on--it has operated, like so many institutions in the state, to exclude blacks from effective participation in the political and democratic process. There is no record of a black person ever being elected to office under a sole commissioner scheme.

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[273] Vereen v. Ben Hill County, Order of March 10, 1993, slip op. at 1.

[274] 1987 census of Governments, Vol.1, No. 2: Government Organization: Popularly Elected Officials [GC87(1)-2] (1990).

[275] Ga. Code Ann. § 36-5-22.1.

Carroll County, which used the sole commissioner system, was sued under Section 2 by the NAACP and private plaintiffs in 1984.[276] The district court dismissed the complaint but the court of appeals reversed. It found that numerous factors showing vote dilution had been established, including polarized voting and the lack of minority elected officials. Although the county was 17% black, the court found that "no black has ever been elected to any county office in Carroll County."[277] The court also found there was evidence tending to show the sole commissioner system had been enacted with a discriminatory purpose.

The county had adopted the sole commissioner system in 1951.[278] Prior to that time it had a three member commission elected at-large. One of the sponsors of the sole commissioner bill was Rep. Willis Smith of Carroll County. He had first introduced a sole commissioner bill in the general assembly in 1947, and had also been a sponsor the same year of a bill designed to maintain the white primary by allowing the Democratic Party to conduct elections entirely without state supervision. According to Willis, "Georgia is in trouble with the

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[276] Carrollton Branch of NAACP v. Stallings, Civ. No. 84-122-6 (N.D. Ga.).

[277] Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547, 1560 (11th Cir. 1987).

[278] Ga. Laws 1951, p. 3310.

Negroes unless this bill is passed. This is white man's country and we must keep it that way." The court of appeals concluded that the statement in 1947 "was evidence of an intent to discriminate against black voters in any voting legislation before the General Assembly during that session, and that a finder of fact might well infer that such intent continued until 1951 when the bill was re-introduced under the same sponsorship."[279] After the case was sent back to the district court for reconsideration, the county agreed to adopt a plan expanding the size of the county government, with six members elected from districts and a chair elected at-large.[280]

Following the decision in the Carroll County case, lawsuits were brought by the ACLU on behalf of black residents challenging the sole commissioner systems in Bleckley, Telfair, Pulaski, and Wheeler Counties.

Bleckley County's Sole Commissioner Form of Government

Holder v. Hall

NAACP of Cochran v. Bleckley County

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[279] Carrollton Branch of NAACP, 829 F.2d at 1551-52.

[280] Id., Order of SeptemberSeptember 17, 1988..

The challenge to the sole commissioner form of government in Bleckley County was brought in 1985. The federal trial judge dismissed the complaint because he felt the plaintiffs had not carried their burden of proof, but he acknowledged that blacks, who made up 22% of the county's population of 10,767, had virtually no chance of winning under the existing system.[281] "I wouldn't run if I were black in [Bleckley] County," he said from the bench at the end of the trial. "You're going to put your hard earned time and shoe leather campaigning throughout this county . . . under these circumstances?"[282] The plaintiffs were in agreement. "It'd be a waste of money" for a black person to run for office in Bleckley County, said plaintiff David Walker. "If you know the trend and you know that you're going to lose, there's no sense in trying," added Rev. Wilson C. Roberson, another of the plaintiffs. A black person "hasn't got a chance."[283]

The court of appeals reversed, concluding that "the evidence conclusively establishes a pattern of racially polarized voting," and that "the totality of the circumstances found in Bleckley County clearly reveal a situation where the

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[281] Hall v. Holder, 757 F. Supp. 1560 (M.D. Ga. 1991)

[282] Hall v. Holder, 955 F.2d 1563, 1571 (11th Cir. 1992).

[283] Id., Record Volume 4, p. 332, Volume 3, pp. 104, 110.

electoral power of Bleckley County blacks has been abridged 'on account of race or color.'" The court found, among other things, that:

> *Bleckley County had enforced racial segregation in all aspects of local government
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> *Bleckley County had fought desegregation in all aspects of public life
>
> *Bleckley County had deprived blacks of the opportunity to participate in public life and government, even prohibiting blacks from registering to vote and from voting
>
> *The only polling place for the entire county, which comprised 219 square miles, was in Cochran at the Jaycee Barn, owned and operated by the "all-white" Jaycees
>
> *Blacks are unable to sponsor candidates for Bleckley County's sole commissioner office because such candidacies are futile
>
> *A substantial number of Bleckley County's voters were highly susceptible to racist, segregationist appeals . . . [and] voted accordingly.[284]

The county appealed to the Supreme Court which brushed aside the overwhelming evidence of vote dilution and elevated formalism and theory over fact and experience in holding, 5-4, that the size of an elected body could not be challenged under Section 2. Three of the justices in the majority said that it was impossible to establish an objective benchmark or standard for increasing the size of an elected body. None of the counties which abolished their sole

commissioner systems, however, had any difficulty in establishing new sizes for their county governments. The other two justices who made up the majority said that the size of a governing body was not a voting "practice" within the meaning of Section 2.[285]

Two other jurisdiction were also sued in the Bleckley County litigation, Cochran, the county seat, over its use of at-large elections for its city council, and the county board of education, over its use of a malapportioned districting plan. The board of education agreed to implement a new plan and hold an election in a majority black district. The election was held in February 1986, and a black person was elected. The city's case was also settled on the basis of district seats. The first election under the plan was held in December 1986, and a black person was elected to the city council.

The ACLU also brought suit in 1988 against Bleckley County on behalf of black residents and the local NAACP of Cochran/Bleckley County, charging that discrimination in the selection and appointment of poll managers and poll workers in county elections violated the Constitution and Section 2.[286] In

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[284] 995 F.2d at 1566, 1572-74.

[285] Holder v. Hall, 512 U.S. 874, 885, 890, 892 (1994).

[286] NAACP Chapter of Cochran/Bleckley County v. Bleckley County, Civ. No. 88-32-2-MAC (M.D. Ga.)

elections from 1978 through 1986, defendants made 224 appointments to the position of poll manager for Bleckley County elections, yet none of the persons appointed was black, and no black person had ever been appointed to or served as a poll manager. During the same period, defendants made 509 appointments to the position of poll worker, of which only 29 (6%) were black persons, compared to the black population of the county, which was approximately 22%. Plaintiffs sought a declaratory judgment and injunctive relief, but the court declined to rule on any of the issues pending resolution of Hall v. Holder, which was not decided by the Supreme Court until 1994. However, even after the Supreme Court's decision in that case, the court did not rule on the issues before it in NAACP v. Bleckley County.

Telfair County's Sole Commissioner Form of Government

Clark v. Telfair County

The plaintiffs filed suit in the Telfair County case in 1987, prior to the decision of the Supreme Court in Holder v. Hall, contending that the sole commissioner system diluted black voting strength.[287] Although blacks were about one third of the county's population, no black person had ever been elected to the commission. The sole commissioner decided not to contest the allegations of the complaint and agreed to adopt a new form of government consisting of a board of commissioners elected from districts. Two white residents, however, who opposed such a remedy, moved to intervene in the law suit, claiming that the plaintiffs had instituted "[a] campaign to terrorize and intimidate the taxpayers of Telfair County." They raised some 21 defenses to the complaint, including that the suit was barred by the Eleventh Amendment, that "Blacks have not been discriminated against in Telfair County," plaintiffs lacked standing, and the action was "barred by the doctrines of sovereign governmental, judicial, official, and good faith immunity."[288] The district court denied intervention noting that the movants' petition "shows disturbing substantive

[287] Clark v. Telfair County, Civ. No. 287-25 (S.D. Ga.).

[288] Id., Proposed Answer of Intervenors Fred A Smith and Joe Tom Jeffries

defects. Essentially it consists of a litany of defenses which the movants believe should be asserted against the plaintiffs. I have examined these defenses. Most of them are ethereal at best, and spurious at worst."[289] The parties agreed that plaintiffs had established "a prima facie case" that the sole commissioner form of government violated Section 2, and the court subsequently issued an order in October 1988, implementing an agreed upon plan providing for a board of commissioners elected from five single member districts, one of which was majority black.[290]

Pulaski County's Sole Commissioner Form of Government

Sutton v. Anderson

The suit against Pulaski County was filed in 1989, but was stayed pending a final decision in the Bleckley County case. The complaint was dismissed after the Supreme Court ruled that Section 2 could not be used to challenge the size of an elected body.[291]

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[289] Id., Order of December 9, 1987.

[290] Id., Order of October 26, 1988.

[291] Sutton v. Anderson, Civ. No. 89-58-1 (M.D. Ga.).

Wheeler County's Sole Commissioner Form of Government

Howard v. Commissioner of Wheeler County

Wheeler County adopted its sole commissioner form of government in 1924 to replace a three member board of commissioners elected from single member districts. As of 1990, no African American had ever been elected to the office of sole commissioner or any other county office elected at-large. The only black office holder in the county was elected to the school board from a majority black district.

Plaintiffs filed suit in 1990, prior to the decision in Holder v. Hall, and contended the sole commissioner system was established with a racially discriminatory purpose and excluded blacks from effective participation in local politics in violation of Section 2. After discovery by plaintiffs, the parties agreed to enjoin the pending 1992 election and settle the lawsuit by adopting a three member commission with one majority black district. The plan was ordered into effect and at a special election in May 1993, the first African American commissioner in the history of the county was elected to office.[292]

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[292] Howard v. Commissioner of Wheeler County, Civ. No. 390-057 (S.D. Ga. January 13, 1993). A similar challenge was brought, and settled, in Webster County, Nealy v. Webster County, Civ. No. 88-203 (M.D. Ga. March 16, 1990), while the state legislature abolished sole commissioner systems in Cherokee County in 1989, Dade, Heard, and Franklin Counties in 1991, and Catoosa and Murray Counties in 1992. Ga. Laws 1989, p. 4295; Ga. Laws 1991, pp. 3893, 3976, 4681; Ga. Laws 1992, pp. 4501, 4649.

Less than a dozen counties in Georgia still use the sole commissioner form of government,[293] and in none of them has a black person ever been elected commissioner.

Georgia's Majority Vote Law

Brooks v. Miller

Prior to adoption of Georgia's majority vote requirement in 1964, elections to statewide offices were conducted under the infamous county unit system, a non-majoritarian scheme which was established by the general assembly in 1917 and gave control to the rural counties containing a minority of the population while diluting the voting strength of urban and black voters in the metropolitan areas of the state. County elections were local option, with most counties using a simple plurality system.

The county unit system was struck down by the Supreme Court in 1963 in Gray v. Sanders, which first used the phrase "one person, one vote."[294] A statewide majority vote bill was introduced in the house the same year. Its chief sponsor, Denmark Groover, was widely quoted in the press as saying that the

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[293] Holder, 512 U.S. at 877.

[294] 372 U.S. 368, 381 (1963).

measure was needed to "restore the protection" that had been lost with the demise of the county unit system, and to thwart election control by blacks and other minorities.[295] Groover later appeared before a senate committee and warned that the federal government "intercedes to increase the registration of Negro voters," and that a majority vote rule would prevent the election by plurality vote of a candidate supported by a "bloc" vote group - meaning blacks.[296] The majority vote provision was passed in 1964 as part of a general revision of the election code, which also included a discriminatory literacy requirement for voter registration and a discriminatory "good character and understanding" test as an alternative to literacy.[297]

Leroy Johnson, the first black elected to the Georgia legislature since Reconstruction and a member of the state senate at the time, said that:

> many white members of the General Assembly favored adoption of a statewide majority vote requirement as a method of diluting minority voting strength. . . . The General Assembly would not have passed a statewide majority vote requirement, either as a house bill in 1963 or as part of the 1964 election code, unless the more conservative members

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[295] McDonald (2003), p. 92.

[296] Id. at 94.

[297] Id. at 102.

> were convinced that the runoff system would help maintain white control over local and state government.[298]

The majority vote requirement had the discriminatory effect its proponents foresaw and intended. In one of the first elections held under the new system, Sam Williams, a black Savannah business man, won a plurality against four whites in the 1964 primary for sheriff of Chatham County, outdistancing his nearest opponent by some 400 votes. In the ensuing runoff, the white voters regrouped and defeated Williams two to one.[299] Aside from discouraging blacks from seeking office, especially statewide office and offices in majority white districts, the net loss to blacks from 1970-1995 caused by the majority vote requirement was 27 nominations or elections to office.[300]

In 1990, Tyrone Brooks, a veteran member of the Georgia House of Representatives and other black residents of the state, represented by the ACLU, filed suit challenging Georgia's statewide majority vote requirement.[301] The Brooks plaintiffs made three claims: the majority vote law was enacted with a discriminatory purpose; it discouraged blacks from running for office,

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[298] Brooks v. Harris, Civ. No. 90-CV-1001 (N.D. Ga.), Pl.Ex. 306, pp. 7-8.

[299] Savannah Morning News, September 24, 1964.

[300] Brooks v. Miller, 158 F.3d 1230, 1235 (11th Cir. 1998).

[301] Brooks v. Harris, 90-CV-1001 (N.D. Ga.).

particularly in majority white jurisdictions; and it resulted in discrimination in violation of Section 2 of the Voting Rights Act. The district court, however, ruled that the majority vote requirement did not violate the Constitution or the Voting Rights Act, and the court of appeals affirmed.[302] In ruling that the requirement had not been enacted with a discriminatory purpose, the court ignored the testimony of two historians who testified on behalf of the plaintiffs. Morgan Kousser, a professor at the California Institute of Technology, said that "[e]very factor that should be considered in a voting rights intent case points, in this instance, to the same conclusion [of purposeful discrimination], and every factor counts heavily against the alternative hypotheses."[303] Steve Lawson, a history professor at the University of North Carolina, reached the same conclusion, "that race played an integral part in determining the legislative outcome."[304]

The court of appeals further held that the discriminatory results standard of Section 2 could not be used to challenge a majority vote law because there was no "adequate remedy" for a violation. The court reasoned that a plurality system could result "in a candidate's wining with 1% of the vote," which "would

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[302] Id., 158 F.3d at 1236, 1241.

[303] Id., Pl. Ex. 102, pp. 27, 32.

[304] Id. Pl. Ex. 300, p. 60.

seriously undermine the legitimacy of the government."[305] Such a hypothesis is based more on fancy than on fact. There would have to be a minimum of 101 candidates in an election for any person to win with just 1% of the vote, and such elections simply don't exist in Georgia. Moreover, the Georgia legislature was to prove the court wrong; there was an "adequate" alternative to the majority vote requirement.

The state had defended the 1964 law by claiming that without a majority vote requirement "stalking horse" candidates could manipulate the electoral process by splitting the vote and allowing entrenched, corrupt incumbents who lacked majority support to stay in office. Roy Barnes, a member of the house who was later elected governor, said a majority vote requirement was "essential" and "there is nothing more American than to have a majority vote requirement."[306] But in 1994, the Democrat controlled legislature brushed aside the good government arguments it had advanced in support of the majority vote requirement and repealed the law in favor of a 45% plurality vote for general elections, except those for certain constitutional offices. Four years later, the

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[305] Id., 158 F.3d at 1240.

[306] McDonald (2003), p. 208.

legislature abolished the majority vote requirement for state constitutional offices as well.

The catalyst for repeal was the defeat of Wyche Fowler, the white Democratic incumbent, by a Republican in the 1992 general election for the U.S. Senate. In a three-way contest, Fowler won a plurality of the votes but was defeated in the ensuing runoff. Thomas Chambless, a house Democrat, explained that it was the majority vote requirement itself - not the plurality rule as had previously been claimed - that allowed so-called stalking horse or fringe candidates to manipulate the electoral process. The people of Georgia were poorly served, he said, "by having a run off election . . . because of the existence of some fringe or very small party candidate such as occurred in 1992."[307]

If any real principle emerges from the state's adoption and subsequent rejection of a majority vote requirement, it is that the party or faction in power can generally be counted on to adopt rules for elections it thinks will promote its own interests, regardless of the discriminatory impact of such rules on minority voters. The Brooks litigation and its aftermath underscore the need for fair and effectively enforced voting rights laws.

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[307] Id., Pl. Ex. 320, p. 1115.

Challenging Restrictive Voter Registration Procedures

Voter Education Project v. Cleland

Georgia traditionally had extremely restrictive registration procedures. Citizens could only be registered to vote in county, state, and national elections by county registrars and deputy registrars. Registration could only be conducted by personal appearance, either at the main office of the board of registrars, or at additional places and times designated by the board of registrars. Additional registration places and hours of operation had to be advertised in a newspaper of general circulation in the county at least seven days prior to the first day for registration. State law placed nearly total discretion in the hands of local officials whether to appoint deputy registrars and permit voter registration at places other than the main voter registration office.

In September 1984, the ACLU sued state officials on behalf of the Voter Education Project, the Georgia State Chapter of Operation PUSH, the NAACP, a class of 1.2 million eligible yet unregistered voters in Georgia, and a class of 450,000 eligible but unregistered black voters in the state.[308] Several registrar boards had failed to appoint enough, or any, deputy registrars. Several counties had imposed dual registration requirements, which required each eligible citizen

[308] Voter Education Project v. Cleland, C84:1181A (N.D. Ga.).

to register with the county registrar and also with the municipality's registrar in order to vote in national, state, and county elections as well municipal elections. Furthermore, many of the county and city boards refused to act favorably on applications from civil rights groups, such as the NAACP, to appoint their members as deputy registrars. Other boards designated satellite registration locations that were inconvenient to black citizens and refused to permit registration at convenient locations such as churches, public housing facilities, and NAACP offices.

Plaintiffs contended state law was vague, gave local registrars uncontrolled discretion in the registration process, and resulted in proportionately fewer blacks than whites being registered to vote. Plaintiffs said the state had a duty to remedy the continuing effects of past discrimination and facilitate minority voter registration. Appropriate remedies included allowing deputized volunteers to register voters door to door, and permitting mail-in and election day registration.

The district court denied the plaintiffs' request for a preliminary injunction after the secretary of state issued emergency regulations requiring each county registrar to designate at least two additional registrars. The case was finally dismissed in January 1987, pursuant to a settlement agreement in which the

defendants agreed to expand voter registration opportunities throughout the state.

Charles H. Wesley Education Foundation, Inc. v. Cox

When the Voting Rights Act of 1965 was adopted, organizations could conduct voter registration drives, but only if their volunteers underwent training to become deputy registrars, or members of the county registrar's staff were available to work at the drives. Drives were also authorized to be held only on specific dates, usually for two or three days, and at fixed locations. Door to door registration drives were prohibited. In the early 1970s, some Georgia counties began designating "satellite" registration sites, which were usually banks or schools where an employee who had gone through training could accept registration applications.[309]

These restrictions changed dramatically with the adoption of the National Voter Registration Act of 1993 (NVRA). That act, with its requirement that states accept mail in registration and offer registration at motor vehicle offices and various state agencies, ended Georgia's rigid control of access to voter

[309] For a discussion of the restrictions placed on registration drives by groups such as the League of Women Voters and the NAACP, see NAACP v. State of Georgia, 494 F. Supp. 668 (N.D. Ga. 1980)(three-judge court), which enjoined under Section 5 a decision to terminate all registration drives by civic organizations.

registration. The NVRA specifically required state election officials to make mail in forms readily available to "private entities, with particular emphasis on making them available for organized voter registration programs."[310] Despite these provisions of the law, Georgia immediately took steps to limit voter registration drives.

The director of the elections division of the secretary of state's office instructed all chief registrars that persons filling out mail in registration applications had to mail or deliver the forms themselves. Organizations conducting registration drives were prohibited, according to the director, from returning the forms for the applicants, for example, by "bundling" them into one envelope or box and then delivering or mailing them to the secretary of state's or a registrar's office.[311] Citing a Georgia statute that said "a person may apply to register to vote by completing and mailing the form to the Secretary of State," the director concluded that "[t]here is no authority for someone else to return the form for a person."[312] The director also said the applications contained confidential information that could not be disclosed to those who were not

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[310] 42 U.S.C. § 1973gg-4(b).

[311] Memorandum from H. Jeff Lanier, Director, Election Division to "All Chief Registrars," May 12, 1995.

[312] O.C.G.A. § 21-2-223; Lanier Memorandum (1995) p. 2.

elections officials. Simple logic would dictate, however, that applicants should be free to mail their own applications, or give them to someone else to mail.

In 2004, the Charles H. Wesley Education Foundation, a predominantly black chapter of a social service fraternity, decided to conduct a voter registration drive. Its members explored the options under state law of undergoing training to become volunteer deputy registrars, which would have allowed them to handle applications and deliver them to the secretary of state. But after learning of the restrictions imposed by state law, including limiting the time and place of a registration drive and requiring advertising in the media, they elected to use the NVRA national registration forms and conduct a drive at a major shopping center. The volunteers retained the completed applications and mailed them in one package to the secretary of state's office. The secretary informed the fraternity's lawyer that it was rejecting the forms because no registrar or deputy registrar was at the drive. In the view of the state, the handling and mailing of the forms after they were filled out violated state law. The state said it was mailing a new form to each applicant, though the registration cutoff for a statewide primary was only three days away.

The state's position not only denied people the right to vote, but was nonsensical. If the fraternity members had mailed the applications one at a time

in separate envelopes, there would have been no indication the state's policy had been ignored.

The fraternity and several of the people who had filled out applications sued to enjoin the state's policy of rejecting applications submitted in bulk.[313] Plaintiffs relied on the NVRA, which provides that states "shall accept" mail in forms.

The court held that it did not matter how an application got delivered, only that it made it to the election officials. The court entered a preliminary injunction requiring that qualified voters who sought to apply through the registration drive be eligible to vote, and made the relief effective in time for the upcoming primary. The state processed the applications and those qualified were allowed to vote in the primary and during the pendency of the litigation. But the state appealed the granting of the preliminary injunction.

The ACLU filed an amicus brief in the court of appeals supporting the plaintiffs. It argued the state's policy violated both the specific language of the NVRA and Supreme Court decisions, which require that severe restrictions on the right to vote be justified by strong state interests. Here, the burden was severe - timely registration applications were rejected, and the state's interests in

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[313] Charles H. Wesley Education Foundation, Inc. v. Cathy Cox, 324 F. Supp. 2d 1358 (N.D. Ga. 2004).

protecting the privacy of voters and against voter fraud were not advanced by its rejection policy. The reality was the policy was a radical limitation on the NVRA.

The court of appeals affirmed the grant of the preliminary injunction: "[t]he NVRA protects Plaintiffs' rights to conduct registration drives and submit voter registration forms by mail, and Defendants' denial of the sixty-four forms here was a clear violation of that interest."[314] It concluded:

> The associational and franchise-related rights asserted by the Plaintiffs were threatened with significant, irreparable harm, and the injunction's cautious protection of the Plaintiffs' franchise-related rights is without question in the public interest.[315]

State election officials have drafted interim regulations to implement the preliminary injunction, registration drives by private citizens are currently conducted, and applications accepted no matter the mode of delivery. But the state continues to contest the merits of the lawsuit in the district court.

Project VOTE! v. Ledbetter

Project VOTE!, a non-profit, non-partisan organization that conducts voter registration of the poor and unemployed, including recipients of public

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[314] Charles H. Wesley Education Foundation, Inc. v. Cathy Cox, 408 F.3d 1349, 1354 (11th Cir. 2005).

[315] Id. at 1355.

assistance, held registration drives at several food stamp distribution centers in Fulton County, Georgia, prior to the 1986 primary election. Just two years earlier, during the 1984 general election, 74% of eligible whites, but only 64% of eligible blacks were registered to vote in Georgia.

After registering more than 400 persons at a single Department of Family and Children Services (DFACS) office in Atlanta during a one week period before the primary elections, Project VOTE! sought permission to continue its activities elsewhere in Fulton County and other locations around the state prior to the general election. Although the DFACS managers uniformly had no objections, state officials informed Project VOTE! in August that it would no longer be permitted to conduct voter registration at DFACS offices.

The ACLU filed suit the following month on behalf of Project VOTE! alleging that because the new policy constituted a change in voting standards, practices or procedures, it required preclearance under Section 5.[316] The lawsuit also charged the state with violating the plaintiffs' First and Fourteenth Amendment rights, and asserted that the state's decision discriminated against blacks in violation of Section 2. Within a week of filing the lawsuit, the state agreed on September 12, 1986, to allow Project VOTE! to conduct non-partisan

[316] Project VOTE! v. Ledbetter, CV-C86-1946A (N.D. Ga.).

voter registration activities in the public waiting areas of DFACS offices as it had requested.

Georgia Judicial Elections

Brooks v. Georgia State Board of Elections

Georgia desegregated its juries in response to a series of Supreme Court decisions setting aside convictions on the grounds that blacks had been unconstitutionally excluded from grand and trial juries.[317] The state also desegregated its prisons and jails in the wake of Lee v. Washington, a case brought by the ACLU that resulted in a Supreme Court decision that racial segregation in penal facilities in Alabama was unconstitutional.[318] Despite these reforms, there was one instrumentality of justice that remained essentially segregated well into the 1980s: the state's judiciary. This was true for several reasons. Traditionally, none of the state's public or private law schools would admit blacks, and as a result there were very few black lawyers, most of whom practiced in the metropolitan Atlanta area. Elections were also held at-large in all the judicial circuits, with numbered post and majority vote requirements,

[317] E.g., Whitus v. Georgia, 385 U.S. 545 (1967).

[318] Lee v. Washington, 390 U.S. 333 (1968).

which allowed the white majority to control the outcome. In addition, three-quarters of the judges were first appointed to office by the governor and ran for reelection with the advantage of incumbency. Incumbent judges were generally unopposed and rarely defeated.

Georgia is divided into 45 judicial circuits, each containing between one and eight counties, and electing between one and 14 superior court judges. All of the circuits had a majority white voting age population, and as of 1988, only 6 of the 137 judges were black. From 1964 to 1988, the state created more than 77 new judgeships and five new judicial circuits, but it failed to submit any of the new voting practices for preclearance under Section 5 until June 1988.

The ACLU, representing black elected officials and community leaders from across the state, filed suit on July 13, 1988 (the Brooks case), challenging: (1) the at-large method of electing superior court judges, with majority vote and numbered post requirements, as diluting minority voting strength under Section 2; (2) the continuing failure of the state fully to comply with Section 5 in creating new superior court judgeships and circuits; and (3) the countywide method of electing judges of the state court.[319] Plaintiffs determined that under a single

[319]Brooks v. State Board of Elections, Civ. No. CV 288-146 (S.D. Ga.).

member district system of elections for the superior courts, a minimum of 25 majority black districts could be created.

The Attorney General notified the state in August 1988, that he did not object to 29 of the new judgeships and three of the five new circuits, which were primarily located in the mountain areas of the state in which there was no substantial black population. As to the remaining changes he requested additional information, including election returns, and the racial designation of registered voters. The state submitted some additional information, but refused to comply with the Attorney General's request, taking the position that the changes were not in fact subject to Section 5. Accordingly, the Attorney General notified the state in June 1989, that he objected to the addition of the 48 judgeships and the creation of two new circuits to which he had earlier requested information.[320] Despite the objection, the state continued to implement the objected-to changes.

Plaintiffs filed a motion to enjoin further enforcement of the disputed statutes, and requested the three-judge court to declare the unprecleared judgeships null and void. The district court, after briefing (joined in by the United States, as amicus curiae in support of plaintiffs) and oral argument, held

[320] James P. Turner, Assistant Attorney General, to Carol Atha Cosgrove, June 16, 1989.

that the changes affecting the election of judges were subject to Section 5.[321] It gave the state 30 days to submit the additional information to the Justice Department. If it did not do so, or if preclearance were not obtained, the order provided that the judgeships would cease to exist at the conclusion of the incumbents' terms of office.

The state provided the requested information to the Attorney General, who on April 25, 1990, entered an objection to the 48 unprecleared judgeships, as well as an additional 10 judgeships created in 1989 and 1990. He concluded that "polarized voting generally prevails in all of the superior court circuits now under review and there is a consistent lack of minority electoral success in at-large elections." The Attorney General further noted there was substantial evidence indicating the majority vote requirement was adopted by the state in 1964 with an "invidious purpose."[322]

The state appealed the order of the three-judge court, and the Supreme Court affirmed, thus establishing that the addition of elected judgeships was a covered change under Section 5 of the Voting Rights Act.[323] The state also filed

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[321] Brooks v. State Board of Elections, 775 F. Supp. 1470 (S.D. Ga. 1989).

[322] John R. Dunne, Assistant Attorney General, to Michael J. Bowers, April 25, 1990.

[323] Georgia State Board of Elections v. Brooks, 498 U.S. 916 (1990).

an action in the District Court for the District of Columbia seeking judicial preclearance of the changes that had been objected to by the Attorney General. The Brooks plaintiffs filed a motion for leave to intervene as parties defendant opposing preclearance, but the court granted them leave to participate only as amicus.

In October 1991, the Attorney General objected to another state law creating an additional state court judgeship in Athens-Clarke County because he was "unable to conclude that this election method was free of discriminatory purpose (with respect to the use of the majority vote requirement), and because the election system appeared to deny black voters an equal opportunity [to elect candidates of their choice]". He further noted that "local elections are characterized by racially polarized voting."[324]

As the Section 5 case was proceeding in the District of Columbia, Anthony Alaimo, a federal district court judge in Brunswick, offered to act as a mediator to try to work out a settlement agreement in the vote dilution case filed by the Brooks plaintiffs. He convened a series of negotiating sessions, which resulted in a proposed settlement in June 1992. The settlement was publicly hailed as an historic achievement by Governor Zell Miller, who had announced earlier that

[324] John R. Dunne, Assistant Attorney General, to Denny C. Galis, October 1, 1991.

resolving the litigation over the selection of judges was a priority of his administration.

Under the settlement, the state agreed to increase the number of African American superior court judges from the existing nine to not less than 25 by December 31, 1994, and an additional five new black superior or state court judges, bringing the total number of African American judges to a minimum of 26. The state would achieve those goals by filling judicial seats "frozen" under the existing court injunction, as well as by creating new "State Assignment Judges" who would serve throughout the state.

The black community would have substantial input in the selection of judges by having one of the plaintiffs and plaintiffs' counsel as sitting members of a Judicial Nominating Commission. The governor would appoint judges from the lists supplied by the commission.

All judicial elections would be held under a "retention" election system, thereby increasing the likelihood that the newly appointed black judges would be re-elected. In the event black judges lost their elections, the commission would nominate replacements.

The state would be permanently barred from discriminating on the basis of race in nominations or appointments and would remain subject to the jurisdiction of the court until such time as it achieved a "racially diverse judiciary

which is reasonably representative of the population of the state." Judge Alaimo would serve as arbitrator of disputes concerning enforcement of the agreement. In the event of backsliding by the state, plaintiffs would be able to renew their challenge to the system of judicial selection under the Voting Rights Act. The settlement was conditioned upon preclearance by the Department of Justice and/or judicial preclearance in the case in the District of Columbia.

A group of white legislators and citizens promptly filed an action in state court challenging the governor's authority to change, by way of a settlement, the method of electing judges. The superior court held that the governor had the power to enter into the settlement and dismissed the action, but the state supreme court on appeal ruled the action was not timely because the settlement agreement had not been finalized.[325] The Department of Justice gave approval to the settlement, and it was then submitted for approval to the district court in Savannah.

A fairness hearing was held in January 1994, at which the plaintiffs offered substantial evidence of racial bloc voting and past discrimination in education and admission to the bar. The court, however, rejected the settlement agreement. It held that in the absence of a violation of Section 2 of the Voting Rights Act, the

[325] Cheeks v. Miller, 262 Ga. 687 (1993).

court was without authority to accept a consent agreement changing the provisions of state law providing for the election of judges. The court also said the consent agreement was an unlawful "quota" system in violation of the Fourteenth Amendment.[326] Plaintiffs appealed, based on the assurances of the state defendants that they would continue to support the proposed settlement agreement. However, on appeal the state changed its position and argued that the case was now moot since some of the deadlines for implementing the agreement had passed, and that the district court did not abuse its discretion in rejecting the settlement. The court of appeals adopted the state's position and dismissed the appeal as moot in July 1995.[327]

After the rejection of the settlement agreement, a trial was held in the District of Columbia court, which in a 2-1 decision precleared the state's voting changes.[328] The majority held that the decision to add new judges was based upon case load and was therefore nondiscriminatory, and it refused to consider whether the method of electing the judges had a discriminatory effect. The Department of Justice refused to appeal, whereupon the Brooks plaintiffs

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[326] Brooks v. State Board of Elections, 848 F. Supp. 1548, 1574 (S.D.Ga. 1994).

[327] Brooks v. State Board of Elections, 59 F.3d 1114 (11th Cir. 1995).

[328] Georgia v. Reno, 881 F. Supp. 7 (D.D.C. 1995).

renewed their motion to intervene for purposes of appealing. The district court denied the motion, and the Supreme Court affirmed in December 1995.[329]

Plaintiffs' Section 2 vote dilution claim remained pending in the Brooks litigation, but the court of appeals had ruled in a series of cases that the method of electing judges could not be challenged under the statute.[330] Plaintiffs had little choice but to dismiss their Section 2 claim.

The litigation over the method of electing Georgia's judges spanned nearly seven years. The plaintiffs prevailed on their claim that state laws affecting the election of state judges were subject to preclearance under Section 5, but not their claim that at-large judicial elections diluted minority voting strength. The litigation, did, however, subject the method of electing judges to close scrutiny by the federal and state courts, the Department of Justice, state elected officials, and the general public. That scrutiny was no doubt instrumental in the subsequent appointment of blacks to the superior courts, as well as to the state court of appeals and supreme court.

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[329] Brooks v. Georgia, 516 U.S. 1021 (1995).

[330] E.g., SCLC of Alabama v. Sessions, 56 F.3d 1281, 1297 (11th Cir. 1995)(the state's interests in the at-large election of judges "outweigh whatever possible vote dilution may have been shown in this case").

Georgia Soil and Water Conservation Districts

Evans v. Bennett

In 1937, Georgia created a state commission on soil and water conservation as part of the national response to the Great Depression and the related soil erosion and crop failures which wiped out thousands of farms and left innumerable farmers and farm workers without work or homes. The Georgia commission was designed to work with the U.S. Department of Agriculture and other governmental agencies.

The state commission is an appointed body, but Georgia also created local conservation districts. There are now 40 such districts, each created as a special district at the request of landowners, with approval by referendum in which all electors in the covered area can vote. Each local district has two supervisors appointed by the state commission and at least three supervisors elected by plurality vote of the electors living in the local district. Statewide there are 195 supervisors elected in the 40 districts. The districts perform various functions concerning land use regulations, soil erosion, and research.

In 1984, the legislature enacted legislation, which was precleared under Section 5, exempting local supervisor elections from the state election code. The state commission subsequently issued election rules and instructions on holding

elections, but failed to submit these or any subsequent changes governing the elections for preclearance.

For a variety of reasons, elections for local supervisors were extremely low profile, with very little voter participation. The elections were not held at predetermined times, nor in conjunction with other elections. Terms expired depending on the time of year the district was created. Election dates were in part based on when terms were to expire and in part on when an incumbent qualified to run again. According to commission rules, when an incumbent's term was due to expire, he or she was given notice. The incumbent could get on the ballot by filing a petition signed by 25 registered voters. Once the incumbent filed a petition, the election date was set "about 6 weeks away." The rules were silent about how an election was to be scheduled when an incumbent did not seek re-election. Petitions by other candidates could be filed up to two weeks before the election. Notice to the public that a seat was to be filled by election, and notice of the election date, were given by a legal advertisement. But the elections received virtually no publicity, and were held in a single polling place, usually the county courthouse in each county covered by the district.

The combined effect of these election procedures was that participation was minuscule. Often less than 100 voters participated in an election, even in populous counties. A modest exception was the 2000 election in DeKalb County,

where an environmental group ran an e-mail campaign urging its members to support two candidates. Those two candidates got 1,538 and 1,523 votes, while the other three candidates received, 93, 58, and 38 votes.

In 2004, two plaintiffs, represented by the ACLU, filed suit against the state commission for failure to submit its voting procedures for preclearance under Section 5.[331] In support of their claim, plaintiffs analyzed the 2000 DeKalb County soil and water supervisor election. The analysis showed that the 1,613 voters who participated were only 0.6% of the 282,193 registered voters in the county, and though just over 50% of the registered voters listed their race as African American, only 9.3% of the voters in the election were African American.

Upon the filing of the lawsuit, the state soil and water commission cancelled all local district elections throughout Georgia pending compliance with Section 5. By agreement of the parties, the court closed the case administratively until the Section 5 process could be completed.

The state commission adopted revised election procedures, taking into account the suggestions and comments of plaintiffs. The procedures provide for future elections to be held in conjunction with regularly scheduled state and municipal elections, which will effectively provide more public notice of the

[331] Evans v. Bennett, No. 1:04-CV-2641-BBM (N.D. Ga.).

elections. The elections are to follow the state election code to the extent practicable, e.g., all precincts will normally be opened and absentee voting will be permitted. The requirement of nomination by petition signed by 25 voters was retained, which was favored by plaintiffs as an inexpensive requirement any serious candidate should be able to meet.

The state commission submitted the new election procedures to the Attorney General for preclearance on October 31, 2005. Plaintiffs supported the request for preclearance, which was granted on December 21, 2005.

Protecting Voter Privacy

Schwier v. Cox

The Privacy Act of 1974 makes it unlawful, with some exceptions, for "any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number."[332] The act protects individuals from disclosing their social security numbers (SSNs) when registering to vote, unless the state required such disclosure prior to passage of the act.

Deborah and Theodore Schwier learned about the Privacy Act as

[332] P.L. 93-579, Sec. 7(a)(1), 88 Stat. 1896.

Gwinnett County parents. The Gwinnett County school system required parents to disclose the SSNs numbers of their children when they enrolled them in the public schools. The requirement was dropped after parents asserted their rights under the Privacy Act.

When the Schwiers moved to Walton County in 1999 and tried to register to vote, they were told they had to disclose their SSNs. After they declined to do so, in reliance upon the Privacy Act, their applications were rejected.

Before the 2000 general election the ACLU filed suit for the Schwiers under the Privacy Act and the Civil Rights Act of 1964, which makes it illegal to deny anyone the right to register and vote for any act or omission not "material" in determining qualifications to vote.[333] The civil rights law had been enacted to prevent registration officials from denying blacks the right to vote for immaterial errors or omissions on their registration forms. The suit sought to require election officials to allow the Schwiers to register and vote without disclosing their SSNs.

On plaintiffs' motion for a preliminary injunction, the court ordered that the Schwiers be allowed to vote if they tendered their SSNs to election officials, and under seal to the court, but their SSNs were not to be permanently entered

[333] Schwier v. Cox, Civ. No. 1:00-CV-2820-JEC (N.D. Ga.).

into the election records and would be destroyed if they ultimately prevailed.

Much of the dispute in the litigation turned on whether Georgia's voter registration law qualified for the "grandfather" exemption in the Privacy Act and whether the state required disclosure of SSNs prior to January 1, 1975. As of that date, the state's voter registration form had a blank for the SSN followed by, "if known at the time of application." Plaintiffs' contended that disclosure of a SSN was not required, and that the state's registration system was not exempt from the Privacy Act. Additionally, when defendants surveyed the 159 counties in Georgia, they found only 24 interpreted SSN disclosure as mandatory.

The district court ruled for the state, holding that neither the Privacy Act nor the Civil Rights Act of 1964 provided private citizens the right to sue.[334] Plaintiffs' appealed, and the state argued that the Privacy Act's regulation of state elections was unconstitutional and exceeded Congressional authority. The United States intervened as of right to defend the constitutionality of the act, and also argued that Congress intended to allow private suits against states for failure to comply with the act.

The court of appeals reversed and remanded, holding that both the

[334] Id., Order of May 14, 2002.

Privacy Act and the Civil Rights Act provided a private right of action.[335] The court's opinion was significant because other courts had rejected private suits under both statutes.

On remand, the district court ruled in favor of the plaintiffs.[336] The court concluded that Georgia's voter registration system did not qualify under the Privacy Act's grandfather clause because the plain language of the state statute did not uniformly require disclosure of one's SSN for voter registration as of December 31, 1974. The court also held that this interpretation was bolstered by the evidence of how the statute was implemented. The court further held that the state, in denying persons the right to vote for failing to provide their SSNs, violated S the Civil Rights Act of 1964 because the disclosure of an applicant's SSN was not "material" in determining whether he or she was qualified under state law to vote. The state's appeal from this decision on the merits is currently pending.

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[335] Schwier v. Cox, 340 F.3d 1284 (11th Cir. 2003).

[336] Id., Order of January 31, 2005.

Challenging Photo Identification Requirements for Voting

Common Cause v. Billups

Prior to 1998, voters in Georgia were not required to present any identification when voting in person at the polls. In 1997, the General Assembly adopted legislation requiring voters to present one of 17 forms of identification on election day. However, if a registered voter did not have any ID, s/he could vote simply by signing a statement under oath affirming that s/he was the person whose name was on the voters list.

In 2005, and despite the public statements of the secretary of state that there had been no evidence of in person voter fraud in Georgia during her nine years in office, the general assembly adopted Act 53, reducing the forms of voter ID from 17 to 6, and requiring all voters who vote in person after July 1, 2005, to present a government issued photo ID. Additionally, voters would no longer be allowed to vote by affirming their identity under oath. The general assembly also doubled the minimum fee for a photo ID from $10 to $20. The photo ID bill was adopted in a highly charged, racially polarized atmosphere. Only 1 of 43 African American legislators in the general assembly voted in favor of the bill.

Despite numerous comment letters from legal scholars, citizen advocacy groups, and civil rights organizations, including the NAACP Legal Defense and Educational Fund, the ACLU, and dozens of others, urging opposition to the

law, the Department of Justice precleared the photo ID bill on August 26, 2005. According to news reports, preclearance was granted over the objections of four of five Justice Department officials who, in an August 25 staff memo to their superiors, said the state had provided flawed and incomplete data, and they found significant evidence that Georgia's voting plan would be "retrogressive."[337] The staff memo also cited comments made by State Representative Susan Burmeister, one of the sponsors of Act 53, who disparaged black voters by saying "if there are fewer black voters because of this bill it will only be because there is less opportunity for fraud. [Burmeister] said that when black voters in her black precincts are not paid to vote, they do not go to the polls."[338]

Passage of Act 53 gave Georgia the most draconian voter identification requirements in the nation. A majority of 30 states do not require registered voters to present any form of identification as a condition for voting, while a minority of 20 states require voters to present some form of ID. Of these 20 states, only two (Georgia and Indiana, where a legal challenge is pending[339])

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[337] Dan Eggen, "Criticism of Voting Law Was Overruled. Justice Dept. Backed Georgia Measure Despite Fears of Discrimination," Washington Post, November 17, 2005.

[338] Section 5 Recommendation Memorandum, Act 53 (H.B. 244) (2005), August 25, 2005, p. 6.

[339] Indiana Democratic Party v. Rokita, 1:05-CV-0634-SEB-VSS (S.D. Ind.).

require a registered voter to present a photo ID as an absolute condition for voting at the polls.

On September 19, 2005, a variety of organizations, including the ACLU, as well as several private attorneys, filed suit in federal district court on behalf of African American voters, civil rights groups, and other advocacy organizations charging the law violated the state and federal constitutions, the 1965 Voting Rights Act, and the 1964 Civil Rights Act.340 The lawsuit asked the court to declare Act 53 "unconstitutional, null and void," and issue both a preliminary and permanent injunction against its use. Among other things, the lawsuit asserted the photo ID requirement:

- **Violates the Fourteenth Amendment** because it treats voters unequally. For example, voters who have a Georgia driver's license, a passport, or a government-issued photo ID are not required to pay for a photo ID. Neither are absentee voters who do not have driver's licenses, passports or other government issued photo ID (other than full-time voters). Other voters who are unequally burdened by the photo ID requirement include those who live in retirement or nursing homes and do not have driver's licenses and students without automobiles who have photo ID's issued by private colleges and universities but which are not valid for voting under the new law.
- **Violates the Twenty-Fourth Amendment** because it constitutes a poll tax on the right to vote.

340 Common Cause v. Billups, 4:05-CV-201 HLM (N.D. Ga.).

- **Violates Section 2 of the Voting Rights Act** because it results in the denial of voting rights to African American and Latino voters. Non-white citizens of Georgia, as a group, have lower personal and family incomes than white citizens of Georgia, and are less likely to have driver's licenses, passports or other government-issued photo IDs.

- **Violates the Georgia Constitution** because it creates an entirely new set of voting qualifications beyond those specified in the state constitution which declares that every person who has registered to vote and who is a citizen at least 18 years of age and not disenfranchised, and who meets minimum residency requirements as provided by law, "shall be entitled to vote."

- **Violates the 1964 Civil Rights Act** (specifically (42 U.S.C. § 1971(a)(2)(A) and (a)(2)(B)); because it applies different standards for voters who vote in person compared to those who vote by absentee ballot and disqualifies voters based solely on whether they have a government-issued photo ID, even if they are personally known to election officials, or their signatures match the one on their official voter registration card.

On October 18, 2005, the district court issued a preliminary injunction holding plaintiffs had a substantial likelihood of succeeding on several grounds, including claims that the photo ID law was a poll tax and violated the equal protection clause of the Constitution. In his decision, Judge Harold Murphy wrote:

> In reaching this conclusion, the Court observes that it has great respect for the Georgia legislature. The Court, however, simply has more respect for the Constitution. Because the Court finds that Plaintiffs have a substantial likelihood of succeeding on their claims that the Photo ID requirement unduly burdens the right to vote and

> constitutes a poll tax the Court must enter a preliminary injunction against the Photo ID requirement.341

In support of plaintiffs' claim that the stated purpose of the photo ID requirement - to "combat fraud" - was a pretext to conceal the true purpose of the law, which was to suppress voting by the poor, the elderly, the infirm, African American, Latino, and other minority voters by making it more difficult to vote, the court found:

- The Secretary of State testified 'that her office has not received even one complaint of in-person voter fraud over the past eight years.'
- Before Act 53 was passed, the Secretary of State informed the legislature that '[a]t virtually every meeting of the State Elections Board during the past 10 years, we have dealt with cases involving fraud or election law violations in handling or voting absentee ballots.'
- The State imposes no Photo ID requirement or absolute identification requirement for registering to vote, and has removed the conditions for obtaining an absentee ballot imposed by the previous law. In short, [Act 53] opened the door wide to fraudulent voting via absentee ballots.342

The court also noted additional burdens imposed by the photo ID statute:

> Photo IDs are issued at Department of Driver Service ("DDS") Centers, but there are only 58 in the entire State of Georgia, which means that in at least 101 of Georgia's 159 counties, voters must travel to another county to obtain a photo ID. And there is no DDS office in the City of Atlanta,

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341 Id., Order of October 18, 2005, pp. 120-21.

342 Id., pp. 12, 95.

> Georgia's largest city. Further, '[m]ost of the DDS service centers are located in largely rural areas where mass transit is likely not available.'
>
> DDS offices often have long lines and three to four hour waits and 'Many voters who are elderly, disabled, or have certain physical or mental problems simply cannot navigate the lengthy wait successfully.'343

Plaintiffs had submitted the declarations of registered voters who did not have approved IDs, which described the difficulties they would face in obtaining a photo ID. The court reiterated these difficulties in its order granting the preliminary injunction, highlighting lack of funds; lack of transportation; physical and mental disabilities that make it difficult for voters to travel to DDS service centers, walk for long distances, and stand in lines; and difficulty obtaining and paying for required documents such as a certified copy of a birth certificate.344 The court also noted that it is impossible for some voters to obtain a photo ID (for which DDS requires an "original or a certified copy" of a birth certificate issued by a state agency) because to obtain a certified copy of a birth certificate, an applicant must provide "a photocopy of your valid photo ID, such as: driver's license, state issued ID card, or employer issued photo ID."345

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343 Id., pp. 22-3, 33-4, 86-7.

344 Id., p. 103.

345 Id., p. 28-29.

In issuing its preliminary injunction, the district court concluded:

> In particular, the Photo ID requirement makes the exercise of the fundamental right to vote extremely difficult for voters currently without acceptable forms of Photo ID for whom obtaining a Photo ID would be a hardship. Unfortunately, the Photo ID requirement is most likely to prevent Georgia's elderly, poor, and African-American voters from voting. For those citizens, the character and magnitude of their injury - the loss of their right to vote - is undeniably demoralizing and extreme, as those citizens are likely to have no other realistic or effective means of protecting their rights.346

Following issuance of the injunction, the state appealed to the Eleventh Circuit, which refused to stay the injunction.347

In an attempt to address the poll tax burden cited by the district court in its injunction, the Georgia legislature passed a new photo ID bill (SB 84) in January 2006, ostensibly providing for free photo identification cards. Despite its attempt to mitigate the burdens posed by the photo ID law, the legislature still neglected to address many of the issues raised in the original lawsuit, including the fact that poor, elderly and minority voters (and others) will incur significant financial costs to obtain these supposedly "free" IDs. The new law also did nothing to address the equal protection claims raised in the lawsuit, as absentee

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346 Id., p. 103.

347 Common Cause v. Billups, 05-15784-G, Eleventh Circuit Court of Appeals, October 27, 2005.

voters can still vote without showing any photo identification while a photo ID remains an absolute requirement for in person voting.

COUNTY AND MUNICIPAL LITIGATION IN GEORGIA

Following passage of the Voting Rights Act and its amendment in 1975, which resulted in increased black registration and political participation, a number of Georgia counties which used district elections switched to holding their elections at-large. The Supreme Court has noted the potential for discrimination inherent in at-large voting and why its adoption is subject to scrutiny under Section 5:

> Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.[348]

The deliberate change from district to at-large elections was but one of many purposeful strategies used by white officials to deprive black voters of the equal opportunity to participate in the political process at the county and local level. This section describes litigation and other actions taken by the ACLU in 70 of Georgia's 159 counties to challenge a wide range of discriminatory election

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[348] Allen v. State Board of Elections, 393 U.S. 544, 569 (1969). For a discussion of the Georgia counties that abandoned their district systems in the wake of increased black political participation after passage of the Voting Rights Act, see McDonald (2003), pp. 131-2, 141-2.

practices and proceedings and enforce the Voting Rights Act and the Constitution since 1982.

In pursuing these efforts in Georgia, the ACLU filed or otherwise participated in 102 separate legal actions. This tally does not include other legal actions previously discussed such as ACLU efforts to challenge the sole commissioner form of government in particular counties, the grand jury method of school board appointments, or statewide litigation to end various discriminatory practices, including challenges to redistricting.

Baker County and the City of Newton

Kelson v. City of Newton

Located in the heart of Georgia's quail hunting plantation country, and 22 miles south of Albany, Newton is a small town of just 851 residents and the county seat of Baker County. Baker, which was known during the days of the Civil Rights Movement as "Bad Baker," was majority black, but prior to passage of the Voting Rights Act only 24 blacks were registered to vote, just 1.9% of the age eligible population. According to one local official, if anyone had suggested

that blacks should be allowed to vote, "why people here would have laughed in your face."[349]

Traditionally, the Newton City Council consisted of a mayor and four members elected at-large by plurality vote, with the highest vote getters being deemed the winners. In 1972, the city council added a numbered post requirement for council seats and also began implementing a majority vote requirement for council and mayoral elections. The requirement, which allows a white majority to control the outcome of elections, has been described by the Supreme Court as a device which can "significantly" decrease the electoral opportunities of a racial minority.[350] Indeed, in calling for the adoption of a majority vote requirement for statewide offices in 1963, one Georgia legislator advised his colleagues that it was needed precisely because it would "thwart election control by Negroes and other minorities."[351] More than 50 cities in Georgia adopted majority vote requirements after passage of the Voting Rights Act, and most, including Newton, ignored preclearance under Section 5.[352] The majority vote requirement, which was actually in conflict with the city charter,

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[349] Atlanta Constitution, July 30, 1963.

[350] City of Rome, Georgia v. United States, 446 U.S. 156, 183 (1980).

[351] Valdosta Daily Times, February 21, 1963 (quoting Rep. Denmark Groover of Bibb County).

and the numbered post requirement were plainly changes in voting but neither was submitted for preclearance under Section 5, despite repeated requests from the ACLU and the Department of Justice that the city do so.[353] According to the Georgia Secretary of State, blacks were approximately 41% of the population of Newton in 1990, and even though black candidates had repeatedly run for city office none had ever been elected.

Following the general election in November 1995, city officials abruptly stopped using the majority vote requirement and cancelled runoff elections in the middle of the election cycle. They continued, however, to enforce the unprecleared numbered post requirement. The racial impact of these selective decisions was apparent. One black candidate received the fourth highest number of votes cast in the election, but lost because he did not receive the most votes for a particular post. Had the numbered post requirement not been enforced, and since he was the fourth highest vote getter among nine candidates for four seats, he would have been the winner of one of the council seats. Another black candidate received the second highest number of votes for Post 1, and even though no candidate won a majority, he was denied the opportunity to

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[352] McDonald, (2003), pp. 135, 143-44.

[353] Laughlin McDonald to Mayor Bebe Johnson, December 28, 1995; Deval Patrick, Assistant Attorney General, to Mayor George Bush, May 31, 1996.

compete in a runoff election. Likewise, no candidate for mayor or Council Post 2 received a majority of votes cast, yet those seats went to the top vote-getters without a runoff.

In 1996, the ACLU filed a lawsuit in federal court on behalf of black voters in Newton to enforce Section 5.[354] Plaintiffs also contended that it was not proper to cancel the runoff after the election had been advertised, and candidates qualified, under numbered post and majority vote procedures. Making selective changes in mid-stream, particularly those which disadvantaged minority voters, was not the appropriate remedy, plaintiffs argued.

In 1997, the city adopted staggered terms of office for the council and submitted the change for preclearance. The Department of Justice refused to make a determination on the submission because the numbered post provision still had not been submitted. The Attorney General concluded, however, that the numbered post requirement "is not legally enforceable."[355]

Eventually, after the city changed lawyers three times, the fourth law firm convinced the city to enter into a consent agreement rescinding the numbered

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[354] Kelson v. City of Newton, GA. Civ. No. 1:96-CV-106-3-(WLS) (M.D. Ga.).

[355] Isabelle Katz Pinzler, Acting Assistant Attorney General, to Frank S. Twitty, Jr., September 5, 1997.

post and majority vote requirements.[356] The court adopted the consent order in April 1998, and an election was held in September 1998 for all council seats. The significant role of Section 5 in helping to ensure racially fair elections in Newton is apparent.

Baldwin County

NAACP v. the Mayor and Alderman of the City of Milledgeville

Milledgeville, with its stately antebellum mansions, was the state capital of Georgia from 1807 to 1868. George Wallace, a resident of Baldwin County, of which Milledgeville is the county seat, was one of the first blacks elected to the state senate during Reconstruction. He was immediately expelled from office by the white controlled legislature on the grounds that blacks were "ineligible" to hold office under the state constitution. The expulsion of Wallace and other blacks from the general assembly, as well as continuing racial violence across the state, prompted Congress once again to place Georgia under military supervision.[357]

[356] Kelson v. City of Newton, GA., Order of April 20, 1998.

[357] McDonald (2003), pp. 23-4.

Today, Milledgeville is more than 45% black. In 1982, black residents persuaded the city to sponsor legislation changing the method of electing the city council from at-large to six single member districts, three of which were majority black. The state senator from Baldwin County refused to support the legislation, and consequently the plan was not enacted during the 1983 legislative session.

In May 1983, black residents, represented by the ACLU, filed suit challenging the city's at-large system as racially discriminatory in violation of Section 2.[358] The parties entered into a consent decree in June 1983, implementing the agreed upon six single member district plan. The city held elections in September 1983, in three of the new districts and two black candidates were elected.

Boddy v. Hall

Baldwin County's five member board of education was traditionally appointed by the grand jury. In 1970, the Georgia legislature expanded the board to seven members, but continued their appointment by the grand jury. Two years later, the state changed the system again and enacted legislation requiring at-large elections by majority vote for the board of education. Similar

[358] NAACP of Baldwin County, Georgia v. Mayor and Alderman of the City of Milledgeville, Civ. No. 83-145-01-MAC (M.D. Ga.).

changes were made by other Georgia jurisdictions which abandoned their grand jury appointment systems and adopted at-large elections in the wake of increased black voter registration following passage of the Voting Rights Act. The at-large system would insure that whites in Baldwin County, who were 63% of the population, would control the outcome of elections. The 1970 and 1972 voting changes were subject to Section 5, but were never submitted for preclearance.

The county's five member board of commissioners was also elected at-large and by majority vote from numbered posts. This election system had been in effect since the 1950s, and made it extremely difficult for black residents to elect a candidate of their choice.

In November 1982, the ACLU filed suit in federal court on behalf of black residents and the local NAACP challenging at-large elections for the board of commissioners and board of education as racially discriminatory in violation of the Constitution and Sections 2 and 5.[359] Oscar Davis, a local resident explained, "[w]e've tried many, many times to get blacks elected and we've never been able

[359] Boddy v. Hall, Civ. No. 82-406-1-MAC, Compl. (M.D. Ga.).

to do it, even when most everyone turns out to vote. We finally made the decision that the only thing we could do was sue."[360]

After the plaintiffs filed suit, local officials finally submitted for preclearance the 10 year old change to at-large school board elections. In May 1983, the Attorney General requested additional information, and in September objected to the at-large component of the 1972 law, finding that "bloc voting along racial lines exists in Baldwin County," and "a system of elections such as that adopted for the election of the board of education tends to deny blacks an opportunity to participate fairly in the election process." The Attorney General further determined that "the additional features of numbered posts and majority runoffs plainly diminish the electoral impact of minority voters in jurisdictions where there is racial bloc voting."[361]

In October 1983, the board of education filed a declaratory judgment action in the District of Columbia seeking a ruling that the 1972 enactment was not racially discriminatory in either purpose or effect.[362] The ACLU filed a motion seeking to intervene on behalf of three black voters, which was granted.

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[360] Atlanta Constitution, June 8, 1984.

[361] William Bradford Reynolds, Asstistant Attorney General, to George M. Stembridge, Jr., Baldwin County Attorney, September 19, 1983.

[362] Baldwin County Sch. Dist. v. Smith, Civ. No. 83-3240 (D. D.C.).

However, in April 1984, the parties filed a joint motion to stay the proceedings pending the outcome of settlement negotiations.

In May 1984, the district court in Georgia signed a consent order between the parties finding that the board of education had failed to preclear the 1972 enactment. Pursuant to the order, the parties agreed upon a plan which provided for the election of the five member board of education from single member districts by majority vote to four year staggered terms. One of the districts was 64% black and another was 58% black. In the August 1984, elections a black candidate won in the 58% black district, and a black person was appointed to the board of education in the 64% black district pending the August 1986 elections.

In April 1983, the plaintiffs and the board of commissioners agreed upon a redistricting plan that provided for one single member district, which was 67% black, and a four seat district with a plurality vote requirement. The plaintiffs agreed to the plan because it initially appeared difficult to draw more than one majority black district. The county submitted the plan to the Attorney General who precleared it, but the district court refused to approve the consent decree.

In June 1984, the parties entered into a subsequent consent decree which provided that the board of commissioners would have five members elected by majority vote from three districts. District 1 (64.15% black) and District 2 (57.85%

black) each elected one member, while District 3 (21.25% black) elected three members from residency districts, with numbered posts. In August 1984, a black candidate was elected from District 1 and a black candidate from District 2 was elected after a run off.

Simmons v. Torrance

On September 4, 1984, a Democratic primary runoff election was held for the Baldwin County Board of Commissioners in District 2 (57.85% black) between Clarence H. Simmons, a black candidate, and Grady Torrance, the incumbent white commissioner. Torrance received 449 votes to Simmons's 412 votes, a 37 vote margin of victory.

On September 12, 1984, the ACLU represented Simmons in a challenge to the election on the grounds that persons who were qualified to vote in District 2 were either not allowed to vote, or incorrectly assigned to another voting district, while persons who were not qualified to vote in District 2 were allowed to cast their ballots in the district.[363] The court found that 40 persons had voted in the runoff who were not entitled to vote in District 2, and that election officials

[363] Simmons v. Torrance, Civ. No. 21,102 (Super. Ct. Bladwin Cty.)

improperly directed two people who were entitled to vote in District 2 to vote in another district. The court ruled that:

> Plaintiff has carried his burden of showing that a sufficient number of ballots were cast by electors not qualified to vote in voting district 2 and were in effect rejected, though cast by persons who were entitled to vote in voting district 2, 'to change or place in doubt the result' of the challenged runoff primary.[364]

A new run off was held on November 6, 1984, and Simmons won. He went on to win the general election as well.

[364] Id., Order of October 24, 1984.

Barrow County

In re City of Winder

Winder is approximately 50 miles due east of Atlanta and is the Barrow County seat. In 1987, the city's population was 6,705, of whom 17.8% were African American. In addition to its mayor, the Winder City Council had six members, all elected at-large, with four council members elected from residential districts.

In 1987, the ACLU initiated negotiations with the city on behalf of black voters seeking the adoption of single member districts. The city responded by agreeing to a plan with four districts, one of which was 65% black. The city's plan also retained two at-large seats. Given the size and distribution of the minority population, it was only possible to create one majority black district; whether four, five, or six single member districts were used.

A single member district plan was subsequently adopted by the legislature and precleared by the Department of Justice. An African American was first elected to the council in 1991 from the majority black district.

Bartow County

Stephens v. Kennedy

Despite the fact that blacks constituted only 11.6% of the population in Bartow County, African Americans succeeded in winning a three-to-one majority on the Kingston City Council in the municipal elections held December 5, 1987. This was the very first time that blacks had won a majority. Two weeks later, and before the newly elected members took office, the council held a special meeting attended by the mayor and three incumbents at which they created a new, non-elected city office of "Administrator-Treasurer" and transferred to it the duties of the elected mayor and council. The group then appointed one of the defeated white incumbents to this position. Additional appointments were made for city attorney, city clerk, election superintendent, and other positions. The group also changed the regular meeting time of the city council so that it conflicted with the work schedules of Jannie Stephens and John H. Hill, the two newly elected black council members.

As a result of these actions, the ACLU filed suit in June 1988 in federal court on behalf of Stephens, Hill, and other black voters, charging that the reallocation of authority from elected officials, a majority of whom were black, to an appointed official who was a defeated white incumbent, as well as other changes that had been enacted, violated the Constitution and Section 5. A three-

judge court was appointed to hear the Section 5 claim and ruled on July 7, 1989, that the power of the city council had not been reallocated elsewhere and that changes in council meeting times were not covered by Section 5. The court based much of its ruling on findings that one of the three black city council members consistently voted with the remaining white incumbent, thereby creating a permanent split in the four-member council. "The parties all agree that the 'black majority' will not vote as a majority," said the court. "Even were this Court inclined to grant relief and enjoin implementation of the changes made, the constitution of this paralyzed council would remain unchanged... This Court cannot heal the rift in the council and declines to intervene into a political impasse which the parties themselves have the power to resolve."[365] Rather than appeal the decision, the plaintiffs then settled the case.

Bibb County

Orrington v. Israel

The City of Macon, the county seat of Bibb County, annexed 196 acres of land in adjacent Jones County in 1962. The property was subsequently sold for development, which included the housing complex of Kingsview Village, all of

[365] Stephens v. Kennedy No. CV-4-88-124 (N.D. Ga.1988), Order, June 26, 1989, pp. 13, 16.

whose residents, 348 in number, were black. There were 47 other residents of the annexed area, all of whom were white. The residents of the annexed areas voted in Macon municipal elections and received water and sewer services from Macon's Board of Water Commissioners.

In 1973, the Georgia General Assembly created the Macon-Bibb County Water and Sewerage Authority (WSA) to replace the Board of Water Commissioners. The 1973 act provided for five commissioners, three elected and two appointed, but only residents of Bibb County could serve on, or vote for members of, WSA. Thus, the residents of the annexed area in Jones County were barred from participating in WSA elections even though they were residents of Macon, were subject to WSA's jurisdiction, and depended on its services.

In February 1984, the general assembly approved a plan to deannex the 196 acres in Jones County from the City of Macon. Although city officials publicly announced that residents would have an opportunity to voice their concerns about the proposed deannexation, the city never held a public hearing or referendum prior to approving the deannexation. The asserted justification for the deannexation was to remove a state legislator from the city's legislative delegation. The city further maintained that the legislation was not intended to dilute minority voting strength, and pointed out that two black legislators signed the deannexation measure. The city agreed to provide municipal services to the

deannexed area through May 1984, and on June 5, 1984, residents of the affected areas were told that all city services would be terminated the next day, including the police department's participation in a Neighborhood Watch program.

Black residents of the deannexed area, represented by the ACLU, responded by filing a federal lawsuit against the city and WSA.[366] The plaintiffs argued that the defendants failed to preclear the 1984 deannexation as required by Section 5, and that the 1984 law violated the Constitution and Section 2.

At a conference with the court shortly after the suit was filed, the city agreed to submit the 1984 act for preclearance and to allow city residents in Jones County to vote for members of WSA pending the Attorney General's decision. The city also agreed to continue to provide residents with municipal services until the lawsuit was resolved.

Although the city submitted the deannexation plan to the Attorney General in 1984, it took almost three years for the city to provide the information requested by the Department of Justice. In April 1987, the Attorney General objected to the deannexation, finding that the city's alleged goal of removing a state legislator from the delegation "could have been accomplished through

[366] Orrington v. Israel, Civ. No. 84-275-2 (M.D. Ga.).

alternate and much less drastic means," and "that race may well have been not only a factor, but a principal factor, in the deannexation decision."[367]

Thanks to Section 5, city residents living in Jones County achieved the results they sought in bringing suit, and stipulated to the dismissal of their legal action.

Lucas v. Townsend

On December 17, 1987, the Board of Public Education and Orphanages for Bibb County, Georgia, placed a bond referendum on the March 8, 1988 presidential preference primary ballot. The election, popularly known as Super Tuesday, had high visibility. And because the Rev. Jesse Jackson's name was included on the ballot, significant African American voter turnout was expected. On January 4, 1988, the school board reversed itself and took the bond measure off the Super Tuesday ballot and called for a special election to be held Tuesday, May 31, 1988 - the day after the Memorial Day holiday.

The goal of the original bond measure was to generate funds to provide air conditioning in school buildings. In setting the May 31 date, the board combined the original bond issue with a second bond issue to build a new high

[367] William Bradford Reynolds, Asstistant Attorney General, to Roy W. Griffins, Jr., Asstistant City Attorney, April 24, 1987.

school into one referendum question. The location of the proposed school, which would affect its racial makeup, was a matter of local controversy.

The ACLU represented five African American residents who objected to the switch in election dates. The plaintiffs favored the air conditioning measure but opposed the second bond issue, and believed the scheduling of the election and the combining of issues was done to manipulate the minority vote.

The ACLU wrote to the board setting out the concerns of plaintiffs and requested the ballot measures be separated and the referenda held on a regular election ballot when a better turnout would be assured. The ACLU also pointed out that the special election date required preclearance under Section 5.

Nearly three months after its decision to call for the special election, the board submitted the change to the Attorney General for preclearance. On May 25, 1988, the Attorney General requested additional information including a "detailed explanation of the reason for choosing May 31, 1988 as the bond election date." The Attorney General also requested the board to respond to the allegations that "(i) the Super Tuesday date had been abandoned because the turnout of black voters was expected to be high on that date and (ii) that the two

bond issues were consolidated to prevent black voters from voting separately on each of the proposed projects."[368]

Despite the absence of preclearance, the board proceeded with its plans to hold the special election. Plaintiffs filed suit seeking to stop the election for noncompliance with Section 5.[369] A hearing was held before a three-judge court, and on Friday night, May 27, 1988, the court denied the injunction. It held: "The Attorney General's regulation making all discretionary special elections subject to Section Five's coverage is simply not supported by the language found in 42 U.S.C. § 1973c."[370]

Plaintiffs appealed and applied to Justice Anthony M. Kennedy, as Circuit Justice, for a stay. Justice Kennedy sought the views of the Solicitor General, Charles Fried, and the Solicitor supported the stay. On Memorial Day, May 31, 1988, Justice Kennedy entered his first stay as a Supreme Court Justice. He held the conclusion of the district court that special elections were not covered changes "is most problematic under our precedents," and found irreparable injury would likely result form the denial of relief:

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[368] Quoted in Lucas v. Townsend, 486 U.S. 1301, 1303 (1988).

[369] Lucas v. Townsend, 686 F. Supp. 902 (M.D.Ga. 1988)(three-judge court).

[370] Id., 686 F. Supp. at 905.

> Permitting the election to go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect, despite their obvious diligence in seeking an adjudication of their rights prior to the election. Even if the election is subsequently invalidated, the effect on both the applicants and respondents likely would be most disruptive. Further, although an injunction would doubtless place certain burdens on respondents, such burdens can fairly be ascribed to the respondents' own failure to seek preclearance sufficiently in advance of the date chosen for the election.[371]

Justice Kennedy enjoined the election approximately 16 hours before the polls opened.

The referendum was rescheduled for the November general election. The board received preclearance for the election date, but did not submit the form of the ballot question - the combining of bond issues - for preclearance. Plaintiffs sought another injunction under Section 5 arguing that the form of the question was required to be precleared. The court sought the views of the Attorney General, who filed a brief that the "discretionary decision to present the voters with a single vote on the entire project is not the kind of change subject to preclearance."[372] The district court adopted that view and denied relief. The bond issue was approved by 50.7% of the votes, a winning margin of 618 votes.

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[371] Lucas v. Townsend, 486 U.S. at 1305.

[372] Brief for the United States as Amicus Curiae, p. 16, quoted in Lucas v. Townsend, 698 F. Supp. 909, 912 (M.D.Ga. 1988)(three-judge court).

The complaint had also challenged the manipulation of the election date and combining the referenda as violating both Section 2 and the Fourteenth Amendment. Plaintiffs introduced substantial evidence of racially polarized voting in contests involving black and white candidates, which was acknowledged by the district court.[373] Plaintiffs' analysis of the referendum vote showed 66% of black voters opposed the bond issue while 57% of whites supported it. The evidence also showed that African Americans were a higher percentage of the turnout on the Super Tuesday primary than at the general election. Plaintiffs' evidence showed defendants' election manipulation efforts did indeed affect the election outcome.

The district court ruled for defendants, holding that the finding of racially polarized voting in candidate races did not prove that white voters usually defeated the choice of black voters in referenda. Plaintiffs appealed and the court of appeals affirmed, concluding that the district court's opinion was not clearly erroneous.[374]

Bulloch County and the Town of Statesboro

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[373] Lucas v. Townsend, 783 F. Supp. 605, 617 (M.D.Ga. 1992).

[374] Lucas v. Townsend, 967 F.2d 549, 553 (11th Cir. 1992).

Love v. Deal

Statesboro, Georgia, is immortalized in Blind Willie McTell's "Statesboro Blues." It is also the county seat of Bulloch County in southeastern Georgia. In 1979, black voters, represented by private counsel, filed suit against the county commission, county board of education, and city council charging that at-large elections for all three bodies violated Section 2 and the Constitution.[375] The law suit also charged that both the board of education, in 1980, and the city council, in 1966, had adopted at-large elections without obtaining Section 5 preclearance.

The board of education promptly settled its portion of the case in May 1980, and agreed to create seven single member districts, with a district residency requirement.[376] Statesboro submitted its at-large system for Justice Department approval in December 1980, but the Attorney General objected, saying:

> blacks constitute about 40.7 percent of the population of the City of Statesboro. Although a black candidate has run for city council on a number of occasions since 1965 under the city's at-large method of election (with staggered terms and majority vote and numbered post requirements), no black has ever been elected. Analysis of election returns reveals that voting in the city generally follows racial lines. We also noted that this change to increase the terms of office was enacted immediately following the first black's bid for office in 1965 and during a period when, according to 1960 census

[375]Love v. Deal, No. CV 679-037 (S.D. Ga.).

[376] Id., Consent Decree, Order and Judgment, May 27, 1980.

> data, blacks appear to have constituted a majority of the city's population.
>
> The increase in terms of office for the mayor and councilmembers, by decreasing the frequency of elections, along with the continued utilization of a system of voting which includes majority vote, numbered posts, and at-large election, enhances the disadvantage faced by blacks in seeking to elect representatives of their choice.[377]

Statesboro had received other Section 5 objections from the Department of Justice. In December 1979, the department objected to a proposed annexation by the city, noting that it had erroneously precleared a 1967 annexation earlier in the year:

> At the outset we note that, in spite of our letter of July 23, 1979, indicating no objection to the 1967 annexation, our present review and analysis reveal that our conclusion at that time not to object was wrong.
>
> Prior to the 1967 annexation the population of Statesboro consisted of 5,223 whites and 5,454 blacks (51%). Substantial evidence has been adduced that the predominantly black Whitesville community on the edge of the city limits voiced its desire to be included in the general expansion of the city boundaries in 1967. Nonetheless, the extended city limits were carefully drawn to fence out the Whitesville area.
>
> The instant annexation would further reduce the black proportion of the city. . . resulting in a cumulative dilution of 11.0% within five to fifteen years (10.4% currently).

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[377] James P. Turner, Acting Assistant Attorney General, to Sam L. Brannen, February 2, 1981.

> Our analysis reveals, therefore, that the present annexation is part of a series of racially selective annexations and also has a dilutive effect on black voting strength in the context of the city's at-large voting system. In addition, our review of information received from minority contacts and past election returns reveals that blacks have been excluded from meaningful access to the political process in Statesboro. No black has ever been elected to city office, although black candidates have run on several occasions. Furthermore, blacks have made unrebutted claims that the city has not been responsive to their needs, including their requests for enhanced voter registration opportunities.[378]

Although the Department of Justice could not reverse its July approval of those 1967 annexations, it objected to Statesboro's second annexation submission and advised the city that "the dilutive effects of the annexations in question could be removed by the adoption of an electoral system, such as single-member districts, which fairly recognizes the political potential of blacks in the city."

Despite this advice, Statesboro proceeded with another annexation in 1980, which drew a similar objection from the Department of Justice:

> We note that the land which is the subject of the annexation is currently uninhabited but is being annexed for the specific purpose of residential development. Your submission also indicates that the owner of the land desires to build multi-family apartment buildings on the land and intends to seek financial assistance from the Department of Housing and Urban Development under the Section 8 Program. If the HUD grant is obtained, a substantial number of black

[378] Drew S. Days III, Assistant Attorney General, to George M. Johnston, December 10, 1979.

> persons may reside in the new residential units. If the owner does not pursue his plan or if the grant is not obtained, the submission indicates that virtually all of the persons who will reside in the new residential units will be white.[379]

The department was careful to note that:

> Section 5 should not hinder the City's plans to develop low-cost subsidized housing to be occupied by both black and white citizens. The objection is being interposed because the City has failed to carry its burden of demonstrating that the development will, in fact, be completed as planned. In the event that the owner pursues his plan and constructs an integrated development, you may wish to seek reconsideration of this objection.

The department also reiterated that it would reconsider its objection if the city adopted an electoral system, such as single member districts, which fairly recognizes the political potential of blacks in the city. Statesboro, bowing to the inevitable, settled its portion of the vote dilution case in 1983, by agreeing to create three single member districts, plus a fourth district that would elect two members.[380]

Conditions in Bulloch County, not surprisingly, reflected those in Statesboro. Blacks were 36% of the population, but no black person had ever been elected to the county government. The county also agreed to settle its

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[379] Drew S. Days III, Assistant Attorney General, to George M. Johnston, General Counsel, August 15, 1980.

[380] Love v. Deal, Order and Judgment, April 7, 1983.

portion of the case in 1983, and adopted a plan for the commission containing two districts, one electing a single commissioner, and which was majority black, and the second electing two commissioners from numbered posts. A full-time, non-voting chairman (except as necessary to break a tie vote) was also elected at-large.[381]

In 1991, the county commission drew several plans to correct the malapportionment revealed by the 1990 census, and tendered them to the plaintiffs. The highest black voting age population of any district in the proposed configurations was 49% and plaintiffs rejected the plans, in part, because of the absence of a majority-minority district. Plaintiffs also wanted to increase the size of the commission by doubling the number of members elected from districts, while keeping the at-large chair.

Plaintiffs, with the assistance of the ACLU, produced a draft plan with a 50.9% black voting age population district to show that a majority-minority district could be drawn. They also produced plans containing a district with a black voting age population as high as 60.5%.[382] The county presented the 50.9% district plan to the court as the plan it preferred. Though plaintiffs preferred a

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[381] Id., Consent Decree, Order and Judgment, May 26, 1983.

[382] Love v. Deal, Transcript of April 16, 1992, p. 120.

higher minority voting age population, they believed the district would allow African American voters to elect a candidate of choice because the district included a college where the vast majority of students were white and most were not registered to vote in Bulloch County. In addition, African American candidates had consistently won in a similar district in prior elections.

After conducting a hearing, the court adopted the plan with the 50.9% African American voting age population district and also adopted plaintiffs' proposal to double the number of members elected from each district.[383] Neither side appealed the adoption of the plan, although a protracted dispute ensued over attorneys' fees, which was resolved by the court of appeals.[384]

But for the oversight provided by the Voting Rights Act, there is little doubt that the rights of minority voters would have been significantly diluted in elections in Statesboro and Bulloch County.

Burke County and the City of Keysville

Sullivan v. DeLoach

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[383] Love v. Deal, Order of April 23, 1992.

[384] Love v. Deal, 5 F.3d 1406 (11th Cir. 1993).

Waynesboro, which had traditionally elected its mayor and council by plurality vote, adopted a new majority vote requirement in 1971. Significantly, the change was made after the 1970 extension of the Voting Rights Act and increased black voter registration.[385] The new voting law was submitted for preclearance pursuant to Section 5, and the Attorney General objected to it because he could not conclude that it "does not have the purpose or effect of abridging rights on account of race."[386] The city, however, ignored the objection and continued to impose a majority vote requirement until it was sued in 1976 by local black residents represented by the ACLU.[387] The plaintiffs challenged the continued use of the objected to majority voter requirement, as well as at-large elections for the city which they contended diluted minority voting strength.

This case was settled by a consent decree in 1977, which included a determination that the at-large method of elections "denies plaintiffs and their class equal access to the political system, in derogation of their rights" under the Constitution and Section 2. The decree also established a district method of

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[385] As the Supreme Court noted in City of Rome, Georgia v. United States, 446 U.S. 156, 183-84 (1980), a majority vote requirement, which allows a numerical majority of whites to regroup around a candidate in a run off election and defeat a plurality winning minority candidate, can "significantly" decrease the electoral opportunities of a racial group.

[386] David L. Norman, Assistant Attorney General, to Jerry Daniel, January 7, 1972.

[387] Sullivan v. DeLoach, No. CV176-238 (S.D. Ga.).

elections consisting of three two-member wards with the mayor elected at-large, and a continuation of the majority vote requirement.[388]

Although the agreed upon plan was a "legislative" plan subject to Section 5, it was not submitted for preclearance until 1988, when it was included in a request to preclear several annexations. The Attorney General requested additional information in February 1989, but it was not provided by the city until five years later, in March 1994. The Attorney General precleared the district plan, except for the adoption of the majority vote requirement for mayor, concluding that:

> Our review of elections involving city voters indicates a pattern of racially polarized voting in Waynesboro that has hampered the ability of black voters to elect their candidates of choice to at-large elected offices. Moreover, it appears that political participation among black voters is depressed, attributable largely to a history of racial discrimination such as that found in the City of Waynesboro, which continues to be reflected in the disparate socio-economic conditions between the city's black and white residents.[389]

Despite the action by the Attorney General, city officials took no public position whether they would comply with the objection. Given the pendency of

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[388] Id., Order of September 22, 1977. The discriminatory effect of a majority voter requirement is neutralized in a fairly drawn district system of elections, while the retention of the majority vote requirement for mayor was part of the compromise that resulted in the consent agreement.

[389] Deval L. Patrick, Assistant Attorney General, to Gary A. Glover, May 23, 1994.

a mayoral election in November 1995, the plaintiffs requested a conference with the court, which was held in October. At the suggestion of the court the parties met and agreed that a plurality vote of at least 37% should be used in the mayoral election. This figure was arrived at based on the fact that no black candidate for mayor had ever received more than 36% of the vote. The agreement was incorporated into a proposed supplemental consent order and was submitted to the Attorney General, who precleared it.[390] It was then tendered to the court for approval.

The day before the election, however, which pitted three whites against a lone black for mayor, the city unilaterally withdrew its consent to the supplemental settlement agreement and announced that it would hold the election for mayor using a majority vote requirement, insuring that the black candidate could not win with a simple plurality. The council's vote was strictly along racial lines, with the white members voting to abrogate their prior agreement.[391]

At the ensuing election, the black candidate, William Patterson, led the ticket with 37.1% of the vote. The city then scheduled a runoff election for

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[390] Elizabeth Johnson to Gary A. Glover, November 3, 1995.

[391] The Augusta Chronicle, "Council rejects election plan," November 7, 1995.

November 21, 1995, between Patterson and the next highest white vote getter. The plaintiffs filed a motion to enjoin the election, but it was not heard by the court and the runoff went forward. The Department of Justice, moreover, although it was invited to do so by the plaintiffs, took no action to enforce its objection to the majority vote requirement. Predictably, white voters regrouped around the white candidate in the runoff and Patterson was defeated.[392]

In December 1995, the district court, noting that the runoff election had been held, dismissed the plaintiffs' motion for an injunction as moot.[393] The plaintiffs could have proceeded with the litigation on the merits, but weary of litigation and racial contention, they elected not to do so. Patterson, the defeated black candidate, said that he was willing to give the new mayor "the benefit of the doubt," but "the way the election was run, I don't know if he'll be fair."[394]

Bynes v. Board of Commissioners of Burke County

[392] The Augusta Chronicle, "Mayor says race relations stable," February 10, 1996.

[393] Sullivan v. DeLoach, Order of December 29, 1995.

[394] The Augusta Chronicle, "Mayor says race relations stable," February. 10, 1996.

In amending the Voting Rights Act in 1982, one of the cases Congress relied upon was Lodge v. Buxton,[395] a successful challenge to at-large elections for the county commission of Burke County, Georgia. Opponents of the amendment argued the case was proof that successful challenges under Section 2 could be brought under the existing discriminatory "intent" standard. Congress, however, noting that the trial court had found "[t]he vestiges of racism encompass the totality of life in Burke County," concluded that Lodge v. Buxton was "an extreme situation" and provided "little support for exclusive reliance on the intent test."[396]

On July 1, 1982, two days after President Ronald Reagan signed the 1982 amendments of the Voting Rights Act into law, saying "the right to vote is the crown jewel of American liberties, and we will not see its luster diminished," the Supreme Court affirmed the decision from Burke County.[397] The Court also approved the remedy ordered by the trial court, the implementation of a single member district plan proposed by the plaintiffs. Elections were held under the

[395] 639 F.2d 1358 (5th Cir. 1981).

[396] S. Rep. No. 97-417, 97th Cong., 2d Sess. 38-39 (1982).

[397] Rogers v. Lodge, 458 U.S. 613 (1982).

new plan in November 1982, and two blacks, Herman Lodge and Woodrow Harvey, were elected to the county commission, the first in the county's history.

A decade later, the 1992 census showed that the commission districts, as well as those for the county board of education which used the same plan, were malapportioned in violation of the one person, one vote standard. Although the total deviation among districts was 37%, the state legislature failed to adopt a constitutional plan during its 1992 session, and as a result the county was proceeding to hold the upcoming elections under the invalid plan. Black residents of Burke County, represented by the ACLU, filed suit requesting the federal court to enjoin further use of the unconstitutional plan and implement a plan that complied with one person, one vote, as well as Sections 2 and 5 of the Voting Rights Act.[398]

The parties were able to agree on a remedial plan which complied with the Constitution and the Voting Rights Act. The plan was submitted to the Department of Justice, approved under Section 5,[399] and implemented by the court at the 1992 elections. There is little doubt that Section 5 played a determinative role in insuring that a fair election plan was implemented in a

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[398] Bynes v. Board of Commissioners of Burke County, Georgia, No. CV 192-085 (S.D. Ga.).

[399] Steven H. Rosenbaum, U.S. Department of Justice, to Laughlin McDonald, April 24, 1992.

county in which, as found by a federal court, "[t]he vestiges of racism encompass the totality of life."

Gresham v. Harris

The Town of Keysville was chartered in 1890, and for many years was a bustling agricultural center. But in 1933, the year the country was sinking deeper into the Great Depression, the town held its last elections for the mayor and council. After that, for reasons no one can fully explain, the municipal life of the town died altogether.

Fifty years later there were only 300 people still living in Keysville, 80% of whom were black. Since there was no municipal government, there was no central water system. A few families had wells. Sewerage was primitive or non-existent. Most of the streets were unpaved, unmarked, and unlighted.

Keysville reached a turning point in 1985 when a mobile home in the black community went up in flames. Neighbors called the nearest fire station - some 25 miles away in Waynesboro - but it did not respond. Nollie Mae Morris, a local black resident, said "that's when we realized that Keysville ought to have fire

protection and some of the other public services that people elsewhere take for granted."[400]

The black community, organized under the banner of the Keysville Concerned Citizens, took on the task of revitalizing municipal government. But they were met with fierce resistance from local whites. In the event elections were held it would be likely that some or most of the elected officials would be black. From the white perspective, that was an outcome to be avoided at all costs.

Local whites claimed that blacks were irresponsible and incapable of governing, and that they were motivated by a desire for power and revenge against whites. The owner of a local nursing home in Keysville said that "black people in this town can't even keep bread in their homes, much less keep up any obligations to the city." Another white resident said that blacks were "racists" and that their attempt to restore local government was "reverse discrimination. They're trying to do to us what they say we did to them back in the 60s."[401] Whites also feared that if the town were revitalized a majority black government would tax them to pay for services which whites already had.

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[400] "The Revival of Keysville," Civil Liberties, (Fall 1987).

[401] Id.; Atlanta Constitution, October 19, 1988; True Citizen, March 1, 1989.

Emma Gresham, a retired school teacher and a leading force in Concerned Citizens, tried to reassure the white community that it had nothing to fear from new elections. "We have no anger in our hearts towards our white brothers and sisters," she told a gathering at a local church. "All we want is a government elected by the people, black and white, that can help bring this town back to life and do something about the water and the sewerage and the other problems. If we all come together, we can make it work."[402] As for the charge that blacks were looking for power, Gresham says they were simply looking for "a better life. I had never even thought about what we were doing in terms of trying to get power."[403] Aside from white resistance, the proponents of municipal government faced other obstacles. Based on existing, and conflicting, deeds and plats the exact location of the town boundaries was unsettled. State law also provided that municipal elections must be conducted by elected officials appointed by the local governing body. Since there was no governing body in Keysville to make appointments, there was no way for an election to be held in conformity with state law. In seeking a way out of this dilemma, and upon the advice of an assistant state attorney general, blacks organized a town meeting to

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[402] The Dallas Morning News, January 29, 1989.

[403] Time, "The Burden of Power," Time, August 7, 1989.

which all residents were invited. The meeting voted to hold an election and appointed two elections superintendents, one black and one white. January 6, 1986, was set as the date for the election.[404]

Candidates duly qualified for mayor and the five council positions; all were black and all were unopposed. Since there was no need to hold an election, the county probate judge administered the oath of office to the black candidates. On the same day, however, several whites filed a suit in state court arguing that the election had not been held in accordance with state law and that the boundaries of the town were unknown. The state court agreed and granted an injunction prohibiting the blacks from taking office and from conducting any more elections without strict compliance with state law.[405]

Concerned Citizens took another tack. They asked their representative in the legislature to introduce legislation activating the town. Whites, for their part, asked the representative to get the legislature to draw the boundaries to exclude them from the town limits. But the legislator refused to get involved in the controversy and took no action.

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[404] Gresham v. Harris, 695 F. Supp. 1179, 695 (N.D. Ga. 1988).

[405] Id.

Concerned Citizens turned next to Governor Joe Frank Harris and asked him to fill the vacant mayor and council positions, as he is authorized to do by the state constitution. Harris refused, claiming that the town boundaries were too uncertain to allow him to make appointments. He suggested that the legislature enact a law requiring county officials to conduct special elections to fill vacancies in municipal offices.

The legislature, under the urging of the legislative black caucus, passed such a law in 1987 and authorized the board of registrars for the county to prepare a list of voters for the election.[406] After being advised by the attorney general that the new statute was mandatory, Burke County officials prepared a map designating the town's boundaries, and issued a call for an election in Keysville to be held on January 4, 1988. The county attorney acknowledged that setting the town boundaries had been "a problem," but said "we now believe that the boundaries have been reasonably determined, and the election can go forward."[407]

The new election procedures were precleared by the Department of Justice, but, before an election could be held, the white plaintiffs again went to

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[406] Ga. Laws 1987, p. 178.

[407] Poole v. Gresham, No. 89-1564, Motion to Affirm, p. 7.

state court and got another injunction against the pending election. According to the state court, the boundaries of Keysville "were improperly determined" and were still essentially unknowable. And although the state court order plainly embodied a change in voting--the canceling of an election - the court nevertheless concluded that the change was not subject to preclearance under Section 5.[408]

Emma Gresham and other members of Concerned Citizens, with the assistance of the ACLU and Christic Institute South, filed a suit of their own in federal court arguing that the state court order canceling the election could not be implemented absent Section 5 preclearance. The court granted an immediate hearing and on December 31, 1987, issued an injunction allowing the January election to go forward.[409] "Either Keysville never existed," the judge said, "or you do the best you can."[410]

White opposition, however, remained unabated. On the day of the election several whites filed an action with the county board of registrars challenging the eligibility of 41 voters on the grounds that the boundaries of the town had not been determined and the residency of the voters could not be

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[408] Poole v. Lodge, Civ. No. 85-V-414 (Sup. Ct. Burke Cty., December 31, 1987).

[409] Gresham v. Harris, 695 F. Supp. at 1181.

[410] Atlanta Journal and Constitution, November 23, 1989.

established. The board of registrars dismissed the challenge, and there was no appeal.[411]

There were two slates of candidates in the election, one supported by Concerned Citizens and the other by those who opposed the restoration of municipal government. Candidates on the two slates got almost the identical number of votes, indicating that the voting was sharply polarized. Emma Gresham was elected mayor, outdistancing her white opponent by ten votes. Blacks were elected to four of the council positions, while James Poole, who had been endorsed by Concerned Citizens in an effort to include whites in the new government, was elected to the fifth council seat.

After the election, whites challenged the results in state court alleging once again that the boundaries of the town were indeterminable and that it was impossible to ascertain who was a qualified voter or candidate. The contest was denied and the state court affirmed the results of the election based on the map and voters list prepared by the county registrar.[412] Shortly thereafter, the federal court issued a permanent injunction that the state court order "changed a

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[411] In Re: Contest of Election Results of the Keysville Municipal Elections Held January 4, 1988, Civ. No. 88-V-21 (Sup. Ct. Burke Cty., May 23, 1988).

[412] Id.

previously precleared practice and therefore should also have been precleared."[413]

Whites in Keysville, however, pressed on with their opposition to municipal government. "We're in it for the duration," vowed their lawyer.[414] The white plaintiffs appealed the decision of the federal court to the U.S. Supreme Court and tried to block the enforcement of various ordinances and annexations enacted by the newly formed government by filing suits in state court. The city responded by removing the cases to federal court.[415]

On May 29, 1990, the Supreme Court affirmed the lower court decision, and on September 21, 1990, the federal court dismissed the state court ordinance and annexation challenges. With entry of these court orders, the dispute over municipal boundaries in Keysville was finally, irrevocably, over. And under the leadership of Emma Gresham and the town council, Keysville blossomed.

The town started a junior city council program for young people, and instituted programs to fight illiteracy and teen pregnancy. A small library was begun in the temporary town hall. The county built a fire station just outside of

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[413] Gresham v. Harris, 695 F. Supp. at 1184.

[414] Dallas Morning News, January 29, 1989.

[415] Keysville Convalescent and Nursing Center, Inc. v. City of Keysville, Georgia, Civ. No. 188-184 (S.D. Ga.); Poole v. City of Keysville, Georgia, Civ. No. 188-183 (S.D.Ga.).

town, street lights were installed for the first time, and a new post office was established. Streets have been paved. There is a new city hall, a clinic, and a handsome playground and recreation center. And rising above it all is a gleaming new water tower, dedicated in 1993 and a symbol of the town's triumph over the dead hand of the past and the closed fist of more recent times.[416]

The changes that came to Keysville were nothing short of remarkable and owed much to the spirit of local residents who persevered against the odds and refused to succumb to the racial fears and distrust that had for so long gripped the white community. The changes also had a lot to do with the increased influence of the Georgia legislative black caucus which shepherded through state legislation requiring officials to conduct town elections. And they had a lot to do with the Voting Rights Act, and those who helped to enforce it, which prohibited whites from blocking the efforts of blacks to participate in the governance of the community in which they lived.

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[416] Atlanta Constitution, October 19, 1988; ACLU, "Reaffirmation or Requiem for the Voting Rights Act?" (May 1995); The Dallas Morning News, January 29, 1989. The closed fist metaphor is that of Judge John Minor Wisdom. See United States v. Jefferson County Board of Education, 372 F.2d 836, 854 (5th Cir. 1966).

Butts County and the City of Jackson

Brown v. Brown

Brown v. Bailey

Jackson, the home of Georgia's death row, is the county seat of Butts County. According to the 1980 census, 43.5% of Jackson's 4,133 residents were black. In 1981, the ACLU filed suit in federal court on behalf of black citizens of Jackson challenging the failure to preclear annexations from 1966-1975 as well as a majority vote requirement imposed by the Jackson Democratic Committee.[417]

The city, which elected its mayor and five member council at-large, had followed a policy since 1965 of annexing areas with white population, which maintained the city's white majority. For example, in 1970, the city annexed of the town of Pepperton, which brought in 234 whites and only 35 African Americans. Overall, between 1960 and 1970, 64% of the 853 persons annexed into the city were white.

As a result of court orders, the city democratic committee disbanded, which had the consequence of ending the majority vote requirement in city elections. The defendants also agreed to submit all their annexations to the Attorney General for preclearance.

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[417] Brown v. Brown. No. CV-81-198-MAC (S.D. Ga.).

In 1981, the Department of Justice refused to preclear two annexations submitted by the city on the grounds that other land had been annexed since 1970, that had not been submitted under Section 5.[418] In April 1982, the city finally submitted to the Department of Justice 42 annexations since 1964 that had never been precleared. The ACLU asked the Attorney General to object on a number of grounds, including that the submissions understated the number of whites annexed into the city, and the city had established a pattern and practice of annexations to maintain the white majority."[419] The Attorney General requested additional information on two separate occasions, indicating that the annexations were problematical, but on May 20, 1983, and despite their racial impact, the Attorney General precleared the submissions.

The ACLU filed suit in 1984 on behalf of black voters challenging at-large elections for the Jackson City Council as violating the Constitution and Section 2. The lawsuit also challenged at-large elections for the three member Butts County Board of Commissioners on similar grounds.[420] Blacks had run for city and

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[418] James P. Turner, Acting Assistant Attorney General, to Alfred D. Fears, City Attorney, Jackson, Georgia, January 12, 1981.

[419] Neil Bradley, ACLU Southern Regional Office, to William Bradford Reynolds, Assistant Attorney General, June 10, 1982.

[420] Brown v. Bailey, No. CV-84-223-MAC (M.D. Ga.).

county office but had always lost. One black candidate made it to a run off for the county commission in 1982, but was defeated in the ensuing election.

In 1986, the city agreed to a plan for the city council consisting of five single member districts, two of which were majority black. The plan was implemented in the May 1986 election, and two blacks won seats on the city council.

The plaintiffs also reached an agreement with the county, expanding the commission from three to five members, with all members elected by districts. Although blacks were approximately one third of the county's population, because of the dispersion of the minority population, only one of the districts was majority black. A special election was held in April 1985, and two black candidates were elected, one from the majority black district and another from a district with a substantial black minority.

The county board of education, whose members were appointed by the grand jury, subsequently adopted the districts used by the county commission. The board's plan was submitted under Section 5 and was precleared.

Duffey v. Butts County Board of Commissioners

In 1992, the new census showed the districts for the Butts County Board of Commissioners and Board of Education were malapportioned with a total

deviation of nearly 25%. The general assembly enacted new districting plans containing only one majority black district, but they were not precleared by the April deadline and fell victim to the "poison pill" provision.

The ACLU then filed suit on behalf of black residents on June 2, 1992, seeking an injunction against further use of the malapportioned plans.[421] Plaintiffs sought, and obtained, a preliminary injunction finding that the election districts were "constitutionally malapportioned."[422]

One year later, on June 10, 1993, the parties entered into a consent decree that retained five single member districts for both boards, reapportioned the districts with minimal deviation, and established two majority black districts, instead of the single majority black district that had been contained in the state legislative plan. The agreement was precleared by the Justice Department in August and on October 1, 1993, the district court ordered the new plan into effect.

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[421] Duffey v. Butts County Board of Commissioners, Civ. No. 92-233-3-MAC (M.D. Ga.).

[422] Id., Order, June 11, 1992.

Calhoun County

Calhoun County Branch of the NAACP v. Calhoun County

Calhoun County, located in southwest Georgia, was named in honor of U.S. Senator John C. Calhoun of South Carolina. Calhoun, architect of the doctrine of state nullification, was twice elected vice-president of the United States but famously resigned the post in 1832, and returned to the U.S. Senate where he championed the cause of states' rights in debates with Daniel Webster.

Calhoun County was majority black and prior to passage of the Voting Rights Act elected its county government from single member districts. As of 1962, only 145 blacks were registered to vote in the county, just 6% of the voting age population. But in 1967, after increased black registration under the act, and faced with the prospect that one or more of its single member districts would have a majority of black registered voters, the county switched to at-large elections.[423] And in doing so, it ignored the preclearance provisions of Section 5.

In 1979, black voters, represented by the ACLU, sued the board of commissioners to enjoin its use of at-large elections for failure to comply with Section 5. The plaintiffs also sued the board of education, whose members were

[423] Georgia Laws 1967, p. 3068.

elected from districts, alleging the districts were malapportioned.[424] On January 30, 1980, a three-judge court ruled that the change to at-large voting had never been submitted for preclearance, and enjoined its further use. Later that year a consent order was entered creating five single member districts, two of which were majority black, for both the county commission and the school board, with the school board having two additional members elected at-large.

Following release of the 1990 census, black voters, represented by the ACLU, again sued the county charging that its voting districts were malapportioned in violation of one person, one vote.[425] On July 13, the district court entered an order enjoining the upcoming primary election for the board of education under the malapportioned plan. The parties then agreed upon a new plan that complied with the equal population standard and maintained two of the districts as majority black. The court entered a consent order directing defendants to submit the plan to the Department of Justice for preclearance.[426] The plan was submitted and precleared, and elections were held in 1992 under the plan for both the board of education and the county commission.

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[424] Jones v. Cowart, Civ. No. 79-79-ALB (M.D. Ga.).

[425] Calhoun County Branch of the NAACP v. Calhoun County, Georgia, Civ. No., 92-96-ALB/AMER(DF) (M.D. Ga.).

[426] Id., Order of August 26, 1992.

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Camden County and the Cities of Kingsland and St. Mary's

Haywood v. Edenfield

Camden County has a long and documented history of racial discrimination against African Americans. In 1978, the Treasury Department conducted an investigation and found that the county was discriminating against minorities in employment. The county's workforce did not reflect its black population, and minorities were relegated to jobs as laborers in the road department.[427] The Department of Health, Education, and Welfare also concluded that the county had fired two black school teachers in retaliation for filing allegations of discrimination, discriminated against blacks in awarding professional non-teaching positions at the county high school, and overwhelming assigned black students to lower, racially identifiable classes and tracks.[428]

In 1980, the City of Kingsland, one of the principal municipalities in Camden County, had a population of 4,166, of whom 33.55% were black. Prior to 1976, local laws required that the mayor and four member council be elected biennially to two year terms by plurality vote. In 1975, Kenneth E. Smith, a black

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[427] Bernadine Denning, Director, Office of Revenue Sharing, to E.B. Herrin, Jr., Chairman, Camden County Board of Commissioners, January 30, 1978.

[428] W. H. Thomas, Dir., Office for Civil Rights (Region IV), to David Rainer, Superintendent, Camden County Schools, September 1, 1977.

candidate, came within 17 votes of winning a plurality and being elected to the council. It was the first time a black candidate had received a substantial number of votes in a city election.

The next year, the city adopted numbered posts and staggered terms, and implemented a majority vote requirement for city elections. The majority vote requirement was formally adopted by the city in 1977, but neither it nor the 1976 changes were submitted for preclearance under Section 5.

The city did, however, seek preclearance in 1978 of another voting change, the relocation of a polling place from city hall to a meeting hall owned by two private, all white organizations, a local Woman's Club and the American Legion. The Attorney General objected to the change, noting that the meeting hall was in an inconvenient location for minority residents, there were no black poll workers or managers at the site, and "members of the black community believe that the use of the meeting hall as a polling place will deter black participation in elections, and that other possible sites are available."[429] After the objection, the city moved the polling place back to city hall.

Black candidates, as could be expected, fared poorly under the city's majority vote requirement. In the 1978 election, a black candidate won a

[429] Drew S. Days III, Asstistant Attorney General, to the Hon. David M. Procter, Judge of Probate Court for Camden County, August 4, 1978.

plurality of the votes for one of the council seat, but was defeated in the ensuing run off.

In November 1981, black residents, represented by the ACLU, filed suit against the city to compel submission of the 1976 and 1977 voting changes under Section 5.[430] The city agreed to stop using its majority vote requirement, and submitted the remaining changes to the Justice Department. The district court stayed the case and postponed the December 1982 elections pending the Attorney General's decision.

In its submission, the city argued the changes were necessary to ensure continuity in office and to avoid all council positions being held by persons new to office. However, the city never submitted any evidence to the Attorney General to support these claims. The city's alleged reasons for the changes were even more questionable given that, in the 1975 election, two council members and the mayor were reelected, and the only opposition against the mayor was from an incumbent council member. There was also evidence that the city violated the state's voter registration laws. In the December 1977 election, there were 785 registered voters, and only those voters were eligible to vote in a run

[430] Haywood v. Edenfield, Civ. No. 281-142 (S.D. Ga.).

off. Despite that, 800 registered voters were certified as eligible to vote in the run off.

On January 3, 1983, the Attorney General precleared the use of staggered terms, but objected to the numbered post provision. He noted that "implementation of numbered positions, in the context of racial bloc voting that seems to exist in Kingsland, would effectively nullify the advantage to the minority community of single shot voting and, thus, diminish their opportunity to elect a candidate of their choice." He also took note of the city's decision to return to plurality voting and emphasized that use of a majority vote requirement "is not legally enforceable." [431]

Plaintiffs requested the court to order a special election for the mayor and four city council positions, arguing that all incumbents were elected under illegal voting procedures. The court declined to cut the incumbents' terms short and instead ordered that only two council positions be filled by special election because those terms would have expired in December 1982, anyway.[432] The court also required that ballot forms, instructions, and candidate qualification procedures explicitly inform all registered voters that there was no anti-single

[431] William Bradford Reynolds, Asstistant Attorney General, to John J. Ossick, Jr., Kingsland City Attorney, Kingsland, January 3, 1983.

[432] Haywood v. Edenfield, Order of March 7, 1983.

shot law, and that incumbency should not be noted on official forms to avoid giving a benefit to those elected under an illegal system.

Foreman v. Douglas

Prior to 1967, St. Mary's, another municipality in Camden County, had six council members elected by plurality vote to staggered two year terms. A mayor was elected by plurality vote to a one year term. In 1967, the city adopted numbered posts and a majority vote requirement for council members, and a majority vote requirement for the mayor. The city reenacted the changes in 1981, which was an election year, but did not submit either the 1967 or 1981 enactments for preclearance under Section 5.

In 1980, St. Mary's had a population of 5,208 people, of whom 18.47% were black. In the 1982 election, Gerald Roberts, a black former council member who had been elected four times, received 45% of the vote in a four candidate race for mayor. Although he received a plurality and would have won under the pre-1967 voting system, he was forced into a run off and was defeated. Furthermore, when Roberts vacated his council seat to run for mayor, no black person even qualified for the vacant seat, underscoring the deterrent effect of the majority vote requirement on black candidacies.

In November 1981, black residents, represented by the ACLU, filed a lawsuit against St. Mary's, seeking to enjoin use of the majority vote and

numbered post requirements absent preclearance under Section 5.[433] The city submitted the changes, and the district court stayed the case pending the Attorney General's decision. The city maintained that even if the changes were rejected, its election scheme would still require a majority vote because the language in the city's charter addressing elections was silent on the majority versus plurality issue. The ACLU submitted comments urging an objection, and pointed out that the Georgia Supreme Court had interpreted language similar to that in the city's charter to require a plurality vote.[434] The ACLU further highlighted the city's failure to provide important data regarding the racial breakdowns of voter registration lists between 1971 and 1980, which indicated that minority registration was depressed. The continued use of numbered posts and a majority vote requirement, the ACLU argued, would have a negative racial impact.

Nevertheless, the Attorney General precleared the changes without explanation in September 1982.[435] Given the Attorney General's approval, the

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[433] Foreman v. Douglas, Civ. No. 281-143 (S.D. Ga.).

[434] Neil Bradley, Associate Director, ACLU Voting Rights Project, to William Bradford Reynolds, Assistant Attorney General, May 28, 1982.

[435] William Bradford Reynolds, Assistant Attorney General, to Stephen L. Berry, Esq., September 14, 1982.

district court ordered municipal elections to be held on December 7, 1982, bringing the litigation to a close.

Baker v. Gay

In February 1984, black residents, represented by the ACLU, challenged Camden County's use of at-large elections for the board of commissioners and the board of education. Under the county's system, members of both boards were elected at-large by majority vote for two year terms. The plaintiffs argued that the county's at-large election system diluted black voting strength in violation of the Constitution and the Voting Rights Act. The parties reached a tentative agreement the day before trial, and entered a consent order resolving the case in October 1985.[436] The agreement provided that both boards would be elected from five single member districts, two of which were majority black.[437] In the August 1986, primary elections, one black candidate won a board of education seat, and two black candidates won commission seats. Another black candidate, the first named plaintiff, lost a third commission seat by three votes.

[436] Baker v. Gay, Civ. No. 284-37, Order (S.D. Ga.).

[437] Id., Order of October 7, 1985.

In April 1991, the county sought to change elections for the board of commissioners by reducing the five single member districts to four, with a chairman elected at-large.[438] The county also wanted board members to serve four year staggered terms instead of two year terms.[439] However, there is no record showing that the Attorney General ever approved these changes. In 1992, the county attempted to get the legislature to enact In 1992, the county attempted to get the legislature to enact a redistricting plan that did not contain any majority black districts, but the county abandoned its efforts after the black community raised objections. Then, in 1993, the county proposed a new redistricting plan with one majority black district at 50.55%. The general assembly passed the redistricting plan with the help of Rep. Charlie Smith of St. Mary's, even though the black community had no say in the drawing of the lines and, for the most part, were completely shut out of the reapportionment process. The county submitted the 1993 plan for preclearance and the last correspondence from the Attorney General shows that the county had not

[438] J. Grover Henderson, Attorney for Camden County, to Richard Thornburg, U.S. Attorney General, April 3, 1991.

[439] Id.

provided sufficient information for the Justice Department to render a decision.[440]

Today, the board of commissioners is composed of five members elected from single member districts to four year staggered terms. As of 2006, although the county populations is 20.1% African American, none of the commission districts are majority black. The county board of education has five members, one of whom is African American.

Carroll County

Wyatt v. Carroll County Board of Commissioners

The 1990 census showed that the six member board of commissioners of Carroll County was malapportioned, with a total deviation of 45.7%. The legislature had enacted a remedial plan but did not submit it for preclearance until shortly before the April 27, 1992, deadline. The plan was not acted on by the Department of Justice, and died as a result of the legislative poison pill.

The black population of Carroll County was approximately 15%, and under the plan based on the 1980 census only one of the districts was majority (51.41%) black. Under the plan enacted by the legislature based on the 1990

[440] James P. Turner, Assistant Attorney General, to J. Grover Henderson, Attorney for Camden County, May 24, 1993.

census, however, none of the districts were majority black, and the percentage of blacks in the previously majority black district was reduced to 47.3%.

The ACLU filed suit on May 1, 1992, on behalf of black voters in Carroll County, alleging that the 1980 plan was malapportioned, and that the 1990 plan was retrogressive because it eliminated the sole majority black commission district under the pre-existing plan.[441] On June 10, 1992, the court enjoined the regularly scheduled primary election for the board of commissioners, and ruled that "it is undisputed, that the current districting system . . . is malapportioned in violation of the Fourteenth Amendment's one person-one vote guarantee."

Defendants then proposed a remedial plan in which one district was majority black based on total population, but contained a black voting age population of just 47.8%. Plaintiffs proposed an alternative plan with a 51.8% black district, which included students living on the campus of West Georgia College, many of whom were either non-residents, and thus not entitled to vote, or unlikely to vote in elections held during the summer. Taking the student population into account gave plaintiffs' proposed district an effective black voting age population. The court, however, rejected plaintiffs' plan and ordered

[441] Wyatt v. Carroll County Board of Commissioners, Civ. No. 3:92-CV-61-GET (N.D. Ga.).

the defendants to submit their plan to the Attorney General for preclearance.[442] On behalf of the NAACP and other black voters, the ACLU urged an objection to the county's plan on the grounds that it was retrogressive compared to the benchmark 1980 plan.[443] Despite the defect in the county's plan, the Justice Department precleared it on August 24, 1992.

Charlton County

Smith v. Carter

About a third of Charlton County is taken up by the Okefenokee Swamp, Seminole for "Land of Quaking Earth," which served in the 19th century as a sanctuary for members of the Seminole Indian Tribe, as well as escaped slaves. Even though blacks were almost a third of the county's population, prior to 1985 no black person had ever been elected to the county commission or school board. On August 29, 1985, the ACLU filed suit on behalf of five black voters of Charlton County against the county commission and school board alleging that at-large elections for both bodies diluted the voting strength of black voters in

[442] Id., Order of June 18, 1992

[443] Mary Wyckoff to Steven H. Rosenbaum, Department of Justice, June 24, 1992.

violation of Section 2 and the Constitution.[444] The lawsuit also alleged that the county had an egregious record of failing to comply with Section 5.

Prior to 1974, the board of commissioners consisted of three members elected at-large from residential districts. In 1974, the general assembly passed legislation that increased the board to five members, established numbered posts and staggered terms, and eliminated residential districts. Although these were changes in voting, the county implemented them at the elections in 1974 and 1976 without complying with Section 5. When the changes were finally submitted in 1977, the Attorney General precleared the increase in the size of the board but objected to the numbered posts and staggered terms:

> Our analysis reveals that blacks have not been elected to the Board of Commissioners of Charlton County under the elective system established by Act No. 1222 . . . and that voting along racial lines is present in Charlton County.[445]

The county asked for reconsideration, but it was denied:

> We have carefully considered the information you have provided, but find that it fails to provide a basis for our withdrawing the objections that were interposed. In particular, we have reanalyzed voting patterns in the county

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[444] Smith v. Carter, Civ. No. 585-088 (S.D. Ga.).

[445] Drew S. Days III, Assistant Attorney General, to Honorable J.S. Haddock, Jr., Judge, Probate Court, Charlton County, June 21, 1977.

> and find that our original conclusion, that racial bloc voting exists, is still warranted.[446]

Despite the objection of the Department of Justice, the county refused to comply and conducted elections in 1978, 1980, 1982, and 1984 using the objected to numbered posts and staggered terms requirements.

In 1982, the Department of the Treasury notified the chairman of the county commission that a discrimination complaint had been filed against the county. After an investigation, the department found that "blacks are substantially underrepresented" in the county workforce with only 1 out of 29 permanent employees being African American. The department concluded that

> the County's recruitment policies and practices, coupled with the limited `active' period for applications, discriminates against blacks by limiting their knowledge of, and opportunity to apply for positions in the County's work force. The County's practice of hiring friends or relatives of incumbent employees, given the predominantly white composition of the County's work force, limits the opportunities for blacks to be considered once they apply.

The county denied the department's findings but signed a five-year compliance agreement. A follow-up investigation in 1983 found that "blacks still remain underrepresented within the County's work force . . . [and] are

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[446] Drew S. Days III, Assistant Attorney General, to Honorable J.S. Haddock, Jr., Judge, Probate Court, Charlton County, August 29, 1977.

predominantly concentrated in the service/maintenance positions."[447] A 1985 letter from the Treasury Department cited the County's "slow progress in fulfilling the hiring objectives of the Compliance Agreement," and noted only four of the County's 35 full-time permanent employees were black.[448]

The county school board also had a record of failing to comply with federal law. Although the Supreme Court outlawed segregation in 1957, the Charlton County schools remained segregated until 1970, with 90.2% of the county's black students in all-black schools. Two of the county's three schools were all-white. The county also maintained separate bus routes, and assigned children to buses based on race. In 1970, in response to a federal court order, the county board of education, along with 81 other local school systems in the state, finally adopted a plan to desegregate its public schools.[449]

Charlton County adopted at-large elections for its school boards in 1975 after the 1970 extension of the Voting Rights Act to replace a pre-existing system

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[447] Treadwell O. Phillips, Manager, Civil Rights Division, Office of Revenue Sharing, U.S. Department of the Treasury to Jessie A. Crews, Jr., Chairman, Charlton County Board of Commissioners, November 14, 1983.

[448] Treadwell O. Phillips, Manager, Civil Rights Division, Office of Revenue Sharing, U.S. Department of the Treasury to William Charter, Chairman, Charlton County Board of Commissioners, February 15, 1985.

[449] United States v. State of Georgia, No. CIV-12972 (N.D. Ga, 1969).

of grand jury appointments.[450] The legislation also provided for numbered posts, staggered terms, and a majority vote requirement. The Attorney General objected to the changes in 1977 on the grounds that "fairly drawn single member districts would give blacks a more realistic opportunity to elect a candidate of their choice."[451] The District Court for the District of Columbia, however, in an unpublished opinion, subsequently precleared the changes.[452]

The 1985 voting rights lawsuit against the board of commissioners and the board of education was resolved by consent decree in December 1985, with the defendants admitting their failure to comply with Section 5. A remedial plan was agreed upon and adopted in 1986, creating five single member districts for both the board of education and board of commissioners.[453] Elections were held that year and black candidates won a seat on each board.

Clay County

Frank Davenport v. Clay County Board of Commissioners

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[450] Act No. 360 (1975).

[451] Drew S. Days III, Assistant Attorney General, to J. S. Haddock, Jr. June 21, 1977.

[452] Treadwell O. Phillips, Manager, Civil Rights Division, Office of Revenue Sharing, U.S. Department of the Treasury to William Charter, Chairman, Charlton County Board of Commissioners, February 15, 1985.

[453] Smith v. Carter, Order of March 31, 1986.

Clay County, which is majority black, is one of the poorest counties in Georgia, with more than 30% of the population living below the poverty level. Located in the southwest corner of the state, on the Georgia-Alabama line, the county traditionally elected its five member board of commissioners from single member districts. No black candidates had ever been elected to the commission.

After passage of the Voting Rights Act, and the prospect that one or more of its election districts might contain a majority of registered black voters, the county abandoned its district system in favor of at-large voting in 1967. This change allowed whites to continue to control the election of all members of the board of commissioners. Although the switch to at-large elections was a change in voting, the county failed to submit it for preclearance under Section 5.

In 1980, members of the local NAACP, represented by the ACLU, filed suit challenging the county's at-large election system and the failure to comply with Section 5.[454] The three-judge court found a Section 5 violation, which resulted in a return to the single member district system.[455]

The 1990 census showed that the county commission districts were malapportioned with a total deviation of 39.1 %. The general assembly enacted a

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[454] Davenport v. Isler, No. 80-42-COL (M.D. Ga.).

[455] Id., Order of June 23, 1980.

remedial plan in 1992, which called for new districts of substantially equal population, three of which contained majority black voting age populations.

However, because the 1992 reapportionment legislation was not precleared by the April 27, 1992, deadline, it was rendered void by a poison pill provision. Since the county was without a constitutional districting plan, the ACLU filed suit on July 10, 1992, seeking a remedial plan for the upcoming elections.[456]

Primary and general elections, however, were held in 1992 under the malapportioned plan and all five districts elected county commissioners for four year terms. When the general assembly reconvened for its 1993 session, it enacted redistricting legislation that provided for districts identical to those in the 1992 legislation, only this time the reapportionment bill contained no poison pill provision.

In 1993, the general assembly enacted legislation changing the method of selecting the Clay County school board members from grand jury appointment to election from the same five single member districts used by the county commission. [457] However, the legislation also included a requirement that school

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[456] Davenport v. Clay County Board of Commmissioners Civ. No., 92-98-COL (JRE) (M.D. Ga.).

[457] This change came about as the result the adoption by Georgia voters of a Constitutional amendment in 1992, mandating that school districts which utilized appointive systems change to

board candidates must possess a high school diploma or its equivalent.[458] The change was submitted for preclearance but was objected to by the Department of Justice:

> In Clay County, only 37% of black persons age 25 and older possess a high school diploma or its equivalent, compared to 69% of white persons age 25 and over, according to the 1990 census. State law generally does not appear to require or endorse the proposed educational qualification and the existing system of grand jury appointments to the school board has no such requirement. Indeed, we understand that none of the three black incumbents on the school board would meet this requirement. In these circumstances, requiring that persons who wish to run for the school board demonstrate that they have a high school diploma or a GED equivalent would appear to have a disparate impact on the ability of black voters in Clay County to elect their preferred candidates.[459]

In a consent decree adopted on June 2, 1993, defendants admitted that the board of commissioner districts were "malapportioned in violation of the one person-one vote requirement of the Fourteenth Amendment," and agreed to hold special elections in 1994, and to submit the newly enacted redistricting plan

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district election systems. See, Ga. Laws 1991, p. 2032; Ga. Const. Art. VIII, Sec. 5, Para. 2.

[458] Georgia Laws, 1993, Act 8.

[459] James P. Turner, Assistant Attorney General, to William H. Mills, October 12, 1993.

for Section 5 preclearance. Plaintiffs agreed to "assist in the preclearance process," and preclearance was granted[460]

Following adoption of the consent decree, the defendants sought attorneys' fees as the prevailing party. Plaintiffs were clearly the prevailing party because they secured the adoption of constitutionally apportioned commission districts, three of which were majority black, as well as the cutting short of the terms of commissioners from four to two years. The court, however, ordered fees awarded to neither party, ruling that, "[a]s incongruous as it may seem, it is the Court's view that in the situation above described there are two prevailing parties in this case."[461]

Clayton & Fulton Counties and the City of College Park

In re the City of College Park

College Park, named for the finishing school and military academy that once anchored the community, is just south of Atlanta and abuts Hartsfield-Jackson International Airport. In 1977, the city had a seven member city council, consisting of a mayor elected at-large and six council

[460] Davenport v. Clay County, Order of June 2, 1993, p. 4.

[461] Id.

members elected from single member districts. The population at the time was 26,835, and approximately 30% black. This was a significant increase from the 15.4% minority population recorded by the 1970 census.

In October 1977, the city submitted a redistricting plan, as well as some 32 proposed annexations, for preclearance under Section 5. The Department of Justice objected to the redistricting plan, as well as 17 of the 32 annexations, noting that:

> Voting in municipal elections appears to follow racial lines. Under the districting plan adopted by the City there will be a black majority in one of the six wards; Ward 2 will be 77 percent black in total population. Thus if voting is along racial lines blacks under this plan will have the opportunity to elect no more than one of the six council members elected from single member districts, although they constitute almost one-third of the City's population. In addition, our analysis reveals that this plan has a total deviation from equal district population of plus or minus 15.8 percentage points, and that it is possible to draw a plan creating two districts with substantial black majorities that has a significantly smaller total deviation.
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> With respect to the annexations. . . Our analysis reveals that of the City's population of 26,835, approximately 8,748 reside in the annexed areas under consideration; of these, according to the best estimates we have received, approximately 98 percent are white. As a result, the City without the annexed areas would have a population of 18,117 [*sic*] and would be approximately 43 percent black. Thus the annexations have resulted in a dilution of the black population from 43 percent to approximately 30 percent.

> Based on this analysis and that presented above with respect to the redistricting, we must conclude that the annexations significantly dilute the City's black population and that College Park's electoral system does not minimize the dilutive effect of these annexations.[462]

By 1983, the black population of College Park had increased to 48.3%, but the 1980 census also showed the six city council districts were malapportioned. The city adopted a redistricting plan and submitted it to the Department of Justice for preclearance, but the Attorney General objected because the plan fragmented the concentrations of black population and created only one majority black district and five safe, majority white districts (not including the at-large mayoral seat) for the incumbents. Were the city apportioned in a racially fair manner, at least two of the six districts would have been majority black.

> In spite of the enormous increase in minority population, the city appears to have made a conscious effort to maintain effective minority voting strength at the level established in 1976. In doing so, the proposed plan increases the fragmentation of the minority community in a manner that adversely affects minorities by packing black population into one district (District No. 2 at 90 percent black) and dividing the rest of the black population concentration between four other districts. Nor does there appear to be any legitimate reason for the strangely irregular lines that meander throughout census Block No. 319, a highly concentrated

[462] Drew S. Days III, Assistant Attorney General, to George E. Glaze, City Attorney, City of College Park, December 9, 1977.

> black community. Such fragmentation and irregularity of shape in the context of the voting patterns that exist in the city and the fact that the city seems not to have welcomed but, rather, to have avoided input from the black community in the reapportionment process, are all probative of racial purpose.[463]

The ACLU, at the request of black residents of College Park, met with members of the city council and was able to secure a redistricting plan that fairly represented minority voters. The new plan contained two majority black districts, was submitted to the Attorney General, and was precleared in February 1985.

Allen v. Reeves

On election day 2003, African American postal worker Tracey Wyatt challenged a white incumbent, Ken Allen, for a city council seat representing College Park's Third Ward. In the ward's south precinct, poll officials instructed voters to deposit their ballots in the ballot box without removing the number stubs attached to each one, a process which violated Georgia election law. A poll watcher objected, but was rebuffed until the late afternoon, when College Park Mayor Jack Longino intervened by contacting the city's supervisor of elections.

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[463] William Bradford Reynolds, Assistant Attorney General, to George E. Glaze, Esq., December 12, 1983.

The elections supervisor then instructed the Third Ward poll manager to tell remaining voters to remove the number stubs from their ballots before casting their votes. The Third Ward's ballots, secured in their boxes, were then transported to the College Park City Hall.

Unsure of what to do with the irregular ballots, the city sought advice from the Fulton County superior court judge on call to manage election disputes, who conducted an informal hearing. The Third Ward's ballot boxes were then opened with witnesses present and the 70 ballots with number stubs still attached were segregated from the rest. The presiding judge then detached the stubs from their ballots and invited poll officials to count the completed votes with witnesses present. All told, 80 votes had been cast in the Third Ward's south precinct: 71 for Tracey Wyatt, and nine for Ken Allen. Across the entire ward, Wyatt prevailed by a margin of 181 to 140.

Allen then filed an election challenge in the Fulton County Superior Court to discount the 70 ballots which had been cast with number stubs attached, and to award him the city council seat.[464] Wyatt, represented by the ACLU, argued that granting Allen's challenge would violate the Fourteenth and Fifteenth Amendments and Article 2 of the Georgia constitution. A victory for Allen,

[464] Allen v. Reeves, Civ. No. 2003-CV-77825 (Fulton Cty. Sup. Ct.).

moreover, would encourage fraud by poll officials, and unjustly penalize voters for mistakes made by election officials.

Wyatt further argued that granting Allen's petition would violate Section 2 of the Voting Rights Act because statistics showed that even if every white voter in the Third Ward went to the polls and voted for Wyatt without removing the number stub, 74% of the discounted ballots would have come from minority voters. By discounting the 70 ballots that had originally been incorrectly cast, the court would be changing the results of an election in which a majority black ward had chosen a black candidate. When reauthorizing the Voting Rights Act in 1982, the U.S. Senate had warned against allowing an isolated incident of misinformation or breakdown in polling procedures to dilute the vote in minority communities.

Following a hearing, the Superior Court dismissed Allen's challenge and upheld the election results. Employing what it described as a "legal fiction," it held that the challenged ballots had not been actually cast until the election judge separated the ballots from their number stubs. Thus, all the ballots were properly cast and counted, and no violation of state law had occurred. A week after the court issued its order, Tracey Wyatt was sworn in as a member of the College Park City Council.

Coffee County and City of Douglas

NAACP v. Moore

Presley v. Coffee County Board of Commissioners

Coffee County, with a population of nearly 22,000, a quarter of whom are black, is located in the rural wire grass region of south central Georgia. In 1968, the county abandoned grand jury appointments of school board members in favor of at-large elections. Two years later, after the legislature authorized a referendum on several school board issues, residents ratified the 1968 change to school board elections, voted to reduce the number of board members from seven to five, and changed the position of county school superintendent from an appointed to an elected position. The 1968 and 1970 changes were all subject to Section 5, but the county failed to seek preclearance. The county had also adopted at-large elections for its five member county commission in 1960, prior to passage of the Voting Rights Act.

In 1977, the ACLU filed suit on behalf of black voters challenging at-large elections for the county board of commissioners, the board of education, and the city commission of Douglas, the county seat, as diluting minority voting strength in violation of Section 2 and the Constitution.[465] The plaintiffs also sought to

[465] NAACP Branch of Coffee County v. Moore, Civ. No. 577-25 (S.D. Ga.).

require the board of education to comply with Section 5. The parties subsequently entered into consent agreements in 1978, acknowledging that at-large elections for each jurisdiction "denied plaintiffs and their class equal access to the political system, in derogation for their rights [under the constitution and the Voting Rights Act]." Five single member districts were established for the commission and school board, but using different district lines. One district for each body was majority black. The plan for the City of Douglas contained three two member districts, one of which was majority black.

Based on the 1980 census, the three bodies were malapportioned. However, despite repeated negotiations, the parties to the 1977 litigation were unable to reach an agreement on remedial plans, and as a consequence the malapportioned plans were used throughout the decade.

In 1992, the general assembly enacted identical redistricting plans for the board of commissioners and board of education. The plans were not precleared by the deadline set by the legislature, and accordingly died of a poison pill provision.

In September 1992, black voters, who were 25.4% of the county population, and nearly half the population in Douglas, again filed suit challenging the malapportionment of the commission, the board of education,

and the city council as violating Section 2, and the Constitution.[466] Defendants did not contest plaintiffs' assertion that the existing plans were malapportioned, acknowledging that the election plan for the board of commissioners contained a deviation of 39.2%, the plan for the board of education 21.72%, and the plan for Douglas 34.9%.[467]

Because the July 21, 1992, primary elections had already been held for the board of commissioners and the board of education under the malapportioned plans, plaintiffs moved to enjoin the general election or require special elections under a properly apportioned and precleared plan. On October 29, 1992, the district court refused to enjoin the pending November elections, but indicated it would require a special election once proper plans had been enacted and precleared. The county submitted the 1992 legislative plan and it was precleared by the Department of Justice on January 19, 1993. Plaintiffs contended, however, that the plan violated Section 2 because it packed black voters in one district and fragmented them in other districts.

Prior to trial on the Section 2 vote dilution claim, the parties reached an agreement on redistricting plans for the commission and board of education

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[466] Presley v. Coffee County Board of Commissioners, Civ. No. 592-124 (S.D. Ga.). The 1977 case, NAACP v. Moore, was consolidated with the Presley case on October 28, 1992.

[467] Id., Plaintiffs' Opposition to Defendants' Motion to Adopt Reapportionment Plan, p. 2.

which created one district with a 65.72% black voting age population (BVAP), and a second district with a 27.22% BVAP. The court signed the consent decree revising the legislative plans on March 16, 1994, and the plans were precleared.[468]

Following the 1990 census, the City of Douglas adopted a plan which packed black voters into a single district, but it was unable to get the plan precleared. Subsequently, on October 7, 1993, the parties to the 1992 malapportionment litigation submitted a consent order to the court enjoining the upcoming elections. The city sought to expand the six member city commission by one member, but the court declined to accept that change. After a trial date was set, the city agreed to a plan containing six districts, three of which were majority African American.

As is evident from these events, Section 5 proved to be an important tool in helping to dismantle election districts in Coffee County that unfairly diluted the political influence of minority voters.

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[468] Deval Patrick, Assistant Attorney General, to Keith H. Solomon and Sidney Cottingham, April 22, 1994.

Colquitt County and the City of Moultrie

Cross v. Baxter

When Congress amended and extended the Voting Rights Act in 1982, one of the cases it relied upon was Cross v. Baxter,[469] a challenge to at-large elections in Moultrie, Georgia - the Colquitt County seat - brought by black residents represented by the ACLU. Despite evidence of discrimination and lack of equal access to the political process, the district court dismissed the complaint. The court of appeals, citing evidence of vote dilution that had been ignored or discounted by the district court, reversed and remanded.[470] The district court, however, once again dismissed the complaint.

A second appeal was taken, but this time the court of appeals affirmed. It held that plaintiffs had not shown that town officials were "unresponsive to the particularized needs of the Black residents."[471] Plaintiffs petitioned the Supreme Court for review, and based on the intervening amendment of Section 2, the Court vacated the decision and sent the case back to the district court for yet another trial under the new "results" standard.[472] The Senate report

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[469] Civ. No. 76-20 (M.D. Ga.).

[470] Cross v. Baxter, 604 F.2d 875 (11th Cir. 1979).

[471] Cross v. Baxter, 639 F.2d 1383 (11th Cir. 1981).

[472] Cross v. Baxter, 460 U.S. 1065 (1983).

accompanying the 1982 amendments expressly provided that proof of unresponsiveness of elected officials was not a prerequisite for a Section 2 violation. The report further noted that the case from Moultrie "was rejected, even though the evidence showed pervasive discrimination in the political process."[473]

On remand, and in light of the amendments of the Voting Rights Act, the City of Moultrie capitulated and agreed to the adoption of district elections. But the price it exacted from the plaintiffs was a plan that packed nearly every black city resident (91%) into a two member district. Rather than prolong the litigation before a district court judge who had twice dismissed their complaint, plaintiffs agreed to the settlement, which clearly reflected the deep and continuing racial polarization in the city.[474] Elections were held under the new plan in May 1985, and two black candidates were elected to office.

Cook County

Jones v. Cook County

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[473] 1982 U.S.C.C.A.N. 39.

[474] Cross v. Baxter, Order of July 24, 1984.

Located along Interstate 75, halfway between Macon, Georgia, and Jacksonville, Florida, Cook County had a population of 13,456 in 1990. The county's history of voting discrimination against its 30% African American population included the adoption, in 1967, of at-large elections to minimize black influence in elections. In 1982, the Attorney General objected to annexations by the county seat of Adel because of their potential to dilute black voting strength:

> Our analysis shows that, assuming the data presented by the City to be accurate, the annexations in question would seem to result in an overall dilution in the black voting strength of between 2.5 and 3 percent, a significant reduction in view of the apparent existence of racial bloc voting in the City.[475]

The Attorney General withdrew his objection in 1983, following a change in the method of elections in Adel.

A vote dilution lawsuit filed by local residents in 1984 was settled by the adoption of five single member districts for both the Cook County board of commissioners and board of education.[476] One of the districts for each body was majority black.

Based on the 1990 census, the districts were malapportioned, with a total deviation of 25.23%. The ACLU filed suit in 1994 on behalf of black voters

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[475] William Bradford Reynolds, Assistant Attorney General, to Howard E. McClain, June 29, 1982.

[476] Cook County Voter Education Project v. Walker, Civ. No. 84-044-VAL (M.D. Ga.), Order of July 11, 1985.

challenging the malapportioned districts for both the commission and the board of education as violating Section 2, Section 5, and the Constitution.[477] In a hearing on December 19, 1995, county officials agreed that "the relevant voting districts in Cook County are malapportioned in violation of the equal protection clause of the fourteenth amendment to the United States Constitution."[478] A consent decree allowed sitting commission members to retain their seats but implemented a new plan, correcting the malapportionment for the 1996 elections. Based on 1990 census figures, the new plan maintained the existing majority black district at 65.45% and created a second district with a 52.02% black population.

Crawford County

Thomas v. Crawford County

In 2002, the ACLU filed suit on behalf of voters in Crawford County alleging that election districts for the board of commissioners and board of education were malapportioned.[479] Both boards consisted of five members elected from five identical single member districts, two of which were majority

[477] Jones v. Cook County Board of Commissioners, 7:94-cv-73-(WLS),(M.D. Ga. filed June 3, 1994).

[478] Jones v. Cook County Board of Commissioners, Civ. No. 7:94-cv-73 (WLS), Order, December 19, 1995.

[479] Thomas v. Crawford County, Georgia, 5:02 CV 222 (M.D.Ga.).

black.[480] A sixth member was appointed to the board of education by its members. The total deviation among the districts was 73.63%, and plainly unconstitutional under one person, one vote.

Failed efforts by the legislature and local officials to cure the malapportionment had a convoluted history. After the 2000 census was released, the board of commissioners adopted an ordinance reducing the number of single member districts for the board from five to four, with the chairman elected at-large. The Georgia General Assembly enacted a plan based on the ordinance, and it was submitted to the Department of Justice for preclearance under Section 5.

The board of commissioners, alleging that it was unaware that the new plan reduced the number of districts, later rescinded the ordinance and asked the Department of Justice to deny preclearance to the proposed four district plan. The department issued a letter on April 29, 2002, stating that it would take no action on the submission in light of the letter from Crawford County officials stating that they no longer wished to implement the submitted plan. The general assembly also passed legislation reducing the number of single member districts

[480] The county adopted single member districts as a result of Section 2 litigation brought in 1984. Raines v. Hutto, 84-321 (M.D.Ga.).

for the board of education from five to four, but Governor Roy Barnes vetoed the bill on May 22, 2002.

Plaintiffs brought suit when it became apparent that the 2002 elections would be held under the malapportioned plan. They sought, and were granted, summary judgment and a preliminary injunction preventing elections from taking place under the unconstitutional plan. The court then held a remedial hearing to fashion a court ordered remedy. Plaintiffs argued for the maintenance of the two majority black districts. The court reviewed plans from the plaintiffs and the county, and adopted a court ordered plan consisting of five single member districts, two of which were majority black.

Coweta County

Rush v. Norman

Coweta County, west of Atlanta, is named for the tribe headed by Chief William McIntosh of the Coweta Tribe of the Creek Indian Nation, "the half-Scot, half-Creek" who relinquished lands to the federal government in the 1825 Treaty of Indian Springs. McIntosh was later slain by an irate group of fellow Creeks at his home on the Chattahoochee River.

In October 1983, the ACLU wrote a letter on behalf of the local NAACP branch to the members of the general assembly from Coweta County advising

them that at-large elections for the county commission, the board of education, and the board of aldermen of Newnan, the county seat, were likely in violation of the Voting Rights Act. In response, a five district plan was adopted for the county commission, one of which was majority black. A plan was also adopted for the board of education containing five single member districts, one of which was majority black, and two at-large seats.

The City of Newnan also enacted a new election plan. It increased the membership on the board of aldermen from four to six, and provided for four members elected from single member districts, one of which was majority black, and two members elected at-large. Blacks, who constituted 45% of the population of Newnan, opposed the plan because it did not fairly reflect minority voting strength. The plan was submitted to the Attorney General for preclearance, who objected to it in August 1984:

> Our review of the information available to us indicates that racially polarized voting exists in the City of Newnan and that no black ever has been elected to the city council, even though six blacks have been candidates for council positions since 1970. Our analysis reveals that the submitted plan provides for one district in which black voters would appear to have a realistic opportunity to elect a representative of their choice.
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> In evaluating the purpose underlying the proposed changes we note at the outset the submission's statement that the proposed changes were initiated in response to a letter from representatives of the minority community seeking a meeting to discuss possible changes in the existing at-large method of election. Our information, however, is that the city has made no effort to solicit input or suggestions from the members of the minority community who sought the change. Nor has the city adequately justified the

method chosen.

> In that regard, our analysis shows that a plan with compact districts which recognize communities of interests likely would provide two districts in which minority voters could elect representatives of their choice. In fact, we understand that the city considered alternatives which would have had exactly that result but rejected all of them in favor of a plan that unnecessarily divides the city's minority residential areas into three districts, thereby affording minorities an effective majority in only one district. In a locality with a history of racial bloc voting, such as seems to exist in the City of Newnan, such fragmentation of minority residential areas has the effect of diluting the black voting strength.[481]

Because of the objection, the method of elections for the city reverted back to the preexisting at-large system.

In September 1984, the ACLU filed suit on behalf of black residents of Newnan challenging at-large elections for the board of aldermen. They also moved to enjoin the October 30, 1984, city elections.[482]

The parties subsequently agreed upon a plan providing for four aldermen elected from single member districts, two of which were majority black. In addition, the number of aldermanic positions was increased from four to six, with the two additional members elected from two voting districts consisting of the combination of the two majority white and the two majority black districts. The agreement also provided for a special election to be held on March 19, 1985,

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[481] William Bradford Reynolds, Assistant Attorney General, to A. Mitchell Powell, Jr., August 31, 1984.

[482] Rush v. Norman, Civ. No. C84-150N (N.D. Ga.).

at which a black alderman was elected from one of the single member majority black districts. Today, the mayor pro tem is a black female who was elected from one of the majority black districts. Thus, Section 5 has played an obvious and critical role in ensuring racially fair elections for the City of Newnan.

Crisp County

Dent v. Culpepper

Based on the 1980 census, Cordele, the county seat of Crisp County, had a population of 10,914 people, a majority (53.37%) of whom were black. The city had a commission-manager form of government with five commissioners elected at-large by majority vote. Only 32.6% of black residents were registered to vote and voting was racially polarized. Prior to 1964, no black person had even run for city commission. In 1974, a black candidate won a plurality of votes but lost in a run off to a white candidate. As late as 1986, only one black person, A. J. Rivers, had ever won a seat on the city commission, and he had run unopposed.

In October 1986, black residents, represented by the ACLU, filed suit against the city challenging its at-large elections as diluting minority voting strength in violation of the Constitution and Section 2.[483] The following year,

[483] Dent v. Culpepper, Civ. No. 86-173-ALB-AMER (M.D. Ga.).

plaintiffs filed a motion for a preliminary injunction to enjoin the pending commission elections. A hearing, which lasted three days, was held on the motion during which plaintiffs put up an abundance of evidence of past and continuing discrimination in the city and the county: no black person had ever been elected probate judge, sheriff, clerk of court, or to the Democratic Executive Committee in the county; no black person was elected to the six member Crisp County Board of Education until the late 1970's; no blacks were elected to the county commission until the creation of a majority black district in 1984; between 1976 and 1986, the county appointed 237 persons as poll managers for county elections, none of whom were black; from 1950 to 1986, the city commission appointed 94 poll managers for city elections, none of whom were black; no black person from the county had ever been elected to the Georgia House of Representatives or Senate from a district which was, in whole or in part, within the city limits; African Americans in the city and county historically had been discriminated against in the areas of education, housing, and public accommodations; there were no public high schools for blacks in the county until 1956, and it was not until the 1970-71 school year that the city was forced by federal court order to desegregate the public schools; 55% of the city's white residents graduated from high school while only 26% of black residents had high school diplomas; the city maintained racially segregated cemeteries; housing

projects remained segregated until the mid-1970's; the county courthouse, polling places, public parks, and other public accommodations were segregated; the local NAACP chapter had no white members; the city had two American Legion posts, one white and the other black; the Lions and Rotary clubs were all white; demonstrators picketing a restaurant in Cordele that refused to serve blacks were attacked by whites on two separate occasions in July 1965; the per capita income for white city residents was $7,122, but only $2,362 for blacks; a majority of the city's black residents lived below the national poverty level while only 9% of white residents lived below that level; and according to plaintiffs' expert, Dr. Peyton McCrary, Cordele adopted a majority vote requirement in 1964 with the specific purpose of diluting the voting strength of black voters. Additionally, Crisp County, which had single member districts for county commission elections, adopted at-large elections shortly before the Voting Rights Act was passed.[484]

Despite the evidence of a Section 2 violation, the court denied the plaintiffs motion for a preliminary injunction. It held "[e]ven assuming that the Plaintiffs will eventually be entitled to the relief they seek . . . the court refuses to

[484] McDonald (2003), p. 131.

'act in haste' under the present circumstances."[485] The following year, and after two years of litigation, the parties entered into a consent decree which established four single member districts for the city commission, with a fifth member, the chair, elected at-large.[486] Two of the districts were majority black. The plan was implemented at the December 1988 election.

Dekalb County

In re the City of Decatur

The City of Decatur, which is six miles east of Atlanta's central business district, is the Dekalb County seat and the second largest city in the Atlanta metropolitan area. The city has operated under a commission-manager form of government since 1920, and in the early 1980's the governing body consisted of a mayor and four commissioners elected at-large. Although 41.7% of Decatur's 18,404 residents were black, no African American had ever been elected to city government.

In the fall of 1983, black residents of Decatur, with the assistance of the ACLU, prepared and presented a reapportionment plan to the city utilizing single member districts. In the event voluntary redistricting was not successful, the ACLU planned to bring suit on behalf of black voters. The redistricting plan was rejected by the mayor and city commissioners, but the members of the local legislative delegation were more receptive to municipal reapportionment. Public hearings were held by the legislators in

[485] Dent v. Culpepper, Order of November 23, 1987.

[486] Id., Order of September 21, 1988.

November 1983, at which several proposed plans were presented by various community groups.

The local delegation settled on a plan providing for two, two member commission districts with the mayor elected at-large. One of the two seat districts was majority black. The plan was enacted by the general assembly at the close of the 1983 legislative session, and elections were held in 1984. For the first time in the city's history, an African American was elected to city office.

Maher v. Avondale Estates

Located just two miles east of the City of Decatur, the DeKalb County seat, the town of Avondale Estates has long been a predominantly white enclave in an area that became mostly non-white. The 1970 census reported that only two of the city's 1,735 residents were black. Ten years later there were 26 blacks out of 2,589 residents.

One of the mechanisms employed to exclude black homeowners was a municipal ordinance, adopted in 1967, that prohibited the display of yard signs and thus limited information about real estate available for purchase. This technique was common in predominantly white neighborhoods that sought to avoid residential integration, but it was seldom imposed by law.

Although patently unconstitutional,[487] the ordinance remained unchallenged until the summer of 1998 when two days before a primary election, Avondale Estates residents Tanya Greene and Sean Maher placed a campaign sign on their front lawn in support of a candidate for superior court judge. Like Ms. Greene, the candidate was an African American who had devoted much of his professional career to representing indigent persons facing the death penalty. The sign was removed by the city clerk on her lunch break the next day.

Avondale Estates resident Laurie Hunt made a yard sign criticizing the city for not discharging the city manager for making racial comments on the job. The city manager, who was also the police chief, was accused of saying "[t]he police officer's

[487] Linmark Assoc. Inc. v. Township of Willingboro, 431 U.S. 85 (1977)(ban on residential "for sale" signs unconstitutional); Ladue v. Gilleo, 512 U.S. 43 (1994)(total ban on political signs unconstitutional).

uniform patch would look better if it had a nigger on the patch with a noose around his neck."[488] The city hired the former county district attorney to investigate the accusation. He concluded that he could not determine the exact phraseology and context of the comment, but that "the words 'nigger' and 'noose' were said."[489] The city council fined the police chief $5,000.00, but did not discharge him. When the city manager/police chief saw Ms. Hunt's sign, he "stopped at the police department" and asked an officer to "just stop and ask the people to remove the sign."[490] Eventually, three squad cars arrived and Ms. Hunt was issued a citation with a potential $100 fine.

According to the city, these citizens had violated the ordinance that banned all yard signs. However, not only was the ordinance unconstitutional, it was selectively enforced.

In 1998, several city residents, joined by a real estate agent and represented by the ACLU, filed suit against the city alleging that the ordinance was unconstitutional.[491] In discovery, plaintiffs learned that no version of the sign ban had been in place before the effective date of Section 5, and that the 1967 ordinance and subsequent amendments had never been submitted for preclearance under Section 5. The regulations for implementing Section 5 include as an example of covered changes "any change affecting

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[488] Investigative Report of Allegation of Racial Discrimination, Prepared for the Mayor and The Board of Commissioners, City of Avondale Estates, Georgia, August 15, 1998, p. 3.

[489] Id., p. 28.

[490] Maher v. Avondale Estates, Ga., No. 1:00-CV-1847 (N.D.Ga. July 20, 2000), Plaintiffs' [First] Motion for Summary Judgment, Exhibit 11, p. 21, filed October 20, 2000.

[491] Maher v. Avondale Estates, Ga., No. 1:98-CV-2584 (N.D.Ga. September 4, 1998); refiled and assigned No. 1:00-CV-1847 (N.D.Ga. July 20, 2000).

the right or ability of persons to participate in political campaigns" enforced by a covered jurisdiction.[492] The complaint was amended to include a Section 5 violation.

After suit was filed the city adopted a moratorium on enforcing the ordinance, and after plaintiffs filed for summary judgment the ban was repealed insofar as it applied to political and "for sale" yard signs. For the general election in 2000, residents could display political signs - without fear of police interference - for the first time in three decades.

Though the main problem - the total ban on political yard signs - was resolved in plaintiffs' favor, the city amended its ordinance six times during the litigation continuing to create other issues regarding size, setback regulations, and unequal treatment based on content. When the district court eventually issued an order on the remaining issues, it concluded that Section 5 did not cover political signs.[493]

Plaintiffs' motion for reconsideration was denied on February 9, 2006.

Dodge County

Brown v. McGriff

Eastman, the seat of Dodge County, is a rural town of 5,440 residents, of whom 37.4% are black. In 1987, black residents, represented by the ACLU, challenged the at-large method of electing the five member city council as diluting minority voting

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[492] 28 C.F.R. § 51.13(k).

[493] Maher v. Avondale Estates, Ga., Order of March 31, 2005, pp. 74-79.

strength in violation of the Constitution and Section 2.[494] The city agreed to settle the litigation, and the parties entered into a consent decree providing for elections from single member districts.[495]

Dooly County

McKenzie v. Giles

The three member board of commissioners and five member board of education of Dooly County were traditionally elected from single member districts. As with many other Georgia counties, following enactment of the Voting Rights Act in 1965, Dooly County abolished its district systems in favor of at-large voting in 1967, and it ignored the preclearance provisions of Section 5.

Black voters of Dooly County, represented by the ACLU, filed suit against the board of commissioners in 1979, and later amended their complaint to include the board of education, alleging that the at-large systems for both boards had been implemented in violation of Section 5, and diluted black voting strength in violation of Section 2.[496] Although blacks were 50.7% of the population of the county according to the 1970 census, prior to the filing of the lawsuit no black person had ever been elected or appointed to either board.

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[494] Brown v. McGriff, Civ. No. 387-019 (S.D. Ga.).

[495] Id., Order of August 1, 1988.

[496] McKenzie v. Giles, No. CIV-79-43 (M.D. Ga.).

After the lawsuit was filed, the county submitted the 1967 voting changes for preclearance, but preclearance was denied by the Department of Justice, which said:

> Our analysis indicates that a fairly-drawn single-member district system would probably contain at least one district with a population majority of blacks. Analysis of precinct returns demonstrates that voting in Dooly County generally follows racial lines, at least to the extent of rendering very improbable the election of a black candidate for County Commission in the context of at-large elections.[497]

After the election, the parties entered into consent decrees providing for single member district voting plans for future elections of the board of commissioners and the board of education.[498]

In 1981, the general assembly adopted legislation to implement the settlement decree, and it was precleared by the Attorney General. However, at the time the voting districts were drawn, the 1980 census was not available and data from the 1970 census was used. The 1980 census showed that the districts were severely malapportioned, with a total deviation for the board of commissioners of 25.96%, and 51.45% for the board of education. Black residents of the county asked members of the local legislative delegation to seek enactment of a new redistricting plan, but they took no action.

McKenzie v. Dooly County

In June 1986, black voters, again represented by the ACLU, filed suit in federal court challenging the county's voting districts as violating the Constitution and Section

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[497] Drew Days III, Assistant Attorney General, to John C. Pridgeon, Esq., July 31, 1980.

[498] McKenzie v. Giles, Order of July 5, 1980.

2.[499] Blacks were a minority of the voting age population in each of the three county commission districts, thereby giving whites the ability to control the outcome of elections in all three districts. The commission district with the largest black population was also overpopulated with a deviation of 15.9%. The situation in the five districts for the board of education was similar. Only one district had a majority black voting age population, and it was overpopulated by 33.3%.

In August 1986, the court enjoined further elections under the malapportioned plans and ordered the development of new plans, finding that, "[i]n this case defendants have not put forth any legitimate considerations for the population disparities. Counsel for the defendants has quite candidly admitted that the population figures as presented by plaintiffs show that the voting districts are malapportioned."[500] The case was settled the following month with the creation of a five district plan for both boards which included two majority black districts, with black populations of 69.01% and 60.09%. A special election was held in November 1986, and blacks were elected to both the county commission and board of education.

Granville v. Dooly County

Dooly County's redistricting problems continued into the 1990s. The new census showed the districts for the board of commissioners and board of education were malapportioned with a total deviation of 34.8%. The general assembly enacted a

[499] McKenzie v. Dooly County, Georgia, No. CIV-86-95 (M.D. Ga.).

[500] Id., Order of August 8, 1986, pp. 3-4.

remedial plan, but it was not precleared by April 27, 1992, and was killed by a poison pill provision. In October 1992, the ACLU again filed suit challenging the existing plan, and the parties quickly agreed to a settlement. The new plan corrected the malapportionment and increased the number of majority black districts from two to three.[501] The settlement also set aside the July 1992, primary, halted the November 3, 1992, general election, and called for a special election to be held in December under the new plan. The parties further agreed that the defendants would ensure that the new plan would be enacted by the general assembly in 1993.

Shaw v. The State

The activities of the ACLU in Dooly County also led the organization to defend the rights of black citizens in other arenas. In 1981, Tom Shaw, a Dooly County voter and plaintiff in previous ACLU litigation, was indicted for aggravated assault, robbery by force, and simple battery upon a Dooly County deputy sheriff. At his first trial, he was represented by private counsel, and a mistrial was declared when the jury could not reach a verdict. At the time of his retrial, his private attorney was out of the state and not available. Over Shaw's objection he was tried without his attorney and without the presence of one witness who had given exculpatory testimony at the first trial. The retrial resulted in a guilty verdict, and Shaw, who had no prior felony convictions, was sentenced to 30 years imprisonment.

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[501] Granville v. Dooly County, No. CIV 92-378-1(M.D. Ga.).

The ACLU began representing Shaw at this point because it felt he was being retaliated against for his voting rights activities. After extensive hearings, the superior court judge denied Shaw's motion for a new trial, and an appeal was taken to the Georgia Court of Appeals.[502] In September 1982, that court affirmed. The ACLU then petitioned the Georgia Supreme Court, and it agreed to review the case. Oral argument was held in January 1983, and in June the Court reversed the convictions and sentences.[503]

Shaw was tried for a third time in August 1983, and found guilty. (The ACLU did not represent him at the retrial). He was sentenced to serve 15 years, instead of the 30 years imposed after the second trial, but that sentence was reduced to 12 years by the State Sentence Review Board.

Dougherty County and the City of Albany

Mathis v. Whittington

Whittington v. Mathis

Wright v. City of Albany

Albany, the county seat of Dougherty County, sits on the banks of the Flint River in southwest Georgia. During the 1960s it was a caldron of civil rights activity. Over a two year period hundreds of men, women, and children who participated in a series of massive civil rights demonstrations, known as the Albany Movement, were arrested

[502] Shaw v. The State, 163 Ga. App. 615 (1982).

[503] Shaw v. The State, 251 Ga. 109 (1983).

and jailed. Four homes where voter registration organizers were staying were riddled with bullets in the summer of 1962. Days later, someone fired three shotgun blasts into the home where Charles Sherrod, a leader of the movement, was sleeping.[504]

More than a decade later, local blacks sued the city over its use of at-large elections, which they contended diluted black voting strength. In an opinion written in 1977, striking down the at-large system, the court made detailed findings showing that the city remained significantly polarized on racial lines. The city functioned "in every respect . . . as a racially segregated community." Schools, voting, the library, the city auditorium, tennis courts, swimming pools, public housing, juries, municipal employment, taxicabs, theaters, and city buses were segregated. The Democratic Party was "in the hands of an all-white committee." The black community "has just never had the opportunity or been permitted to enter into the political process of electing city commissioners." The challenged system, the court found, was "winner take all" and was unconstitutional.[505] The at-large elections were replaced with a mayor-commission form of government, consisting of six wards and a mayor elected at-large. The new system provided blacks for the first time an opportunity to elect candidates of their choice to the city government. But vestiges of the old racial divisions remained.

In August 1984, three candidates from Ward 2 vied for a seat on the Albany Board of Commissioners. The white incumbent, Joe Whittington, and a black challenger, Henry Mathis, got the most votes, but neither received a majority required

[504] For an account of the Albany Movement, see John Lewis, Walking with the Wind: A Memoir of the Movement (New York: Simon and Schuster, 1998), 186, 191.

for election. A run off was held in September, during the course of which Mathis learned that poll workers at one of the majority black precincts were denying people the right to vote if they had not voted in the August primary. Under state law, to vote in a run off a voter must have been eligible to vote in the preceding election, but there is no requirement that the voter actually voted in the prior election.

Mathis complained to the election superintendent that eligible voters were being turned away, and the practice was stopped. Between 14-18 voters had been improperly denied the right to vote, and Mathis and election officials contacted most of them and they voted later in the day. But four electors were never located and thus never voted. As fate would have it, Mathis lost the run off by two votes (900 to 902). Had the four voters who were improperly turned away been allowed to vote, the outcome could have been different.

Mathis, represented by the ACLU, filed an election challenge with the board of commissioners. The board denied the challenge by a vote of 3 to 2, and did so strictly along racial lines. The three white commissioners who voted in the majority were of the view that the voters who were turned away had "forfeited" their votes by not filing a complaint on their own behalf with the election superintendent. Mathis appealed to the Superior Court, and after a hearing it granted the challenge and ordered a new

[505] Paige v. Gray, 437 F. Supp. 137, 153-58 (M.D. Ga. 1977).

election.[506] The incumbent appealed and the Georgia Supreme Court affirmed on January 3, 1985.[507]

A new run off election was held in February, but as often happens to successful challengers, Mathis was defeated. Mathis later ran again for the city council, and was elected.

As black participation in governmental affairs increased, so did white flight from the city. In 1980, blacks were 47.6% of the population, but by 2000, the black population had increased to 64.7%. Following the 2000 census, the city adopted a new redistricting plan for the mayor and commission to replace its admittedly malapportioned existing plan, but it was rejected by the Department of Justice under Section 5. The Department of Justice noted that while the black population had steadily increased in Ward 4 over the past two decades, subsequent redistrictings had decreased the black population "in order to forestall the creation of a majority black district." The department's letter of objection concluded that it was "implicit" that "the proposed plan was designed with the purpose to limit and retrogress the increased black voting strength in Ward 4, as well as in the city as a whole."[508]

In June 2003, the city submitted a second redistricting plan to the Department of Justice for preclearance. In response, the department requested additional information to enable it to make a determination whether the plan complied with Section 5. In light

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[506] Mathis v. Whittington, Civ. No. 84-M-515 (Dougherty Sup. Ct.).

[507] Whittington v. Mathis, 324 S.E.2d 727 (Ga. 1985).

[508] J. Michael Wiggins, Acting Assistant Attorney General, to Al Grieshaber, Jr., City Attorney, September 23, 2002.

of the pendency of a municipal election in November 2003, the city notified the department that it was withdrawing its submitted plan, and that the upcoming election would be held under the existing 1990 plan, despite the fact that it contained an unconstitutional deviation among districts of 53%.

Black residents of the city, represented by the ACLU, brought suit to enjoin further use of the malapportioned plan, and requested the court to supervise the development and implementation of a remedial plan that complied with one person, one vote and the Voting Rights Act.[509] In a series of subsequent orders, the court granted the plaintiffs' motion for summary judgment, enjoined the pending elections, adopted a remedial plan prepared by the state reapportionment office, and directed that a special election for the mayor and city commission by held in February 2004. The court emphasized that "[i]n drawing or adopting redistricting plans, the Court must also comply with Sections 2 and 5 of the Voting Rights Act." Under the court ordered plan, blacks were 50% of the population of Ward 4, and a substantial majority in four of the other wards.[510] But for Section 5, elections would have gone forward under a plan in which purposeful discrimination was "implicit," and which could only have been challenged in time consuming vote dilution litigation in which the minority plaintiffs would have borne the burden of proof and expense.

Knighton v. Dougherty County

[509] Wright v. City of Albany, Georgia, 306 F. Supp. 2d 1228 (M.D. Ga. 2003).

[510] Id. at 1235, 1238 , and Order of December 30, 2003.

Wright v. Dougherty County

Because of a racial divide in the county's legislative delegation, the Dougherty County Commission and Board of Education were also unable to redistrict following the 2000 census. While cities in Georgia have the power under state law to redistrict themselves, redistricting at the county level can only be done by the general assembly. As a matter of long standing courtesy, the legislature will not enact a redistricting plan for a county that does not have the unanimous approval of the county's legislative delegation. Dougherty County's legislative delegation, divided strictly along racial lines, could not agree on new plan for the county commission and board of education, and as a result the county proceeded to hold elections in 2002 under a plan that contained a total deviation of 29.8%, and was in clear violation of the one person, one vote principle.

The dispute within the county's legislative delegation centered, predictably, on the number of majority black districts a new plan would have. Both the county commission and the board of education consisted of seven members, six of whom were elected from identical single member districts and the seventh member at-large. The county had asked the delegation to approve, and the legislature to enact, a plan that contained three majority white districts, despite the fact that whites were a minority (39%) of the population of the county. After the two black members of the delegation, both of whom lived in Albany, refused to approve the proposed plan, minority residents of the county, represented by the ACLU, filed suit to enjoin continued use of the existing malapportioned plan and to require court supervision of a properly

apportioned plan that complied with Sections 2 and 5.[511] The lead plaintiff, Rev. Lawrence Knighton, when asked to assess the current state of race relations in Dougherty County, soberly replied "it's Sodom and Gomorrah."

The district court allowed the 2002 elections to go forward under the malapportioned plan, and gave the legislature yet another opportunity to enact a constitutional plan. When it again failed to do so, the court granted the plaintiffs' motion for summary judgment, enjoined further use of the challenged plan, and adopted a court ordered plan, similar to one proposed by plaintiffs, in which "four out of the six districts are clearly majority African-American." In implementing its plan, the court again emphasized its obligation to "comply with Sections 2 and 5 of the Voting Rights Act."[512] Thus, the Voting Rights Act was applied to insure that black voters in the county had an equal opportunity to elect candidates of their choice to the county commission and board of education.

Douglas County

Simpson v. Douglasville

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[511] Knighton v. Dougherty County, Georgia, Civ. No. 1:02-CV-130-2 (WLS) (M.D. Ga.). An earlier suit had been filed by black plaintiffs seeking similar relief but had been dismissed on the dubious theory that the plaintiffs, while they lived in overpopulous districts, did not live in the most overpopulous district and thus lacked standing. See Wright v. Dougherty County, Georgia, 358 F.3d 1352 (11th Cir. 2004).

[512] Knighton, Order of April 23, 2004, pp. 6, 9.

The City of Douglasville enacted a number of annexations over the years, but failed to submit them for Section 5 review. Minority plaintiffs, represented by the ACLU, sued the city in 1996, seeking compliance with the preclearance requirement.[513]

Prior to filing the lawsuit, the ACLU consulted with the city attorney and was able to reach an agreement on the need for preclearance. Plaintiffs were thus able to file simultaneously with the complaint a proposed consent judgment reflecting the agreement of the parties. The consent order, which was approved by the district court on June 28, 1996, enjoined the city from further implementation of the unprecleared annexations and required them to be submitted to the Attorney General within 75 days. The city complied with the decree, however, in part because of the large number of annexations it was not until November 23, 1998 – over two years from the date the lawsuit was filed - that the city gathered and submitted all the information needed for the Department of Justice to make a decision.

The Douglasville City Council consisted of seven members, five elected from single member districts and two at-large. As was predictable, the annexations caused severe malapportionment of the districts. Approximately 1,985 persons were added to the city, which resulted in a total deviation of 128%.

Plaintiffs filed an amended complaint seeking to correct the malapportionment and to ensure that any remedial plan did not dilute the voting strength of African Americans. The city agreed to a modification of the election structure which would continue to protect minority voting strength. The modified plan had three members

[513] Simpson v. Douglasville, No. 1:96-cv-01174 (N.D.Ga.).

elected from single member districts and four members elected by numbered posts from two double member districts. The plan was submitted for preclearance, and the Department of Justice approved it on June 11, 1999. The parties submitted a joint consent decree providing for the new plan to be implemented in November 1999, which was approved by the court.

Though it took more than three years, African Americans were able to secure compliance with Section 5, cure unconstitutional malapportionment, and convince local officials to modify their method of elections to prevent minority vote dilution.

Evans County

Concerned Citizens for Better Government for Evans County v. Deloach

Woody v. Evans County Board of Commissioners

Evans County is located in southeast Georgia, and based on the 1980 census had a population of 8,428, of whom 34.72% were black. The county was named for Confederate General Clement A. Evans who surrendered under General Robert E. Lee after leading the last charge of the Army of Virginia at Appomattox.

In August 1983, black voters, represented by the ACLU, filed suit to challenge the at-large method of electing the county's five member board of commissioners as diluting minority voting strength in violation of the Constitution and Section 2.[514] The litigation also challenged at-large elections in Claxton (pop. 2,694), the county seat, and the town of Hagan (pop. 880). The lawsuit against the county was settled in January the

[514] Concerned Citizens for Better Government for Evans County v. DeLoach, Civ., No. 483-343 (S.D. Ga.).

following year with the creation of five single member districts for the county commission, one of which was majority black.[515] That district subsequently elected a black candidate to the county commission.

The claims against the two towns were resolved several months later when the city of Hagan agreed to elect its five member council from two districts, one with three members and designated posts, and the other with two members and designated posts. The city of Claxton agreed to increase the size of its council to seven members, with two elected from one district and five elected from a second district.[516]

The 1990 census showed that the districts for the commission and board of education were malapportioned with a total deviation of 33.7%. And although 34% of the county's population of 8,724 was black, the black population was packed in the single majority black district at the level of 87.9%. The general assembly enacted a new districting plan for the county commission and board of education based on the 1990 census, but the plan retained the single, packed majority black district, containing approximately 85% black population. This configuration essentially gave 80% of the electoral power to whites who comprised less than 65% of the total county population.[517] The legislation also contained a "poison pill" provision, and when the plan was not precleared by April 27, 1992, it was automatically repealed.

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[515] Id., Order of January 13, 1984.

[516] Concerned Citizens for Better Government for Evans County v. DeLoach, Order of April 18, 1984 (City of Hagan); Order of July 27, 1984 (City of Claxton).

[517] Mary Wyckoff, ACLU, to Steven H. Rosenbaum, Department of Justice, January 29, 1993, fn. 4, pp. 6-7.

In 1992, the ACLU filed suit on behalf of black voters challenging the malapportioned plan under the Constitution and Section 2.[518] And on June 29 the district court enjoined "holding further elections under the existing malapportioned" plan for both bodies.[519]

The defendants then proposed a new redistricting plan increasing the number of county commission districts from five to six with two majority black districts. This plan was opposed by plaintiffs who contended that because increasing the number of commission districts was not done to create a second majority black district but, rather, to dilute black voting strength. Plaintiffs also argued that by increasing the number of districts, defendants were seeking to maintain four majority white districts and protect white incumbents. They also pointed out that the 72% and 70% black majority districts created by defendants' plan "essentially amount to packed districts."[520] In contrast, plaintiffs proposed a plan that maintained the five county commission districts, but created two majority black districts with 64% and 65.8% black population, respectively. The defendants' plan effectively reduced minority voting strength from 40% of district members (two seats out of five) to 33% (two seats out of six).

For the board of education, which had an additional member – the chair - elected from the county at-large, defendants' proposal to expand the number of districts from five to six further diluted minority voting strength by reducing minority voter

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[518] Woody v. Evans County Board of Commissioners, Civ. No. 692-073 (S.D. Ga.1992).

[519] Id., Order of April 7, 1994, p. 2.

[520] Mary Wyckoff, ACLU, to Steven H. Rosenbaum, U.S. Department of Justice, January 29, 1993, p. 8.

opportunity from 33% (two members on a six member board) to 28.6% (two members on a seven member board).

Defendants adopted their plan regardless of the concerns expressed by plaintiffs and submitted it to the Attorney General, who precleared it on December 13, 1993, despite evidence of racially discriminatory intent. The district court subsequently ordered the six member plan into effect, with the chair of the board of commissioners elected by majority vote of the members, and the chair of the board of education - a seventh member elected at-large and voting only in the event of a tie.

The plan was implemented at the next regularly scheduled elections that year.[521]

Floyd County and the City of Rome

Askew v. City of Rome

Located in north Georgia, the City of Rome has a population of 30,000 and is 30% African American. For the first 10 years Section 5 was in effect, Rome simply ignored the preclearance requirements. During that period, Rome implemented majority vote, staggered terms, and numbered post requirements for its nine member city commission and seven member school board. When the city finally submitted an annexation for preclearance in 1974, an investigation by the Attorney General revealed the unprecleared election structures and a total of 60 unprecleared annexations. When the annexations were submitted without including the election structure changes, the Attorney General declined to preclear them "[b]ecause these electoral changes are

[521] Id., Order of April 7, 1994.

indispensable to an evaluation of the voting effects of the annexations."[522] When everything was finally submitted, the Attorney General objected to the structural changes and 13 of the 60 annexations.[523]

The city then sought preclearance by filing suit in the District Court for the District of Columbia. The city also challenged the constitutionality of Section 5 and, alternatively, sought to be removed from the list of Section 5 covered jurisdictions by "bailing out" from coverage. The district court denied bail out as well as preclearance to the structural changes, and the Supreme Court affirmed. It held the changes, "when combined with the presence of racial bloc voting and Rome's majority white population and at-large electoral system, would dilute Negro voting strength."[524] The Court rejected the city's challenge to the constitutionality of Section 5, finding that it was an appropriate exercise of congressional authority to enforce the non-discrimination provisions of the Constitution.

In 1987, the city against sought to implement staggered terms for school board members, but was stopped from doing so by yet another objection of the Attorney General. The Attorney General concluded the change would be retrogressive because "black candidates have had limited success in seeking seats on both the city school

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[522] J. Stanley Pottinger, Assistant Attorney General, to Robert M. Brinson, August 1, 1975.

[523] J. Stanley Pottinger, Assistant Attorney General, to Robert M. Brinson, October 20, 1975.

[524]City of Rome v. United States, 446 U.S. 156, 183 (1980).

board and the city board of commissioners. This appears to be based in part on a prevailing pattern of racial bloc voting in city elections."[525]

In 1993, three African American residents of Rome and two organizations, represented by the ACLU, challenged Rome's method of electing its city commission and school board under Section 2 and the Fourteenth Amendment.[526] At the time suit was filed, Rome had a nine member city commission elected at-large from three residency wards. All three seats in each ward were up for election at the same time, and the three top vote getters were elected. The school board had seven members, all elected at-large and all elected at the same time with the top seven vote getters being elected. As of 1996, only one African American had ever been elected to the city commission. Only two African Americans had ever been elected to the school board, and only one served at any given time. Only one African American had ever been elected to either board without having first been appointed.

The city filed a counterclaim that Section 2 of the Voting Rights Act was unconstitutional, which was denied by the district court. The court also denied Rome's motion to compel disclosure of the membership lists of the plaintiff NAACP, finding that such discovery would violate the members' First Amendment right of association.

In 1970, a black man ran for the school board and received the highest number of votes in the general election but was defeated in a run off held under the unprecleared majority vote requirement. The district court found "[m]ore voters turned out for the

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[525] William Bradford Reynolds, Assistant Attorney General, to Robert Brinson, August 11, 1987.

[526] Askew v. City of Rome, No. 4:93-cv-28-HLM (N.D. Ga.).

run off than turned out for the initial election," and they did so in order to "defeat the first serious black candidacy in Rome's history." The court also found Rome remained "a largely segregated society," and "racism does affect a portion of the electorate when the voters are unfamiliar with a candidate of the opposite race."[527] Nonetheless, the court dismissed the complaint because blacks had been able to elect preferred white candidates under the challenged system. The plaintiffs appealed, but the decision was affirmed.[528]

Fulton County

Lewis v. City of Atlanta

In November 1982, the Atlanta City Council passed a resolution authorizing a referendum whether there should be a freeze on the production and development of nuclear weapons, and whether money should be transferred from the defense budget to jobs and human services programs. A group of local businessmen, together with the Southeastern Legal Foundation, filed suit in state court charging that the referendum was ultra vires, in that the city charter authorized referenda

[527] Askew v. City of Rome, 127 F.3d 1355, 1377, 1383 (11th Cir. 1997).

[528] Id. at 1355.

only upon presentation of a petition signed by city voters. The state court enjoined the referendum on the ultra vires theory.[529]

John Lewis and Mary Davis, two members of the city council, and two other black registered voters, all of whom were represented by the ACLU, filed suit in federal court alleging that since the prior practice of the council had been to authorize the placing of questions on the ballot, the state court order was a change in voting that could not be implemented without Section 5 preclearance.[530] A single-judge, concluding that there was "some reasonable possibility of plaintiffs' success on the merits of their motion," granted a temporary restraining order requiring the ballots to be printed with the "nuclear freeze-jobs for peace" question included.[531] The full three-judge court, however, denied a request for a preliminary injunction on November 17, 1982, but without resolving any of the Voting Rights Act issues. The election went forward without the nuclear freeze question on the ballot. In the meantime, the city council amended its charter to clarify the authority of the council to conduct referenda. The amendment to the charter rendered moot the question of the validity of the state court order, and the district court, upon plaintiffs' motion, dismissed the complaint on mootness grounds on September 28, 1983.

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[529] Southeastern Legal Foundation, Inc. v. City of Atlanta, Civ. No. C-92179 (Sup. Ct. Fulton Cty).

[530] Lewis v. City of Atlanta, Civ. No. 82-2464A (N.D. Ga.).

[531] Id., Order of November 16, 1982.

Glynn County

Brunswick-Glynn County Charter Commission v. United States

Glynn County is located in southeast coastal Georgia and includes the industrial city of Brunswick, the county seat, as well as St. Simon's Island, an affluent, predominantly white resort. Brunswick is majority black, and since the mid-1970's, two of its five council members have been African American.

In 1982, the state legislature, at the request of local officials, and over the objections of the Brunswick black community, adopted legislation consolidating the governments of Brunswick and Glynn County. The county submitted the legislation for preclearance and the local branch of the NAACP, represented by the ACLU, argued that consolidation would have a racially discriminatory effect because it would dilute the voting strength of black voters in Brunswick. They also said consolidation was being undertaken with a racially discriminatory purpose in violation of the Constitution and Section 2.

Although blacks were a majority of the population of Brunswick, they were a minority of the population in Glynn County. Under the proposed plan, six members of the consolidated government's board of commissioners would be elected from single member districts and one at-large. Blacks were a majority of the voting age population in only one of the districts. In addition, consolidation was to be approved by a countywide referendum, rather than by separate votes in the city and

the remainder of the county. In July 1982, the Attorney General objected to the consolidation legislation finding that:

> the majority-black population of the City of Brunswick will be submerged in the majority-white population of Glynn County, resulting in diminished opportunities for blacks to elect representatives of their choice to govern their affairs. Whereas at present blacks have been successful in electing candidates of their choice to the city commission . . . they will not be in a position to exert such influence in the consolidated government in the context of racial bloc voting that appears to exist in Glynn County.[532]

The Attorney General also objected to the single referendum provision, noting that it was a change from procedures previously followed in the county, and that it would have "the effect of diminishing the political voice of blacks, who constitute a majority in the City of Brunswick, but not whites, who compose a majority of Glynn County."

In 1983, the Georgia General Assembly took another stab at consolidation. It enacted legislation providing for the consolidated government to be elected from three multi-member districts, one of which was 65.9% black. But again, the referendum on the proposed new government was to be held on a countywide basis. The Attorney General precleared the proposed new plan as "fairly" recognizing minority voting strength, but again objected to the proposed referendum, noting

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[532] William Bradford Reynolds, Assistant Attorney General, to Terry K. Floyd, Glynn County Attorney, August 16, 1982.

that it did not recognize "the black community's electoral voice . . . on a par with that of the white community's . . . [resulting] in a dilution of black voting strength."[533]

In 1986, the county charter commission filed a declaratory judgment action in the District Court for the District of Columbia seeking a ruling that its single referendum proposal did not violate Section 5.[534] Local black residents of Glynn County, represented by the ACLU, sought to intervene to oppose preclearance. The district court dismissed the complaint in July 1986, on the grounds that the charter commission, as opposed to the local governing bodies or election officials, lacked standing to bring a suit for preclearance. Rather than refile their complaint, the county conducted a referendum, but consolidation was defeated. The county then filed a state court challenge to the election, but the state court dismissed the suit in May 1987.

Lyde v. Glynn County Board of Elections

The Glynn County Board of Education was composed of ten members, with two members elected from each of five two member districts. Blacks are 25% of the county population, and were a majority in one of the two member districts, which had elected two African Americans.

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[533] William. Bradford Reynolds, Assistant Attorney General, to Terry K. Floyd, Glynn County Attorney, February 21, 1984.

[534] Brunswick-Glynn County Charter Commission v. United States, Civ. No. 86-0309 (D. D.C.).

At a referendum held in November 2002, voters approved a change in the size and method of election of the board of education. Although the referendum was a change in voting, the county did not submit it for preclearance. In 2003, the general assembly enacted legislation implementing the referendum.[535] The bill was signed by the governor on May 30, 2003, but the county did not submit it for preclearance until ten months later. On its face, the change was retrogressive as the new system used the same district lines as the preexisting plan, but reduced to one the number of board members elected from each district. Two other board members were elected at-large. Given the reality of polarized voting, African American voters would be able to elect their candidate of choice to only one of seven seats under the proposed new system, rather than two of ten seats as under the preexisting plan.

In support of preclearance, the county argued the new plan was the same as that used by the county commission and that blacks had been elected county wide as coroner and state court judge.[536] The county failed to note that no African Americans had been elected to the at-large seats on the county commission, or were likely to be elected to the at-large seats on the school board. The county also argued that the change was not retrogressive because the ability to elect "one (1) member out of seven (7) would be proportional based on registered voters," an argument that

[535] Ga. Laws 2003, p. 3697.

[536] Submission letters of March 18, 2004, and June 4, 2004.

failed to take into account the fact that black voter registration was depressed, with blacks constituting only 18% of registered voters.

On June 18, 2004, the Attorney General precleared the legislation authorizing the referendum, but requested additional information regarding the statute adopting the new plan. Plaintiffs, African American citizens and registered voters of Glynn County, represented by the ACLU, filed suit on July 16, 2004, seeking to enjoin the upcoming elections for failure to comply with Section 5.[537]

The court conducted a hearing on plaintiffs' motion for temporary restraining order on July 19, 2004. Despite clear precedent that unprecleared voting changes are void and unenforceable,[538] the court did not issue a ruling and voting under the new plan began on July 20th. However, the court entered an order at 10:34 a.m. on the 20th enjoining the election because election officials had posted a sign at one of the polling places erroneously stating that the election had been enjoined.[539]

Nonetheless, on July 28, 2004, the Attorney General precleared the new election plan. Plaintiffs and defendants entered into an agreed order rescheduling the primary election for the board of education for August 24, 2004. The at-large seats were won, predictably, by two white males.

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[537] Lyde v. Glynn County, Civ. No. 204-091 (S.D. Ga.).

[538] E.g., Lucas v. Townsend, 486 U.S. 1301, 1305 (1986).

[539] Lyde v. Glynn County Board of Elections, Order of July 20, 2004.

In this instance, the failure of Section 5 to block implementation of a plainly retrogressive voting change must be laid at the door step of the Department of Justice, and not the statutory scheme itself.

Greene County

Bacon v. Higdon

Greene County was majority black, but prior to passage of the Voting Rights Act blacks were excluded from the political process. Following the abolition of the all white primary, the local paper warned in 1946 that if blacks voted in any appreciable numbers, "some hooded and secret order such as the Ku Klux Klan will ride again, and all power acquired by the ballot will be lost by terrorism." The paper reasoned, "[i]f California has the rights to have a law keeping a Japanese from owning property it seems to us that Georgia can have a white primary."[540]

Traditionally, three members of the county board of commissioners were elected from single member districts, with a fourth member, the chair, elected at-large. Commission members were also required to be property owners. On the eve of passage of the Voting Rights Act, with its promise of increased black registration, the county changed the method of electing the commission to insure that whites, who were a majority of the county's voting age population, as well as registered

[540] Harris County Journal, June 28, 1946 (reprinted from Greensboro Herald Journal).

voters, could continue to control the outcome of all elections. This was done by increasing the size of the commission to five members, all elected at-large and by majority vote, and by retaining the requirement that commissioners be freeholders.

The board of education, whose five members were appointed by the grand jury, also in 1964 adopted at-large elections with a majority vote requirement. The change was approved in a county wide referendum, and the first elections under the new system were held in December 1964. The new election procedures were different from those in effect for the board of education on November 1, 1964, and were thus subject to preclearance under Section 5. The board, however, ignored Section 5 and proceeded to hold illegal at-large elections over the next 21 years, disregarding requests from the Department of Justice in 1978, 1979, and 1984 that the new procedures be submitted for Section 5 review. The at-large method of elections for the board of education was reenacted by the state legislature in 1985, but again no effort was made to comply with Section 5.

Prior to 1970, no black person had ever been elected to, or appointed to serve on, the board of commissioners or board of education. After that, blacks served in token numbers only.

In March 1985, black residents of Greene County, represented by the ACLU, challenged at-large elections for the board of commissioners and the board of education as having been adopted, and as being maintained, purposefully to discriminate against blacks in violation of the Constitution, and as diluting minority

voting strength in violation of Section 2.[541] The plaintiffs also contended that the method of elections for the board of education was in violation of Section 5.

Three months later, in June 1985, the parties entered into a consent decree enjoining at-large elections for the board of education pending Section 5 review. The parties also agreed to submit a final decree to the court reapportioning both the board of commissioners and the board of education into four single member districts with the chair elected at-large. Two of the districts were majority black.

In January 1986, the district court issued an amended consent order and decree adopting the new voting plan for the two governing bodies.[542] At the ensuing election held in August 1986, one black person was elected to the board of commissioners and two blacks were elected to the board of education.

Hall County

Bryant v. Miller

The Georgia General Assembly has the duty under state law to reapportion county governing bodies and school boards every 10 years based on the recent census. Despite that, the legislature failed to redistrict 16 counties - Butts, Carroll, Clay, Dougherty, Evans, Hall, Lee, Liberty, Mitchell, Monroe, Morgan, Newton,

[541] Bacon v. Higdon, Civ. No. 85-40-ATH (M.D. Ga.).

[542] Id., Consent Order and Decree of January 10, 1986.

Screven, Sumter, Tattnall, and Terrell - after the 1990 census. The deviations in the 16 counties ranged from 18% (Terrell) to 73% (Lee). No plans were enacted for three of the counties. Plans were enacted for the remaining 13, but the enabling statutes all contained a "poison pill" provision that if the plan were not precleared under Section 5 by April 27, 1992, the beginning date of qualifying for county commission and school board elections, it would become "null and void." None of the 13 plans were precleared by that date, and the malapportioned plans remained in effect as a result.

Prior to the 1992 elections, and in an effort to secure a comprehensive and orderly remedy, the ACLU filed suit in federal court in Atlanta on behalf of residents of the 16 counties asking the court to supervise the required redistricting in conformity with one person, one vote and Sections 2 and 5 of the Voting Rights Act.[543] The court, however, declined to exercise broad jurisdiction and, citing "improper joinder of claims," dismissed all the cases except the one against Hall County.[544] The ACLU pursued the case against Hall County and filed new, separate actions against the other counties to secure constitutionally apportioned plans.

Hall County is located in Northeast Georgia, historically an area of small farms and few African Americans. The county commission consists of five

[543] Bryant v. Miller, Civ. No. 1 92-CV-1042 (N.D. Ga.).

[544] Id., Order of May 13, 1992.

members, four elected from districts and one at-large. The total deviation among the districts was 44.2%. Blacks were 8.6% of the population, and when combined with Hispanics were 13.6% of the population, still too small to constitute a majority in a single member district.

Local efforts to reapportion the county commission in the late 1980s and early 1990s, as well as efforts to establish single member districts for city council elections in Gainesville, the county seat, were conducted against the backdrop of considerable activity by the Ku Klux Klan. Headquartered in nearby Oakwood, the Georgia chapter of the Invisible Empire Knights of the Ku Klux Klan was particularly active in Gainesville, holding frequent marches and rallies, including one unsuccessful attempt to secure a parade permit to march along a three mile route through the heart of Gainesville's small African American community. These developments were cited by State Representative Wycliffe Orr in a letter to county and city officials, following a 1991 public meeting concerning local government redistricting. "Our area has been harmed, and greatly misrepresented to the state, nation and world, by the substantial national attention given to Ku Klux Klan activities in our community," Orr wrote.[545]

The reapportionment plan enacted for Hall County by the Georgia general assembly, and which was killed by the poison pill, contained districts of

[545] Representative E. Wyckliffe Orr to Hall County Board of Commissioners, et. al, December 20, 1991.

substantially equal population, including a district with a combined black and Hispanic population of 39%. The district court ruled, predictably, that the existing plan for the county was "unconstitutionally malapportioned," and that new districts had to be drawn.[546]

Rather than accept the unprecleared legislative plan, plaintiffs asked the court on May 20 to adopt an alternative plan which contained a slightly higher minority population of approximately 42%, and with a lower deviation of just .43%.[547] Were the court to adopt the legislative plan, plaintiffs further argued, the plan would have to be precleared under Section 5 because it reflected the "policy choices of the elected representatives of the people." The court disagreed and ordered the 1992 legislative plan into effect for the 1992 primary and general elections.[548]

Plaintiffs appealed the district court's adoption of the unprecleared legislative plan to the Eleventh Circuit on the grounds that a local federal court did not have the authority to implement an unprecleared legislative plan.[549] In the 1992 election, Frances Meadows, the black chairwoman of the Hall County Voting Rights Task Force, a private citizens' group, ran a close second in a four-candidate race in the

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[546] Bryant v. Miller, Order of May 22, 1992, n. 3, p. 4.

[547] Mary Wyckoff, ACLU, to Hon. Orinda Evans, May 11, 1992, p. 2. See, also, Bryant v. Miller, Stipulations for Hall County, May 20, 1992.

[548] Bryant v. Miller, Order of May 22, 1992.

[549] Bryant v. Miller, Civ. No. 92-8533 (11th Cir.).

July primary for the county commission in the newly created 39% minority district. Meadows then went on to beat the white, four term incumbent commissioner in the August runoff.[550] With no Republican opposition in November, Meadows won the general election, becoming the first African American to win county office in Hall County. In light of the success of a minority candidate, and the inability to draw a true majority minority district, plaintiffs dismissed their pending appeal on December 23, 1992.

Harris County

Brown v. Reames

In 1975, five black voters of Harris County, Georgia, represented by the ACLU, challenged the at-large method of electing the county board of commissioners.[551] Black were 45% of the population, but no black person had ever been elected to the commission, or any other county office.

Historically, blacks had been excluded from the electoral process in Harris County until the 1930s, when President Franklin Roosevelt established the Little White House at Warm Springs, and thus a federal presence in the county. Some blacks voted as a result, but according to one black resident, prior to the next two

[550] Editorial, "County government begins to reflect our diversity," Gainesville (Georgia) Times, August 14, 1992.

[551] Brown v. Reames, Civ. No. 75-80 (M.D. Ga.).

elections, and in an effort to intimidate blacks from voting, whites "dug some graves there by the courthouse, some short graves, and burned some crosses at the crossroads."[552] After that, and prior to passage of the Voting Rights Act, most blacks in the county simply did not vote. As of 1963, only 263 blacks were registered to vote, 8.5% of the eligible population. By contrast, more than 100% of the eligible white population was registered.

Elections in the county were run by whites, and no black person ever served as a poll worker until 1971. At the 1974 election, only one black person was appointed to serve as a poll worker. No blacks served in the 1975 election. At the time the law suit was filed in 1975, no black person had ever been an officer or member of the executive committee of the Democratic Party, which controlled the political process, and the chair of the county party said that he didn't intend to take any action to increase black participation in party affairs. "I'm going to mind my own business," he said," and I want everybody else to do that too."[553]

Racial bloc voting was a fact of political life in Harris County. When the Department of Justice objected in 1972 to a proposed numbered post requirement for county commission elections, it noted "a pattern of racial bloc voting" which would "diminish significantly the possibilities of a member of a racial minority being

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[552] Id., Trans. 115, 118.

[553] Id., Trans. 285-86.

elected to the county commission."[554] Three years later, the department objected to at-large elections for the board of education because "minority candidates have not been able to become elected to any county-wide office in Harris County," and an at-large system "has the discriminatory effect of diluting the ability of minority candidates to participate as members of the Board of Education."[555]

In 1974, J. B. Stoner, an avowed white supremacist who promised that his election "will take the fear of black savages out of White people, and put it back into the blacks, where it belongs," finished third out of a field of ten candidates in one precinct and fourth in two others.

Despite the extensive evidence of discrimination and its continuing effects, the district court dismissed the complaint filed by the ACLU because, in its view, the county's election laws "did not have as their purpose a dilution of the minority vote," and:

> the Constitution does not require that elections must be somehow so arranged that black voters be assured that they can elect some candidate of their choice and that an at-large system of election is not to be regarded as unconstitutional merely because a minority of voters cannot elect a candidate from among themselves.[556]

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[554] David L. Norman to Roy Moultrie, December 5, 1972.

[555] J. Stanley Pottinger, Assistant Attorney General, to Ken Askew, August 18, 1975.

[556] Brown v. Reames, Order of December 16, 1977.

The plaintiffs appealed, and the appellate court vacated the trial court's opinion and sent the case back for further consideration in light of the intervening decision of the Supreme Court in City of Mobile v. Bolden requiring proof of purposeful discrimination in Section 2 cases.[557]

After the remand, plaintiffs attempted to negotiate a settlement, but defendants remained adamant in retaining the at-large system. Before the case was reconsidered by the district court, Congress amended Section 2 in 1982, dispensing with any requirement of proving racial purpose to establish a violation of the statute. The Harris County defendants, apparently concluding that their at-large system could not be defended under the new discriminatory results standard, agreed to adopt single member districts. A plan was agreed upon by the parties, enacted by the Georgia General Assembly, and precleared by the Attorney General on April 16, 1984. The first elections under the new plan were held in 1985.

Houston County and the Cities of Perry and Warner Robins

In re the City of Perry

Perry is the seat of Houston County, home of Warner Robins Air Force Base, acclaimed as "Georgia's largest industrial complex." In 1963, just prior to the passage of the Voting Rights Act, Perry adopted at-large elections for its six member council, with

[557] Brown v. Reames, 618 F.2d 782 (5th Cir. 1980). See City of Mobile v. Bolden, 446 U.S. 55 (1980).

a mayor elected at-large.

In 1973, the city sought preclearance for two voting changes: a 1970 change imposing a plurality requirement for municipal elections, and a 1973 change imposing a majority vote requirement for municipal elections. The Department of Justice precleared the 1970 change to plurality voting, but objected to the 1973 change, saying:

> Our analysis has demonstrated that where, as in the City of Perry, there is significant participation in the political process by the black community, a majority requirement has the practical effect of decreasing the potential for minority voters to elect candidates of their choice. Furthermore, the imposition of a majority requirement on a pre-existing designated post system as exists in the City of Perry, similarly reduces the potential voting strength of minority groups.
>
> In addition, recent court decisions dealing with issues of this nature, indicate that the combination of numbered posts and majority vote requirements might have the effect of abridging minority voting rights.[558]

Beginning in 1978, black candidates had run in at least four city council races, but despite comprising 35.20% of the population of Perry, no black candidate for mayor or city council had ever been elected. In October 1983, the ACLU, on behalf of the local NAACP, wrote the county's legislative delegation that at-large elections for the city council were likely in violation of Section 2 and requested them to consider changing to a district system. Following negotiations with the legislative delegation, city council members, and the NAACP, legislation was enacted in 1984 dividing Perry into three

[558] J. Stanley Pottinger, Assistant Attorney General, to Lawrence C. Walker, Jr., August 14, 1973 (internal citations omitted).

two-member districts, one of which was majority black.

The plan was submitted for preclearance, and the city advised the Attorney General that blacks had participated in the districting process:

> The white participants initially suggested a combination plan whereby some of the councilmembers would be elected at large and some from districts. The black participants did not favor this and this plan as proposed by the white participants was abandoned.[559]

The Department of Justice precleared the city's plan. Today, two blacks serve on the city council, both of whom were elected from the majority black district. The other members of the council are white.

Green and Concerned Citizens of Warner Robins and Houston County v. Mayor and Council of City of Warner Robins

By 1990, the population of Warner Robins, another city in Houston County, had grown to 42,672. Blacks were 25% of the population and 18% of registered voters. The city council discussed moving to single member districts in 1991, but failed to enact a new plan.

In August 1992, the ACLU filed suit on behalf of black voters, including members of the Concerned Citizens of Warner Robins and Houston County,

[559] Lawrence Walker, Jr. to Mr. Gerald W. Jones, Chief, Voting Section, U.S. Department of Justice, May 30, 1984.

challenging Warner Robins's at-large elections.[560] According to an analysis of elections by plaintiffs' expert, Allan J. Lichtman, professor of political science at American University, blacks voted cohesively at the average rate of 82%, and whites at the average rate of 89%. The lawsuit sought to enjoin the upcoming November elections, and establish single member districts.

After the case was filed, the parties met to negotiate a new plan. Though few council members defended the at-large plan, the parties disagreed over the configuration of the single member districts. The city was anxious to have a new plan in place for the November elections, however, and negotiated a plan acceptable to black voters, with five districts, including one with a majority black population greater than 65%. A sixth council seat was to be elected at-large.

The judge, however, refused to adopt the new plan on the grounds that the state legislature, which by law had the authority to change the method of city elections, had not yet had an opportunity to consider a remedy. On August 26, 1992, the judge enjoined the November city council election and stayed the litigation until the conclusion of the 1993 general assembly session. As a matter of law, the judge could have approved the plan, subject to Section 5 preclearance, but chose not to.

When the general assembly convened in 1993, the city submitted two plans, the negotiated 5-1 plan, and a second plan with four single member districts, one of which

[560] Green and Concerned Citizens of Warner Robins and Houston County v. Mayor and Council of City of Warner Robins, Georgia, Civ. No. 92-331-2-MAC (WDO) (M.D. Ga.).

was majority black, plus two at-large seats (the 4-2-1 plan). The plaintiffs opposed the second plan because the additional at-large seat would contribute to minority vote dilution. The legislature enacted the city's preferred plan.

The plan was submitted to the Department of Justice for preclearance, and the Houston County NAACP wrote a letter urging an objection, saying it was "inherently unfair to the minority community, and will dilute its voting strength at city level."[561] The plan was precleared by the Department of Justice on August 23, 1993, and a special election was held in October 1993.

Jasper County and the City of Monticello

In re Jasper County and the City of Monticello

Not all changes in voting procedures were the result of litigation. The threat, or implied threat, of litigation has sometimes been sufficient to prompt jurisdictions to adopt racially fair election plans. Jasper County, and the county seat of Monticello, were two such jurisdictions.

Jasper County was created in 1807 from a part of Baldwin County and was named for Sergeant William Jasper, a Revolutionary War hero who died trying to retrieve a flag during the siege of Savannah. Monticello was named for Thomas Jefferson's home in Virginia, mainly due to the large number of

[561] Rev. C. E. Edgerton, President, Houston County Branch of the NAACP, to the U.S. Department of Justice, March 2, 1993.

Virginians who moved to the area. Monticello emerged as a center of commerce and industry between 1885 and 1930. To accommodate mill and agricultural workers, the town established a segregated African American neighborhood on the south side close to one of the mills. The neighborhood was named Washington Park in honor of Booker T. Washington, and still survives today

Based on the 1980 census, 40.31% of Jasper County's residents, and 54% of Monticello's residents, were black. Despite this large black population, no black candidate had ever won a county commission election, and only one black person had ever been elected to the city council. Not surprisingly, both of the governing bodies were elected at-large. In October 1983, the ACLU wrote the representatives of the general assembly from Jasper County on behalf of the Jasper County Branch of the Southern Christian Leadership Conference (SCLC) that at-large elections for the city council and the county commission were in probable violation of Section 2 and requesting them to introduce legislation implementing districting plans. Local officials responded favorably to the request. Representative Culver Kidd said:

> I agree that changes need to be made in this area, as well as possibly the method for choosing the board of education. Personally, I feel that having the board of education appointed by the Grand Jury is obsolete and should have been stopped a long time ago.[562]

[562] Culver Kidd to Christopher Coates, November 17, 1983.

In December 1983, the Monticello City Council requested the local delegation to introduce a bill providing for two, two member voting districts, with one of the districts being majority black. The fifth member would continue to be elected at-large. The local delegation introduced the bill during the 1984 session of the legislature, and it was enacted. Today, the mayor pro tem and two city council members are African American.

The response by the county commission was also favorable. Legislation was enacted in 1984 which expanded the size of the commission from three to five members, all elected from single member districts. Two of the districts were majority black.

Jefferson County

Tomlin v. Jefferson County, Georgia Board of Commissioners

In 1860, Jefferson County, located just south of Augusta in east Georgia, had a population of 4,133 whites and 6,045 slaves. By 1980, the county was still majority (55%) black, but no black person since Reconstruction had served on the three member county commission.

In response to increasing black political activity in the 1970s, three towns in Jefferson County - Louisville, the county seat, Wadley, and Wrens - adopted majority vote and numbered post requirements for the election of their city councils. The Department of Justice objected to the changes in Louisville and Wadley in 1974.

"There is increasing interest in the political process by the black community," the Attorney General noted in objecting to Louisville's submission, and "a majority and designated post requirement have the practical effect of eliminating the potential for minority voters to elect candidates of choice."[563] In objecting to Wadley's submission, the Attorney General wrote:

> under Wadley's current system of at-large plurality elections, minority race voters have the potential to elect a candidate of their choice. In fact, as you know, two minority candidates have won election to the City Council in recent years. This minority voting strength potential is lost, however, if candidates must restrict their candidacies to a single, specific post, and must receive more than half of the votes cast.[564]

Wrens did not submit its changes for preclearance until 1986, and they also drew an objection from the Attorney General:

> We note that although there have been several attempts by black candidates to gain a position on the city council, there has been only one black city commissioner elected since these changes were implemented [in 1970], and that commissioner has been largely unopposed in his elections. . . . [It] appears in substantial part to be the result of a general pattern of racially polarized voting occurring in the context of Wrens' at-large election system; a condition which, since 1970, has made it even more difficult for black candidates to elect candidates of the choice by requiring that candidates run for numbered positions and receive a majority of the vote to be elected. . . . such a

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[563] J. Stanley Pottinger, Assistant Attorney General, to James C. Abbot, Attorney for Louisville, June 4, 1974.

[564] J. Stanley Pottinger, Assistant Attorney General, to Sidney R. Shepherd, October 30, 1974.

> requirement, in the circumstances as they exist in Wrens, would appear to have the proscribed retrogressive effect.[565]

The ACLU first filed a suit on behalf of black voters challenging Jefferson County's at-large system in April 1980,[566] but voluntarily dismissed the complaint after the Supreme Court's decision that year in City of Mobile v. Bolden,[567] which required proof of intentional discrimination to establish a violation of Section 2.[568] After Congress amended the Voting Rights Act in 1982 to restore a results standard for Section 2 claims, plaintiffs initiated discussions with county officials about changing the at-large method of elections for county commission. The parties were able to agree on a new plan expanding the commission from three to five members, with four members elected from single member districts, two of which were majority (78% and 65%) black, and the fifth member elected at-large. By agreement, a lawsuit was refiled in April 1983,[569] and the agreed upon redistricting plan was implemented via a consent order signed in September. In the ensuing elections in 1984, a black candidate was elected from the district with a 78% black majority, but the black candidate lost in the district with a 65% black majority.

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[565] William Bradford Reynolds, Assistant Attorney General, to Honorable J. J. Rayburn, October 20, 1986.

[566] Johnson v. Buchanan (S.D. Ga).

[567] 446 U.S. 55 (1980).

[568] Johnson v. Buchanan.

[569] Tomlin v. Jefferson County Board of Commissioners, Civ. No. 683-23 (S.D. Ga.).

Jenkins County

In re Talmadge Fries

In June 1982, the City of Millen, the seat of Jenkins County, adopted an ordinance that "No officer or employee of the City of Millen shall continue in the employment of the City after becoming a candidate for nomination or election to any City office." Notably, the ordinance contained an exception that it "shall in no way effect, and specifically excludes from its coverage, those individuals who presently hold the positions of Mayor and Councilman." Thus, by its terms, present office holders were free to hold city employment and run for, or hold, city office. Indeed, one member of the council worked for the Millen Fire Department but was thus exempt from the ordinance's coverage. The ordinance was clearly a change in voting, but the city did not submit it for preclearance.

Talmadge Fries, a black member of the Millen Fire Department, filed to run for city office in December 1982. Prior to the election, he received a letter from the city administrator that he would have to resign his position with the fire department in order to have his name placed on the ballot, and if he declined to do so, "your qualifying fee of $25.00 will be refunded to you and you will not be considered a candidate for election."[570]

[570] H. Carter Crawford to Talmadge V. Fries, November 30, 1982.

Fries contacted the ACLU, which determined that the ordinance had never been submitted for preclearance, and advised the city that the ordinance was unenforceable. Shortly thereafter, the city attorney, in apparent recognition that the ordinance had serious equal application problems and was not likely to be precleared, advised the ACLU that the ordinance had been repealed and that Fries was "at liberty" to run for the city council.[571]

Green v. Bragg

Based on the 1990 census, Jenkins County, which General William T. Sherman passed through and torched on his notorious march to the sea after the fall of Atlanta, was 41% black. The county's three member board of commissioners and board of education, as well as the Millen city council, were elected at-large. Although black residents of the county were politically cohesive, black candidates rarely won board or council seats under the at-large systems.

In 1991, black residents, represented by the ACLU, filed a federal suit against the county and City of Millen, arguing that at-large elections diluted minority voting strength in violation of the Constitution and Section 2.[572] Negotiations followed, and the parties agreed on a new plan for the board of commissioners and board of

[571] R. H. Reeves, II, to Neil Bradley, ACLU, December 16, 1982.

[572] Green v. Bragg, No. 691-078 (S.D. Ga.).

education containing five single member districts, two of which were majority black. The plan was precleared by the Department of Justice and implemented at the elections in November 1993, at which all members of both boards were elected to new terms.

The City of Millen, which was majority black, adopted a plan for a five member commission elected from two double member districts and one single member district. One of the double member districts, and the single member district, were majority black. Under the city's proposed implementation schedule, the double member districts would elect one member in 1993, and then all three districts would elect new members in 1995. The Attorney General approved the districting plan, but objected to the schedule of elections on the grounds that the new plan would not be fully implemented until 1995, and the city had not carried its burden of showing that the delay "has neither a discriminatory purpose nor a discriminatory effect."[573] As a result of the objection, the city agreed to hold elections in 1993 in all three districts.

In 1995, the county attempted to relocate two polling places, one of which was situated in a predominately black community and easily accessible to many voters by foot. One of the new proposed sites was located outside of the city limits in a predominately white neighborhood which had no sidewalks, curving roads, and

[573] James P. Turner, Acting Assistant Attorney General, to Roy E. Paul, Attorney for Jenkins County and the City of Millen, August 2, 1993.

a speed limit of 55 miles per hour. Thus, even if some voters could walk to the proposed polling place, it would have been very dangerous. The county maintained that the proposed site was in racially neutral territory. However, the Attorney General rejected the change and determined that "the county's proffered reasons for the selection of this particular polling site appear to be pretextual, as the selection of this location appears to be designed, in part, to thwart recent black political participation."[574]

The oversight of the county's voting changes provided by Section 5 thus helped ensure that blacks had access to the polls and were able to participate effectively in the electoral process.

Johnson County and the City of Wrightsville

Wilson v. Powell

Buoyed by the 1945 decision in King v. Chapman,[575] which outlawed the white primary in Georgia, blacks in Johnson County began to register to vote in increasing numbers, despite considerable obstacles and white resistance. Three years later, in March 1948, on the eve of Johnson County's Democratic primary, 400 blacks had registered. This prompted swift action by the Ku Klux Klan. On the eve

[574] Deval L. Patrick, Assistant Attorney General, to William E. Woodrum, Jenkins County Attorney, March 20, 1995.

[575] 62 F. Supp. 639 (M.D. Ga. 1945), aff'd sub nom. Chapman v. King, 154 F.2d 460 (5th Cir. 1946).

of the primary a crowd of 700 whites, including some 250 Klan members, gathered on the town square in Wrightsville to hear Dr. Samuel Green, the Grand Dragon of the Georgia KKK, denounce racial equality. "Again you will see Yankee bayonets trying to force social and racial equality between the black and white races," Green, an Atlanta physician, shouted. "If that happens there are those among you who will see blood flow in these streets. The Klan will not permit the people of this country to become a mongrel race." According to Time magazine, no blacks voted the next day.[576]

More than 30 years later, the Klan still made its presence felt in Wrightsville, when a crowd of 75 Klansmen and other white supremacists gathered in April 1980, to oppose civil rights marchers who were peacefully protesting what they said were racial actions and police misconduct by the sheriff.

Three years later, black residents of Johnson County, represented by the ACLU, filed suit in February 1983, challenging at-large voting for the county board of commissioners and the Wrightsville City Council.[577] The county had a black population of 31%, and its county seat, Wrightsville, had a black population of 38%. No black person, however, had ever been elected to either of the governing bodies.

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[576] "Sheet, Sugar Sack & Cross," Time, March 15, 1948.

[577] Wilson v. Powell, Civ. No. 383-14 (S.D. Ga.).

In September 1983, plaintiffs and the City of Wrightsville entered into a consent decree providing for three city council seats elected from single member districts, one of which was 75% black. In the first election under the new plan in November 1983, the first black elected official in the history of Johnson County was elected from the majority black district.

In April 1984, the county commission and the plaintiffs agreed on a consent decree that increased the number of county commission seats from three to five, and provided for elections from five single member districts, one of which was 66% black. At the first election under the new plan in August 1983, a black person was elected from the majority black district.

Johnson County Branch of the NAACP v. Johnson County

Black voters and the Johnson County NAACP, represented by the ACLU, returned to court again in 1992, seeking redistricting of malapportioned election districts for both the board of commissioners and board of education in compliance with the Constitution and the Voting Rights Act.[578] A consent judgment was entered on September 16, approving a redistricting plan for both bodies which was subsequently approved by the Justice Department.

[578] Johnson County Branch of the NAACP v. Johnson County, Georgia, Civ. No., 392-026 (S.D. Ga.)

The Attorney General, however, objected to a voting change submitted that same month by the City of Wrightsville which proposed the relocation of a precinct from the county courthouse to the racially segregated American Legion Hall. In the objection letter, the Department of Justice concluded that:

> the American Legion in Johnson County has a wide-spread reputation as an all-white club with a history of refusing membership to black applicants. Moreover, the American Legion hall, itself, is used for functions to which only whites are welcome to attend. Consequently, the atmosphere at the American Legion is considered hostile and intimidating to potential black voters, and it appears that locating a polling place there has the effect of discouraging black voters from turning out to vote.[579]

In that same 1992 letter, the Attorney General did, however, approve a belated request from the city to approve the 1968 elimination of a segregated polling place at the Wrightsville City Hall and the establishment of an integrated polling place at the county courthouse.

Lamar County

Strickland v. Lamar County

Located in west central Georgia between Atlanta and Macon, Lamar County had approximately 12,500 people, 33.81% of whom were black in 1980. The county's three member board of commissioners was elected at-large. In 1984, in response to

[579] John R. Dunne, Assistant Attorney General, to Charlotte Beall, October 28, 1992.

requests from local residents, the county board of commissioners asked the state reapportionment office to draw some proposed redistricting maps for the county. The board selected a plan, which was subsequently enacted by the general assembly, consisting of four single member districts, one of which was majority black, and one at-large district for the chairman. The plan also included a majority vote requirement.[580] An alternative plan, which the board rejected, called for five single member districts, two of which were majority black, with the chairman selected by the board members.

In March 1986, the Attorney General denied preclearance to the county's proposed plan, saying, in part:

> the commissioners of Lamar County selected the proposed 4-1 plan allegedly because a majority of petition signatures and individuals present at two public hearings supported this plan. We have been advised, however, that a majority of those who attended the hearings actually backed the county's five single-member district plan.[581]

The Attorney General also rejected the county's assertion that under the proposed plan blacks would have an opportunity to elect a candidate to the at-large position and not be limited to one representative from the single majority black district. According to the Attorney General, "the historical lack of success of black candidacies in county at-large elections suggests that the likelihood of a black

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[580] Georgia Laws 1985, p. 5020.

[581] William Bradford Reynolds, Assistant Attorney General, to Norman Smith, March 16, 1986, p. 1.

supported candidate defeating a white-supported opponent in a county-wide election is, at best, remote."[582]

The county had also claimed that blacks would likely elect a single black representative under the 4-1 plan, but could not be assured of similar success in either of the two majority black districts under the five single member district plan. The Justice Department disagreed.

> The county's reasoning would appear to overlook, however, the potential for electing candidates of their choice provided to blacks by their percentage of the voting age population in those two districts, thus, affording to them the opportunity secured by the Voting Rights Act. In the circumstances, it is far from clear that the county's decision to adopt the 4-1 plan was free of discriminatory purpose - - a purpose to minimize to the fullest extent possible black voting opportunities within the county.[583]

Two months later, on May 30, 1986, black voters in Lamar County, represented by the ACLU, filed suit against the board of commissioners and the five member county board of education, which was also elected at-large.[584] The suit charged that at-large elections for the board of commissioners and the majority vote requirement violated the Constitution and Section 2. The suit similarly charged that at-large elections for the board of education with a majority vote requirement, and

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[582] Id., p. 2.

[583] Id.

[584] Strickland v. Lamar County, Civ. No., 86-167-2-MAC (M.D. Ga.).

the use of a multi-member residential district in the area of the county having a high concentration of black population, violated the Constitution and Section 2.

Later that year, in October, the district court granted a stay to allow the general assembly an opportunity to enact and preclear new redistricting plans for the board of commissioners and board of education. In 1987, the general assembly enacted legislation for both governing bodies, which the Attorney General precleared, providing for four single member districts, two of which were majority black, and one at-large position.[585]

The plaintiffs, however, contended the new plans were malapportioned, and filed a motion for a preliminary injunction against the holding of a special election on March 8, 1998. The district court denied the motion and the elections went forward.

Plaintiffs renewed their contentions in a motion for summary judgment, but more than three years later, on September 25, 1991, the district court denied the motion on the ground of mootness. According to the court, the one person, one vote challenge was based on 1980 census data, which had been superseded by the 1990 census. The lawsuit was dismissed without prejudice in March 1992.[586]

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[585] Georgia Laws 1987, p. 3752 (board of commissioners) and Georgia Laws 1987, p. 3740 (board of education). See, also, Strickland v. Lamar County, Order of November 25, 1992, pp. 3-4.

[586] Strickland v. Lamar County, Order of November 25, 1992, p. 4.

Laurens County

Concerned Citizens Committee of Dublin & Laurens County v. Laurens County

Laurens County, located along the Altamaha River in middle Georgia, has been a major cotton and timber-producing area. The county is the state's third largest in land area and the City of Dublin is the county seat. Across the Altamaha from Dublin is East Dublin, where African Americans were slightly less than one-third (29%) of the population in 1970. Beginning in the mid-1970s, the Justice Department had objected several times to election changes proposed by the East Dublin City Council. In 1974, the Attorney General objected to changes implementing numbered posts and staggered terms, and to the postponement of city elections.[587] Seventeen years later, when East Dublin again tried to implement numbered posts and a majority vote requirement, the Justice Department again objected to these changes in the context of the at-large council elections.[588] In that 1991 objection, the Attorney General stated:

> Furthermore, it appears that the council adopted the majority vote requirement over the objections of the two minority members of the council and despite the explicitly state[d] concern of Mayor Gornto and others that the proposed change would have a discriminatory effect. Yet, even in the face of these

[587] J. Stanley Pottinger, Assistant Attorney General, to William Malcolm Towson, March 4, 1974 and June 19, 1974.

[588] John R. Dunne, Assistant Attorney General, to William L. Tribble, April 26, 1991.

> concerns, no valid, non-racial reason has been advanced by the city to justify either the majority vote requirement or the change to numbered position for the at-large council seats.

In 1990, Laurens County had a population of 39,988, of which 33.3% were African American. When data from the 1990 census became available, it showed the districts from which the Laurens County Board of Commissioners were elected were significantly malapportioned. The general assembly failed to reapportion Laurens County during the 1992 legislative session, leaving in place districts with a total deviation of 28.27%.

To remedy this inequality, the ACLU filed suit on behalf of the Concerned Citizen Committee of Dublin and Laurens County on July 17, 1992, under the Constitution and Section 2 and Section 5, challenging the malapportioned district voting plans used to elect members to the board of commissioners.[589] County officials subsequently agreed to seek redistricting in the 1994 session of the Georgia General Assembly, and the court ordered a stay of the proceedings in March 1993. Defendants, however, failed to secure a redistricting plan during the 1994 legislative session. The parties then agreed to a plan with five single member districts including two majority black districts, and the new plan was implemented at a special election in December 1994.

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[589] Concerned Citizen Committee of Dublin and Laurens County v. Laurens County, Civ. No. 392-033 (S.D. Ga.).

Liberty County

Bryant v. Liberty County Board of Education

Liberty County is home to Fort Stewart, headquarters of the Army's Third Infantry Division. During Reconstruction, the county had been represented in the state senate by Tunis Campbell, one of the most effective and influential blacks in the legislature, until he was literally run out of the state by the forces of White Redemption. The county also had at least one special tie with the modern civil rights movement. In the 1960s, the Dorchester Academy, an all-black school that operated in the county until 1945, was used by Dr. Martin Luther King, Jr., and others to plan desegregation campaigns and train civil rights activists. Today, Liberty County's population of 61,610 is split roughly equally between blacks (42.8%) and whites (46.6%), with a remaining population that is 8.2% Hispanic.

In 1986, under pressure from the black community and the threat of litigation, the state legislature adopted single member district plans for both the Liberty County Board of Commissioners and the Board of Education. Six members of each board were elected from districts, with the chair elected at-large.[590]

Four years later, and under similar pressures, the city of Hinesville, the Liberty County seat, changed from electing its city council at-large by plurality vote to elections from single member districts by majority vote. The change also

[590] Act No. 780 (1986); Act No. 778 (1986).

provided for the election of the mayor by majority vote.[591] The Department of Justice approved the adoption of single member districts for the council, but objected to the majority vote requirement for mayor. It noted that the Attorney General had previously interposed a Section 5 objection in 1971 to the adoption of a majority vote requirement for mayor, as well as majority vote and numbered post requirements for the city council when elections were held at-large:

> Thereafter on three occasions the city requested reconsideration and the Attorney General declined to withdraw the objection. As explained in our most recent determination in this regard, on August 23, 1983, the changes did not pass muster under Section 5 because they would occasion an impermissible retrogression in minority voting strength in the context of at-large elections and racially polarized voting. Our review of the city's election history since 1983 does not suggest that our past analyses were incorrect. Indeed, the apparent basis for the city's change to single-member districts is a concern that municipal elections are characterized by polarized voting. We also note that the black population percentage in the city has increased significantly in the last decade, which serves to heighten the retrogressive effect of the proposed majority vote requirement in the context of city-wide elections. Thus, while the change to single-member districts for councilmanic elections, in one of which blacks constitute a majority of the registered voters, renders the majority vote provision for those elections nonproblematic, the majority vote requirement for mayor continues to have an impermissible effect under the Voting Rights Act.[592]

Based on the 1990 census, the districts for the board of commissioners and board of education were malapportioned with a total deviation of 55.9%. The

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[591] Act No 825 (1990).

[592] John R. Dunne, Assistant Attorney General, to James W. Smith, Esq., July 15, 1991.

general assembly enacted legislation in 1992, which called for new districts of substantially equal population. However, like other reapportionment bills enacted that year, the legislation became null and void when the justice department failed to preclear the measure before April 27, 1992, the beginning date of qualifying for county commission and school board elections, thus triggering a "poison pill" provision in the law which caused the redistricting measure to expire.

Because Liberty County was left with a malapportioned districting plan based on the 1980 census, the ACLU filed suit in 1992, on behalf of black voters seeking constitutionally apportioned election districts for the county.[593] The court granted plaintiffs' motion for preliminary injunctive relief on July 7, 1992, and the following year the parties agreed to a redistricting plan in which two of the six single member districts contained majority black voting age populations.[594] The plan was precleared by the Justice Department on April 27, 1993.[595]

In 2004, the chair and vice chair of the Liberty County Commission were African American, and under their leadership the county established a Museum of African American History on the grounds of the Dorchester Academy.

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[593] Bryant v. Liberty County Board of Education, Civ. No. 492-145 (S.D. Ga.).

[594] Id., Consent Decree, Order and Judgment, February 11, 1993.

[595] James P. Turner, Acting Assistant Attorney General, to J. Noel Osteen, Esq., April 27, 1993.

Long County and the City of Ludowici

Glover v. Long County

Wallace v. City of Ludowici

Named after Crawford W. Long, the first physician to use anesthesia during surgery, Long County is located in southeast coastal Georgia. Although 26% of the sparsely populated rural county was black in 1980, the county was racially polarized and had never elected an African American to county office. In 1976, the Department of Justice had objected to the proposed use of majority vote and numbered post requirements for school board elections saying:

> We have noted particularly information concerning recent minority political activity and racial bloc voting in the county. Additionally, we have not been apprised of any compelling reasons for the use of candidate residency districts . . . In the context of an at-large electoral system, the opportunity for minority voters to elect a representative of their choice to the board of education is significantly lessened by the use of candidate residency districts.[596]

In June 1985, the five member Long County Commission established a committee to study the possibility of redistricting. Two years later, in January 1987, it came up with a plan to create five election districts, including one that would have been majority black. Later that month the ACLU filed suit on behalf of a group of black and white citizens challenging the at-large method of elections as diluting

[596] J. Stanley Pottinger, Assistant Attorney General, to Honorable J. R. Shaw, July 16, 1976.

black voting strength in violation of Section 2 and the Constitution.[597] Three months later, in April, the parties agreed to a single member district plan for the five county commissioners, including one majority black district. The plan was adopted by the court, precleared by the Department of Justice and the first elections under the new apportionment were held in 1988.

The ACLU also filed suit in Long County in June 1987, on behalf of black residents of Ludowici, the only city in the county, challenging the use of at-large elections for city council as violations of Section 2 and the Constitution.[598] Like the county, the city was approximately one-fourth black, yet no African American had ever been elected to city government. A settlement order was issued in October, establishing five single member districts, and the first election under the new plan was held in September 1989.

Lowndes County

NAACP of Lowndes County v. Tillman

Lowndes County is located in southwest Georgia on the Florida state line. In 1859, the town of Valdosta was established as the new county seat in order to connect the county with a railroad line from Savannah. With this transportation link

[597] Glover v. Long County, Civ. No. 287-20 (S.D. Ga.).

[598] Wallace v. City of Ludowici, Georgia, No. CIV-287-147 (S.D. Ga.).

established, Valdosta became the largest inland market in the world for Georgia Sea Island cotton, until the arrival of the boll weevil in 1915 led to the destruction of cotton crops across the state.

According to the 1980 census, more than 39% of Valdosta's 37,596 residents were African American, yet only one black person had ever been elected to the six member city council, which was elected at-large. In 1983, the Lowndes County Chapter of the NAACP and individual black voters, represented by the ACLU, challenged at-large voting for the city council as violating Section 2 and the Constitution.[599]

Prior to 1963, four of the six council members had been required to reside in specific residential wards. City officials abolished the residency requirement in 1963 and imposed a majority vote requirement. The effect of these changes was to solidify control of the outcome of elections by the white majority.

Litigation brought several years earlier by the United States challenging racial segregation in Valdosta city schools highlighted the problem of race discrimination in Lowndes County. In 1978, the court of appeals vacated a district court ruling holding that a unitary school system had been achieved in Valdosta. Instead, the appellate court found that a high incidence of racially identifiable schools belied the school board's contention that Valdosta had achieved a unitary system. "Fifty-five

[599] Lowndes County Chapter of the NAACP v. Tillman, Civ. No. 83-108-VAL (M.D. Ga.).

percent of Valdosta's elementary school population is black, and 80% of those black students attend schools that are over 90% black. . . Thus we can see that several of Valdosta's elementary schools are virtually one race."[600] Two years earlier, the U.S. Department of Education had withdrawn federal funding from the Lowndes County public schools after finding that four black administrators had been discriminatorily demoted in order to prevent them from being principals in newly desegregated county schools. According to the federal Equal Employment Opportunity Commission (EEOC), "the demotions had the effect of maintaining the status quo of having all-White Administrators as Principals."[601]

The ACLU law suit challenging city council elections was filed the same week the Department of Justice brought a similar suit challenging at-large voting in both Lowndes County and Valdosta.[602] The court consolidated both cases for purposes of discovery and trial.

In September 1984, the Justice Department and city officials reached an agreement that the city would be divided into six single member voting districts, three of which were majority black. The number of city council members was also increased to seven, with the seventh member elected at-large (the 6-1 plan). The

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[600] United States v. The Board of Education of Valdosta, 576 F.2d 37, 38 (5th Cir. 1978).

[601] Harris A. Williams, District Director, Atlanta District Office, EEOC, to Otis G. Lane and Lowndes County Public Schools, June 23, 1987, Charge Number 041851508.

[602] United States v. Lowndes County, Civ. No. 83-106 (M.D. Ga.)

Lowndes County NAACP objected to the addition of the at-large seat on the grounds that it would dilute minority voting strength, but the district court approved the plan. While the 6-1 plan was flawed, it did contain three majority black districts and when elections were held under the new plan in February 1985, three black candidates were elected. The government's law suit against the county was settled on the basis of single member districts and in 2006, one of the county's four commissioners is African American.[603]

Elections for the county board of education were also at-large. And with the general population of the county approximately 75% white, it had not been possible for blacks to win when forced to compete in county-wide elections.[604] From 1970 to 1988, only two African Americans had run for a position on the board of education (in 1970 and 1984) and both had lost. Although black voters had repeatedly appeared before the all white school board to suggest the adoption of district elections, the board had failed to follow through on promises to further explore the possibility of redistricting.

Beginning in 1985, the EEOC had issued a series of determination letters in favor of black teachers and administrators who had alleged discrimination by the

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[603] McDonald, (2003), p. 183.

[604] Kathleen Wilson, "County School District Proposal," The Valdosta (Ga.) Daily Times, September 9, 1987.

Lowndes County Board of Education.[605] Frustrated by adverse conditions in the schools and their exclusion from the county board of education, black residents filed a complaint with the Department of Justice alleging "bold, overt and longstanding racial discrimination in the Lowndes County Georgia School System."[606] Voters also appealed to the ACLU for assistance in bringing suit to force a change, but it did not appear possible to draw a majority black district using a five member format at the time.

Following the 1990 census, the school board voluntarily changed to single member districts and created one majority black district. Since that time there have been as many as two African Americans serving at one time on the seven member board and currently one black member serves on the board.

Macon County

Hall v. Macon County

Macon County is a small, majority (59.5%) black county located in southwest Georgia. Its board of commissioners and board of education are each composed of

[605] Harris A. Williams, District Director, Atlanta District Office, EEOC to Timmy Young and Lowndes County Board of Education, October 30, 1987, Charge No. 110851956; Harris A. Williams, District Director, Atlanta District Office, EEOC, to Otis G. Lane and Lowndes County Public Schools, June 23, 1987, Charge Number 041851508. Harris A. Williams, District Director, Atlanta District Office, EEOC, to Lowndes County Board of Education, September 30, 1985, Charge Number 041861534.

[606] Willie Mack Rose, Concerned Citizens of Lowndes County, to U.S. Department of Justice, November 23, 1987.

five members elected from single member districts. The 1990 census showed the districts were malapportioned with a total deviation of 21.69%. The general assembly failed to redistrict the two boards during its 1992, 1993, and 1994 sessions, and in 1994, the ACLU filed suit on behalf of Macon County residents against county officials seeking a constitutional plan for the 1994 elections.[607]

On July 12, 1994, the court enjoined the upcoming election and ordered the parties to present remedial plans by July 15, 1994. In March 1995, the court ordered a five district plan that remedied the one person, one vote violations and ordered special elections be held.

[607] Hall v. Macon County, Civ. No. 94-185 (M.D. Ga.).

Marion County

Story v. Marion County

Rural Marion County lies in the heart of the West Georgia cotton belt. The county was home to more than 10,000 people before the Civil War, including 3,600 slaves, but suffered heavy population losses when bank panics, the boll weevil, and the Great Depression combined to cripple the agricultural economy.

The county was governed by a three member commission which, historically, had been was elected from single member districts. In 1957 the districts were abolished in favor of at-large elections with staggered terms and a majority vote requirement. Although blacks were 46% of the county population based on the 1980 census, no black person had ever been elected to the county commission. In 1985, black residents of the county, represented by the ACLU, filed suit challenging at-large commission elections as violating the Constitution and Section 2.[608]

In its answer, the county conceded the "entitlement of all citizens of Marion County to a Board of Commissioners elected from equal population, single-member Commissioner districts in place of the exiting at-large system," and represented that it intended to seek legislation in 1986 establishing single member commission districts. The parties subsequently agreed to increase the size of the council to five members elected from single member districts, two of which would be majority

[608] Story v. Marion County Board of Commissioners, Civil Action No. 85-175-COL (M.D. Ga.).

black. The plan was enacted by the general assembly and precleared by the Justice Department, but at a subsequent referendum the plan was rejected by the voters of the county, a majority of whom were white. The defendants then asked the court to adopt a plan containing three single member districts, one of which was majority black, as an interim court ordered plan. The plaintiffs, in turn, asked the court to implement a five member plan, containing two majority black districts. Due to this impasse, no action was taken by the court, and the case was closed without reaching a resolution.

McBride v. Marion County

In 1999, black residents of the county, again represented by the ACLU, filed a second lawsuit challenging at-large elections for the Marion County Commission.[609] The Department of Justice filed a similar case against the county,[610] and the two suits were consolidated. This time, the parties were able to reach a settlement, and on June 13, 2000, the court entered a consent order. Among its findings were:

> *Racially polarized voting patterns prevail in elections in the county, including elections for the county commission.
>
> *No black candidate for the Marion County Board of Commissioners has been elected to office under the at-large method of election. Indeed, no black candidate has been elected

[609] McBride v. Marion County Commission, 4:99-CV-134 (M.D. Ga.).

[610] United States v. Marion County, Civil Action No. 4:99-CV-151 (M.D. Ga.)

> to any county office in Marion County in which voting occurs on an at-large basis.
>
> *Black citizens in Georgia and its political subdivisions (including Marion County) have suffered from a history of official racial discrimination in voting and other areas, such as education, employment, and housing. . . . These factors hinder black citizens' present-day ability to participate effectively in the political process.
>
> *[T]here is a strong likelihood that plaintiffs would prevail were these actions to proceed to trial.[611]

A plan was also agreed upon containing three single member districts, one of which was majority black. The new plan, which had previously been precleared by the Department of Justice, was implemented at the elections in 2000.

Black voters, however, continued to have problems participating in county elections. In 1965, the county school board had adopted at-large elections but failed to submit the change for preclearance under Section 5.[612] The board was sued in 1984 by the Marion County Voter Education Project, which resulted in the implementation of five single member districts for the board, two of which were majority black.[613]

When the 2000 census showed the districts for the school board were malapportioned, the county redrew them and submitted the new plan for

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[611] Id., Order of June 13, 2000.

[612] McDonald (2003), pp. 131-32.

[613] Marion County Voter Education Project v. Grier, Civ. No. 84-97-COL (M.D. Ga.).

preclearance. The plan retained a significant black population in one of the districts (District 1), but reduced the black population in District 4 to a bare majority (50.7% BVAP). The county argued that the reduction in black population in District 4 was unavoidable due to a decline in the overall black population of the county, but the Department of Justice disagreed, saying elections in Marion County were:

> marked by a pattern of racially polarized voting . . . [and] the significant reduction in the black voting age population in District 4, and the likely resulting retrogressive effect on the ability of black voters to elect a candidate of choice to two seats on the board, was neither inevitable nor required by any constitutional or legal imperative.[614]

The county submitted a revised plan to the Justice Department in 2002 that provided for a five member school board with four single member districts, and one additional position elected at-large. Two of the election districts had a black majority, and the plan was approved in 2003. Today there are two African American members of the Marion County school board.

McDuffie County

Bowdry v. McDuffie County Board of Commissioners

The ACLU originally challenged the at-large method of electing the McDuffie County Board of Commissioners, the board of education, and the Thomson City

[614] Ralph F. Boyd, Jr., Assistant Attorney General, to Wayne Jernigan & Phillip L. Hartley, October 15, 2002.

Council in 1976.[615] The case, which was filed on behalf of black voters, was settled in 1978 by entry of a consent order adopting district election plans for all three jurisdictions. Although the plans later became malapportioned under both the 1980 census and the 1990 census, the defendants failed to enact redistricting plans and conducted the 1992 primary under the preexisting plans. Plaintiffs filed a motion in October to enjoin the pending November elections, but at a hearing on October 28, 1992, the court refused to stop the elections, although it did require that special elections be held in 1993 under properly apportioned and precleared plans.

Meriwether County

Bray v. City of Greenville

The City of Greenville in Meriwether County is predominately black, and a majority of Greenville elected officials have traditionally been African American. Meriwether County, by contrast, is predominantly white and, prior to passage of the Voting Rights Act, it elected its board of commissioners from single member districts. After passage of the act and increased black registration, the county adopted at-large elections for the board to ensure the white majority would continue to control elections. The change was submitted for preclearance, but the Attorney General objected, noting that under the existing plan, two of the districts were

[615] Bowdry v. McDuffie County Board of Commissioners, Civ. No. 176-128 (S.D. Ga.).

majority blacks while the at-large plan "would have the effect of abridging minority voting rights in Meriwether County."[616]

In the May 1987 mayoral election, the incumbent, John Carter, narrowly beat a challenger, James Bray, by four votes. Bray challenged the election, and after a hearing on September 16, 1988, the Superior Court of Meriwether County set aside the results for errors in the tabulation of absentee votes and ordered city officials to conduct a special election on October 26.[617] Under Section 5, a special election ordered by a state court is a change in voting requiring preclearance. Section 5, however, gives the Attorney General 60 days to act upon a submission, a period of time that extended beyond the date set by the superior court for the special election.

City officials submitted the special election for preclearance, but were advised the day before the election that no decision had been reached. The mayor and council, upon the advice of the city attorney, then notified the superior court that the submission had not been precleared and that they were therefore canceling the election. James Bray, the defeated challenger, then moved the superior court to hold the mayor and council members in contempt for failing to hold the election, and the court did so.

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[616] J. Stanley Pottinger, Assistant Attorney General, to Ben R. Freeman, July 31, 1974.

[617] Bray v. City of Greenville, Case No. 87-V-179 (Ga. Sup. Ct.).

In a harsh and punitive decision, the state court held the mayor and four council members, all of whom were black, in contempt of court, fined them $500 each, ordered them to pay Bray's attorneys' fees in the amount of $5,250, - all out of their personal funds, and directed that they be incarcerated in the county detention center for 20 days. The mayor and council members could avoid jail time only if they paid the fines and fees by a date set by the court. This was no doubt the first time in the history of the Voting Rights Act that local officials had been ordered to pay fines and costs and go to jail for complying with the preclearance requirements.

The mayor and council, represented by the ACLU and the Greenville City Attorney, removed the state case to federal court under a law that permits removal where a defendant is acting under compulsion or authority of federal law – in this instance the Voting Rights Act.[618] The federal court vacated the contempt order and directed city officials to conduct a special mayoral election on January 4, 1989, and to preclear the election under the Voting Rights Act. The defendants complied with the court's order, the election was held, and Bray was elected the new mayor of Greenville.

Miller County

Thompson v. Mock

[618] Bray v. City of Greenville, No. 3:88-CV-127 (N.D. Ga.).

Miller County, located in southwest Georgia, was home to Governor Marvin Griffin. In the wake of the 1954 Brown decision ending segregation in public schools and increased civil rights activity in the state, he warned that "the majority race in Georgia is under siege" and urged "a Solid White Vote [in all elections] until sanity, and with it safety, returns."[619] Although the black population of the county was approximately 28%, prior to passage of the Voting Rights Act only six blacks were registered to vote.

Miller was one of the counties that switched from district to at-large elections for its board of commissioners following increased black voter registration after passage of the Voting Rights Act. It made the change in 1976, and the next year, it changed the method of selecting members of the county board of education from grand jury appointment to elections at-large. Both changes were implemented, but neither was submitted for preclearance under Section 5.

In 1980, the ACLU filed suit on behalf of black voters against the county board of commissioners and board of education alleging that their use of at-large elections violated Section 5 and the Constitution.[620] In June 1980, a three-judge district court enjoined further at-large county elections absent preclearance. The suit against the county commission was subsequently settled by consent order creating

[619] Quoted in McDonald (2003), p. 72.

[620] Thompson v. Mock, No. 80-13 (M.D. Ga.).

one two member and four single member districts, with one district being majority black. The suit against the board of education was settled by consent order in February 1981, creating five single member districts, with one of the districts being majority black. The plan was formally enacted by the legislature and approved by the voters in a referendum later that year.

After release of the 1980 census, the parties agreed upon a new redistricting plan for the county commission retaining a majority black district, which was enacted by the legislature in 1983.

Mitchell County

Cochran v. Autry

In 1979, the ACLU filed suit on behalf of black voters challenging at-large elections for the Mitchell County Board of Commissioners and Board of Education as diluting minority voting strength in violation of the Constitution and Section 2.[621] Despite the fact that blacks were nearly 50% of the population, no black person had ever been elected to the board of commissioners and no more than one black person ever served at one time on the board of education.

Located in rural Georgia, south of Albany, Mitchell County has a long and violent racial past. In 1868, during Reconstruction, whites attacked a black political

[621] Cochran v. Autry, Civ. No. 79-59-ALB (M.D. Ga.)

rally in Camilla, the county seat, in what became known as the Camilla Massacre. An undetermined number of black participants were killed and 30 or 40 people were wounded.[622]

In the 1970s, the lack of black political representation had direct consequences for employment and the availability of services to black Mitchell County residents. There were no black personnel in the county commissioner's' office or the tax assessor's office. There were no black deputies at either the sheriff's department or the county prison, where discriminatory practices persisted. Sections of roads through the black community remained unpaved.[623]

As in a number of other Georgia jurisdictions, no black person had served on the grand jury in Mitchell County.[624] After the Supreme Court in 1967 called into question Georgia's segregated system of jury selection, the state enacted legislation requiring fair racial representation on grand juries. Faced with the prospect that a more racially representative grand jury might appoint black members to the school board, Mitchell County then abandoned grand jury appointments and switched to at-large elections in 1970. Though preclearance was required by Section 5, the change was not submitted to the Justice Department until 1979.

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[622] McDonald (2003), p. 23.

[623] Wayne Mixon and Ed Brown to the Mitchell County Chairman and Board of Commissioners, undated, c. 1976.

[624] McDonald (2003), pp. 133-134.

In 1976, the federal district court in Albany had found the grand and traverse jury lists for Mitchell County still to be "racially discriminatory."[625] Between 1970, when the school board switched from grand jury appointment to at-large elections and subsequently implemented a majority vote requirement, and 1979, no more than one black person at a time had served on the seven-member board of education.

On September 15, 1978, the Department of Justice objected to election changes in the Mitchell County school district, which required residency districts, designated posts, and a majority vote requirement. While that objection was later withdrawn, the language of the September 15, 1978, Attorney General's letter was clear,

> Under recent Supreme Court decisions, to which we feel obligated to give great weight, election systems containing such features have been found to have the potential for minimizing and canceling out the voting strength of racial minorities.[626]

Also in the 1970s, voting precincts at Camilla, Pelham, and Baconton were staffed by members of the Rotary, Pilot, and Lions Clubs, none of which had any black members. In 1976, Ed Brown, a state officer of the NAACP, ran unsuccessfully for the state house from Mitchell County. In 1979, he ran unsuccessfully for mayor of his hometown, Camilla, and he encountered open hostility campaigning in the white community. On one occasion a white man tore up Brown's campaign card as he stood on the man's front doorstep. On another occasion, an elderly white man

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Brown v. Culpepper, 559 F. 2d 274 (5th Cir. 1977).

[626] James P. Turner, Acting Assistant Attorney General, to Charles Stripling, September 15, 1978.

said, "You're trying to take over. I've seen the time in Mitchell County when people like you would just disappear." The assaults were not simply verbal. During one of his campaigns, Brown's car was burned.[627] In 1980, the Department of Justice sent 19 federal officials to observe elections in Mitchell County.[628]

Following the 1980 decision of the Supreme Court in Mobile v. Bolden, which required proof of intentional discrimination in a vote dilution case, the litigation against the county commission and board of education was stayed. But after the amendment and extension of the Voting Rights Act in 1982, adopting a "results" test for Section 2 violations, the parties agreed to settle the litigation. In May 1984, the parties entered into a consent decree providing for single member districts for the five member board of commissioners, with two of the districts majority black. At the elections held in 1984, two black candidates were elected, marking the first time in the 20th century that African Americans were elected to the county commission.

The consent decree also provided for a six member board of education elected from single member districts, with the chair elected at-large. Three of the six districts were majority black, and in the August 1984 election black candidates won in two of the three majority black districts.

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[627] McDonald (2003), pp. 118, 156-157.

[628] Observation of Elections Under the Voting Rights Act of 1965, U.S. Department of Justice, Civil Rights Division, Voting Section, March 12, 1981.

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Brown v. McNeill

McCoy v. Adams

In 1984, the ACLU brought suit on behalf of black voters against two municipalities in Mitchell County, Camilla,[629] the county seat, and Pelham, for their use of at-large elections.[630] Camilla was one of the 30 or more Georgia cities that adopted a majority vote requirement after the 1970 extension of the Voting Rights Act. Camilla had a black population of 61%, but only one black person had ever been elected to the city council.

Prior to filing the lawsuit, the plaintiffs and city officials agreed to enter into a consent decree after the lawsuit was filed enjoining the regularly scheduled city election in December, and scheduling a special election for late February 1985. The parties also agreed to divide Camilla into two three member districts--one predominantly white, the other predominantly black--and that at the special election in 1985, two posts in the majority black district would be open for election. Elections were held in April 1985, and two black candidates were elected, one of whom was Ed Brown, the state NAACP officer.

Until 1964, the Pelham City Council controlled the method of selecting the board of education under a 1901 city ordinance, but that year the Georgia General

[629] Brown v. McNeill, Civ. No. 84-248 (M.D. Ga.).

[630] McCoy v. Adams, Civ. No. 84-240-ALB-AMER (M.D. Ga.).

Assembly repealed the ordinance and established a seven member board, elected at-large, with the mayor serving as an ex officio member. In 1971, the legislature decreased the number of members to six, plus the mayor, and instituted a residential ward system, with a majority vote requirement. Both changes differed from election practices before November 1, 1964, but neither was submitted for preclearance as required by Section 5.

In 1980, black residents of Pelham were 47% of the population, but no black person had ever been elected to the city council, and only one black person had been elected to the local board of education. Prior to filing suit in 1984, the parties met and discussed alternatives to the at-large system, but local officials stymied efforts to implement single member districts by seeking to reduce the size of both elective bodies from six members to five. Such a reduction would have provided black majorities in only two districts compared to three in a six district plan. In light of the discriminatory effect of the city's proposal, the plaintiffs filed their lawsuit.[631]

Subsequently, the parties entered into a consent decree on November 14, 1986, enlarging both the council and school board to seven members, elected from two districts. One district, majority black, would elect three members and the other, majority white, would elect four members. The Department of Justice approved the changes and elections implementing the settlement were held in January 1987. Black

[631] McCoy v. Adams.

candidates were elected to three seats on the city council and three seats on the city school board. These results stood in sharp contrast to the decades of exclusion of blacks from meaningful participation in government in Pelham and Mitchell County.

Morman v. City of Baconton

The City of Baconton, another municipality in Mitchell County, was required to redistrict after the 2000 census, and again Section 5 was critical in blocking the use of an admittedly unconstitutional plan.

In April 2003, the city enacted a redistricting plan for its mayor and five member city council based upon the 2000 census. The preexisting plan, which had been enacted in 1993, contained a total deviation of 49.7%. The city submitted its new plan to the Attorney General and it was precleared on October 17, 2003. However, prior to preclearance the city had allowed candidates to qualify under the old 1993 plan.

To complicate matters further, despite preclearance, the city prepared to hold city council elections in November 2003, under the old plan. The city, to its credit, attempted to secure an order from the Superior Court of Mitchell County enjoining the November 4 election under the 1993 plan, but the state court refused to implement the precleared 2003 plan, and instead ordered elections to go forward

under the malapportioned 1993 plan. The order of the state court was itself a voting change that could not be implemented absent Section 5 preclearance.

Black residents of Baconton, with the assistance of the ACLU, then filed suit in federal court to enjoin use of the 1993 plan on the grounds that it would violate Section 5 and the Fourteenth Amendment.[632] The day before the election the court held a hearing, and, hours before the polls opened, granted an injunction prohibiting the city from implementing the unprecleared and unconstitutional plan.[633] The court further ruled that a special election for the city council would be held under the precleared 2003 plan in March 2004, to coincide with the presidential preference primary, which was the next regularly scheduled election. These events show how Section 5 continues to play a central role in preventing the use of plainly unconstitutional election plans.

Morgan County and the City of Madison

Butler v. Underwood

Edwards v. Morgan County Board of Commissioners, Board of Education, and Board of Registrars

Morgan County is located approximately one hour's drive, due east, of Atlanta. The county was 45% black in 1964, and elected its board of commissioners

[632] Morman v. City of Baconton, Georgia, Civ. No. 1:03-CV-161-4 (WLS) (M.D. Ga.).

[633] Id., Order of November 3, 2003.

from single member districts, yet no blacks had been elected to any county office. After passage of the Voting Rights Act and the prospect that one or more of its election districts would contain a majority of registered black voters, the county in 1971 abandoned its district system in favor of at-large voting. This change allowed the white majority to continue to control the election of all members of the board of commissioners. Although the change was required to be precleared, the county ignored Section 5.

Notably, in July 1975, the Justice Department objected to the adoption of majority vote and numbered post requirements for the city council of Madison, the county seat, because of the potential - in concert with at-large voting - to dilute minority voting strength, saying:

> We are unable to conclude that the implementation of the majority requirement and the numbering of the City Council posts does not have a racially discriminatory effect.
>
> Our analysis demonstrates that under Madison's current system of at-large plurality elections, minority race voters have the potential to elect a candidate of their choice. This minority voting strength potential is lost, however, if candidates must restrict their candidacies to a single, specific post, and must receive more than half of the votes cast.[634]

The following year, the ACLU filed suit on behalf of black voters challenging at-large elections for the county board of commissioners, as well as for the city council of Madison, as violating the Voting Rights Act and the Constitution.[635] In

[634] J. Stanley Pottinger, Assistant Attorney General, to E.R. Lambert, July 29, 1975.

[635] Butler v. Underwood, Civ. No. 76-53-ATH (M.D. Ga. 1978).

1978, the district court ordered elections for the county board of commissioners returned to the preexisting district system because the 1971 change to at-large voting had never been precleared. The court also found that at-large elections in the City of Madison "may have denied plaintiffs and their class equal access to the political system in derogation of their rights under the Fourteenth and Fifteenth Amendments of the Constitution of the United States," and ordered the use of a three district plan for the city council.[636]

The 1980 census showed that the 1976 court-ordered districting plan for the county was malapportioned. The general assembly enacted a remedial plan in 1982, but local officials proceeded to enforce it during the upcoming elections, and again without complying with Section 5, which had just been extended by Congress for 25 years.

Seeking to block use of the unprecleared plan, the plaintiffs again applied to the federal court for injunctive relief under Section 5, which was granted. Local officials finally submitted the new plan and it was precleared. Elections were held in October 1982, and Walter C. Butler, Jr., who later became state president of the NAACP from 1993 to 2005, was elected to the Morgan County Commission.

The 1990 census showed that the board of commissioners and the Morgan County Board of Education, whose members were elected from the same five single

[636] Id., Order of December 14, 1978.

member districts, were malapportioned with a total deviation of 26.1%. The general assembly enacted a remedial plan, but it was not precleared before the April 27, 1992, deadline and died as a result of a "poison pill" provision in the legislation.

Because Morgan County had a malapportioned plan, the ACLU filed suit on May 1, 1992, on behalf of black voters seeking constitutionally apportioned election districts.[637] The parties entered into a consent decree, pursuant to which the 1992 elections went forward as scheduled under the malapportioned plan, but provided for a new redistricting plan for the two boards which was ordered into effect on an interim basis effective December 1, 1992.[638] That plan contained two majority black districts with 62.49% and 52.25% black voting age population, respectively. In 1993, the Georgia General Assembly enacted the interim plan, which was precleared by the Department of Justice, and implemented at the regular elections in 1994.

Muscogee County and the City of Columbus

Fourth Street Baptist Church v. Board of Registrars of Columbus/Muscogee County

In Muscogee County, more than 15 years after passage of the Voting Rights Act, 60% of voting age whites were registered to vote compared to 48% of voting age blacks. In an effort to increase black registration, the Fourth Street Baptist Church in

[637] Edwards v. Morgan County Board of Commissioners, Civ. No. 92-54-ATH(DF) (M.D. Ga.).

[638] Id., Consent Decree and Order, July 20, 1992.

Columbus asked the county board of registrars in 1983 to designate the church as a satellite voter registration site. State law expressly authorized the designation of churches as satellite voter registration sites, and other counties had regularly made such designations. The Muscogee County board, however, turned down the request because it had adopted a policy of not allowing registration to be conducted at churches on the grounds that it would violate the First Amendment doctrine of separation of church and state.

The Fourth Street Baptist Church, its minister and members, and represented by the ACLU, sued the board of registrars in state court in January 1984, alleging that the action of the board violated state law, the federal Constitution, and resulted in discrimination against blacks, who continued to suffer the effects of past official discrimination in registering and voting, in violation of Section 2.[639] The state court, however, turned a deaf ear to the complaints of the black community and, without conducting a hearing of any kind, dismissed the lawsuit on April 13, 1984. In a terse, one paragraph opinion it held that, while the state statute authorizing the designation of churches as satellite voter registration sites was constitutional, local registrars had absolute, unreviewable discretion in designating or refusing to designate additional registration sites.

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[639] Fourth Street Baptist Church v. Board of Registrars of Columbus/Muscogee County, Georgia, No. C84-330 (Sup. Ct. Muscogee County).

Plaintiffs appealed but the Georgia Supreme Court affirmed. Without reaching the issue of the constitutionality of the board's separation-of-church-and-state policy, the court held that "nothing . . . requires that a Board of Registrars designate churches as voter registration sites, and nothing requires that the Fourth Street Baptist Church be so designated." And throwing in some legal obfuscation for good measure, it held that the plaintiffs' case should be dismissed for the additional reason that it had been brought as an action for "declaratory judgment," rather than as one for "mandamus."[640] The decision showed a remarkable level of indifference by the state's highest court to the depressed level of black voter registration.

Newton County

Ellis-Cooksey v. Newton County Board of Commissioners

Newton County, located 30 miles east of Atlanta, had a population of 41,808 in 1990, of whom 22.4% were African American. The county also had a long history of adopting discriminatory election procedures and ignoring Section 5.

In 1967, two years after passage of the Voting Rights Act, the county abandoned its sole commissioner form of government and switched to a five member board of commissioners elected from three single member districts, and one multi-member district composed primarily of the City of Covington, the county seat,

[640] Fourth Street Baptist Church v. Columbus Board of Registrars, 320 S.E.2d 543, 544 (Ga. 1984).

which elected two members. Approximately 44% of the population of Covington was black and could have constituted a majority in a single member district. The county did not submit the 1967 change for preclearance.

In 1971, in the face of increased black voter registration, Newton County abolished its district system and adopted at-large elections for all five commission seats. The change was covered by Section 5, but the county did not submit it for preclearance. Four years later, and only then under threat of litigation, the county submitted its 1967 and 1971 changes for preclearance, and they were objected to by the Department of Justice.

Nothing that "no black has ever been elected to serve on the County Board of Commissioners," the department concluded that the at-large voting provided for in the 1967 plan "will operate to minimize or dilute the voting strength of the minority and, thus, have an invidious discriminatory effect." The department also found that "a similar discriminatory effect will be occasioned by the changes [in 1971] . . . which results in requiring all candidates for the Board of Commissioners to run for staggered terms, at-large, with a residency requirement in each of the districts."[641] As a result of the objection, the county returned to district elections for the county commission.

The board of education, whose members were traditionally appointed by the

[641] J. Stanley Pottinger, Assistant Attorney General, to John P. Howell, January 29, 1976.

grand jury, adopted an election scheme in 1967. Three members were elected from single member districts, two members were elected from a multi-member district composed of the city of Covington, and two members were elected at-large. The change was not submitted for preclearance until 1975, when it was objected to by the Department of Justice, which noted that "no black has ever served on the Newton County Board of Education," and concluded that the board's voting system, "especially with respect to the multimember district within the City of Covington, will operate to minimize or dilute the voting strength of the minority and, thus, have an invidious discriminatory effect." The department also declared that "a similar discriminatory effect will be occasioned by . . . requiring all Board of Education members to run for staggered terms at large with residency required in the county's districts."[642] Rather than face litigation, the school board adopted the same district lines as the county commission.[643]

The 1990 census showed the five single member districts for the board of commissioners and board of education were malapportioned, with a total deviation of 38.6%. After the legislature failed to enact a remedial plan, the ACLU filed suit on behalf of black voters in Newton County in June 1992, seeking constitutionally

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[642] J. Stanley Pottinger, Assistant Attorney General, to John P. Howell, November 3, 1975.

[643] McDonald (1982), pp. 42-3.

apportioned districts for the commission and school board.[644] The suit also sought to enjoin upcoming primary elections, scheduled for July 21, 1992, as well as the November 3 general election.

The parties settled the case the following month and the court issued an order that "[t] he 1984 district plan does not constitutionally reflect the current population."[645] Rather than enjoin the upcoming elections until a new apportionment plan could be adopted by the legislature, the court ordered the 1992 elections to go forward using a districting plan jointly prepared by the plaintiffs and defendants. Under that plan, African Americans made up a majority of one of the five single member districts, and 26.81% of the population in a second district.

Subsequent to the court's order, the Department of Justice precleared the redistricting plan on August 14, 1992. Candidate qualifying was reopened and a special primary election was conducted under the new plan on September 15, 1992, followed by the general election on November 3, 1992.

In the absence of Section 5, and the continuing role it played in the 1992 redistricting, black voters would doubtlessly continue to be excluded from equal participation in the political process in Newton County.

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[644] Ellis-Cooksey v. Newton County Board of Commissioners, Civ. No. 1 92-CV-1283-MHS (N.D. Ga.)

[645] Id., Order of July 19, 1992, p. 3.

Peach County

Richardson v. Peach County

A largely agricultural county in middle Georgia, located just south of Macon, Peach County is home to Fort Valley State University, a historically black institution founded in 1895, and a major employer in the county. Other employers included Blue Bird, the school bus manufacturer, which employed 1,600 workers, and an agricultural pesticide and fertilizer company in operation since 1910, which settled lengthy litigation in state court in 1998 for arsenic and other chemical pollution that had a disparate impact on black residents.[646]

In June 1994, the ACLU filed suit on behalf of black voters in Peach County challenging the malapportionment of the board of commissioners and board of education as a violation of the Constitution and Sections 2 and 5.[647] The challenged plan contained a total deviation of 81.78%. The suit asked the court to enjoin use of the existing districting plan at the upcoming July primary elections.

Peach County, which is 47.5% black, has a long history of infringing on the voting rights of African Americans. In 1974, the Attorney General objected to the adoption of majority vote and numbered post requirements by Fort Valley, the Peach County seat, because he was unable to conclude that the voting changes, in

[646] In Re: Ft. Valley Litigation, Master File No. 94VS0000001, Final Order Approving Settlement, October 12, 1998.

[647] Richardson v. Peach County, Georgia, Civ. No. 94-228-2-MAC (DF) (M.D. Ga.).

conjunction with the city's use of at-large elections, would "not have a racially discriminatory effect." The Attorney General further suggested that the proposed changes would be precleared if the city adopted "a racially neutral election system, such as district representation."[648]

Black voters, represented by the ACLU, later sued the three member Peach County Board of Commissioners in 1976, for its use of at-large elections and for failing to preclear the adoption of staggered terms in 1968.[649] The three-judge court agreed that the staggered term requirement had not been precleared and enjoined its further use absent compliance with Section 5. However, the court refused to set aside the 1976 election which had been held under the unprecleared staggered term format. Plaintiffs appealed, and the Supreme Court remanded the case to the district court with instructions to allow the county 30 days to seek preclearance. If preclearance were granted, the matter would be at an end; however, if preclearance were denied, plaintiffs could request additional relief in the form of new elections under the preexisting format. The county submitted the staggered term provision and it was precleared. The opinion of the Supreme Court thus established the precedent of "retroactive" preclearance of unsubmitted voting changes.[650]

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[648] J. Stanley Pottinger, Assistant Attorney General, to Charles R. Adams, May 13, 1974.

[649] Berry v. Doles, Civ. No. 76-139 (M.D. Ga.).

[650] Berry v. Doles, 438 U.S. 190 (1978).

The challenge to at-large elections for the board of commissioners was settled by consent decree in 1979. Under the agreement, the size of the commission was increased to five members, with four members elected from single member districts and one member elected at-large. The staggered term requirement was retained.[651]

In 1992, after passage of legislation by the general assembly the previous year which abolished grand jury appointment of school boards and required their election instead, the Peach County Board of Education adopted the same method of elections as the board of commissioners: four single member districts and one seat elected at-large.

Even though the county had adopted district elections in 1979, it had failed to reapportion after either the 1980 or 1990 census. After the ACLU filed suit in 1994, challenging the county's malapportioned districts, the parties agreed on a new plan that increased the size of the board of commissioners and board of education from four to six members and utilized single member districts. The new "Peach 6" plan continued the use of staggered terms.[652] The plan was precleared by the Attorney General on January 23, 1995, and elections were held immediately thereafter.

Pike County and the Town of Zebulon

[651] Berry v. Doles, Civ. No. 76-139 MAC (M.D. Ga.), Final judgment and decree, November 19, 1979.

[652] Richardson v. Peach County, Georgia, Order of September 29, 1994, p. 6.

Hughley v. Adams

Pike County adopted at-large elections for its board of education in 1972 under circumstances that strongly indicate race was a primary factor in the decision. The members of the school board were traditionally appointed by the grand jury, but that system was changed in 1967, when the legislature approved a plan to elect the five member board from single member districts. The county had a population of some 9,000 people, 26% of whom were black. No black person, however, had ever served on the school board or any elected board in the county.

Two black candidates ran for the school board under the district system in 1970, marking the first time in history that African Americans had run for a county office. The two were defeated, but both ran strong races and one, the Rev. Robert Curtis, made it into a run off.[653] Before the next election, and without seeking preclearance, the county switched to at-large voting, insuring that the white majority would control the election of all seats on the board.

In February 1978, the Department of Justice contacted local officials and requested them to submit the school board's plan for preclearance. The county did so, and the Attorney General entered an objection:

> Because of the potential for diluting black voting strength inherent in the use of at-large elections with residency requirements in Pike County, we are unable to conclude that the County has sustained its burden of showing that the change to

[653] Atlanta Constitution, December 10, 1980.

> at-large elections with residency requirements will not have a racially discriminatory effect in Pike County. . . It is our view that the change accomplished by H.B. 1947 would represent such a retrogression.[654]

The county, however, ignored the objection and continued to hold elections at-large until it was sued by black residents, represented by the ACLU, in 1980.[655] The plaintiffs sought enforcement of Section 5 and an injunction against further use of the objected to at-large system.

In July 1980, a three-judge court enjoined further use of the county's at-large plan and remanded the case to a single judge for implementation of a remedy. Because the preexisting single member districts were malapportioned, a new plan was required. Following a trial in September 1980, the court accepted the defendants' proposed plan, and the plaintiffs appealed. They contended the county's plan could not be implemented absent preclearance under Section 5, and that the plan, which contained five majority white districts, was an inadequate remedy for the Section 5 violation and the dilution of minority voting strength.

In February 1982, the court of appeals remanded the case to the district court, ruling that the redistricting plan was a legislative plan and was thus subject to Section 5 preclearance.[656] A hearing was conducted on remand in September 1982, and after

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[654] Drew S. Days III, Assistant Attorney General, to James D. Turpin, March 15, 1979.

[655] Hughley v. Adams, No. 80-20N (N.D. Ga.).

[656] Hughley v. Adams, 667 F.2d 25 (11th Cir. 1982).

opening arguments, the judge indicated he wanted the defendants to consider an interim remedy of immediately appointing a black person to the board of education. The board agreed to do so, marking the first time in the history of Pike County that an African American served on any elective county board.

The parties subsequently agreed to establish six single member districts for the board, one of which had a black majority of 65%. The new redistricting plan was precleared by the Attorney General on March 11, 1983. The consent decree also provided for satellite voter registration and for the appointment of blacks as deputy registrars. Black voter registration increased substantially as a result, and in August 1984, a black person was elected to the school board from the majority black district. Thus, the role of Section 5 in securing a racially fair method of elections for the board of education in Pike County is apparent.

The Town of Zebulon

The ACLU, on behalf of the Pike County NAACP and black voters living in Zebulon, the county seat, also wrote to members of the Pike County legislative delegation in November 1983, advising them that in light of recent court decisions at-large elections for the county commission and the Zebulon city council were likely in violation of Section 2. Following negotiations with county and city officials, the legislature enacted legislation in 1984 providing for: (1) the election of the four member Zebulon City Council from two, two member districts, one of which was 65% black; and

(2) the election of the five member Pike County Commissioners from four single member districts, with the chairman elected at-large. One of the districts had a black population of 62%, and in elections held in that district in August, a black candidate defeated the white incumbent. The first election for the Zebulon City Council was held under the new plan in December 1984, and a black candidate was elected.

Complaints of discrimination in voting in Pike County, however, have been ongoing. In October 30, 1989, Phyllis Beck, a black resident of the county, wrote a letter to the U.S. Attorney in Atlanta, noting that Zebulon was conducting a special voter registration drive on the eve of municipal elections. No public notice of the drive had been given, in the newspapers or otherwise, and city officials called only unregistered white voters asking them to register, advising them that City Hall would remain open beyond its regular hours until 8:30 p.m.[657] It does not appear that the U.S. Attorney took any action on Ms. Beck's complaint.

Pulaski County and the City of Hawkinsville

Lucas v. Pulaski County Board of Education

In 1982, the general assembly enacted legislation providing for elections for the Pulaski County Board of Education from seven single member districts.[658] The

[657] Phyllis D. Beck to U.S. Attorney Robert L. Barr, October 30, 1989.

[658] Ga. Laws 1982, p. 2664.

1990 census showed that the districts were malapportioned with a total deviation of 47.75%. The legislature, however, failed to enact a remedial plan and elections were scheduled to be held in 1992 under the unconstitutional plan. Black residents of the county, who were 32.5% of the population, and represented by the ACLU, filed suit in 1992 to enjoin the upcoming elections.[659] The plaintiffs also challenged at-large elections for the five member board of commissioners of the City of Hawkinsville, the county seat.[660] It is worth noting that as of 1989, no blacks had ever served as county commissioner, and there were no black officials, administrators, professionals, para-professionals, department heads or supervisors employed by the county.

On October 14, 1992, the district court entered a consent order involving the board of education, affirming that "Defendants do not contest plaintiffs' allegations that the districts as presently constituted are malapportioned and in violation of the Fourteenth Amendment of the Constitution." The order also enjoined further elections for the board of education, including the scheduled November 3, 1992, election, until the general assembly was able to enact new reapportionment legislation and receive preclearance from the Justice Department under Section 5. A

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[659] Lucas v. Pulaski County Board of Education, Civ. No. 92-364-3 (MAC) (M.D. Ga.).

[660] Black residents had also challenged the sole commissioner form of government in Pulaski County in 1989. See Sutton v. Anderson, Civ. No. 89-58-1 (M.D.Ga.), and supra p. 145 .

satisfactory plan was adopted and precleared, and the parties agreed to dismiss the case against the board of education by order of February 14, 1995.

Hawkinsville was 49.6% black, but only one black person had ever won a contested election in the past 25 years, and no African American had ever served as chairman of the city commission. The complaint, which charged that Hawkinsville's at-large elections violated the Constitution and Section 2, also cited the city's majority vote requirement and its use of numbered posts and staggered terms as mechanisms which enhanced the opportunity for discrimination against minorities.

As evidence of racial polarization and discrimination in voting, the law suit cited a number of facts:

> * No black candidates had ever run for county-wide office and only one black candidate had ever won election to the Hawkinsville board of commissioners.
>
> * Black voter registration in the city lagged significantly behind whites, with only 48.9% of African Americans registered to vote, compared to 66.7% for whites in 1980. In 1993, the gap was 74.4% for blacks, and 89.8% for whites.[661]

With only one voting precinct in Hawkinsville, it was impossible to perform a statistical analysis of racial polarization in city elections, but an analysis by plaintiffs' expert of three county wide elections where an African American candidate ran for office revealed a distinct pattern of racially polarized voting where the average level

[661] Lucas v Pulaski County Board of Education, Plaintiffs' Proposed Findings of Fact and Conclusions of Law, March 13, 1995, pp. 16.

of white crossover voting was a mere 1.46%.[662] With two-thirds of Pulaski County's registered voters living in Hawkinsville, and a similar racial breakdown of registered voters in the county and city, plaintiffs argued that these results were statistically representative of racially polarized voting in the city.

Other socio-economic racial disparities were evident:

> * One half (50.52%) of blacks in Hawkinsville lived below the poverty level in 1989, compared to just 9.52% of whites.[663]
>
> * A substantial majority (61.4%) of blacks over age 25 had no high school diploma, while 76.3% of whites had at least a high school diploma.
>
> * Of all black households, 8.8% lacked complete plumbing compared to no white households.
>
> * Schools in both the city and county were not desegregated until 1970, and even then the county maintained segregated bus routes.[664]

Shortly before trial, on November 9, 1995, the court on its own motion dismissed the complaint without prejudice. As it had done in several other cases, it said that the case could not proceed until "all issues are finally decided in the case of Holder v. Hall, 512 U.S. (1994)." It dismissed the case "subject to the right of plaintiffs to refile the same in the event that the remaining issues in Holder are

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[662] Id., p. 6.

[663] Id., p. 12.

[664] Id., pp. 12, 14, 30.

decided favorably to them."[665] Because the case against Hawkinsville did not involve a sole commissioner, the resolution of Holder v. Hall was arguably not relevant. However, given that the court had made pre-trial rulings unfavorable to plaintiffs, it was decided not to appeal in favor of the possibility of refiling at a later date.

Putnam County

Clark v. Putnam County

Eatonton, the county seat of Putnam County, was the home of Joel Chandler Harris, the author of the Uncle Remus tales. In 1976, Willie Bailey and other black residents of Putnam County, represented by the ACLU, filed suit challenging at-large elections for the city's mayor and commission, the county commission, and the county board of education as diluting minority voting strength. After repeated attempts to get the parties to settle, the court issued a detailed opinion in 1981, striking down the challenged systems as having been adopted, and being maintained, purposefully to discriminate against blacks in violation of the Constitution.[666]

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[665] Lucas v. Pulaski County, Order of November 9, 1995.

[666] Bailey v. Vining, 514 F. Supp. 452 (M.D. Ga. 1981).

The court found voting was racially polarized. Schools and juries had been segregated. Few blacks were employed by the city or county or had been appointed to local boards and commissions. The municipal housing authority was operated on a racially segregated basis. The swimming pool was white only until 1969. Public funds had been used to pave the road to an all white private school, which opened following the desegregation of public schools. The golf course, operated on land owned by the county, was segregated. Voting lists were maintained on a segregated basis. No blacks were appointed as deputy registrars until after a lawsuit was filed in 1976, and there were virtually no black election officials in the city and rural precincts. Blacks were excluded from participating in the affairs of the Democratic Party. Blacks had a depressed socioeconomic status that hindered their ability to support candidates for public office. Despite the fact that blacks were 49% of the population, no black candidate had ever won a contested at-large election in the county during the 20th century. The court concluded, not only that blacks "have not had equal access to the political processes," but "[t]here is no doubt that the at-large electoral systems in Putnam County were in the past, and are today, maintained for the specific purpose of limiting the county's and city's black residents' ability to meaningfully participate therein."[667]

[667] Id. at 454-63.

At the court's direction, the parties agreed on remedial districting plans for the three bodies. The plans were implemented in 1982, and a total of seven blacks were elected to office.

The election plans for the county commission and school board contained four single member districts, two of which were majority black, with a fifth member elected at-large. In 1992, the court amended its order to reflect the 1990 census, but retained the two majority black districts.

In 1997, four white plaintiffs filed a lawsuit challenging the constitutionality of the majority black county commission districts as racial gerrymanders in violation of the Shaw/Miller line of cases.[668] Several of the original plaintiffs in the 1976 lawsuit, again represented by the ACLU, sought to intervene to defend the challenged plan. Although minority residents have been permitted to intervene in virtually every one of the Shaw/Miller challenges, let alone minority plaintiffs who had participated in prior litigation that produced the plan at issue, the district court denied intervention. The intervenors appealed the district court's order to the Eleventh Circuit, which reversed,[669] holding that the county commissioners' representation of the black intervenors might be inadequate and that they were entitled to intervene.

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[668] Clark v. Putnam County, 168 F.3d 458 (11th Cir. 1999).

[669] Id. at 463.

In January 2001, the district court dismissed the white plaintiffs' complaint. It found traditional districting principles were not subordinated to race. The district lines, while intended to maintain two majority black districts, were the natural outcome of traditional districting principles as applied to the demographic and geographic realities of the county. The plan utilized geographic compactness, adherence to natural boundaries, the preservation of communities of interest, and the protection of incumbents. The district court also found that because the county had two concentrations of African Americans, it would have been difficult to have divided the county differently without raising problems of minority vote dilution.[670]

The white plaintiffs appealed, and in a 2-1 decision the court reversed.[671] It held the district court erred in failing to find unconstitutional intentional discrimination. It also made findings that were completely tautological, including that the existing minority districts were not needed because African American candidates were being elected in those districts, while ignoring the evidence that no African American had ever won countywide or in any majority white district.

The 2000 census showed the county was approximately 30% black and the districts for the board of commissioners and board of education were malapportioned. Because the court of appeals had ruled that the 1992 plan was

[670] Clark v. Putnam County, Civ. No. 97-622 (M.D. Ga.).

[671] Clark v. Putnam County, 293 F.3d 1261 (11th Cir. 2002).

unconstitutional, the benchmark for the 2000 redistricting was the 1982 plan - the most recent legally enforceable plan. Placing the 2000 census data on the 1982 plan showed the continued existence of two majority black districts. The county, however, proposed a plan, which was adopted by the legislature, that had only one majority minority district and cut the black population in the other formerly majority black district in half. The plan was submitted for preclearance, but the Department of Justice objected, concluding that black voters had elected candidates of their choice in the majority black districts, and that "[o]ur statistical analysis also shows that white voters do not provide significant support to candidates supported by the minority community." The department also concluded that the reduction of black population in the formerly majority black district "casts substantial doubt on whether minority voters would retain the reasonable opportunity to elect their candidates of choice under the proposed plan," and that the retrogressive effect of the plan was "neither inevitable nor required by any constitutional or legal imperative," as demonstrated by the presence of alternative plans that were fairer to the black community.[672]

The white plaintiffs filed a second lawsuit challenging the 1982 plan for the county commission and school board as being malapportioned.[673] The

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[672] J. Michael Wiggins, Acting Assistant Attorney General, to Robert T. Prior, August 9, 2002.

[673] Clark v. Putnam County, Civ. No. 02-262 (M.D. Ga.).

malapportionment was undisputed, and the ACLU intervened in the new lawsuit on behalf of the same minority voters as in the first suit in order to participate in the development of a constitutional remedial plan. Two majority black districts could be drawn, but only by reducing the black population to a bare majority, a result which the ACLU intervenors did not advocate. The court implemented a plan that retained one district at 57% African American voting age population, and created another with a black voting age population of 43%.

A special election was held in 2002 for the two school board seats held by African Americans, and two black candidates were elected. No county commission seats were up for election in 2002. In its 2003 session, the general assembly adopted the court's plan for use in future elections for both the school board and the county commission.

The litigation in Putnam County was lengthy, and illustrates how contested the issue of political power can be at every level of government; and, especially how issues of race continue to play a central role in those contests. In situations such as these the critical role played by Section 5 in protecting the rights of minority voters is evident.

Randolph County

Cook v. Randolph County

Randolph is a majority (58%) black, rural county located in southwest Georgia. Prior to passage of the Voting Rights Act, only 11.5% of the black voting age population was registered to vote. Black voter registration was depressed for a variety of reasons, including challenges by local registrars to the qualifications of blacks who were on the voter rolls. In one case, the court found the removal of blacks from the voter lists "constituted an illegal discrimination against them on account of their race and color," ordered them restored to the rolls, and ordered that they collect damages from the registrars in the amount of $20 per person.[674]

In January 1993, the general assembly enacted legislation redistricting the five member county commission. Based on the 1990 census, the existing plan had a total deviation of 29.97%. Also in 1993, the legislature adopted the same districts for election of the five member board of education.[675] At the time the legislation was enacted, Randolph County was one of only a handful of counties in the state that still used the grand jury method of school board appointments. Significantly, the 1993 law contained a new requirement that members of the board of education possess a high school diploma or general educational development (GED) equivalent.

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[674] Thornton v. Martin, 1 R.R.L.Rptr. 213, 215 (M.D. Ga. 1956).

[675] 1993 Georgia Laws, 3588 (county commission districts) and 1993 Georgia Laws, 3568 (board of education districts).

The 1993 laws were submitted for preclearance and the Department of Justice approved the election of the school board from single member districts. However, it objected to the proposed redistricting plan on the grounds that it unnecessarily fragmented the black population in one of the previously majority blacks districts. According to the objection:

> There appears to be a pattern of racially polarized voting and substantially lower levels of participation by black voters relative to white voters in Randolph County elections. In this context, the identified fragmentation of black population concentrations has the effect of limiting the opportunity for black voters to elect candidates of their choice. Our examination of the information in your submission fails to show that this fragmentation was required in order to comply with the county's legitimate redistricting criteria.[676]

The Attorney General also objected to the educational requirement for school board members on the grounds that it would have a racially discriminatory, regressive effect:

> It does not appear that state law generally requires or endorses the proposed educational qualification. In addition, the existing system of grand jury appointments to the school board has no such requirement, and it appears that in practice persons have been appointed to the school board who did not meet this requirement.
>
> According to the 1990 census, approximately 65 percent of black persons age 25 and older do not possess a high school diploma or its equivalent, compared to only 36 percent of white persons age 25 and over. Hence, requiring that persons who wish to run for the school board demonstrate that they have a high school

[676] James P. Turner, Acting Assistant Attorney General, to Jesse Bowles, III, June 28, 1993, pp. 2-3.

> diploma or a GED equivalent would appear to have a disparate impact on black residents of Randolph County. Moreover, it appears that a number of candidates of choice among black voters in previous elections would be barred from serving on the school board by this provision. Under these circumstances, where the pronounced disparate impact of the proposed educational requirement appears to have been well-known, your submission does not provide an adequate non-racial justification for this requirement.[677]

In light of the Attorney General's objection, and the existence of malapportioned districts, the county had another plan drafted by the State Legislative Reapportionment Office which it submitted to the Department of Justice for preclearance. Despite the fact that the county had no authority under state law to adopt a redistricting plan, such authority being reserved to the state legislature, the county announced plans to conduct the November 2 school board election under the new plan.

On October 5, 1993, black voters, represented by the ACLU, filed suit.[678] They asked the court to enjoin elections for the school board and board of commissioners on the grounds that the districting plan for both bodies was either malapportioned in violation of the Constitution and Section 2, or had not been precleared pursuant to Section 5. Later that month, on October 29, the parties signed a consent order stipulating that the existing county districts were malapportioned, and agreeing on a

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[677] Id., pp. 3-4, internal citations omitted.

[678] Cook v. Randolph County, Civ. No. 93-113- COL (M.D. Ga.).

redistricting plan containing five single member districts with a total deviation of 9.35%. Three of the five districts were majority black. Defendants also agreed not to seek to enforce the provision in the 1993 law requiring board of education candidates possess a high school diploma or GED.[679] The reapportionment plan was adopted as an interim plan and implemented at the board of education special election in December 1993. It was submitted by defendants for enactment in the 1994 General Assembly, and subsequently submitted to the Department of Justice for preclearance.

Richmond County

United States v. City of Augusta

Hasan v. Mayor and City Council of Augusta

As Georgia's second oldest city, Augusta has a long history of voting discrimination. Political campaigns have been characterized by overt and subtle racial appeals. In 1981, the Department of Justice objected to the city's adoption of a majority vote requirement because:

> An analysis of ward returns demonstrates that voting in the City of Augusta generally follows a pattern of racially polarized voting. Although blacks constitute 49.88 percent of the population of the city (according to the 1970 census), only four of the sixteen councilmembers are black. Our analysis also

[679] Id., Order and Decree of October 29, 1993.

> revealed that even some of these black candidates who have been successful won only because of the plurality requirement. Therefore, on the basis of our review, the adoption of the majority vote requirement would appear to represent a retrogression in the position of black voters.[680]

Also, in 1987, the Department of Justice, in an objection that was later withdrawn as part of a court settlement, objected to the city's "ambitious annexation program," writing,

> While the city's efforts to increase its size do not, per se, violate the Voting Rights Act, we are concerned regarding the annexation standards applied to black and white residential areas. In this regard, it appears that the city's present annexation policy centers on a racial quota system requiring that each time a black residential area is annexed into the city, a corresponding number of white residents must be annexed in order to avoid increasing the city's black population percentage. Our information indicates that several black communities adjacent to the city actively have sought annexation but that such annexation requests have been delayed or denied while a white residential area containing approximately the same number of people can be identified for annexation.
>
> We are aware of efforts by the city's Annexation Office to conduct door-to-door surveys in identifying areas for annexation and it appears that these efforts have been concentrated in white residential areas to balance the black residential areas that actively have sought annexation. The annexations now submitted for Section 5 review appear to have been effectuated pursuant to this racial quota policy.
>
> Our review of the Augusta annexations, however, reveals that the city's annexation policy centers, to a significant extent, on

[680] James P. Turner, Acting Assistant Attorney General, to Samuel F. Maguire, March 2, 1981, p. 2.

> race, and that such policy has an invidious impact on black citizens.[681]

In June 1987, the ACLU filed suit in federal court on behalf of black voters in the City of Augusta challenging at-large voting for the Augusta City Council as violating the Constitution and Section 2.[682] Although Augusta's population was approximately 50% black, and in 1981 the city had elected its first black mayor and several black council members, blacks remained significantly underrepresented on the city council. In addition to the discriminatory effect of at-large elections, there was strong evidence that at-large voting had been adopted for the express purpose of diluting the black vote.

The complaint was filed by the ACLU after black voters were denied intervenor status in a separate law suit challenging Augusta's at-large system that had been brought by the Attorney General five months earlier, in January 1987.[683] The government's suit alleged that the city's apportionment, which ironically the Attorney General had precleared a week earlier under Section 5, still violated Section 2 on the grounds that "the at-large method of election denies black citizens a fair opportunity for effective political participation."[684]

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[681] William Bradford Reynolds, Assistant Attorney General, to Charles A. DeVaney, July 27, 1987, pp. 1-2.

[682] Hasan v. Mayor and City Council of Augusta, Civ. No. CV187-087 (S.D. Ga.).

[683] United States v. City of Augusta, Civ. No. CV187-004 (S.D. Ga.).

[684] Id., Order of July 22, 1988, p. 1.

After being denied intervenor status and in view of past disagreements between minority voters and the Attorney General over the interpretation and application of the Voting Rights Act, black plaintiffs felt it was necessary to file a suit of their own. In a number of voting cases, challenges brought by the government to discriminatory voting practices would have been compromised or abandoned but for the presence of minority intervenors. In Augusta, black voters also wanted to be involved in the remedial phase of litigation to help determine the form and method of electing their city government. In addition to appealing the denial of intervenor status, the ACLU sought to have its case consolidated with the government's law suit.

In July 1987, the court denied consolidation of the two cases and stayed the ACLU's case pending resolution of the government's case. Two years later, in February 1989, after a settlement implementing a remedial election plan was reached in the government's case, the ACLU's dismissed its pending case. Pursuant to the settlement agreement, the City of Augusta "adopted a new method of election which affords its black constituency a realistic opportunity to elect candidates of their choice to at least 6 of 13 seats on the new council."[685]

The ACLU also took legal action on July 14, 1988, successfully blocking a special election set for July 19, on consolidation of the City of Augusta with

[685] James P. Turner, Acting Assistant Attorney General, to Linda W. Beazley, May 30, 1989, p. 2.

surrounding Richmond County because the date of the election had not been precleared under Section 5. Efforts to consolidate the City of Augusta with Richmond County, which had first begun in 1971, were opposed by a substantial majority of black voters because blacks were a minority in the surrounding county and they felt consolidation would dilute the overall impact of the black vote, especially in Augusta. The plaintiffs contended that the referendum was set at a special time, rather than at the time of a regularly scheduled general election, because the black turnout would be lower, and thus the referendum would be more likely to pass.

The Attorney General objected to the July 19 date, noting that the issue of consolidation "has divided the electorate largely along racial lines." He further noted that "the date for the referenda election was chosen without any apparent consideration or serious solicitation of the views of the black community with respect to an appropriate date for the election," and that the evidence suggested "the July 19 date was calculated to disadvantage the black constituency by timing the election so as to take advantage of conditions that would suppress the black voter turnout."[686]

[686] William Bradford Reynolds, Assistant Attorney General, to Linda W. Beazley, July 15, 1988.

The city and county then held a referendum on consolidation at the time of the general election in November 1988. Voters approved the measure, but the Attorney General denied preclearance, saying:

> our analysis suggests that the proposed consolidation could reduce significantly the electoral effectiveness of the majority-black population of the City of Augusta by the manner in which it is merged with the majority-white population of Richmond County, resulting in diminished opportunities for black citizens to elect representatives of their choice to govern their affairs.[687]

The Attorney General further concluded that the county and city had not carried their burden of proving "that the proposed changes are not tainted . . . by an invidious racial purpose" to dilute minority voting strength.

In yet another referendum in 1996, voters approved the consolidation of Augusta and Richmond County, making Augusta the second largest city in Georgia, with a population of 195,182 in 2000.[688] A consolidation plan was adopted providing for a 10 member commission elected from eight single member districts and two super districts, and with a mayor (with limited powers) elected at-large. Each of the two super districts was created by combining four single member districts and each superdistrict elects one member. One super district is majority black and the other is majority white. The plan satisfied the Department of Justice's objections to

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[687] James P Turner, Acting Assistant Attorney General, to Linda W. Beazley, May 30, 1989, p. 4.

[688] The New Georgia Encyclopedia, Cities and Counties, Augusta, accessed online January 12, 2006, http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-955.

consolidation, and was precleared. Blacks have consistently elected half of the commission members.

Schley County and the City of Ellaville

In re the City of Ellaville

Located in west central Georgia, approximately a dozen miles northwest of the Andersonville Prison historic site, the town of Ellaville is the county seat and only incorporated town in Schley County. In 1980, Ellaville had a population of 1,684 people, 43% of whom were black and lived predominantly in the northern section of the city. Since at-large elections were adopted in 1914, only one black candidate had managed to get elected to the city council.

In 1984, a group of black Ellaville residents, represented by attorneys from the Georgia Legal Services Program, began meeting with city officials to persuade them to adopt single member district elections, but the mayor and the city clerk were opposed. With help from the ACLU, Legal Services attorneys devised a five member redistricting plan containing two majority black districts.

In September, a large delegation of black citizens appeared before the city council to argue their case, thus prompting city officials to unanimously adopt a city ordinance requesting that the local representatives to the Georgia General Assembly introduce single member district legislation during the 1986 session.[689] Later that fall, and with help from the ACLU, the Legal Services attorneys drafted a Section 2 complaint against the city, but it was not filed.

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[689] "Blacks Seek Voting Changes," Patriot-Citizen, September 20, 1984; An Ordinance to Provide for Council Districts for Election of Said Members to Ellaville City Council, December 16, 1984.

When the legislature convened in 1986, it enacted local reapportionment legislation for Ellaville creating five single member districts, two of them majority black, with district elections becoming effective that December.[690] The change to single member districts was approved by the Department of Justice, which also precleared the 1971 adoption of numbered posts in city elections - a voting change that had not previously been submitted for preclearance.[691]

Screven County

Culver v. Krulic

Screven is a rural county located along the Savannah River in southeast Georgia's coastal plain. Black voter registration was historically depressed, and after passage of the Voting Rights Act, federal examiners were sent to Screven County and registered 1,448 black voters.[692]

In 1964, Screven County replaced its grand jury method of appointing members of the board of education with a system consisting of seven members, six of whom were elected from single members districts and the seventh at-large. The districts for the board of education were severely malapportioned, with a deviation

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[690] Senate Bill 469, Act. 900, 1996 Georgia General Assembly Session.

[691] William Bradford Reynolds, Assistant Attorney General, to Jeanette H. Peedes, Mayor, City of Ellaville. Undated.

[692]U.S. Commission on Civil Rights, The Voting Rights Act: Unfulfilled Goals (Washington, D.C.; September 1981), p. 103.

from ideal district size of 195.77%. The county elected its five member commission at-large, and in 1972, without seeking preclearance under Section 5, it adopted staggered terms for commission members. As late as 1984, and even though Screven County was 45% black, no black person had ever been elected or served on either the board of commissioners or board of education.

Inequalities in public education, which have a direct impact on political participation, were particularly evident in Screven County. When schools were desegregated by court order in 1972, the county board of education sold or leased one of its public school facilities to a new private academy for one dollar and allowed white students attending the private school free use of other public school facilities, including the football stadium.

In 1984, the ACLU filed suit on behalf of black voters to enjoin at-large elections for the board of commissioners as diluting minority voting strength, as well as the county's use of staggered terms absent preclearance. The plaintiffs also charged that the board of education districts were malapportioned, and that the method of electing the board diluted black votes.[693]

Both boards agreed to settle the case by adopting the same seven single member districts. Two of the new districts had 65% black populations and one had 54%. Under the terms of the consent agreement signed November 5, 1984, elections

[693] Culver v. Krulic, Civ. No. 484-139 (S.D. Ga.).

previously scheduled for the following day were rescheduled to January 1985. Black candidates were subsequently elected to two seats on the county commission and one on the school board, while a white incumbent retained his school board seat in a 65% black district.

Watson v. Screven County Board of Commissioners and Board of Education

The 1990 census showed the seven districts adopted in 1984 in Screven County were malapportioned with a total deviation of 60.9%. The general assembly failed to reapportion the county during its 1992 legislative session, and on June 3, the ACLU, on behalf of black residents, filed suit against the county seeking to enjoin use of the malapportioned plan.[694] A month later, the parties signed an order acknowledging that both Screven County boards "appear to be malapportioned," and the court enjoined the primary election scheduled for July 21.[695] The parties negotiated over plans during the summer, and in a consent decree signed August 31, 1992, the parties agreed to hold special primary elections on November 3 in five of the seven redrawn districts. The Justice Department precleared the plan on October 30.

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[694] Watson v. Screven County, Civ. No. 692-072 (S.D. Ga.).

[695] Id., Order of July 7, 1992, p. 2.

After the new plan was implemented, black voters succeeded in electing their candidates of choice to two seats on the board of education and a seat on the county commission. These numbers increased to three and two, respectively, later in the decade. The black candidate elected to the county commission in 1992 became chair of the commission in 2002, a post he still held in 2006. Creating fair representation on the county commission also led to the integration of formerly all white appointed boards in the county, including the zoning board, the industrial development board, and the board governing the local Department of Family and Children Services.

Despite the advances in black political participation, and despite requests from local black residents, the county superintendent of elections had never appointed a black as manager of a local polling place until the county was sued by the United States in 1992.[696]

Seminole County and the City of Donalsonville

Moore v. Shingler

Seminole County, the legendary home of Chief Oceola, is located in the far southwest corner of the state, bounded by Florida and Alabama. The town of Donalsonville, the county seat, was 47% black, but as of 1984 no black person had ever been elected to the city council. Black voters, represented by the ACLU, filed

[696] United States v. Screven County, Georgia, Civ. No. 692-154 (S.D. Ga.).

suit that year alleging that the at-large method of elections for the city council diluted minority voting strength in violation of Section 2 and the Constitution.[697]

Seminole County had a history of discrimination against blacks in voting. Unlike many Georgia counties that switched from district to at-large elections after passage of the Voting Rights Act, Seminole County, which was 35% black, relied on grossly malapportioned commission districts to minimize the impact of black voters. The districts for the county commission had been drawn in 1933, and by 1980 the district encompassing Donalsonville, which had the county's largest concentration of black voters, had grown to more than 2,200 voters. By contrast, the Rock Pond district, which also elected one member to the county commission, had just 170 registered voters. When the county refused to redistrict, a lawsuit was filed by the ACLU on behalf of black voters in April 1980, and the court ordered the county to reapportion.[698] At the next election, Donald Moore, a black school teacher, was elected to the county government from the town of Donalsonville.

After the 1984 complaint was filed against the city, local officials offered to settle the case by increasing the size of the council from four to six members and dividing the city into two three-member districts, one of which would be majority black. The plan, which was agreeable to the plaintiffs, was adopted, and elections

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[697] Moore v. Shingler, Civ. No. 84-71-THOM (M.D. Ga.).

[698] Williams v. Timmons, Civ. No. 80-26 (M.D. Ga.).

were held in 1986. Today, Donalsonville has a population of 2,911 that is 58.7% black, 3.9% Latino and 37.2% white. The city has a six member council elected from two districts with numbered posts and the mayor elected at-large. Presently three council members are African American and three are white, as is the mayor.

Spalding County and the City of Griffin

Based on the 1980 census, Spalding County had a population of 47,899, of whom 27% were black. No black person, however, had ever been elected to the county board of education or to the commission of the city of Griffin, the county seat, which was 42% black. Black voters faced a number of obstacles electing candidates to public office, including at-large elections, bloc voting by the white majority, and depressed levels of black registration.

In 1981, for example, the Griffin-Spaulding County Board of Education tried to abolish its two multi-member election districts in favor of a numbered post system. The Department of Justice objected to the change, finding "a general pattern of racially polarized voting in Griffin-Spaulding County Board of Education elections," and that "no black candidate had ever defeated a white candidate for election to the school board."[699]

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[699] James P. Turner, Asstant Attorney General, to James C. Owen, Attorney for Spalding County, July 6, 1981.

Spalding County VEP v. Cowart

In 1984, the ACLU represented black citizens in a lawsuit challenging the county's refusal to designate additional sites for voter registration in the black community.[700] After lengthy negotiations, and in light of the fact that the Georgia Secretary of State had already implemented regulations allowing for satellite voter registration, the parties settled the suit. The agreement called for the local registrar to allow registration at a number of additional sites in the black community, thus helping to increase the number of registered black voters.

Reid v. Martin

The Spalding County Board of Commissioners consisted of three members elected at-large by majority vote to staggered terms. The city council of Griffin consisted of five members elected at-large, by majority vote, with four council members elected from numbered posts. The five council members selected one of their number to serve as mayor.

In late 1983, the ACLU, on behalf of black residents, asked the local legislative delegation to change the method of elections in Spalding County to provide minority voters a better opportunity to elect candidates of their choice. The delegation never responded, but the county did place a "straw poll" question on the

[700] Spalding County VEP v. Cowart, No. 3-84-CV-79 (N.D. Ga.).

March 1984 presidential preference primary ballot concerning the county's method of elections. Voters overwhelmingly favored district elections and enlarging the county commission to five members.

Despite these "straw poll" results, two of the three commissioners opposed any change in the election scheme. Thus, in May 1984, the ACLU represented black residents in a lawsuit challenging the county and city's use of at-large elections as racially discriminatory in violation of the Constitution and Section 2.[701]

In the August 1984 primary, one of the commissioners who opposed changing the county's method of elections lost his seat to a candidate who favored creating five single member districts. The county commission then moved to stay the litigation to allow the county to develop a new plan, which the court granted.

After the new commissioner was sworn in, the commission agreed to create five single member districts that would be acceptable to plaintiffs, but the local legislative delegation said they would only introduce a plan that retained at least one at-large seat. The county conducted another straw poll and voters again supported the five district plan. As a result, the legislative delegation agreed to introduce the commissioners' plan during the 1985 session. The legislature adopted the plan, and the Attorney General precleared it. On October 22, 1985, the county held a special election to fill the two newly created commission seats and one black

[701] Reid v Martin, Civ. No. C-84-60-N (N.D. Ga.).

person was elected.

The city, in response to the plaintiffs' lawsuit, proposed a plan with four single member districts and one at-large seat. One of the districts had a black population of 65%, but a bare majority of black registered voters. Despite the black community's objection to the at-large seat, the city had the plan introduced in the legislature, and it was adopted, and submitted for preclearance. Because the Department of Justice had not precleared the plan by mid-September 1985, the court granted the city's unopposed motion to stay the November elections.

The Attorney General objected to the city's proposed plan, finding that "[e]ven though the black population has increased to 42 percent of the city, only one district has been created with sufficient black population to constitute a voting age majority and, thus, allow blacks a realistic opportunity to elect a candidate of their choice to office." The Attorney General further noted that "the city [had] fragmented" concentrations of black population between two predominantly white districts and that:

> the Voting Rights Act does not allow a covered jurisdiction to fragment or manipulate cohesive minority residential areas or adopt a particular method of election for the purpose of avoiding the higher black percentages that would logically result from the nonracial development of a districting plan.[702]

In light of the objection, the parties agreed to expand the council to seven

[702] William Bradford Reynolds, Assistant Attorney General, to Andrew J. Whalen, III, Attorney for Spaulding County, September 25, 1985.

members and utilize six single member districts. The city held elections under the new plan in 1986, and two black candidates were elected.

NAACP v. City of Griffin

In 2001, Griffin adopted a redistricting plan for the November elections based on the 2000 census. Only two of the six single member districts in the new plan were majority black, although the census showed the city's black population had increased from 42% to 49%. When the plan was submitted for preclearance, the local NAACP urged the Department of Justice to object.

On August 22, 2001, the Department of Justice requested more information from the city to make its determination under Section 5, but the city was not responsive. The city then announced that the November 6, 2001, election for the board of commissioners would be conducted using the existing plan, despite the fact it was malapportioned with a deviation of 93.55%. The local NAACP, represented by the ACLU, filed a law suit to enjoin the November elections, arguing that the malapportioned plan violated one person, one vote.[703] The court scheduled a hearing the day after the plaintiffs filed suit, and at the hearing the city agreed to postpone the elections until it created a new plan. Thereafter, the city adopted a new single member district plan with six members, three of which had a majority

[703] Griffin Branch, NAACP v. City of Griffin, Civ. No. 3:01-CV-154-JTC (N.D. Ga.).

black voting age population. The city held a special election in March 2002, and three African American candidates were elected.

NAACP v. Griffin-Spalding County Board of Education

In 2002, the Spalding County sought legislation to hold a referendum on whether its school board should be reduced from 10 members to 5 or 7. The members were elected from single member districts and by majority vote. The 10 member board had been implemented in the early 1980s, as a result of a vote dilution lawsuit, and African Americans had long held four of the ten seats.

The referendum legislation was enacted by the general assembly, the city adopted it on March 7, and it was submitted for preclearance the next day. Then, despite not having received preclearance, the city proceeded with plans to hold the referendum. Representative John Yates, who introduced the bill, said "Spalding County will have to proceed with the March [19] election and then worry about the Justice Department."[704]

On March 15, 2002, the ACLU filed suit on behalf of the local NAACP, seeking to enjoin the unprecleared election.[705] Later that evening the Department of

[704] Travis Rice, "School-Board Size: Issue On Its Way to Ballot," Griffin Daily News, February 10, 2002.

[705] NAACP v. Griffin-Spalding County Board of Education, Civ. No. 02-022 (N.D. Ga.).

Justice precleared the referendum, and plaintiffs dismissed their lawsuit as moot.[706]

The referendum passed with 70%support and the city adopted a plan in which African Americans were a majority of registered voters in two districts, and a majority of the black voting age population in a third. African Americans went on to win two seats in the 2002 elections.

Sumter County and the City of Americus

Sumter County, home of the notorious Andersonville Prison, and in more modern times the home of President Jimmy Carter, was one of the largest slave owning counties in the state. By 1850, county residents owned nearly 4,000 slaves, making it one of the most prosperous of Georgia's pre-Civil War "Black Belt" counties.

In 1960, Sumter County had a population of 24,641, of whom 52.5% were black. Like other majority black counties in the Deep South where whites feared they had more to lose if blacks secured political power proportional to their population, white resistance to the civil rights movement in Sumter County was intense, unceasing, and often violent. As noted by the ACLU in its 1982 special report, Voting Rights in the South:

> Prior to the passage of the 1965 Voting Rights Act, only 548 blacks were registered to vote in Sumter County, 8.2% of the

[706] Joseph D. Rich, U.S. Department of Justice, to Timothy N. Shepherd, March 15, 2002.

> eligible population. Voting was segregated and blacks were excluded from positions as election managers and poll workers. The Jaycees, an all white organization, ran county elections. The Democratic Party was racially exclusive and no blacks served on its executive committee until 1975.
>
> Beginning in the early 1960s, SNCC and other civil rights groups launched voter registration drives in Sumter County. Shortly thereafter, in 1963, four SNCC workers involved in those campaigns were arrested and charged with insurrection – at that time a capital offense in the State of Georgia. The four were held without bail until a three-judge court enjoined the prosecutions, ruled the insurrection statute unconstitutional, and ordered the defendants admitted to bail. The prosecutor, Stephen Pace Jr., later admitted that, 'the basic reason for bringing these insurrection charges was to deny the defendants . . . bond . . . and convince them that this type of activity is not the way to go about it.' Remaining charges against the four were eventually dismissed.[707]

Sumter County was the subject of several federal court decisions in the 1960s and 70s enjoining racial segregation in county elections and other discriminatory practices that denied blacks the right to vote or diluted black voting strength.[708] Following increased black voter registration and participation after passage of the

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[707] Laughlin McDonald, Voting Rights in the South: Ten Years of Litigation Challenging Continuing Discrimination against Minorities (New York; ACLU, 1982), pp. 76-77.

[708] See United States v. Chappell and Bell v. Horne (M.D. Ga. 1965), 10 R. Rel. L. Rptr. 1247 (noting racial segregation in county elections; county interference with black voters; maintaining voter lists on a racial basis; and prosecuting blacks for their attempts to vote, and failing to release them on their own recognizance); Bell v. Southwell 376 F. 2d 639, 644 (5th Cir. 1967) (citing the "gross, spectacular, and completely indefensible nature of state imposed, unconstitutionally racially discriminatory practices" at a justice of the peace election, including segregated voting lists, segregated voting booths, intimidation of black voters by election officials, and the "unwarranted arrest and detention" of blacks who protested racial discrimination); Wilkerson v. Ferguson, Civ. No. 77-30 (M.D. Ga.) (successful challenges to at-large elections for the Americus City Council and the Sumter County Commission).

Voting Rights Act, white officials in Sumter County adopted a pattern of non-compliance with Section 5. In 1968, the City of Americus changed its method of holding mayoral and city council elections from plurality to majority vote, but did not submit the changes for preclearance. The new majority vote requirement was used to exclude plurality winning blacks from office on two occasions, in 1972 and 1977.[709] Then, in June 1978, the Sumter County Democratic Party abolished its primaries, but failed to comply with Section 5 prior to holding general elections in December.

Edge v. Sumter County School District

Perhaps the most egregious Section 5 violation involved the refusal of the county board of education to honor an objection to at-large voting by the Attorney General. Litigation to enforce the Section 5 objection was filed by the ACLU on behalf of local residents in 1980, two years before the 1982 extension of Section 5, but the lawsuit was not resolved until 1986.[710]

Prior to 1968, members of the board of education were appointed by the grand jury. That year, the general assembly enacted legislation providing for the election of school board members from a combination of at-large and single member

[709] McDonald (1982), 45.

[710] Edge v. Sumter County School District, No. Civ-80-20-AMER (M.D. Ga.).

districts.[711] In July 1972, in response to a lawsuit brought by Sumter County residents, including then Governor Jimmy Carter - who had served on the Sumter County School Board from 1955 to 1962 - a federal district court ruled the board of education districts were unconstitutionally apportioned and entered an order allowing the board an opportunity to seek a legislative remedy.[712] Instead of curing the malapportionment of the single member districts, the general assembly enacted legislation that abolished the districts altogether and required members of the board to be elected at-large.[713] The board submitted the change to the Department of Justice for preclearance but the Attorney General objected, saying:

> Our investigation reflects that there are significant concentrations of black citizens in parts of Sumter County and that the requirement that all candidates must be voted on county-wide would result in the dilution and minimization of the voting strength of black citizens.[714]

County officials then "withdrew" the submission, taking the position that the plan was court ordered and thus exempt from Section 5. In a July 24, 1973, letter the board of education informed the Justice Department that it considered its submission a "useless and unlawful act," and the Attorney General's objection

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[711] Georgia Laws 1968, p. 2065.

[712] Carter v. Crenshaw, Civ. No. 768 (M.D. Ga.).

[713] Georgia Laws 1973, p. 2127.

[714] J. Stanley Pottinger, Assistant Attorney General, to Henry L. Crisp, July 13, 1973.

"illegal, void and of no effect." On September 12, 1973, the department responded, informing the county that the legislative plan "was properly subject to the pre-clearance requirements of Section 5 of the Voting Rights Act" and that the change to at-large elections was "inoperable in view of the objection."[715] Defying the Attorney General, the board refused compliance and continued to hold at-large elections under the 1973 law.

After the ACLU filed suit against the board of education in 1980, the three-judge district court entered an order on December 1, 1981, granting plaintiffs' summary judgment on their Section 5 claim and remanded the case to a single judge district court to supervise the development and implementation of a new remedial election plan.[716] Defendants appealed and the Supreme Court summarily affirmed on June 1, 1982.[717]

Pursuant to orders of the single judge court, the board prepared a reapportionment plan and submitted it for preclearance. According to the 1980 census, 43.4% of the 13,240 residents in the Sumter County School District were black, yet no black person had ever been appointed or elected to the school board. The redistricting plan submitted for preclearance provided for one at-large and six

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[715] Edge v. Sumter County School District, No., Civ-80-20-AMER, (M.D. Ga.), Plaintiff's Pre-Trial Brief, p. 3.

[716] Edge v. Sumter County School Dist., 541 F. Supp. 55 (M.D. Ga. 1981).

[717] Sumter County School District v. Edge, 456 U.S. 1002 (1982).

single member districts, of which only two were nominally majority black. According to plaintiff's expert, Professor Michael Binford, when the board's plan was adjusted for the percentage of blacks and whites who were eligible voters, the percentage of blacks and whites who were actually registered, and the expected turn out rate for blacks and whites, "no district would have anywhere near a majority of black voters."[718]

The board's plan was objected to by the Attorney General in December 1982, on the ground it did not "fairly reflect the black voting strength in the school district." The department further stated that the plan:

> fragments the black voting strength for apparently no compelling governmental reason and such fragmentation need not exist in a fairly drawn plan. Our analysis also has revealed evidence of racially polarized voting, non-responsiveness on the part of the school board members to the particularized needs of the black community, and other factors which, in the context of a history of racial discrimination in the county, increase the likelihood that the proposed redistricting plan will deny black voters an equal opportunity to elect representatives of their choice.[719]

The Justice Department also noted the school district's failure to consider a more equitable plan proposed by plaintiffs:

> In this connection, we note that the ACLU had provided the school district with an alternate plan which contains seven

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[718] Edge v. Sumter County School District, No., Civ-80-20-AMER, Plaintiff's Pre-Trial Brief, p. 4.

[719] William Bradford Reynolds, Assistant Attorney General, to Henry L. Crisp, December 12, 1982, p. 1.

> contiguous single-member districts, of which three districts would contain black population percentages of over 60 percent, including two with black populations of more than 65 percent. Our understanding is that the school district did not consider that plan, nor has it presented any legitimate reasons for not doing so. Furthermore, our analysis shows that by a mere adjustment of boundary lines in the six-one plan, contiguous and fairly drawn districts of about 65 and 72 percent could result.
>
> The information which has been provided also suggests that the submitted plan was designed with the purpose of minimizing minority voting strength in the school district. Thus, it appears that the board consciously did not consider the alternate plan proposed by the ACLU because of racial considerations and similarly did not obtain or seek input from the minority community, which comprises 43 percent of the district's population.[720]

The defendants prepared a second plan and submitted it to the Department of Justice. Like the first, it contained one at-large and six single member districts, but it avoided some of the fragmentation of the prior plan and contained three majority black districts with 65%, 63%, and 55% black population, respectively. Still, the second plan was objected to by the Justice Department which cited recent annexations by the City of Americus which reduced the black population in one of the districts. "We have regrettably been afforded no information regarding the impact of these annexations on the proposed plan, nor has it been explained why the school board refrained from sharing such information with us," the department wrote. "Nor are we able to conclude, in light of the continuing exclusion of effective

participation by black citizens and their representatives in the redistricting process, that this discriminatory result was unintended."[721]

By April 1984, fully 81% of Sumter County schools were black as a result of white flight to private, segregated academies. Yet the county schools remained controlled by an all white school board, a white school superintendent, and a white school board attorney, none of whom sent their children or grandchildren to the county public schools.[722]

Following the second objection by the Justice Department to the county's redistricting plan, defendants asked the court to adopt a court ordered plan which would not have to be precleared. On May 14, 1984, the court adopted such a plan reapportioning the board of education into seven single member districts, each of which contained a majority of white registered voters. According to plaintiff's expert, Jerry Wilson, the court's plan also protected incumbents, placed two of the most politically active black leaders in Sumter County in overwhelmingly white districts, and created a non-contiguous district. Plaintiffs appealed the court's order on June 13, 1984, on the grounds that it did not address and cure the objections of the Attorney General to the prior plans, and perpetuated the effects of past

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[720] Id., p. 2.

[721] William Bradford Reynolds, Assistant Attorney General, to Henry L. Crisp, September 6, 1983, p. 2.

[722] Rick Atkinson, "Segregation Rises Again in Many Southern Schools," Washington Post, p. A1.

discrimination. The Department of Justice, reversing its prior position, filed a brief with the court of appeals arguing that the effect of the various objections from the Attorney General was to return membership selection of the board of education to appointment by the grand jury. The court of appeals, however, rejected that argument and vacated the trial court's order on the grounds that it had "misapplied legal standards," in fashioning its plan.[723] The court also held that the plan was retrogressive, failed to remedy or cure the specific Section 5 objections of the Attorney General, and did not adequately maintain the integrity of the school board's second plan, which contained two majority black registered voter districts.

On remand the parties agreed on a new plan for the board using six single member districts and one at-large seat. Three of the six districts were majority black, with 66.57%, 64.49% and 57.26% black populations, respectively.[724]

Foust v. Unger

Special, non-partisan elections for the school board were held in November 1986, but the candidate of choice of black voters, Ronald J. Foust, who was one of the plaintiffs in the 1980 lawsuit, was defeated by four votes in his bid to represent District 4, which was 64.49% black. The winner, Douglas Unger, received 248 votes

[723] Edge v. Sumter County School District, 775 F. 2d 1509, 1511 (11th Cir. 1985).

[724] Id., Order of October 9, 1986, p. 2.

to Foust's 244.

The ACLU filed an election challenge on Foust's behalf in Superior Court contending that persons not eligible to vote in District 4 had been allowed to vote, while those who were eligible to vote had been turned away.[725] Following a trial, the court ruled in Foust's favor, concluding that "irregularities had occurred . . . or that illegal votes were received or legal votes rejected sufficient to change or place in doubt the result," and ordered a new election.[726] The election was held in April 1987, but as so often happens when candidates manage successfully challenge the outcome of an election in which they lost, Foust was defeated, although again by a very narrow margin.

Hoston v. Board of Commissioners of Sumter County

A separate lawsuit was brought in 1984 by the ACLU on behalf of Sumter County residents charging that the five member board of county commissioners, which had a total deviation among districts of 50.32%, was malapportioned in violation of the Constitution and Section 2.[727] A subsequent analysis prepared by the Reapportionment Services Unit of the Georgia General Assembly found a total

[725] Foust v. Unger, No. Civ. 86V-794 (Sumter Superior Court).

[726] Id., Order of March 11, 1987, p. 2.

[727] Hoston v. Board of Commissioners of Sumter County, Georgia, Civ., No. 84-77-AMER (M.D. Ga.).

deviation of 82.4%.[728] At the time the suit was filed, only one district was majority black, and there was only one black person on the five member board, despite the fact that 44.21% of Sumter County's 29,360 residents were black. The suit also charged defendants with failing to secure preclearance of a valid reapportionment plan under Section 5.[729]

After plaintiffs moved for a preliminary injunction to block the 1984 board of commissioners election, a consent order was issued acknowledging that the districts were malapportioned, and instructing both parties to submit reapportionment plans to the court. Defendants submitted a proposed plan, but plaintiff's objected on the grounds that the total deviation was too high (11.9%), the plan was retrogressive, and it packed one district with an 86% black population, "thereby insuring that the remaining districts will be safe, majority white districts and diluting voting strength of minority voters."[730]

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[728] Id., Affidavit of Laughlin McDonald, January 31, 1985.

[729] Black residents of the county, represented by the ACLU, had also filed suit years earlier, in 1977, against the Sumter County Board of Commissioners and the Americus City Council alleging that at-large elections diluted minority voting strength. Wilkerson v. Ferguson, Civ. No. 77-30-AMER (M.D. Ga.). The case was settled, and according to the consent decree, plaintiffs "established a prima facie case that the present method of electing the Chairman and members of the Board of Commissioners of Sumter County unconstitutionally dilutes minority voting strength, in violation of the Fifteenth Amendment of the Constitution." Id., April 7, 1980. An identical finding was made with regard to the method of electing the mayor and city council of Americus. As a result of the litigation, at-large elections for the board of commissioners and city council were abolished in favor of single member districts, and redistricting plans were adopted based upon the 1970 census.

[730] Hoston v. Board of Commissioners, Plaintiffs' Objections to Defendants' Proposed Redistricting Plan, October 19, 1984.

On February 27, 1985, after trial on the merits, the court ruled the challenged plan unconstitutional and directed the defendants to adopt a new plan and seek preclearance under Section 5 within 30 days. The parties subsequently agreed on a reapportionment plan creating two majority black districts of approximately 68% and 66% black population.[731] Special elections were held under the new plan in October 1985, and two black candidates were elected. The second black person elected, O.L. Bryant, was one of the plaintiffs and became the second black person ever elected to the commission in the history of Sumter County.

Cooper v. Sumter County Board of Commissioners

After release of the 1990 census, it became clear that Sumter County's commission districts were again malapportioned with a total deviation of 27.79%. The ACLU brought another suit in federal court on behalf of black plaintiffs charging the districts violated one person, one vote.[732] On July 17, 1992, the district court entered a consent order finding "malapportionment in excess of the legally acceptable standard."[733] Because the general assembly was in recess and was not scheduled to convene until January 1993, the order also adopted a new, interim

[731] Id., Final Judgment and Decree, July 1, 1985.

[732] Cooper v. Sumter County Board of Commissioners, Civ. No. 1:92-cv-00105-DF (M.D. Ga.).

[733] Id., Consent Order and Decree, July 17, 1992, p. 2.

redistricting plan for the 1992 elections. The consent decree preserved the two majority black districts, and further provided that the defendants would have the agreed upon plan enacted during the 1993 general assembly session and submit it to the Department of Justice for preclearance. The plan was enacted by the general assembly and subsequently precleared.

The critical role played by Section 5 since its extension in 1982 in reapportionment in Sumter County is abundantly evident. Although there has been extensive litigation in the county to enforce the Constitution and the Voting Rights Act, in the absence of Section 5 that litigation would doubtlessly be ongoing.

Nance v. Department of Human Resources

In 1996, James Nance, a black man from Crisp County, was elected to a six year term on the Crisp County Board of Commissioners. Two years later, he was hired as a case manager by the Department of Family and Children Services (DFCS) in neighboring Sumter County. The program in which he worked was funded in part with federal money, and as a consequence, employees in the program are subject to limitations on partisan political activity specified by the Hatch Act.[734]

After he had been on the job for several months, Nance was informed by his supervisor that because of his prior election to the board of commissioners in Crisp

[734] 5 U.S.C. 1501 et seq.

County, he was engaged in "partisan politics" in violation of the Hatch Act. He was told that he could continue either as a DFCS employee or a Crisp County Commissioner, but that he could not hold both positions at the same time.

While the Hatch Act prohibits a covered state employee from being a candidate for public office in a partisan election, it does not by its terms prohibit a state employee from merely being an office holder. And even though he was an office holder, Nance was not a candidate for the Crisp County Board of Commissioners or any other partisan office within the meaning of the statute during his employment with DFCS.[735]

Nance, represented by the ACLU, filed suit in federal court in 1998 to enjoin DFCS from making him either quit his job or resign from the board of commissioners.[736] He argued that DFCS had no authority under state or federal law to expand the definition of political activities prohibited by the Hatch Act. He also contended the DFCS policy was a voting practice or procedure for which preclearance under Section 5 had neither been sought nor received, and was therefore unenforceable.

After the complaint was filed, DFCS reversed itself and agreed that Nance was not in violation of the Hatch Act. It rescinded its interpretation of the statute

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[735] 5 U.S.C. 1502(a)(3).

[736] Nance v. Georgia Department of Human Resources, No. 1:98-CV-128-2 (WLS) (M.D. Ga.).

and allowed Nance to continue his employment while serving as a member of the Crisp County Commission. The complaint was dismissed as moot in June 1998, but again, Section 5 played an important role in allowing a minority elected official to continue in office and represent the constituency that had put him there.

Tattnall County

Carter v. Tootle

Historically, the board of commissioner of Tattnall County consisted of five members, four of whom were elected from districts, with the chair elected at-large. Although blacks were nearly 30% of the population, no black person had ever been elected to county office. In 1968, after passage of the Voting Rights Act and the prospect that one or more of the districts would have a majority of black voters, the county abandoned its district system and changed the method of electing the board of commissioners to four at-large seats, with the elected commissioners appointing a chairman. In 1972, the chair was made an elected at-large position. The 1968 and 1972 changes were subject to Section 5, but the county failed to submit them for preclearance.

In June 1984, a group of black residents represented by the ACLU sued the county for failure to comply with Section 5.[737] The plaintiffs also contended that the

[737] Carter v. Tootle, Civ. No. 484-219 (S. D. Ga.).

pre-1968 plan, the only legally enforceable plan, was malapportioned in violation of one person, one vote.

In October 1984, the parties entered into a consent decree providing for a six member board, with five members elected from districts and the chair elected at-large. One of the districts was 66% black. Although the district court allowed the November 1984 elections to be held under the existing system, it ordered that, upon preclearance, the new plan would go into effect at a special primary held in February 1985.

Williams v. Tattnall County Board of Commissioners

The 1990 census showed that the plan for the Tattnall County Board of Commissioners and Board of Education was malapportioned, with a total deviation of 51.7%. The general assembly failed to enact a remedial plan and black residents of the county, represented by the ACLU, brought suit in 1992 to enjoin use of the unconstitutional plan and request that the court implement a new plan for the 1992 elections.[738]

On July 7, 1992, the district court, finding that the existing plan was malapportioned, enjoined the July 1992, primary elections for the board of commissioners and board of education until such time as an election could be held

[738] Williams v. Tattnall County Board of Commissioners, Civ. No. CV692-084 (S.D. Ga.).

under a court ordered or a precleared plan. When the parties were unable to agree on a plan, the court directed defendants to submit for preclearance a plan they had proposed, which contained five single member districts, one of which was 68.53% black. The district with the next highest black population was 27.44% black. Plaintiffs objected to the defendants' plan because an alternative plan they had prepared created one majority African American district as well as a district that was 40% black. The Department of Justice precleared the defendants' plan, and on February 9, 1993, the district court entered a consent order adopting the precleared plan and scheduling a June 1993 special election to be conducted under the plan.

Windgate v. Tattnall County Board of Commissioners

Shortly before the 2000 census was released, white residents of Tattnall County filed a law suit in which they claimed the 1993 court approved plan was a racial gerrymander in violation of the Shaw/Miller line of cases.[739] Black voters, represented by the ACLU, were granted leave to intervene to defend the challenged plan. However, the plaintiffs and the defendants entered into a consent order on November 21, 2000, invalidating the 1993 plan and providing that the county would adopt a new plan in light of the 2000 census to be implemented at a special election coinciding with judicial elections scheduled for July 2002.

[739] Windgate v. Tattnall County, Georgia, Civ. No. CV600-070 (S.D. Ga.)..

Following release of the 2000 census, the county prepared a number of plans, none of which contained a majority black district. The ACLU intervenors prepared several alternative plans that complied with traditional districting principles and submitted them to the county for its consideration, but the plans were rejected. Although the county's plan was plainly retrogressive compared to the 1984 benchmark plan, the Attorney General precleared it and it went into effect.

The lengthy and divisive litigation over redistricting in Tattnall County puts to rest any doubts that race continues to drive the political process there.

Taylor County and the City of Butler

Chatman v. Spillers

In 1972, the city of Butler, which was 46% black, abandoned its plurality method of electing the mayor, which had been in effect since 1919, and adopted a majority vote requirement. Like the other more than 50 cities in Georgia that adopted majority vote requirements after passage of the Voting Rights Act, Butler ignored preclearance under Section 5.[740]

Butler also elected its five member city council at-large. Given the prevalence of bloc voting by the white majority, no black person had ever been elected to the council or as mayor.

[740] McDonald, (2003), pp. 135, 143-44.

In May 1986, black residents of the city, represented by the ACLU, filed suit alleging that the majority vote requirement and the at-large method of elections for the council violated Sections 2 and 5 of the Voting Rights Act.[741] At the request of the plaintiffs, in December 1986, the court enjoined elections for the mayor and council under the challenged system. But due to abortive attempts by the legislature to enact a remedial plan, the refusal of the city to conduct mayoral elections under the preexisting plurality system, and the refusal of the district court to order a special election, no municipal elections were held in Butler until 1995, and only then because they were ordered by the court of appeals.

After the legislature twice failed to enact a remedial plan, the parties agreed to reapportion the city council into two districts. One district was majority black and contained two numbered posts, and the other was majority white and contained three numbered posts. Terms of office were staggered and elections were by majority vote. The settlement agreement was approved by the district court in June 1992.

Since the plan adopted by the district court was a legislative plan, i.e., one proposed by the defendants, the order required that it be submitted for preclearance under Section 5. The order further provided that a special election be called within 30 days after preclearance, and as soon as practicable under state law. In the event

[741] Chatman v. Spillers, Civ. No. 86-91-COL (M.D. Ga.).

preclearance were denied, the parties could apply to the court for additional relief.

The Attorney General precleared the submission, except the majority vote requirement for mayor, concluding:

> the city has not demonstrated that the adoption of a majority vote requirement for mayoral elections will not 'lead to a retrogression in the position of . . . minorities with respect to their effective exercise of the electoral franchise. . .under Section 5, the city may implement the multimember district method of electing city councilmembers and districting plan that were precleared in August, 1992, with the mayor elected at large pursuant to the plurality vote requirement of the 1919 city charter.[742]

The city, however, refused to conduct any elections, while the court denied plaintiffs' request for court ordered relief. It held that the court:

> does not feel impelled to enter an order imposing upon the parties a plan gratuitously suggested by the Justice Department. The Plaintiffs' motion for court ordered elections is therefore denied in the hope that the parties will again be able to agree.[743]

The plaintiffs appealed and the court of appeals held that the district court "abused its discretion by refusing to order elections under the terms suggested by the plaintiffs," and directed that elections be held within 30 days.[744] Elections that complied with the Voting Rights Act were finally held in Butler in May 1995, some nine years after the complaint was filed. Two black candidates were elected to city

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[742] James P. Turner, Assistant Attorney General, to Alex Davis, August 25, 1992, and June 25, 1993.

[743] Chatman v. Spillers, Order of May 10, 1994.

[744] Chatman v. Spillers, 44 F.3d 923, 925 (11th Cir. 1995).

council, the first in the city's history.

Telfair County and the Town of Lumber City

Spaulding v. Telfair County

Clark v. Telfair County

In September 1986, the ACLU filed suit in federal court on behalf of five black voters in Telfair County alleging that the county board of education was malapportioned.[745] Located in rural south central Georgia, Telfair County was home to the father-son dynasty of two of the state's most well known governors, Eugene and Herman Talmadge. Both were staunch segregationists whose harsh views on race directly reflected the ideas and values of the white communities in which they lived. After the Supreme Court outlawed segregation in public schools in 1954, Herman Talmadge predicted "blood will run in Atlanta's streets." As a member of the U.S. Senate from 1956 to 1980, Herman Talmadge voted against the landmark 1964 Civil Rights Act and the 1965 Voting Rights Act.

At the time the ACLU filed its suit in 1986, race relations in Telfair County still remained sharply polarized. In 1986, the Telfair County School Board, which contained one majority black district, was last apportioned using 1970 census data. By 1980, the county population was 11,445, and 31.19% black. Based on the new

[745] Spaulding v. Telfair County, Civ. No 386-061 (M.D. Ga.)

census, the total deviation was 47.09%. Blacks also were heavily packed into a single district, where they constituted 89.12% of the population. Had the districts been unpacked and properly apportioned, blacks would have constituted a majority in two of the seven school board districts with a greater opportunity to elect candidates of their choice.

The ACLU lawsuit also charged the defendants with violating Section 5 of the Voting Rights Act because of their refusal to call a special election as required by state law after the only two candidates running in the primary from District One were disqualified. One of the candidates did not reside in the district and the other had served as a deputy registrar. Because nobody else was nominated, there was no candidate for county school board on the ballot in the general election from District One, which was majority black. The plaintiffs contended that the refusal to call a special election required by state law constituted a voting change requiring Section 5 preclearance. The plaintiffs also asked the court to invalidate the old districting plan and require the board to adopt a new apportionment.

On October 31, 1986, less than a week before the November general election, the court entered a consent order staying the elections, ordering a new apportionment plan, and providing for a special election. The court found that "Plaintiffs have established a prima facie case that the current apportionment of the Board of Education is in violation of the Fourteenth Amendment," and required the defendants to develop and implement a new apportionment for the school board

within 60 days. The order also required that the new apportionment plan "shall fairly represent black residents of Telfair County and contain at least two majority black districts, one of which shall contain a black population of at least 65%."[746] After negotiations, the parties agreed on a plan which was implemented by final court order in April 1987. The new plan created two majority black school board districts with African American populations of 77.52% and 53.02% respectively, and set a special election for June 30.

Approximately three weeks after the final order was issued, and eight months after the lawsuit was originally filed, seven white citizens of the county and Lumber City, a town located in Telfair County, moved to intervene to oppose the settlement. The would-be intervenors asserted their rights on various grounds, including a claim that the court ordered redistricting plan diluted their voting strength, was an "unconstitutional gerrymander," and commingled the interests of Lumber City residents with residents of the rural portion of the county. The court denied the motion to intervene on the grounds that it was not timely.[747]

Woodard v. Mayor and Town Council of Lumber City

[746] Id., Order of October 31, 1986, pp. 1-2.

[747] The ACLU also brought suit in 1987 on behalf of black plaintiffs challenging Telfair County's sole commissioner form of government. The action resulted in a settlement order providing for a board of commissioners elected from districts. See Clark v. Telfair County, Civ. No. 287-25 (S.D.Ga. October 26, 1988), and the discussion of sole commissions supra pp. 137-147.

Black voters in Lumber City represented by the ACLU also filed suit in federal court in 1987, challenging at-large city elections as diluting minority voting strength in violation of Section 2 of the Voting Rights Act and the Constitution. The law suit also charged that the majority vote requirement and numbered post provisions for city elections had never been precleared, as required by Section 5.[748] According to the 1980 census, 55% of Lumber City's 1,426 residents were white and 45% were black, yet no black person had ever been elected to the six member council, and the only black person to win a plurality of votes was defeated in a run off in 1985.

Six months after the suit was filed the district court granted the plaintiffs' motion for summary judgment and enjoined city elections on the grounds that preclearance had not been secured for the majority vote and numbered post provisions.[749] The city then submitted a number of voting changes to the Department of Justice for preclearance, including the majority vote and numbered post requirements, but the Attorney General objected to both in a July 1988 letter noting the presence of racially polarized voting in city elections.

> The reality of the potential for discrimination becomes readily apparent from the results of the 1985 election where, by virtue of the majority vote requirement, the black candidate failed to become the first black elected to the city council, although she

[748] Woodard v. Mayor and Town Council of Lumber City, Civ. No. 387-027 (S.D. Ga.).

[749] Woodard v. Mayor and City Council of Lumber City, Ga., 676 F. Supp. 255 (S.D. Ga. 1987).

appeared to have been the clear choice of minority voters.[750]

The Department further noted that a 1988 ordinance containing the majority vote and numbered post requirement was adopted at a time when blacks were becoming politically active in city elections and were challenging the legality of the at-large system. In objecting to the change, the department found that it was "tainted, at least in part, by a proscribed purpose," and that "[w]here, as in Lumber City, racial bloc voting exists in the context of an at-large system, the use of certain election features, such as a majority vote requirement, serves but to enhance the opportunity for discrimination against minority voters."[751]

On October 7, 1988, at the request of the city, the attorney general declined to withdraw the objections to the majority vote and numbered post requirements, explaining that the department's decision was based on "concerns that racial bloc voting exists in Lumber City elections, and that black persons do not constitute a majority of the voters in the city such as would mitigate the racially discriminatory impact of those electoral features."[752]

The court entered another order on January 5, 1989, with the consent of the parties, finding that at-large elections for Lumber City "are in violation of Section 2

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[750] William Bradford Reynolds, Assistant Attorney General, to Ken W. Smith, Esq., July 8, 1988.

[751] Id., p. 2.

[752] William Bradford Reynolds, Assistant Attorney General, to Ken W. Smith, Esq., November 13, 1989.

of the Voting Rights Act, 42 U.S.C. §1973." The next month, on February 16, 1989, the court approved a new election plan, and required the defendants to submit it for Section 5 preclearance. The plan provided for two districts, one 86% white and the other 74% black, each of which would elect two members of the council. However, the remaining two members and the mayor continued to be elected at-large. The plan also retained the majority vote and numbered post requirements, which the Attorney General had previously objected to. On November 13, 1989, once again at the request of the city, the department again refused to preclear the plan saying:

> The history of the city's earlier efforts to impose similar requirements on the electoral process make it difficult to conclude now that black persons could elect a candidate of choice to an at-large seat in Lumber City.
>
> While we note, at the outset, that the submitted changes result from a settlement in Woodard v. Mayor of Lumber City, CV 387-027 (S.D. Ga.), we are faced with unanswered concerns that the city may have sought here to limit the opportunity of blacks to elect candidates of their choice to the city council. In that regard, our information is that the city rejected a number of alternatives that contained fairly drawn districting plans and provided minority voters with an opportunity to participate equally in the electoral process and, instead, insisted on features such as the use of a majority vote requirement, numbered posts and staggered terms for at-large seats.[753]

In April 1990, the court directed the parties to make a "fresh start towards resolving the pending litigation," and to independently submit new remedial

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[753] Id., p. 2.

plans.[754] The plaintiffs proposed the elimination of all at-large seats, other than the mayor, and called for the creation of two districts, one 75% black, the other 86% white, which would elect three members each. The city defendants proposed a plan that was virtually identical to the one previously rejected by the Attorney General - including the majority vote requirement - and called for two members to be elected from a majority black district, two from a majority white district and two elected at-large.

After hearing evidence and witnesses, the court concluded in an August 3 ruling that 56% of the 1,486 residents of Lumber City were black, not the 45% that had been indicated by the 1980 census. "Despite the increase in black population and the percent of black registered voters, other factors remain which continue to abridge black political participation," said the court. As evidence, the court noted that "Voting tends to be on racial lines . . . no black has ever been elected to office . . . there have been very few black candidates for office; the first black to win a plurality of votes was defeated in a runoff."[755]

Given the existence of racially polarized voting and the history of discrimination, the court ruled that use of a majority vote requirement in Lumber City could "enhance the opportunity for racial discrimination and submerge black

[754] Woodard, Order of August 3, 1990.

[755] Id., p. 3.

voting strength."[756] The court imposed a plurality vote requirement in its place, but in all other respects adopted the plan proposed by the defendants and ordered the city divided into two districts, one majority black, and the other majority white, each containing two numbered posts. The order called for two additional council positions, as well as the mayor, to be elected at-large.

Unlike the court's order of February 16, 1989, the August 3, 1990, order did not require the defendants to obtain Section 5 preclearance. Plaintiffs, however, appealed on the theory that the court ordered plan incorporated policy choices of the defendants and was thus subject to Section 5. Elections were held under the new plan on October 2, 1990, and although blacks won both seats from the majority black district, the one black candidate who ran for one of the at-large seats received only 30% of the vote. Another black candidate ran for one of the two seats in the majority white district, which was 21% black, and received only 22.7% of the vote.

Prior to oral argument in the court of appeals, 1990 census data was released for Georgia which showed that the population figures relied upon by the district court inflated the percentage of blacks residents, casting further doubt on the validity of using any at-large seats for the city council. The plaintiffs moved to supplement the record on appeal by adding the 1990 census data. The motion was granted and the court reversed in May 1991, remanding the case to the district court

[756] Id., p. 4.

for further consideration of the question of remedy in light of the new census.

On October 2, 1992, the district court entered an order adopting a new districting plan prepared by the defendants based upon the 1990 census, and continuing the two at-large seats for the city council. The court later ruled that the redistricting plan was court ordered and need not be submitted for Section 5 preclearance. Although plaintiffs continued to object to the use of at-large seats for the city council, they decided against further appeals.

Crisp v. Telfair County

Ten years after the conclusion of Woodard v. Mayor of Lumber City, the ACLU again brought suit in Telfair County on behalf of black voters, this time challenging county commission lines as malapportioned and violating Section 2 and the Constitution. The lawsuit was filed in August 2002 and was the fourth voting rights lawsuit brought by the ACLU in Telfair County since 1986.[757]

The 2000 census showed that the five county commission election districts had a total deviation of 56% (or 34% if the population of Telfair State Prison was not considered). The Telfair County Commission had adopted a reapportionment plan in February 2002, that had been drafted by the Georgia Reapportionment Office containing one majority black (67.76%) district, and another with 45.73% black

[757] Crisp v. Telfair County, CV 302-040 (S.D. Ga.).

preclearance and ruled the motion for summary judgment was "largely moot."[761] The court granted plaintiffs' motion for attorney's fees, but awarded less than 50% of the amount claimed. Plaintiffs' attorneys appealed, and through mediation with the Eleventh Circuit mediator in 2004, increased the recovery from approximately $5,400 to $9,000.

Terrell County

Holloway v. Terrell County Board of Commissioners

In June 1992, the ACLU filed suit on behalf of black voters challenging the malapportionment of the Terrell County Board of Commissioners under the Constitution and Section 2.[762] A small county northwest of Albany, Terrell was 60% black, and its board of commissioners consisted of five members, four of whom were elected from single member districts and one at-large. The challenged plan, based on the 1980 census, had three majority black districts by population, but one was packed with African Americans at the level of 85%, while in the other two blacks were less than a majority of the voting age population. Despite the black population majority in the county, only one African American had ever been elected to the board of commissioners.

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[761] Id. Order, July 24, 2003.

[762] Holloway v. Terrell County Board of Commissioners, CA-92-89-ALB/AMER(DF) (M.D. Ga.).

population, but the plan had not been introduced by the local legislative delegation for enactment by the general assembly. Although 38.73% of the county population was black, no more than one African American had ever served on the five seat commission.

After plaintiffs filed suit, the county stipulated that its commission districts were malapportioned, and that "It is possible...to draw a five single member district plan with at least one majority black district in Telfair County."[758] The plaintiffs then filed for summary judgment and asked the court to hold the existing plan unconstitutional and order a new plan into effect.

With the parties in agreement on the five single member district plan, the Telfair County Commission again called on the local legislative delegation to introduce the plan in the 2003 general assembly session as a remedy to the malapportioned districts.[759] The plan was adopted on the last day of the legislative session and signed into law on June 3, 2003.[760]

Ruling that the existing plan was malapportioned and "violates the one person, one vote standard of the equal protection clause of the Fourteenth Amendment," the court noted that the plan had been submitted for Section 5

[758] Id., Joint Stipulation of the Parties, November 25, 2002.

[759] Telfair County, Georgia, Reapportionment Resolution, January 9, 2003.

[760] Id., Order, July 8, 2003.

Terrell County, which earned the sobriquet "Terrible Terrell" during the Civil Rights Movement, had a long history of racial discrimination and voting rights litigation. In litigation brought by the ACLU, the board of commissioners was sued over its use of at-large elections in 1976, which resulted in a consent decree adopting the 4-1 plan.[763] The five member county board of education was sued the same year because it had adopted at-large elections in 1965, without preclearing the change under Section 5, and had held illegal elections from 1968 through 1978.[764] And no blacks had been elected under the at-large system, even though 90% of the public school pupils in the county were black.

After the 1976 law suit was filed, the county submitted its at-large plan for the board of education for preclearance, but the Attorney General objected, finding that:

> No black has been elected to the Board of Education or to any other office in the County. Prior to 1966 blacks were not permitted to serve on the County Grand Jury, which prior to the adoption of this Local Amendment appointed members of the Board of Education; a court order was required to desegregate the Grand Jury. In 1967 Terrell County was designated by the Attorney General, pursuant to Section 6 of the Voting Rights Act, 42 U.S.C. 1973d, for the appointment of Federal Examiners. Public schools in Terrell County were not desegregated until the 1970-71 school year, and a court order was required for such desegregation. An analysis of precinct election returns for elections in which there were black candidates supports an inference that white voters in the County are generally reluctant to vote for black candidates. The voting changes resulting from the Local Amendment have been enforced in violation of Section 5 of the Voting Rights Act.[765]

[763] Holloway v. Faust, Civ. No. 76-28-AMER (M.D. Ga.).

[764] Merritt v. Faust, Civ. No. 76-28-AMER (M.D. Ga.).

[765] Drew S. Days II, Assistant Attorney General, to W.L. Ferguson, December 16, 1977.

In light of this objection, the court ordered the county to return to the preexisting grand jury method of appointments and a grand jury from which blacks were not excluded subsequently appointed five new members to the board of education, two of whom were black.[766]

The City of Dawson, the county seat, was also sued in 1977 over its use of at-large elections, which were alleged to dilute minority voting strength. The suit was settled by agreement of the parties, providing for a six member council elected from single member districts, and a mayor elected at-large.[767]

After the reapportionment suit was brought in 1992, defendants admitted the plan was malapportioned, but the parties agreed not to delay the regularly scheduled July 1992, election. On July 16, the district court entered a consent order in which the plaintiffs agreed to dismiss their motion for injunctive relief and to stay proceedings on their complaint based on the parties' agreement to negotiate and secure preclearance under Section 5 of a redistricting plan which remedied the malapportionment, and which would be agreeable to all parties for use in the 1994 elections. The consent order further provided that commission members elected in 1992 under the malapportioned plan would only serve two year terms, and that their successors would be elected pursuant to the new districting plan in 1994. The

[766] Merritt v. Faust, Order of July 21, 1978.

[767] Holloway v. Raines, Civ. No. 77-27-AMER (M.D. Ga.), Order, February 1, 1979.

parties negotiated a new redistricting plan, corrected the malapportionment, and created two effective majority black districts. Despite this agreement, the county proposed, and had the 1993 Georgia General Assembly adopt, a redistricting plan which plaintiffs did not support. On October 14, 1993, the county submitted its plan for preclearance. Plaintiffs objected to the county's proposed plan in a comment letter to the Department of Justice, because the plan created three majority black districts by population, at 77%, 64%, and 52% respectively, but only one of these had a black voting age population sufficient to create an effective majority black district.

In February 1994, the Department of Justice precleared the county's redistricting plan over the objections of the black community and the plan was implemented during the regularly scheduled 1994 elections.

Toombs County and the City of Lyons

Maxwell v. Aiken

The City of Lyons is the county seat of Toombs County. In 1986, its five member council was elected at-large, with numbered posts, staggered terms, and a majority vote requirement. Although blacks constituted 32.4 % of the city's 4,203 residents, they were totally excluded from city government. In fact, up until 1968, the Lyons City Charter had actually limited eligibility for elective office to white males who were freeholders of real estate within the city. The white males provision was repealed in 1968, but the city retained the requirement that candidates be freeholders of real estate until 1980. Several black residents ran for council seats after the repeal of the white males provision, but all were defeated. No black person had ever been appointed to serve an unexpired term on the council, or serve as a voter registrar, election superintendent, election manager, assistant election manager, election clerk, or poll worker.

Blacks were also severely marginalized in housing, public services, employment, education, and economics. As of 1986, the city fire department had no black members and the city owned and maintained a cemetery in which only white persons were buried. Per capita annual income for blacks was less than half that of whites, with nearly two-thirds (63.7%) of black families living below the poverty level, compared to 15.7% for whites. Black unemployment was more than double (12.4%) that of whites and 15.8% of black housing units lacked complete bathrooms,

compared to none of the housing units occupied by whites.

In 1983, the local NAACP chapter proposed that the city charter be amended to provide for single member districts. The city council responded with a plan of its own, and in 1985 changed the method of electing council members by abandoning at-large elections from four residency districts and adopting elections from four single member districts and one at-large seat. However, the city's districting plan packed 90.2% of the black population into a single district, leaving none of the four others with a black population of more than 23.7%. The plan was submitted for preclearance, but the Attorney General predictably objected in November 1985, because of the "excessive concentration of blacks in a single district and no potential for meaningful voter participation of blacks in any other."[768] The Attorney General also noted:

> In selecting this election method and the districting plan to implement it, our analysis shows that a number of other readily discernible district configurations, both with and without an at-large seat, were available to the city which would have more accurately reflected the black voting strength in the City of Lyons than does the submitted plan.

In response to the denial of preclearance, the mayor and council, at their January 1986 meeting, voted to return to the prior at-large system of city government.

In February 1986, the ACLU filed suit on behalf of six black residents of

[768] William Bradford Reynolds, Assistant Attorney General, to Alvin L. Layne, November 29, 1985.

Lyons, challenging the city's at-large method of electing council members on the grounds that it diluted black voting strength in violation of the Constitution and Section 2.[769] The case was settled in August with the adoption of a single member district plan, with two districts having black populations in excess of 60%. The settlement also required the defendants to appoint black residents to fill vacancies on the city development authority, planning and zoning board, board of voter registrars, city housing authority, and regional library board. The first elections were held under the new system in 1988.

Treutlen County and the City of Soperton

Smith v. Gillis

Flanders v. Soperton

The City of Soperton, located about 70 miles southeast of Macon, is the county seat of Treutlen County, one of the 15 smallest counties in the state. In September 1985, the ACLU filed suit in on behalf of more than a dozen black voters against the Soperton City Council, the Treutlen County Board of Commissioners, and the Board of Education on the grounds that the at-large method of electing all three bodies diluted the voting strength of minority voters in violation of Section 2

[769] Maxwell v. Aiken, No. CV-686-024 (S.D. Ga.).

and the Constitution.[770]

In April 1986, the parties agreed on new plans involving five single member districts for the board of commissioners and the board of education. The board of commissioners was increased from three to five, while the board of education remained at five members. Two majority black districts were created, with black populations of 51.82% and 70.73%, respectively. The plan was adopted in the 1986 general assembly session, elections were held in December 1986, and blacks were elected to both bodies. The City of Soperton, which was almost 50% black, also agreed to five single members districts, two of which were majority black and were majority white. The fifth district had a slight white majority.

Eight years later, in November 1994, the ACLU again brought suit on behalf of black voters in Soperton, challenging the five member city council as malapportioned in violation of one person, one vote. According to the 1990 census, Soperton's population was 2,797, of whom 49.23% were black, and the total deviation among city election districts was 46.15%.[771]

Elections had already been held under the malapportioned plan in November 1993, but the lawsuit sought to enjoin use of the plan in the next regularly scheduled city election in November 1995. A consent order was filed August 7, 1995, in which

[770] Smith v. Gillis, Civ. No. 385-042 (S.D. Ga.)

[771] Flanders v. City of Soperton, Civ. No. 394-067 (S.D. Ga.).

both parties agreed the city election districts were malapportioned, and adopted a districting plan with a total deviation of 6.8% that contained two majority black districts of 75.34% and 72.92% black voting age population, respectively.

A decade later in Treutlen County, African Americans still held two seats on the county school board, including the post of chairman, and in 2004, the two-thirds majority white county elected a black probate judge. Nevertheless, significant evidence of racial division remains. Although a black student was selected as the Treutlen High School homecoming queen in 2005, black and white students still attended segregated, privately sponsored high school proms, and the majority white school board declined to end the practice.[772]

Troup County

Cofield v. City of LaGrange

In October 1993, the ACLU filed suit on behalf of black voters, who were members of the NAACP and the Troup County Coalition, challenging at-large elections for the mayor and six member city council of LaGrange, the Troup County seat.[773] Located in the Piedmont foothills about 60 miles southwest of Atlanta, LaGrange was 42% black, but only one black person had ever been elected to the city

[772] Don Schanche, Jr., "Prom Night in Black and White: Treutlen community still divided over concept of unified prom," Macon Telegraph, April 26, 2005.

[773] Cofield v. City of LaGrange, Civ. No. 3:93-CV-97-JYC (N.D. Ga.).

council. The plaintiffs also sought to enjoin, for failure to comply with Section 5, the implementation of a 4-2-1 plan, which the city had adopted to replace its existing at-large system.

The effects of past discrimination in LaGrange were starkly apparent. A minority (44%) of black residents had high school diplomas while 65% of whites were high school graduates. White residents had more than 2.5 times the per capita income of blacks ($16,000 as compared to $6,000 annually), and 35% of African Americans lived below the poverty line, compared to 10% of whites. Unemployment was three times higher for African Americans.[774] As a direct consequence of their depressed socio-economic status, blacks were only 25% of the city's registered voters.

In 1992, prior to the filing of the lawsuit, black residents of LaGrange proposed a plan to city officials utilizing six single member districts for the council, three of which were majority black, to replace the existing at-large system, with the mayor continuing to be elected at-large. In response, and at the city' request, the general assembly enacted legislation providing for a referendum in LaGrange in 1993, on whether to adopt a districting plan with six single member districts for the council (only two of which were majority black) or a plan with four single member seats and two seats plus the mayor elected at-large (the 4-2-1 plan). The latter plan

[774] Cofield v. LaGrange, 969 F. Supp. 749, 757 (N.D. Ga. 1997).

would have effectively guaranteed white control of a majority of the city council.[775] The plan proposed by black voters was not included as one of the referendum options. The referendum also called for an election to be held in November 1993, using whichever plan was adopted.

The voters selected the 4-2-1 plan, and the city submitted it for preclearance. The Department of Justice requested more information, and on motion of the plaintiffs, the three-judge district court enjoined the pending election under the 4-2-1 plan for failure to secure preclearance under Section 5.[776] The Attorney General subsequently objected to the plan because the city had not shown that the retention of two at-large seats for the council would not cause dilution of minority voting strength:

> Our analysis reveals that the present-day effects of the history of racial discrimination in LaGrange and in Troup County result in the disparities that exist in the socio-economic status between black and white citizens and lower black registration rates. Moreover, the electoral history in the city and county suggest the existence of a pattern of racially polarized voting in the city.[777]

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[775] Ga. Laws 1993, Act 57.

[776] Cofield, 969 F. Supp. at 756.

[777] James P. Turner, Acting Assistant Attorney General, to James R. Lewis, December 13, 1993, p. 3. This was not the first objection to voting change in Troup County. In 1973, the Department of Justice Department had objected to majority vote and numbered post requirements adopted by Hogansville, another Troup County town, after a black candidate was first elected to office: "Our analysis has shown that where, as in Hogansville, there is increasing participation in the political process by the black community, a majority and designated post requirement have the practical effects of eliminating the potential for minority voters to elect candidates of their choice through the use of single-shot voting. Furthermore, the imposition of a majority requirement on a pre-existing designated post system similarly reduces the potential voting strength of minority groups. These changes occurred after the first black to be elected to the city council was elected under the plurality

The city also failed to show that the 4-2-1 plan did not protect incumbents at the expense of black voters. "While we recognize that the desire to protect incumbents may not in and of itself be an inappropriate consideration," the Attorney General wrote, "it may not be accomplished at the expense of minority voting potential." The city asked for reconsideration, but it was denied by the Department of Justice:

> As explained in the December 13, 1993, letter, our Section 5 objection was based on the process that led to the adoption of the new electoral plan, including the reasons provided for the rejection of alternative electoral plans favored by the black community. We also assessed the new plan in light of the apparent pattern of racial bloc voting in the city and the lower rates of electoral participation for black persons compared to white persons. These circumstances would serve to limit the ability of black voters to elect candidates of their choice to the two black-majority single-member districts. In light of these factors and the others mentioned in our objection letter, we concluded that the city had failed to demonstrate that the proposed plan was not adopted, at least in part, in order to minimize black voting strength.[778]

In an attempt to adopt a plan that would meet the Section 5 objections, the city council set up a biracial committee to study substitute plans. The committee was unable to agree on a plan, but the council adopted one of the plans the committee had considered, but which was objected to by the black community. The plan kept four single member districts, two of which were majority black, and

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system." J. Stanley Pottinger, Assistant Attorney General, to James T. Hunnicutt, August 2, 1973.

[778] Deval L. Patrick, Assistant Attorney General, Civil Rights Division, to James R. Lewis, April 1, 1994, pp. 1-2.

changed the two at-large seats to two "super district" seats. Each of these super districts was created by combining two of the single member districts, making one super district majority black and the other majority white. Each super district would elect one member. The plan also added a seventh council member, plus the mayor, elected at-large. The seven seat (4-2-1-1) plan was then adopted by the general assembly in 1994.

The plan was submitted for preclearance, but the Attorney General objected, noting the minority community's opposition to the addition of the seventh seat:

> At the outset, we note that the city has made significant improvements to the objected-to plan by changing at-large seats to "super district" seats and in so doing, took action that would have addressed fully our concerns with the earlier plan.
>
> The city has gone further, however, and has added an at-large position to the governing body in an apparent effort to limit black representation. Based on the city's actions and decisions during the process to adopt a plan to overcome our objection, it seems that the proposed plan was selected more to maintain the existing white control over the council than to provide black voters with an equal opportunity to enjoy their voting potential.[779]

Following the objection by the Department of Justice, the city abandoned its efforts to adopt a districting plan and implemented the at-large system at the 1995 elections, during which two black candidates were elected - one ran unopposed, and the other had been appointed to fill an unexpired term, and thus ran as an incumbent.

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[779] Deval L. Patrick, Assistant Attorney General, to James R. Lewis, October 11, 1994, p. 1.

The ACLU litigation challenging the at-large system as violating Section 2 proceeded to trial in April 1996. The court entered a detailed opinion finding that the challenged system, with numbered posts and a majority vote requirement, diluted minority voting strength. Among the court's findings were:

> *During segregation, black schools had significantly fewer resources than white schools, and were "run down, overcrowded, and only went through the eleventh grade."
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> *"The present effects of this discrimination are real," and "continue to translate into diminished political influence and opportunity for LaGrange's African-American citizens."
>
> *The black population of the city "is largely segregated."
>
> *"[D]e facto segregation remains in local organizations and churches. The Shriners and Masons have separate white and black lodges. Neither the Rotary Club nor the Highland Country Club have black members."
>
> *"LaGrange City-Council elections exhibit racially segregated voting."
>
> *Minority candidates for public office had experienced "extremely limited success."
>
> *"[T]he vestiges of LaGrange's history of discrimination continue to impact the ability of LaGrange's African-American citizens to elect their chosen candidates."[780]

After the court's decision, the parties reached an agreement on an election plan using two three-member districts, one majority white (83.5%) and one majority black (68.5%). The plan was subsequently approved by the Department of Justice for the November 4, 1997, election.

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[780] Cofield, 969 F. Supp. 749, 756-57, 769, 776-777.

As events in LaGrange clearly show, it took four years of litigation and repeated rounds of Justice Department objections, but Section 5 ultimately proved essential to securing a plan that provided black voters an equal opportunity to elect candidates of their choice.

Upson County and the City of Thomaston

Beginning in 1979, the ACLU initiated litigation on behalf of black voters in Upson County under the Constitution and the Voting Rights Act, challenging discrimination in city and county government, including governance of the public schools. The first lawsuit was filed against the Thomaston School Board in 1979 and continued until 1983.[781] Subsequent litigation involved the ACLU's defense of a black city council candidate, William Hughley, to whom the city refused to administer the oath of office after he won the election.[782] A separate lawsuit also was filed by the ACLU on Hughley's behalf against the mayor and council charging them with violations of the Voting Rights Act and the Constitution.[783]

Searcy v. Hightower

[781] Searcy v. Hightower, Civ. No. 79-67-MAC (M.D. Ga.).

[782] City of Thomaston, Georgia v. William D. Hughley, File No. 11643 (Superior Court of Upson County, Georgia) and Hughley v. City of Thomaston, 180 Ga. App. 207 (1986).

[783] Hughley v. Kersey, No. CIV-85-445-1-MAC (M.D. Ga.).

With a population of approximately 26,000 in 1980, Upson County, located in west central Georgia, was 27% black, yet 55% of the more than 3,000 people living below the poverty line were African American. Of the 4,058 students that completed high school in 1980, only 16% were black. The demographics of Thomaston, the county seat, were similar to that of the county. With a population of slightly less than 10,000, the City of Thomaston was approximately 24% black, yet no black person in living memory had ever been elected to the city council.

While some Georgia counties chose the members of their school boards by racially exclusive grand juries, the Thomaston School Board was appointed by an institution that was, if anything, even more elite and racially exclusive than the grand jury. Under a unique self-perpetuating scheme, the Thomaston school board appointed its own members. Terms of office were staggered and each year the members selected a new person to replace the member whose term was expiring.

Education was traditionally provided to whites in Thomaston by the R. E. Lee Institute, a private school incorporated in 1906 for the exclusive benefit of "white pupils and patrons," and named after the famous Confederate general. The institute eventually fell upon hard financial times, and in 1915 the general assembly created a public school system from the R. E. Lee Institute. The trustees of the institute, who were all white, were named as the new members of the public school board, and the

self-perpetuating method of membership selection was installed.[784] For a period of 61 years the board never appointed a black person to serve on the school board. The board also operated a segregated school system until 1970, when it was forced to comply with the Brown decision. Even when the R.E. Lee Institute finally desegregated, the school kept many of the traditions of its all white predecessor, including the confederate name.

Not only was the school board racially exclusive, but its membership was dominated by a handful of prominent local families. The Hightower family, owners of a textile mill, placed six members on the board, the Adams family five, and the Hinson, Varner, and Thurston families placed two each.[785] With the assistance of the ACLU, George Searcy and several other black Thomaston residents, including the Upson County Chapter of the NAACP, filed suit in March 1979, alleging that the method of selecting the school board violated the Constitution and Section 2.[786] In response to the suit, the school board finally appointed a black person, the Rev. Willis Williams, to the board and adopted a policy that it would not discriminate in filling future vacancies.

The district court dismissed the lawsuit on the grounds that the selection

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[784] Searcy v. Williams, 656 F.2d 1003, 1005 (5th Cir. 1981).

[785] Id. at 1006 n.1.

[786] Searcy v. Hightower, Civ. No. 79-67-MAC (M.D. Ga.).

system was not unconstitutional and that the Voting Rights Act did not apply to the appointment method of choosing school board members. The court of appeals, however, reversed. It found the system for selecting school board members "was tainted with a segregative origin." The evidence of discriminatory administration was "overwhelming," and the system had "clearly operated purposefully to further discrimination." Rather than accept the defendants' representations that they would no longer discriminate, the court invalidated the selection scheme itself. Citing the isolation of the board from "public pressure," it held there was "no assurance that the pattern of past discrimination is forever broken."[787] The court further ordered the district court to retain jurisdiction until the legislature adopted a new plan for selecting the school board members. The school board sought review in the Supreme Court, but it summarily affirmed the decision of the court of appeals.[788]

The general assembly enacted a statute in 1983, providing for appointments to the school board by the mayor and city council and requiring "that all segments of the community which it serves are adequately and properly represented on said board without discrimination as to any segment."[789] Under the new system, the board nominates three candidates for each vacant school board position, one of

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[787]656 F.2d at 1010-11 and n.9.

[788] Hightower v. Searcy, 455 U.S. 984 (1982).

[789] Ga. Laws 1983, p. 3506.

whom is appointed by the city council. The action of the legislature was no doubt influenced by the continuing federal commitment to civil rights enforcement evidenced by the extension and amendment of the Voting Rights Act the preceding year.

The board subsequently adopted a resolution that two of the seven members of the board were to be racial minorities. The board, however, refused to consent to entry of an order by the court adopting the new remedy and making it binding on the defendants. The plaintiffs objected to the new plan because: (1) the resolution was a promise revocable at will by the board; (2) by retaining total control over nominations, the board had failed to establish a new plan as required by the court; and (3) the city government, which was exclusively white, had itself discriminated against blacks in making appointments to local boards and commissions. The district court indicted that it would not approve the new legislation over the plaintiffs' objections, whereupon the defendants agreed to entry of an order on June 29, 1983, requiring them to insure the membership of two blacks on the school board (more or less depending on the black percentage of the city's population). The Thomaston case may be the only one in which a federal court has approved proportional representation as a remedy for a voting rights violation.

In November 1983, the ACLU notified the legislative representatives of Upson County that it had been retained by local citizens to challenge the at-large method of electing county commissioners, members of the Thomaston City Council,

and members of the Upson County Board of Education. Although approximately one quarter of the population of Thomaston was black, the mayor and five council members, who were elected at-large, were all white.

Several years earlier, both the city and county had been sued for employment discrimination and lost, and both were ordered to pay damages and attorneys fees.[790] Faced with the prospect of more litigation, the Upson County Commission asked state legislators to introduce legislation in 1984, to increase the number of county commissioners from three to five, with four of the commissioners being elected by district and the fifth - the commission chairman - running at-large.

Two legislators balked at introducing a bill calling for single member districts without including a requirement that the change be submitted to voters in a referendum. Since everyone believed a referendum would likely fail, an agreement was reached to have the county take out a newspaper advertisement explaining that a federal lawsuit to require single member districts was likely to succeed and would cost the county a considerable amount of money. In the published advertisement the commissioners explained why they felt compelled to dismantle at-large voting:

> After long and careful consideration, we decided that the commandment from Washington was 'crisp and clear,' and if we were to avoid expensive Civil Rights' (sic) litigation in Federal Court, it would be necessary that a plan be prepared and submitted to the 1984 General Assembly which would comply with the Federal Law and Court decisions.[791]

[790] Bentley v. City of Thomaston, No. CIV-79-235-MAC (M.D. Ga).

[791] "Important Notice to the People of Upson County," Hometown Journal, February 20, 1984, p. 11A.

The legislation was approved and then submitted to Upson County voters for a referendum in April 1984, who also approved the measure. Of the four districts that were created, one was 66% African American, while the three others were 10%, 16%, and 18% black, respectively. A special election was then held in conjunction with the August 1984 primary to fill four of the five commission positions. Three African Americans qualified for District One, and after a run off, one of them received the nomination and ran unopposed in the general election.

The county school board, which had one black member out of seven, introduced a redistricting bill but refused to hold any discussions with the ACLU regarding its proposed new plan which created six districts and retained one at-large seat. One district was projected at 71% African American, but the next highest black population district would only have been 48%. Additionally, the legislation called for no election to be held for another two years, until 1986. The statute was submitted to the Department of Justice pursuant to Section 5 and precleared.

The City of Thomaston adopted legislation calling for four districts, retaining a mayor and an at-large seat. The plan was acceptable to the ACLU clients and was implemented in the 1985 election.

City of Thomaston, Georgia v. William D. Hughley

Hughley v. City of Thomaston

Hughley v. Kersey

During the 1985 elections in the City of Thomaston, an African American candidate, William Hughley, was elected. However, no sooner had Hughley won than the city refused to administer him the oath of office and filed suit against him in state court, alleging that he was ineligible to serve because of a conflict of interest based upon his employment by the Thomaston-Upson County Recreation Commission.[792] Notably, Hughley had been recruited for the position of assistant director of athletic programs to comply with the remedial provisions of the earlier employment discrimination lawsuit.

The state trial court agreed with the city that Hughley was ineligible to serve, but was reversed on appeal on the grounds that even if there had been a conflict of interest the remedy was not disqualification from office.[793] The ACLU represented Hughley in that action and filed a separate lawsuit on his behalf against the mayor and the city council in federal court under the Constitution and Sections 2 and 5 of the Voting Rights Act.[794] In the federal case Hughley contended, among other things, that the conflict of interest rule was a new voting practice or procedure that had never been precleared under Section 5. Hughley also sought back pay and damages for the city's refusal to permit him to serve as a council member.

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[792] City of Thomaston, Georgia v. William D. Hughley, File No. 11643 (Superior Court of Upson County, Georgia).

[793] Hughley v. City of Thomaston, 180 Ga. App. 207 (1986).

[794] Hughley v. Kersey, No. CIV-85-445-1-MAC (M.D. Ga.).

The city persisted in its efforts to keep Hughley off the council despite the fact that whites who had similar "conflicts of interest" had been elected to the city government and were allowed to serve. At the hearing on Hughley's motion for injunctive relief held in the federal lawsuit, a witness for the city testified that while serving on the city council he was advised that if he took a job with the Thomaston-Upson County Recreation Commission a conflict of interest would result, and that as a result he did not take a job that had been offered to him. Subsequently, the same witness executed an affidavit impeaching his prior testimony and admitting that while serving on the city council he was in fact employed by the recreation commission.

Ultimately, the city agreed to settle the federal case and pay Hughley $14,500 in back pay, damages and attorney's fees. He was finally sworn in on November 18, 1986.

There is little doubt that the "crisp and clear" message from Congress in 1982 that equal voting rights continue to be protected by federal law played a critical role in the adoption of election procedures in Upson County providing minority voters an equal opportunity to elect candidates of their choice.

Warren County

Warren County Branch of the NAACP v. Haywood

Warrenton, the county seat of Warren County, is located in Georgia's coastal plain. Based on the 1980 census, Warrenton was majority (61%) black. Its five member council and mayor were elected at-large, and prior to 1987, black candidates had run for the council 11 times, but were successful only once. Due in part to lower socioeconomic status, black political participation was depressed, and white voters always constituted a substantial majority of those actually voting in city elections.

The city was also characterized by deep racial polarization. Church membership was segregated along racial lines, membership in the Warrenton Kiwanis Club was all white, housing was segregated, and only white persons were buried in the cemetery operated and maintained by the city. When schools were desegregated by court order a private school, the Briarwood Academy, was established in Warren County. No black child attended school there. In 1986, when Charles Logan, the only black candidate ever to win a contested at-large election in Warrenton, ran for mayor, the white incumbent was quoted in the newspaper as referring to Logan as a "nigger."[795] Black candidates declined to campaign door-to-door in the white community because the reception they received was generally hostile.

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[795] The Warren County Branch of the NAACP v. Haywood, No. CV 187-167 (S.D. Ga.), Plaintiffs' Proposed Findings of Fact and Conclusions of Law in Support of Their Motion to Adopt Their District Voting Plan, May 9, 1989, pp. 2-8.

Like the City of Warrenton, Warren County was also majority (60%) black. It was not until 1984, when the method of electing the three member county commission was changed from at-large voting to the use of two single member districts and one commissioner elected at-large, that the first black person was elected to the commission. No black person had ever been elected sheriff, clerk of court, probate judge, superintendent of schools, or to the general assembly from a district lying in whole or in part in Warren County. And the twelve member Warren County Democratic Executive Committee, which was elected from six voting districts, remained all white until 1982 or 1983, when two black members were first elected.

Black voters of Warrenton and the Warren County Branch of the NAACP, represented by the ACLU, filed suit in 1989, challenging at-large elections for the City of Warrenton.[796] The court conducted a hearing and provided the parties an opportunity to settle the case and present proposed remedial plans. Plaintiffs proposed a plan creating two districts, one majority black electing three council positions, the other majority white electing two council positions, and a mayor elected at-large. Defendants' proposed plan provided for two districts, each electing two council members, and the mayor elected at-large. One district was majority black (80.46%), the other majority white (58.97%).

[796] The Warren County Branch of the NAACP v. Haywood.

Despite its acknowledgment of racial polarization, depressed black socioeconomic status, and low black voter turnout, the court adopted the defendants' plan. It noted that "[h]istorical patterns and present-day reality indicate that socially and economically depressed elements of the black population in Warrenton continue to endure racial discrimination in political and other processes." Nevertheless, the court rejected plaintiffs' proposal on the grounds that it "may cause rancor, further racial polarization, and reduced incentive [on the part of black voters], because of the abnormally high level of participation in city government which would be had by the voice of the black electorate from the 'super district' of the plaintiffs' plan." In the court's view, and despite the fact that Warrenton was majority black, the creation of a majority black district electing three members of the council "would give the appearance of the imposition of a penalty against one racial group or an undue reward to another."[797] The plaintiffs elected not to appeal the adoption of the city's 2-2-1 plan.

Washington County

Washington County Branch of the NAACP v. Washington County

In 1992, the Washington County Branch of the NAACP, represented by the ACLU, challenged the malapportionment of the Washington County Board of

[797] Id., Order of July 13, 1999.

Commissioners and Board of Education.[798] The district court enjoined the July 21, 1992, primary election for the governing boards, and the county agreed to seek redistricting from the Georgia General Assembly in its 1994 session. The general assembly enacted a plan which had four single member districts and one at-large seat, with two majority African American districts. The Department of Justice precleared the plan, and the county implemented it in July 1994.

[798] Washington County Branch of the NAACP v. Washington County, Civ. No. 92-256-3-MAC (M.D. Ga.).

Wayne County

Freeze v. City of Jesup

Black residents of Jesup, the seat of Wayne County, have long been known for their political activism. One of the many Georgia divisions of the Universal Negro Improvement Association was located in Jesup, where the groups' members promoted the ideals of Marcus Garvey, such as pride in blackness and a reliance on self-defense rather than purely legal protection.

Beginning in 1955, the board of commissioners of Jesup was composed of six members elected at-large by plurality vote to staggered terms, with one of the members designated to serve a one year term as mayor. In 1968, the size of the board was reduced to four commissioners and a mayor elected at-large, with numbered post and majority vote requirements. Although the 1968 changes were subject to Section 5, the city did not submit them for preclearance.

In 1985, the city again changed its method of elections to a two district system. One of the districts was 97% black and elected one member to the commission, the other was 94% white and elected three members to the commission. A fifth member, the mayor, was elected at-large. All members were elected by majority vote. The city was 30.5% black, and the first black person ever elected to the commission was elected from the 97% black district.

After conversations and correspondence with the Department of Justice, the city sought preclearance of the 1968 and 1985 changes. The Attorney General

objected to the numbered post and majority vote requirements adopted in 1968 because "racial bloc voting . . . appears to exist in the city," and "the addition of numbered posts and a majority vote requirement eliminates the ability of black voters to single-shot vote for candidates of their choice and, therefore, is retrogressive, thereby having the prohibited racial effect."[799]

As for the changes adopted in 1985, the Department of Justice concluded "most of the county's black population is overconcentrated in the single-member district," while the three member district "is geographically large and essentially retains features of the at-large election system." In addition, "the material submitted concerning the county commissioners' deliberations shows that they were well aware of these limiting aspects of the submitted plan and supports an inference that the plan was designed and intended to limit the number of commissioners black voters would be able to elect."[800]

Rather than submit a plan that was responsive to the department's objections, not to mention the needs and interests of minority voters, the commission voted on July 8, 1986, to return to the pre-1968 method of electing a six member commission at-large and by plurality vote.

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[799] William Bradford Reynolds, Assistant Attorney General, to Robert B. Smith, Attorney for the City of Jesup, March 28, 1986.

[800] Id.

In response, black residents, represented by the ACLU, filed suit against the city, asserting that its voting system was purposefully discriminatory and diluted minority voting strength in violation of the Constitution and Section 2.[801] After several rounds of negotiations, the parties entered into a consent decree on October 15, 1986, which provided for the creation of six single member districts, two of which were majority black, and an at-large, no-vote, no-veto, mayor. The defendants also agreed to appoint city residents to boards, authorities and commissions in proportion to the racial percentages of the population.

Wilcox County

Dantley v. Sutton

Rochelle, the largest city in rural Wilcox County, had a black population of 44% based on the 1980 census. No black person, however, had ever been elected to the city council, which consisted of six council members and a mayor, all elected at-large. Wilcox County also had a substantial (32%) black population, yet no black person had ever been elected to the five member county government, which was also elected at-large.

Wilcox County had a long history of racial discrimination and racially polarized voting. According to census data, the unemployment rate for non-whites

[801] Freeze v. Jesup, Civ. No. 286-128 (S.D. Ga.).

in this agricultural county was twice as high as the rate for whites, and non-whites were three times as likely to have incomes below the federal poverty level. The City of Rochelle had an ordinance maintaining segregated burial grounds.[802] As a result of a law passed in 1962, the city was required to designate the race of voters on its voters' lists, and to be eligible to be mayor or alderman a person had to be "the owner of real property in the corporate limits" of Rochelle and "have paid all taxes and licenses."[803]

In 1984, the ACLU filed suit in federal court on behalf of black voters of Rochelle challenging at-large voting for the city council as violating the Constitution and Section 2.[804] The lawsuit also charged the city with violating Section 5 for failing to preclear various annexations made in 1967. In addition, in 1984, there was a vacancy on the city council. Under the city charter the council had the power to appoint a person to fill a vacancy until the end of the term, the council could not find a white who was willing to serve, and rather than appoint a black person to fill the vacancy, the council simply allowed the spot to go unfilled. Plaintiffs alleged that

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[802] City of Rochelle Ordinances, Cemeteries, Section 5, adopted August 10, 1909: "All interment of whites within the corporate limits of the city shall be in Pine View, and all interments of colored citizens shall be in Oak Grove, and any person or persons violating this ordinance shall be punished as prescribed in Section 95 of this Code."

[803] Ga. Laws 1962, pp. 2791-2814.

[804] Dantley v. Sutton, Civ. No. 84-165-ALB-AMER (M.D. Ga.).

the failure to fill the vacancy was another voting change subject to Section 5, which the city had failed to submit for preclearance.

Prior to filing suit, the ACLU, on behalf of black voters, attempted to negotiate a new city election plan. Local officials, however, were only willing to agree upon a district voting plan that reduced the number of council members from six to five. Because such a reduction would have limited black voters to only two majority black districts, rather than the three majority black districts possible under a six member plan, the negotiations failed.

In September 1985, a three-judge court enjoined further use of the unprecleared annexations absent compliance with Section 5.[805] Four days later, with the consent of the parties, the single-judge court invalidated the existing at-large system and directed plaintiffs and defendants to submit proposed redistricting plans within 30 days.

Local officials and plaintiffs submitted plans and on April 18, 1986, the court adopted a plan proposed by defendants that divided the city into two districts. One district was majority black and elected two council members. The other district was majority white and elected three council members. Under the defendant's plan, the mayor would continue to be elected at-large. The Department of Justice precleared the new plan on July 21, 1986, but local officials failed to schedule new elections.

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[805] Id., Order of September 13, 1985.

After the court again ordered new elections, two African Americans were elected to the council in May 1987.

Teague v. Wilcox County Board of Commissioners

The ACLU also filed suit in federal court on behalf of black voters and the NAACP in Wilcox County, charging that the at-large method of electing the five member county board of commissioners violated the Constitution and Section 2.[806] As with the city of Rochelle, the plaintiffs had negotiated with the county in an effort to replace at-large voting with single member districts. Although an agreement had been reached on a redistricting plan in February 1987, the local legislative delegation refused to introduce a bill in the general assembly adopting the plan, unless the legislation included a referendum on the change that would be submitted to the voters in Wilcox County. After the law suit was filed, the parties agreed to submit a consent order to the court providing that the plaintiffs had established a prima facie case that at-large elections for the board of commissioners violated Section 2, and adopting the previously agreed upon single member district plan.

At a hearing in July 1987, the court observed, "[t]here's evidence that it was suggested it would be best to let a suit be filed and have the federal courts settle the matter, thereby avoiding the decision by the elected officials of Wilcox County." Commenting further on the case, the court said:

> On occasion, the federal courts have gotten involved in matters that, quite frankly were none of their business. On other occasions, however, the rights of citizens, guaranteed under the Bill of Rights and later amendments to the United States Constitution, can only be upheld by the federal courts. And this

[806] Teague v. Wilcox, No. CV-87-80-ALB-AMER (M.D. Ga.).

> is one of those cases . . . The rights of citizens are guaranteed by the Constitution. . . They are not approved by referendum or mass meetings. Quite frankly . . . the social history of the south would have been far different if over the past 33 years there had been more concern by state legislators for the rights of all the people rather than for the best interest of the majority.[807]

The court approved the consent order which called for the board of commissioners to be elected from five districts, with two of them majority black at 62.1% and 53.8%, respectively. When the parties were unable to agree on a schedule of elections or on plaintiffs' attorneys' fees and costs, they returned to court where elections were ordered and attorneys' fees awarded.

When the general assembly passed local legislation in 1988 to implement the redistricting plan stipulated in the 1987 consent order, the legislation contained an unintentional drafting error that mistakenly called for implementation of the redistricting plan at the 1988 general election. In point of fact, the redistricting plan already had been implemented at a special election in September 1987, as the court order had originally required.[808] As a result, the court enjoined county officials from implementing the faulty special election provisions of the 1988 law.

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[807] Id., Transcript of Order of July 30, 1987, pp. 1-2, 4-5.

[808] Sewell R. Brumby, Legislative Counsel to Hon. Duross Fitzpatrick, May 3, 1988.

Wilkes County and the City of Washington

Avery v. Mayor and Council of the City of Washington

The City of Washington (population 4,279) is the county seat of Wilkes County, which is located in east Georgia. In 1990, the city was majority (60%) black, yet no more than one black person had ever served on the six member city council at any given time. Voting was at-large, and black voter registration, due to socio-economic disparities and the longstanding effects of discrimination, lagged behind that of whites. The combination of at-large voting and depressed black voter registration allowed whites to control the outcome of city elections.

The county, by contrast, elected its county commission from districts. Although the county was 46% black, no black candidates had ever been elected to the county government. In 1972, after the extension of the Voting Rights Act and an increase in black registration, the county adopted at-large elections for both its county commission and board of education. The changes were not submitted for preclearance until 1976, when the Attorney General objected to the new measures:

> According to information provided us no black has ever been elected to office in Wilkes County and there are indications that a pattern of racial bloc voting sufficient to preclude election of any minority member under the at-large system of electing may exist. Our examination also reveals evidence of residential patterns in the City of Washington, the principal city in the county, sufficient to offer under a system of fairly drawn single member districts a reasonable opportunity for minority political representation.
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> Under these circumstances we are unable to conclude, as we must under the Voting Rights Act, that the use of the at-large system of election in Wilkes County does not have the effect of

discriminating on account of race or color.[809]

The county then brought a declaratory judgment action, but the District of Columbia Court denied preclearance. It held the use of at-large elections in Wilkes County "has the effect of abridging the right to vote of blacks," and the plaintiffs "failed to meet their burden of demonstrating that the adoption of the voting changes at issue was done without a discriminatory racial purpose."[810] The Supreme Court summarily affirmed.[811] Even though single member district elections were retained for both county commission and board of education elections, none of the districts were majority black. After the 1980 census, the districts were redrawn, and two of the four single member districts were majority black at 66.8% and 52.5%, respectively, but racial polarization, lower rates of black voter registration and turnout, and other factors prevented the election of blacks to the county commission. One African American was able to win election to the board of education, however.

In 1988, the local NAACP requested the City of Washington to change to single member district elections.[812] The council voted unanimously to proceed with districts in 1989, however, no action was taken over the next three years. With city

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[809]J. Stanley Pottinger, Assistant Attorney General, to Wilbur A. Orr, June 4, 1976.

[810] Wilkes County v. United States, 450 F. Supp. 1171, 1178 (D.D.C. 1978).

[811] Wilkes County v. United States, 439 U.S. 999 (1978).

[812] Rev. G. L. Avery, President, Wilkes County N.A.A.C.P. to E.B. Pope, Mayor, City of Washington, May 31, 1988.

council elections scheduled for November 1992, the ACLU contacted the city attorney in August on behalf of its clients, who included local leaders of the NAACP, to explore the possibility of adopting a racially fair election scheme.[813] The parties agreed to establish two three-member districts for city council elections, one 91.83% black and the other 71.66% white, with the mayor elected at-large. By agreement, the ACLU filed suit on August 20, charging that the at-large method of electing the city council violated Section 2, and the case was settled the next day.[814] The voting change was submitted to the Department of Justice for expedited review and was precleared on September 15, 1992.[815]

Evidence of racial polarization among voters in Wilkes County continues to the present day. In March 2000, the Department of Justice denied preclearance to a voting change proposed by the City of Tignall (population 653), the second largest municipality in the county.[816] Although Tignall was 43% black, the city's five member council was elected at-large, and prior to 1999, only one council member was black. In 1999, the city amended its charter to change the method of election to include numbered posts and staggered terms, and to abandon its plurality vote

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[813] Kathleen L. Wilde, ACLU Staff Counsel, to Virginia Ledbetter, City Clerk, City of Washington, August 4, 1992. See, also, Minutes of the Regular Meeting of the Washington City Council, August 17, 1992.

[814] Avery v. Mayor and Council of the City of Washington, Georgia, Civ. No. 192-169 (S.D. Ga.).

[815] John R. Dunne, Assistant Attorney General, to Pete Kopecky, Esq., September 15, 1992.

[816] Bill Lann Lee, Acting Assistant Attorney General, to Melvin P. Kopecky, Esq., March 17, 2000.

system in favor of a majority vote requirement. The Department of Justice outlined its concerns in a lengthy letter interposing objections to the changes:

> Based on our analysis of the available information, it appears that voting in Tignall is racially polarized and that minority voters under the existing system have achieved some success by limiting the number of votes that they cast for city council seats in order to elect their candidate of choice. This technique is referred to as single-shot voting. Under the proposed system, each seat on the council that is up for election will be identified as a separate post and candidates will compete against one another for that specific post. This will eliminate the opportunity minority voters have had under the existing system to boost the effectiveness of their vote for their preferred candidate through single-shot voting.
>
> The imposition of numbered posts and a majority vote requirement, in addition, are more likely to result in head-to-head contests between minority and white candidates for the city council. Minority candidates who are forced into head-to-head contests with white candidates in this racially polarized voting environment are more likely to lose than would be the case under the existing system with concurrent terms and a plurality vote requirement.
>
> We have also examined the implications for minority voters of staggering the terms of council members, so that only two members are elected in one election cycle and three members are elected the next. In this context, it appears that staggering council terms will reduce the opportunity of minority voters to elect their candidate of choice through single-shot voting by reducing the number of positions to be voted upon and, thereby, limiting the effectiveness of this vote-withholding technique. The 1991 and 1995 election results appear to support this conclusion because the minority-preferred candidate won, but placed fifth and third, respectively, in contests in which only a few votes separated the winning and losing candidates.
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> It appears, therefore, that the city's proposed addition to its at-large election system of numbered posts, a majority vote requirement and staggered terms will lead to a worsening of minority electoral opportunity, which is prohibited by Section 5.[817]

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[817] Id.

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KANSAS

Kansas Voter Registration

League of Women Voters of Kansas v. Graves

In an effort to counter the deleterious effect on minority voter participation that many registration systems had caused, Congress passed The National Voter Registration Act (NVRA) in 1993, requiring states to make voter registration available by mail and in person at state agencies, such as the department of motor vehicles and offices that provide services to the poor or the disabled. The NVRA required the State of Kansas to enact legislation by January 1, 1995, implementing the act's provisions to make voter registration more widely available, but the state failed to pass the necessary legislation by the compliance deadline.

With no implementing legislation in place well past the deadline, the League of Women Voters of Kansas, the Kansas AFL-CIO, and other organizations and citizens filed suit with the assistance of the ACLU on August 8, 1995, to require the state to comply with and implement the NVRA.[818] Three months later, on November 30, 1995, the district court ordered the state to comply with the act, including making available to plaintiffs all information relating to the state's implementation plan, and reinstating all voters who had been purged from the rolls in violation of the NVRA. The court gave the legislature until June 15, 1996, to adopt

[818] League of Women Voters of Kansas v. Graves, Civ. No. 95-2350-KHV (D. Kan.).

implementing legislation.

In March 1996, the legislature adopted NVRA enabling legislation, and on June 28, 1996, the court dismissed the case with the agreement of all the parties.

LOUISIANA

STATEWIDE ISSUES

Congressional Redistricting

Hays v. Louisiana

In the aftermath of Shaw v. Reno, a three-judge court invalidated Louisiana's Fourth Congressional District as an instance of unconstitutional "race-conscious" redistricting.[819] The Supreme Court agreed to review the case, and the ACLU filed an amicus brief supporting the appellants (defendants below) and the constitutionality of the challenged district. The ACLU argued in its brief that affirmance would radically alter the application of the Voting Rights Act and result in a purge of minorities from elected offices at all levels.

Amicus furthered argued that the consideration of race in redistricting was not per se suspect and was different from the consideration of race in the allocation of scarce employment or contractual opportunities where an independent claim of entitlement existed. Any racial group may complain if its voting strength has been abridged, but a non-dilutive, race-conscious redistricting plan injures no one. Congress has also sanctioned the use of majority minority districts and concluded that they do not isolate voters or increase racial tension.

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[819] Hays v. Louisiana, 862 F. Supp. 119 (W.D.La. 1994).

The court did not reach the merits of the case, but dismissed the action in June 1995, on the grounds that none of the plaintiffs were residents of the challenged district and therefore lacked standing.[820]

NVRA Enforcement

ACORN v. Fowler

Following passage of the National Voter Registration Act (NVRA) by Congress in 1993, Louisiana enacted implementing legislation on June 29, 1994, which it then submitted to the Department of Justice for preclearance.[821] While the department approved most of the plan on November 21, it objected to a provision of the law which required first time voters who had registered by mail to present photo identification at the polls. As of 1990, the population of Louisiana was 30.6% black, and, according to the Justice Department, the ID provision would "eliminate certain of the gains to minority voters mandated by Congress in enacting the NVRA" and would weigh heaviest on "the very group of voters whose political participation in federal elections the NVRA seeks to encourage through increased access to voter registration opportunities."[822]

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[820] Louisiana v. Hays, 515 U.S. 737 (1995).

[821] Third Extraordinary Session of the 1994 Louisiana Legislature, Act 10 (HB 209).

[822] Deval L. Patrick, Assistant Attorney General, to Sheri Marcus Morris, Assistant Attorney General of Louisiana, November 21, 1994, p. 2.

After the Louisiana Attorney General issued an opinion that the objected to provisions could be severed from the enabling legislation, the state issued emergency regulations to implement the NVRA, but they fell far short of the federal mandate, and by January 1, 1995, the state had failed to meet the NVRA implementation deadline. For example, although the NVRA required state officials to offer assistance to potential registrants, Louisiana did not instruct its employees to volunteer their help. Moreover, the state's emergency regulations did not provide for the distribution of voter registration forms with each application for food stamps or Aid to Families with Dependant Children, as required by the NVRA. When members of the Association of Community Organizations for Reform Now (ACORN), a nonprofit advocacy group for low income citizens, tried to register to vote at the New Orleans branches of the Office of Family Support and Department of Motor Vehicles early in 1995, state employees said no registration forms were available.

In January 1995, state Senator M. J. "Mike" Foster brought suit in state court arguing that the objected to portions of the state's NVRA enabling legislation could not be severed.[823] The next month, ACORN and individual black voters, represented by the ACLU, the New Orleans Legal Assistance Corporation, and the NAACP Legal Defense and Educational Fund, Inc., filed suit in federal court to

[823] Foster v. Fowler, 652 So.2d 993 (La. 1995).

compel Louisiana to comply with the NVRA. The lawsuit cited, among other things, the state's "egregious history of erecting barriers to the right to vote, many of which have been aimed particularly and discriminatorily at African-Americans," including the state's 1898 "grandfather clause," as well as educational and property qualifications for registration.[824]

The state also persisted in its efforts to get federal approval of its restrictive photo identification requirement for voting. In February, it asked the Justice Department to reconsider its earlier denial but the department declined. In addition to noting that the state's request for reconsideration did "not contain any new relevant factual information or legal arguments," the Justice Department reaffirmed its objection to the plan on the grounds that blacks were four to five times less likely than whites to have driver's licenses or other photo identification. Moreover, the department said, the state had created two standards for voter identification: registrants by mail had to produce a picture ID, while those who registered in person could utilize a wider range of documents. The department further advised that a proposed Louisiana funding initiative aimed at providing mail registrants with photo ID would need to be precleared "with a view towards the impact of such a project on mail registration under the NVRA, as well as the state's objected-to

[824] ACORN v. Fowler, Civ. No. 95-0614 (E.D. La.).

picture identification requirement."[825]

On March 27, while other state defendants in the ACORN suit were engaged in settlement negotiations and the state was beginning to implement the NVRA, Louisiana Secretary of State Fox McKeithen answered the complaint by asserting, among other things, that the NVRA was unconstitutional in violation of the Tenth Amendment. Three days later, the state supreme court issued a ruling in the case brought by Senator Foster, holding Louisiana's voter identification provision could be severed from the rest of the enabling legislation and the precleared sections could be implemented.[826] As a result of these developments, Louisiana was compelled to comply with the NVRA and did so within the year. Plaintiffs then moved to dismiss the case voluntarily and without prejudice, which the court ordered on September 19, 1995.

Louisiana continued to struggle, however, to develop a voter identification measure that would not have a retrogressive effect on minority voters, and it was not until 1997 that the state finally submitted a voter identification plan that satisfied the Voting Rights Act. The 1997 plan allowed voters without a photo ID to vote if they signed an affidavit attesting to their identity, and supplied either a current voter registration certificate or their date of birth or other information. With this

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[825] Loretta King, Acting Assistant Attorney General, to Sheri Marcus Morris, Assistant Attorney General of Louisiana, February 21, 1995.

[826] Foster v. Fowler, 652 So. 2d at 993.

affidavit of identity provision in place, the Justice Department approved Louisiana's voting changes.[827]

COUNTY AND MUNICIPAL LITIGATION IN LOUISIANA

Bossier Parish

Reno v. Bossier Parish

Bossier Parish, Louisiana, adopted a redistricting plan for its 12 member school board in 1992 and submitted it for preclearance to the Department of Justice. The Attorney General objected, noting that while the parish was 20% black, none of the proposed districts was majority black, despite the fact that a proposed plan submitted by the local NAACP had demonstrated that a 12 member plan could be drawn containing two majority black districts. No black person had ever been elected to the school board, and it was undisputed that the plan adopted by the parish split black communities to avoid creating a majority black district. One board member said that while he favored black representation on the board, "a number of other board members opposed the idea." Another board member said "the Board was hostile to the creation of a majority-black district." The Attorney General

[827] Isabelle Katz Pinzler, Acting Assistant Attorney General, to Angie Rogers LaPlace, Assistant Attorney General of Louisiana September 29, 1997.

concluded that she was "not free to adopt a plan that unnecessarily limits the opportunity for minority voters to elect their candidates of choice."[828]

The parish filed a declaratory judgment action in the District of Columbia court which granted preclearance. It held that it could not deny preclearance of a proposed voting change under Section 5 even though the change violated Section 2. The Attorney General appealed and the ACLU, together with the NAACP Legal Defense and Educational Fund, filed an amicus brief in support of the United States and the private intervenors.

Amicus argued that the legislative history of the 1982 amendments of the Voting Rights Act showed that Congress intended for the results standard of Section 2 to apply to Section 5 preclearance. The Senate Report that accompanied the amendments provides that "[i]n light of the amendment to section 2, it is intended that a Section 5 objection also follow if a new voting procedure so discriminates as to violate section 2."[829] The principal cosponsors of the 1982 amendments, Representative James Sensenbrenner (R. WI) and Senator Ted Kennedy (D. MA), reiterated on the floors of the House and Senate during the legislative debates that "where there is a section 5 submission which is not retrogressive, it would be

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[828] This history is set out in Reno v. Bossier Parish School Bd., 528 U.S. 320, 324, 348 (2000) ("Bossier II").

[829] S.Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982).

objected to only if the new practice itself violated the Constitution or amended section 2."[830]

The Supreme Court affirmed. It held that a violation of Section 2 could not be a basis for an objection under Section 5. As for the legislative history cited by amicus, the court said Section 5 was not itself amended in 1982, and the language in the Senate Report that Section 2 was to apply in Section 5 preclearance was merely a "footnote."[831] The court did, however, remand the case for consideration whether the dilutive impact of the parish's plan supported a finding that the plan had been enacted with a discriminatory purpose.

On remand the district court again granted preclearance, concluding that the 1992 plan was no worse than the preexisting plan, in that neither contained any majority black districts, and that the evidence failed to establish "retrogressive intent."[832] The Supreme Court again affirmed. In doing so, and in an extraordinarily obtuse opinion, it held that "§ 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose."[833] Thus, an admittedly discriminatory plan, that was the product of intentional discrimination

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[830] 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner); 128 Cong. Rec. S7095 (daily ed. June 16, 1982) (remarks of Sen. Kennedy).

[831] Reno v. Bossier Parish School Bd., 520 U.S. 471, 484 (1997) ("Bossier I")

[832] Reno v. Bossier Parish School Bd., 7 F. Supp. 2d 29, 31-2 (D.D.C. 1998).

[833] Bossier II, 528 U.S. at 341.

and had an undeniable discriminatory affect, was nonetheless precleared under Section 5.

West Feliciana Parish and the Town of St. Francisville

Wilson v. Mayor and Board of Aldermen of St. Francisville

St. Francisville is the parish seat of West Feliciana Parish, Louisiana. Located on the banks of the Mississippi River between New Orleans and Natchez, the land yielded unparalleled crops of cotton, sugar cane, indigo, and tobacco. According to local accounts, in the 1850s the parish was home to more than half of America's millionaires, the beneficiaries of an economy built upon the institution of slavery.

The parish today is home to numerous grand antebellum plantation homes, which escaped the ravages of the Civil War, including The Myrtles Plantation (circa 1796), Rosedown Plantation (1835), and Oakley House (1806), where James Audubon tutored the daughter of plantation owners James and Lucy Pirrie and painted 80 of his famous American bird pictures. The parish is also home to Angola, the state prison. As late as 1963, the parish, which was nearly 70% black, and faithful to its ante-bellum heritage, had not a single black registered voter.[834]

[834] The story of Rev. Joseph Carter, the first black citizen to register in the parish in modern times, is told in chilling detail in "Birth of a Voter," Ebony Magazine, February 1964.

Based on the 1990 census, St. Francisville had a population of 1,700 people, 31% of whom were black. Its mayor and five member board of aldermen were elected at-large, and as of 1992, no black person had ever been elected to a city office.

At the request of black residents, the city adopted a districting plan in 1992, creating one single member district that was majority black, and one four member district that was majority white. The plan was submitted for preclearance. However, the city made plans to conduct the October 1992, election under the preexisting at-large plan with the incumbents to remain in office until January 1997. Black residents of the town, represented by the ACLU, filed suit in federal court in September 1992, and asked the court to enjoin the pending at-large elections.[835] The court denied the motion but agreed to consider holding a special election based upon the preclearance determination of the Attorney General or further order of the court.

Plaintiffs' expert, Dr. Stephen Cole, analyzed election returns for 25 parish, state, and federal elections from 1979 to 1992, involving contests between African American and white candidates in which voters in St. Francisville and West Feliciana Parish participated. His analysis showed significant levels of racial bloc voting in St. Francisville. The average cohesion for black voters in the 25 contests

[835] Wilson v. Mayor and Board of Aldermen of St. Francisville, Louisiana, No. CV 92-765-B-1 (M.D. La.).

was 78%. The average percentage of white voters voting for white candidates was 93%, which Dr. Cole characterized as "extreme racial polarization."

In addition to the interracial contests, Dr. Cole analyzed four contests involving only white candidates in which David Duke was a candidate. Duke was a former leader of the Ku Klux Klan and was widely perceived as a white supremacist. Three of the four contests demonstrated racially polarized voting. In the 1990 primary election for U.S. Senator, in a field of four white candidates, Duke received a whopping majority (75%) of the white vote in West Feliciana Parish. In the 1992 primary for Governor, in a field of 11 white candidates, Duke also received a majority (54%) of the white vote in West Feliciana Parish and made it into the run off where he increased his share of white votes in the parish to 62%.

It was not until October 1992, that an African American was elected to the board of aldermen, the first in the history of St. Francisville.

The Attorney General, however, denied preclearance to the city's proposed districting plan on May 18, 1993, because it unnecessarily limited "the opportunity for minority voters to elect candidates of their choice."[836]

After the Section 5 objection, the city indicated that it would be willing to settle the pending litigation. Following negotiations, the parties agreed on a redistricting plan creating one majority black district and a second district with a

[836] James P. Turner, Acting Assistant Attorney General, to William D'Aquilla, May 18, 1993.

substantial black population. The plan was precleared by the Department of Justice and adopted by consent judgment by the district court on June 26, 1995.

In October 1995, however, the city filed a motion to vacate the consent judgment in light of the Shaw/Miller cases, arguing that the plan creating a majority black district "might be unconstitutional." Plaintiffs opposed the motion on the ground, among others, that the Shaw/Miller cases did not apply to vote dilution challenges brought under Section 2 of the Voting Rights Act. The court held a trial in August 1996, on the issue whether the consent decree was constitutional, after which it ruled that the district in the agreed upon plan was not compact. However, the court further ruled that a majority black district was required by Section 2 and adopted one of the plans that had been proposed by the plaintiffs as a court ordered remedy. The city did not appeal.[837]

[837] Although the court held that Section 2 required the creation of a majority black district and adopted plaintiffs' proposed districting plan, it denied the plaintiffs' request for cost and fees in connection with the Shaw/Miller aspect of the case on the grounds that they were not prevailing parties. Wilson v. Mayor and Board of Aldermen of St. Francisville, Louisiana, 964 F. Supp. 217 (M.D.La. 1997), aff'd 135 F.3d 996 (5th Cir. 1998).

MARYLAND

STATEWIDE ISSUES

Exclusion of Unaffiliated Voters from Maryland Judicial Nominations

Suessmann v. Lamone

Maryland nominates candidates for circuit court judgeships by a process that can only be described as bizarre and complex. Under state law, candidates run in primary elections, but without any party label or other distinguishing mark which might indicate their party affiliation. Not only are they not required to be affiliated with the party in whose primary they run, they can run in both major party primaries (cross-file) at the same time. If nominated, a candidate appears on the general election ballot without any party designation. Both major parties, Democrat and Republican, have adopted rules prohibiting any person from voting in their primaries who is not a party member.

In 2004, plaintiffs represented by the ACLU, who were not affiliated with either the Republican or Democratic Party, challenged their exclusion from voting in the primaries which nominated circuit court judges as a violation of the Fourteenth Amendment and the Maryland Declaration of Rights.[838] Plaintiffs did not challenge the authority of the state to make judicial elections partisan or nonpartisan, and they recognized the right of a political party — when nominating candidates for partisan

[838] Suessmann v. Lamone, 383 Md. 697 (2004).

office — to exclude voters who are not affiliated with that party.[839] Plaintiffs did not seek to vote for any partisan office that would be on the ballot of a political party. The Maryland scheme, however, worked at cross purposes. Though state law limited partisanship in judicial elections, the state allowed political parties to control who could vote in the judicial nomination process.

A special trial court of three judges rejected plaintiffs' claims. On appeal, the Court of Appeals of Maryland affirmed with two judges dissenting. The majority characterized plaintiffs' claim as being deprived "of the right to vote in the primary elections of a party to which they do not belong."[840] That, of course, would have been a frivolous claim, and not one that plaintiffs made. In a tautology the court held the primary was not nonpartisan:

> The inescapable conclusion is that when the State truly establishes a nonpartisan primary, the primary is characterized by the fact that unaffiliated voters are eligible to vote in it. . . If this be so, then the political primaries nominating circuit court judges cannot, by definition, be nonpartisan since unaffiliated voters are ineligible to vote in them.[841]

It was irrelevant to the court that candidates who were unaffiliated with a party could run in its primaries and win nomination, that candidates could file with two parties at the same time, and could not have a party designation on the general

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[839] See Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986).

[840] Suessmann, 383 Md. at 732.

[841] Id. at 16-17.

election ballot. In the court's view, "the procedure for electing judges remains a partisan one in form and in substance."[842]

COUNTY AND MUNICIPAL LITIGATION IN MARYLAND

Cecil County and the Town of Port Deposit

Dooling v. Town of Port Deposit

Michael Dooling, a retired mill wright, spent most of his life in and around Port Deposit, Maryland, a small town on the shores of the Susquehanna River. In the 1990s he moved around the country, but he maintained ties to Port Deposit and voted there. In 1999, he returned to Port Deposit and bought a houseboat moored on the river. He took an interest in town council meetings, attending almost every one, and in 2001 decided to run for town council. He needed 25 petition signatures to get on the ballot, and collected 33.

Under clear Maryland law, the houseboat was located within the town limits, and Dooling had been in the houseboat long enough to meet the residency requirement for running for city office. Nonetheless, after he submitted his petition he was told by an election supervisor to submit more documentation about his residency. The election supervisor resigned the same day and qualified to run for city council, a potential opponent to Dooling if Dooling were on the ballot. Dooling

[842] Id. at 22.

was given one day to produce documentation, which he did. He went to a town council hearing on his candidacy, and the council, after asking him if he had any more evidence, went into closed session. It considered allegations that were not disclosed to Dooling, and barred him from appearing on the ballot.

Dooling's name did not appear on the ballot in 2001, and the town did not change its view that he was not a resident which barred him from running for office at the next election. With the assistance of the ACLU, the ACLU of Maryland filed suit in federal court on Dooling's behalf, seeking a judgment that he was, in fact, qualified to run for town council.[843] The suit alleged that barring him from running for public office violated the First and Fourteenth Amendments and Maryland state law.

The court denied the city's motion to dismiss. After discovery, both sides moved for summary judgment. On the Sunday before a scheduled hearing on the summary judgment motions, the trial judge wrote a memorandum to counsel stating his view that the plaintiff had established legal residence in the town, that the town had been provided "an unfortunate piece of advice" by the town attorney, and that absent evidence that Dooling had claimed a domicile elsewhere, issues such as where his houseboat was located were "red herrings."[844] In view of the court's

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[843] Dooling v. Town of Port Deposit, Civil No. 1:02-cv-00650-AMD (D. Md.).

[844] Id., Memorandum to Counsel, June 8, 2003, docket entry No. 48.

memorandum, the parties resolved the litigation with an agreement that the plaintiff was a resident of the town and entitled to vote and run for office.

Worcester County

Cane v. Worcester County

Worcester County, founded in 1742, is Maryland's only seaside county. In November 1992, black residents of the county, represented by the ACLU and the ACLU of Maryland, filed suit challenging at-large elections for the county commission.[845] The commission consisted of five members, four of whom were required to live in residency districts, with the fifth member residing anywhere in the county. African Americans were 21% of the population, but never in the 253 year history of the county had an African American been elected to any county office.

Following a trial, the district court invalidated the at-large system. Among its findings were:

*[W]hites vote as a bloc.

*Even under the best of circumstances, the at-large system debases the value of the minority's political strength.

*[A]n African-American candidate will lose in county-wide elections.

[845] Cane v. Worcester County, Md., Civ. No. 1:92-cv-03226-JHY (D. Md.).

> *[N]o African-American has won a county office in a county-wide head-to-head contest against a white candidate.
>
> *[T]he current system . . . interacts with past and present discrimination to deprive African-Americans of Worcester County the same 'opportunity [as] other members of the electorate to participate in the political process and to elect representatives of their choice.'[846]

At the remedy stage, the county submitted a plan using five residency districts, but retaining at-large voting. Plaintiffs submitted plans using single member districts, or in the alternative, cumulative voting. The court ordered into effect a plan which used cumulative voting, concluding that it would remedy the Section 2 violation, as well as retain the county's preference for at-large voting.[847]

The county appealed and the court of appeals affirmed the finding of a violation, but remanded as to the remedy imposed by the district court.[848] It did not reject cumulative voting per se, but held the district court should give the county an additional opportunity to propose a remedial plan and consider the county's argument that cumulative voting would not protect its interest in geographic diversity. The county filed a petition for a writ of certiorari, but it was denied.[849]

On remand to the district court, both parties submitted plans. The court adopted the county's proposed single member district plan for the primary, a plan

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[846] Cane v. Worcester County, Md., 840 F. Supp. 1081, 1090-91 (D. Md. 1994).

[847] Id., 847 F. Supp. 369 (D. Md. 1994).

[848] Cane v. Worcester County, Md., 35 F. 3d 921 (4th Cir. 1994).

[849] Worcester County, Md. v. Cane, 513 U.S. 1148 (1995).

which did not have a majority African American district, but a cumulative plan for the general election.[850] Both sides appealed and the court of appeals held the district court's plan did not provide an adequate remedy for the Section 2 violation, and ordered "immediate implementation of Plaintiffs' alternative plan."[851] The county filed another petition for a writ of certiorari, but it was denied.[852]

The deeply contested litigation in Worcester County demonstrates the critical role the Voting Rights Act continues to play in ensuring equal access to the political process. It also shows how divisive and contentious race remains in the modern era, and how some jurisdictions are still intent on resisting efforts to ensure equal political access.

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[850] Cane v. Worcester County, Md., 874 F. Supp. 687 (D. Md. 1995).

[851] Cane v. Worcester County, Md., 59 F. 3d 165 (4th Cir. 1995).

[852] Worcester County, Md. v. Cane, 518 U.S. 1016 (1996).

MICHIGAN

Allegan and Saginaw Counties - Enforcing the Language Minority Provisions of the Voting Rights Act

Hernandez v. Thomas

Buena Vista Township in Saginaw County and Clyde Township in Allegan County are the only two jurisdictions in Michigan covered by the preclearance provisions of the Voting Rights Act because of the presence of language minorities, primarily Spanish speaking citizens.[853] The two townships are also required by the Voting Rights Act to provide ballots and other election materials in Spanish. The townships, however, had conducted elections since the date of their coverage in 1976, without providing the required bilingual election material.

The ACLU, with the ACLU of Michigan, brought suit on behalf of Spanish speaking plaintiffs in 1992, prior to the presidential primary to compel election authorities to provide ballots and other election materials in Spanish.[854] On March 12, 1992, the three-judge district court ordered that ballots and ballot instructions be provided in Spanish for the March 17, 1992, presidential primary, along with

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[853] In 1975, the original definition of "test or device" under the Voting Rights Act was expanded to include the practice of providing any election information, including ballots, only in English in states or local jurisdictions where members of certain language minorities - defined as American Indian, Asian American, Alaskan Natives or those of Spanish heritage - constituted more than five percent of the voting age citizens. This change to the act expanded Section 5 coverage to Alaska, Arizona, and Texas in their entirety, and parts of California, Florida, New York, North Carolina, South Dakota, and the two Michigan townships of Buena Vista and Clyde.

[854] Hernandez v. Thomas, No. 1:92-CV-173 (W.D. Mich.).

bilingual interpreters to assist Spanish speaking voters in the two townships. The state also agreed to provide Spanish voter information throughout the state, whether or not required by the Voting Rights Act.

The plaintiffs further contended that the state had implemented a 1988 law without receiving preclearance that required voters, including those in the two covered townships, to declare a party preference in order to vote in a presidential primary election. The three-judge court concluded that the new law was a covered change and enjoined its application in Buena Vista and Clyde Townships absent preclearance.[855]

The state subsequently submitted the 1988 law to the Department of Justice and it was precleared. The Michigan Democratic Party however refused to count, for delegate selection purposes, the ballots cast in the presidential primary by voters in the two townships who, because of the ruling of the three-judge court, were not required to declare a party preference. Plaintiffs sought to enjoin the party from failing to count those votes, but the district court found that insofar as delegate selection was concerned, the party was not a state actor covered by the Fourteenth Amendment or Section 5, and dismissed plaintiffs' claim.

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[855] Id., Order of March 12, 1992.

MISSISSIPPI

STATEWIDE ISSUES

Mississippi Voter Registration

Young v. Fordice

Mississippi traditionally operated a dual system of voter registration requiring citizens to register twice, first for state and federal elections, and again for municipal elections. In 1987, a federal district court found the original version of the dual registration requirement "was enacted as part of the 'Mississippi plan' to deny blacks the right to vote following the Constitutional Convention of 1890," and that a revised version of the registration system, adopted in 1984, violated Section 2 because it "result[ed] in a denial or abridgement of the right of black citizens in Mississippi to vote and participate in the electoral process."[856] The court found the registration rate among blacks was significantly lower than for whites (54% compared to 79%).

The district court also took judicial notice of recent federal court decisions finding that:

> *[R]acially polarized voting has prevailed in Mississippi elections, resulting in the defeat of black preferred candidates by white bloc voting and in black voters being unable to elect candidates of their choice.
>
> *[T]here continue to exist socio-economic disparities between

[856] Operation PUSH v. Allain, 674 F. Supp. 1245, 1251, 1253, 1268 (N.D. Miss. 1987).

> whites and blacks in Mississippi that impair equal access to the political process in Mississippi.
>
> *[T]here is evidence of racial campaign tactics still being used in Mississippi.
>
> *[T]he percentage of elected officials who are black remains disproportionately low.
>
> *Since 1984 the dual registration requirement has continued to have a discriminatory impact on blacks.[857]

After the decision of the district court, the legislature adopted legislation remedying the Section 2 violation, which was approved by the district court and affirmed on appeal.[858] The new system was "unitary," meaning registration at any office entitled a person to vote in all elections. But Mississippi resurrected dual registration in 1995.

The NVRA, also known as the Motor Voter Act, greatly expanded the opportunities for registration for federal elections, including mail-in registration and registration at state motor vehicle and social service offices. Mississippi adopted procedures to implement the NVRA in 1995, but it did so without complying with Section 5. Under the new system, voters who registered under the NVRA were allowed to vote only in federal elections. To vote in state and local elections, NVRA registrants had to register a second time through state registration procedures. As a

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[857] Id. at 1252, 1255.

[858] Operation PUSH v. Allain, 717 F. Supp. 1189 (N.D. Miss. 1989), aff'd 932 F. 2d 400 (5th Cir. 1991).

result, thousands of voters who had registered under the NVRA, a majority of whom were black, would be ineligible to participate in state elections.

On April 20, 1995, the Lawyers' Committee for Civil Rights Under Law, assisted by the ACLU, filed suit on behalf of a class of registered and unregistered voters in Mississippi.[859] They asked the court to require Mississippi to comply with the NVRA, and to enjoin the state from implementing separate voter registration procedures for federal and state elections without receiving preclearance under Section 5. A similar lawsuit was filed by the Attorney General on behalf of the United States, and the two cases were consolidated. On July 24, 1995, the district court ruled that preclearance was not required, because the state's NVRA plan "did not effect a change subject to Section 5 preclearance." Plaintiffs appealed the district court's order to the Supreme Court. The United States also filed a notice of appeal which it subsequently decided not to pursue.

The Supreme Court agreed to hear the appeal, and on March 31, 1997, in a unanimous opinion, ruled the state's regulations requiring separate registration for state and federal elections were unenforceable unless precleared under Section 5. While noting that the NVRA did not "categorically" forbid a dual system, the Court held the state must preclear the "discretionary elements of the new federal system."[860]

The state submitted its administrative rules for preclearance, and on September

[859] Young v. Fordice, 3:95CV197 (S.D. Miss.).

[860] Young v. Fordice, 520 U.S. 273, 290 (1997).

22, 1997, the Attorney General objected to the dual registration system:

> [T]he State's federal-election-only implementation of the NVRA has a disproportionate impact on black citizens, preventing them, to a greater extent that white citizens, from voting in state and local elections. This had the overall impact of hampering the ability of black persons to participate in the political process.[861]

The Attorney General not only found dual registration would be retrogressive and likely result in the disfranchisement of numerous voters, but the reasons offered by some state officials for opposing public agency registration "appear to have been insubstantial, and in some cases have been couched in racially charged terms indicating antipathy towards 'welfare voters.'" Indeed, some 30,000 people, the Justice Department noted, more than half of the Motor Voter registrants, had not registered to vote a second time for state elections, apparently under the mistaken belief that the state had a unitary registration system. The Attorney General concluded "[t]he State has also administered this new dual registration requirement in such a way that discriminatory effects on black voters were not just foreseeable but almost certain to follow."[862]

In 1998, the legislature approved a bill that would have eliminated the dual registration system, but the measure was vetoed by Governor Kirk Fordice. The plaintiffs then filed a supplemental complaint, asking the court to postpone state and local elections set for November 1998, until Mississippi complied with the NVRA and

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[861] Isabelle Katz Pinzler, Acting Assistant Attorney General, to Sandra M. Shelson, Mississippi Special Assistant Attorney General, September 22, 1997, p. 5.

Section 5. Alternatively, plaintiffs asked the court to enter an interim order to permit all NVRA registrants to vote in all elections. On October 5, 1998, the district court granted the requested relief, and enjoined state and local officials from denying any NVRA registrants the right to vote in state and local elections. It further directed that its order remain in effect until the state obtained Section 5 preclearance of an alternative plan. The state did not appeal.

This case clearly illustrates how Section 5 played a pivotal role in blocking the implementation of discriminatory registration procedures in Mississippi.

COUNTY AND MUNICIPAL LITIGATION IN MISSISSIPPI

Perry County

McCarty v. Board of Supervisors of Perry County

Coleman v. Board of Supervisors of Perry County

Perry County is in southern Mississippi, near Hattiesburg and the Gulf Coast. The county's board of supervisors and election commission are elected from the same five single member districts. Despite the fact that the county was 22.5% black, the districts had always been majority white, and no black person had ever been elected to either board.

When the 1990 census showed the county's districts were malapportioned, and

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[862] Id.

the county proceeded to adopt a new districting plan, it again drew all majority white districts. The county submitted the plan to the Department of Justice for preclearance, which was denied. According to the Attorney General:

> There are significant concentrations of black population in the county that seem to have been fragmented, unnecessarily, among three of the five supervisor districts, namely Districts 1, 4, and 5.
>
> During the redistricting process, the county appears to have been aware of the interest on the part of black citizens to have their voting potential better recognized, especially by creating a district that combines concentrations of black population in one district, thus providing to black voters an opportunity to elect candidates of their choice to the board of supervisors.
>
> While we have noted the county's claim that it is impossible to draw a majority black district, the information provided does not support this conclusion. Although a bi-racial committee was involved in the redistricting process, it is not clear that the committee had independent and meaningful input into the process.[863]

In July 1992, the ACLU, on behalf of black voters, challenged the existing districting plan for the board of supervisors and election commission as malapportioned and as diluting minority voting strength in violation of Section 2 and the Constitution.[864] Given that the existing plan was malapportioned, and in light of the Attorney General's objection to its proposed plan, the county adopted a new plan, with the approval of the plaintiffs, that created a majority black district. The plan was precleared and on February 12, 1993, the court entered an order providing for a special

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[863] John R. Dunne, Assistant Attorney General, to Jeffrey T. Hollimon, November 19, 1991.

[864] McCarty v. Board of Supervisors of Perry County, Mississippi, No. 2:92cv169 (S.D. Miss.).

election in November 1993, for the election commission and the majority black board of supervisors district.

Prior to the election, in September 1993, a group of mostly white residents of Perry County, including the incumbent supervisor who resided in the newly created majority black district, filed a Shaw/Miller action[865] seeking to enjoin the November election on the grounds that the majority black district was "bizarrely" shaped and denied them equal treatment. The plaintiffs in the first lawsuit represented by the ACLU intervened in the second action to defend the constitutionality of the challenged plan. The plaintiffs in the second case also sought to intervene in the first case to raise their Shaw/Miller objections to the county's plan.

The district court held a hearing in both cases on October 18, 1993, on the question whether it should enjoin the November special election, and refused to do so. The election was held, and for the first time in the county's history a black candidate was elected to the board of supervisors.

After the district court denied the request for an injunction, the parties entered into a consent order staying the litigation until six months after release of the 2000 census. In April 2001, the court dismissed the Shaw/Miller litigation brought by the white plaintiffs as "largely moot."[866]

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[865] Coleman v. Perry County, Civ. No. 2:93-CV-250 (S.D. Miss.).

[866] Id., Order of April 9, 2001.

In addition to showing the essential role of the Voting Rights Act in securing the equal opportunity for racial minorities in the political process, this case illustrates how white voters and incumbents continue to resist change by often filing fruitless challenges to fairly drawn election plans.

MISSOURI

The City of St. Louis

Moore v. Board of Election Commissioners

Thousands of voters in St. Louis, Missouri, were turned away at the polls on election day 2000 because of inaccurate voter lists and other irregularities. Many more voters did not even have the opportunity to vote because of understaffed polling places and inadequately trained election workers. So widespread were the problems, in fact, that voters sued to extend voting hours in the city because of substantial delays experienced earlier in the day.[867]

Once the dust from the election had settled, the ACLU brought suit in state court on behalf of African American voters challenging those systemic election practices and procedures that had contributed to the election day difficulties in St. Louis.[868] Among the problems targeted by the suit were: the city's use of flawed inactive voter lists, inadequately staffed polling places, inadequate and malfunctioning voting equipment, inadequate training of election judges, lack of sample balloting machines, and lack of available assistance to voters who need help completing a ballot. The plaintiffs alleged that these and other election practices had a disproportionate impact on African Americans and violated the state constitution.

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[867] Odom v. Board of Election Commissioners, No. 004-2379 (St. Louis City Circuit Court 2000).

[868] Moore v. Board of Election Commissioners, No. 014-01245, (St. Louis City Circuit Court 2001).

The parties engaged in settlement negotiations for more than a year and were on the verge of settlement when the Department of Justice filed a similar suit in federal court.[869] The Attorney General alleged on behalf of the United States that the city's inactive voter procedures had resulted in the improper removal of eligible voters from the registration rolls in violation of the National Voter Registration Act of 1993 (NVRA).

The city quickly settled with the Department of Justice. In a consent decree filed in August 2002, the city agreed to: conduct a media campaign designed to encourage city residents to verify whether their voter registration status remained active; appoint "specialist judges" to process inactive voters on election day; provide adequate staff and technology to each polling place; and maintain its list of inactive voters in conformity with the requirements of the NVRA.

The consent decree provided the ACLU plaintiffs substantially all the relief they had sought under state law, and rendered their state court case moot. Once the federal court approved the consent decree, the ACLU plaintiffs voluntarily dismissed their case.

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[869] United States v. Board of Election Commissioners, Civ. No. 4:026CV001235 CEJ (E.D. Mo.).

NORTH CAROLINA

STATEWIDE ISSUES

State Redistricting

Thornburg v. Gingles

Black residents of North Carolina successfully challenged in district court six multi member house and senate districts in the state's 1982 legislative redistricting plan as diluting black voting strength in violation of Section 2.[870] The state appealed.

The ACLU and the League of Women Voters (LWV) filed an amicus brief in the Supreme Court in support of the plaintiffs. One of the arguments made by the state, which was supported by the Solicitor General as counsel for amicus curiae United States, was that the election of a token number of minorities to office in the disputed districts foreclosed a Section 2 vote dilution challenge. In its amicus brief, the ACLU and LWV argued that when Congress amended Section 2, it included express language requiring that the political processes be "equally open" to minorities, and that they not have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Given congressional policy in favor of strong enforcement of civil rights, the right protected by the statute was one of equal, not token or minimal, political participation.

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[870] Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984).

The Supreme Court, in its first opinion construing amended Section 2, affirmed the decision of the lower court, and in doing so rejected the argument that "some" black electoral success foreclosed a Section 2 challenge. Citing the legislative history and the language of Section 2, it held that if the election of a few minority candidates foreclosed the possibility of dilution of the black vote, the majority might evade Section 2 "by manipulating the election of a 'safe' minority candidate." The court concluded, where a districting plan "generally works to dilute the minority vote, it cannot be defended on the grounds that it sporadically and serendipitously benefits minority voters."[871]

Thornburg v. Gingles was a landmark case because the court set standards for adjudicating vote dilution claims, i.e., by proof of minority geographic compactness, minority political cohesion, and legally significant white bloc voting, known as the "Gingles factors," which greatly facilitated Section 2 challenges throughout the South and the nation as a whole.

Shaw/Miller Litigation and Congressional Redistricting in North Carolina

Shaw v. Hunt

Upon his departure from Congress in 1901, George White, a black Republican from Tarboro, North Carolina, announced that "[t]his is perhaps the Negro's temporary

[871] Thornburg v. Gingles, 478 U.S. 30, 75-6 (1986).

farewell to Congress."[872] He was right. It was not until 1992, when Melvin Watt and Eva Clayton were elected from two majority black districts in North Carolina, that Tarheel voters again sent an African American to Congress. Watt's 12th District was 57% black and was so persistently challenged by white voters that its boundaries were considered by the Supreme Court no less than four separate times.

In Shaw v. Reno the Court held that North Carolina's 1991 congressional plan was subject to challenge under the Fourteenth Amendment, saying the plan "bears an uncomfortable resemblance to political apartheid," and because Watt's majority black district was "bizarrely" shaped.[873] The ACLU, along with its involvement in other Shaw/Miller litigation, participated as an amicus in defending the constitutionality of District 12.

The court's ruling in Shaw v. Reno was made despite the fact that irregularly shaped districts had frequently been drawn to protect white incumbents, and despite the facts that the court had previously held that a regular district shape was not constitutionally required and that the white plaintiffs did not allege that they had been injured or that their voting strength had been diluted by the challenged plan. Furthermore, while blacks constituted 22% of North Carolina's population, just 2 of 12 districts - 17% - were predominantly minority. In addition, in its original configuration,

[872] Michael Barone with Richard E. Cohen, eds., The Almanac of American Politics (Wash., D.C.: National Journal Group, 2003), p. 1225.

the 12th District was more integrated, or racially balanced, at 57% black and 43% white, than any congressional district previously drawn in the state.

On remand the three-judge district court again dismissed the complaint on the grounds that the state's plan promoted a compelling interest and was narrowly tailored, and the Supreme Court again agreed to hear the case on appeal. The ACLU, joined by the Lawyers' Committee for Civil Rights Under Law, filed an amicus brief in support of the appellees, who were the state defendants below, in support of the challenged plan. The ACLU argued in its brief that Congress had sanctioned the use of majority minority districts and that highly racially integrated districts such as those in North Carolina did not segregate or cause harm to voters. The Supreme Court reversed, however, on the grounds that race was the "predominant" factor in drawing the plan and the state had subordinated its traditional redistricting principles to race.[874]

In response to the decision of the Supreme Court, North Carolina enacted a new congressional plan in 1997. This time, District 12 was more regular in shape and was majority (53%) white. The state also claimed that it drew its plan primarily for political reasons; that is, to maintain the existing split of six Republican and six Democratic districts and that race was not a predominant consideration. The district court, without

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[873] 509 U.S. 630 (1993).

874Shaw v. Hunt, 517 U.S. 899 (1996)

benefit of a trial, brushed aside the state's explanations of how and why it had drawn the districts and summarily struck down the 1997 plan as "facially race driven."[875]

The state appealed, and the ACLU again filed an amicus brief in support of the challenged plan. The ACLU argued that the entire Shaw/Miller line of cases should be reconsidered by the court, and that it should return to the pre-existing rule that redistricting plans may be invalidated only if they cause actual harm to some identifiable group in the jurisdiction. The Shaw/Miller cases acknowledged that the white plaintiffs neither alleged nor suffered any personal injury, such as the dilution of their voting strength. Instead, the alleged injury was theoretical and consisted in being "stigmatized" by a racial classification, a claimed injury that has been previously rejected by the court as being insufficient to state a claim in cases brought by black plaintiffs. By requiring strict scrutiny of majority-minority districts, the Shaw cases singled out non-whites for special, discriminatory treatment in the redistricting process.

The Supreme Court reversed the decision of the three-judge court.[876] It held that the court improperly invalidated the state's plan without first holding a trial to resolve disputed issues of fact - whether the plan had been drawn "predominantly" on the basis of race or merely to preserve partisan balance in the state's congressional delegation. The case was again sent back to the district court for further proceedings.

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[875] Quoted in Hunt v. Cromartie, 526 U.S. 541, 545 (1999).

[876] Id. at 554.

On remand the three-judge court again invalidated the challenged plan and the Supreme Court again agreed to hear the state's appeal. The ACLU filed an amicus brief in which it reiterated its arguments that the Shaw/Miller line of cases should be reconsidered, and that the court should return to the pre-existing rule that redistricting plans may be invalidated only if they cause actual harm to some identifiable group in the jurisdiction. The Supreme Court did not set aside its Shaw jurisprudence, but it again reversed the lower court and held that its finding that the challenged district had been drawn primarily on racial lines was clearly erroneous, and that the district was not unconstitutional.[877]

By 1998, the black population in District 12 had shrunk to just 36%, but Watt won reelection with 56% of the vote, based on the power of incumbency and the support of many white liberals in this heavily urban district. "There are still whites who under no circumstances will vote for a black person," Watt said.[878] He has continued to represent the 12th District and in 2004 was unanimously elected as chair of the Congressional Black Caucus for the 109th Congress.

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[877] Easley v. Cromartie, 532 U.S. 234 (2001).

[878] Barone (2003), p. 1227.

Alamance County

Lewis v. Alamance County

Alamance is one of 40 North Carolina counties covered by Section 5. In 1990, Alamance County elected its five member board of commissioners in at-large, partisan elections. In the primary, candidates had to receive at least 40% of the votes to be nominated without a run off, and the general election was decided by majority vote. According to the 1990 census, almost 20% of the county was black, but only one black person had ever been elected and he was initially appointed and ran as an incumbent.

In 1993, the ACLU filed suit of behalf of black voters challenging the at-large method of electing the board of commissioners as violating the Constitution and Section 2.[879] Although the district court found that blacks usually voted for the same candidates, and rejected arguments by the defendants that black voters were not cohesive ("The overwhelming evidence indicates that the Alamance County black community is cohesive."[880]), the court dismissed the complaint, concluding that black voters had "some success electing preferred white candidates," and therefore there was no evidence of racially polarized voting sufficient usually to defeat the minority community's candidates of choice.

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[879] Lewis v. Alamance County, No. 2:92CV00614 (M.D.N.C.).

[880] Id., Order of April 6, 1995.

On appeal, in a 2-1 opinion, the Fourth Circuit affirmed. It held that black voting strength was not diluted because blacks often voted for winning white candidates. The dissent, noting the lack of success of minority candidates, said "I believe that members of the black community in Alamance County would be truly surprised to learn that they enjoy the same opportunity as white voters to elect their preferred candidates as county commissioners."[881] The Supreme Court denied the plaintiffs' petition for review.[882]

Brunswick County

Gause v. Brunswick County

Located in the southeastern corner of North Carolina's, Brunswick County is one of the state's fastest growing communities. Once a favored destination of Confederate blockade runners, Brunswick County has since been discovered by a generation of retirees drawn to its temperate climate. The North Carolina board of elections registered 10,343 Brunswick County voters in 1970, but that number had nearly tripled to 29,921 by 1992, with white voters accounting for most of the growth. The population explosion did little to relieve historical housing segregation, however. As of 1994, the county's booming beach towns included only seven African American residents. The 1990 census also showed severe income disparity between Brunswick County's black

[881] Lewis v. Alamance County, N.C., 99 F.3d 600, 620 (4th Cir. 1996) (Michael, J., dissenting).

[882] Lewis v. Alamance County, N.C., 520 U.S. 1229 (1997).

and white residents, with black per capita income at $6,862 compared to $12,789 for whites.

The county council consisted of five members elected at-large, and though the black community constituted more than 18% of the county population, it was unable to elect its candidates of choice. Even black candidates who received between 80% and 100% of the black vote could not win.

Thurman Gause, a former candidate for county commissioner, filed suit in 1993, represented by the ACLU, challenging the county's at-large system as diluting minority voting strength in violation of Section 2.[883] Gause asked the court to enjoin future elections until Brunswick County reconfigured its five election districts to make one of them majority black. Plaintiff's redistricting expert showed it was possible to create a district with a population more than 60% African American.

Brunswick County moved for summary judgment, arguing that the black population was too dispersed to make a compact voting district, and that black preferred candidates had been elected to other offices in the county. The county objected to plaintiff's proposed majority black district and argued that it was based on "geographic extremes."

The district court granted the defendant's motion for summary judgment, noting the successes of black candidates in school board elections, and the difficulty of drawing

[883] Gause v. Brunswick County, No. 93-80-CIV-7-D (E.D.N.C.).

a compact, majority black district when only one of the county's 22 precincts was majority black.[884]

The plaintiff, represented by other counsel, appealed and the Fourth Circuit affirmed. In an unpublished opinion, it held the dispersion of the county's minority population prohibited the construction of a majority black district, which it held was a prerequisite to maintaining a vote dilution suit.[885]

Chatham County and Siler City

Patterson v. Siler City

Siler City is located in Chatham County, North Carolina. The city was governed by a mayor and five member town commission, elected at-large and by majority vote. As of 1988, the city was 28.8% black, but in its 101 year history only one black person, George Edwards, had ever been elected to the commission.[886]

For years, black residents of Siler City had requested the commission to change its voting system. Dan Patterson, an active resident of Siler City, along with other black citizens, sent numerous letters to the board arguing that at-large elections precluded minorities from electing representatives of their choice. In March 1988, the city created

[884] Id., Order of October 12, 1995.

[885] Gause v. Brunswick County, N.C., 92 F.3d 1178 (4th Cir. 1996).

[886] Bob Wachs, "Lawsuit Challenges Town Electoral Process," The Chatham News, July 14, 1988, p. 1A.

an Electoral System Committee, comprised of 5 whites and 4 blacks, to advise the board on possible alternatives to the existing method of electing commissioners, giving particular consideration to providing an equal opportunity for black citizens to elect candidates of their choice.[887] Even the city attorney admitted that "as long as we have 'at-large' elections with all voters being able to vote for all seats, it will be difficult to get a black elected."[888]

In July 1988, after years of waiting on the city to respond to the black community's requests, Patterson and other black residents, represented by the ACLU, challenged Siler City's use of at-large elections as violating the Constitution and Section 2.[889] The defendants moved to stay the proceedings on the grounds that the city had undertaken the development of a new election plan which would address the problems with the city's voting system. The proposed plan provided for a seven member board of commissioners - five elected from districts and two elected at-large. The new plan created two majority black districts, and would go into effect in the 1989 election. After the North Carolina General Assembly enacted the new election system for Siler City, the parties consented to a dismissal of the action.[890]

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[887] Earl B. Fitts, Mayor of Siler City, to Electoral System Committee Members, March 30, 1988.

[888] Minutes from Electoral System Committee meeting, April 20, 1988.

[889] Patterson v. Siler City, Civ. No. C-88-701-D (M.D.N.C.).

[890] Id., Order of March 30, 1989.

Soon after the suit was dismissed, the Chatham County Election Board met to consider consolidating its two town polling places into one for municipal elections. One of the polling places was located in a predominately minority community and it was estimated that between 20% - 30% of voters who used this location walked to the polling place to vote. The county, however, wanted to locate the new polling place in a predominately white community that had little parking and virtually no black poll workers or managers. Black residents protested the proposed new location, arguing that removing the polling place from the minority community would cause considerable economic hardship on those voters who would now have to go across town to vote.[891]

Edgecombe and Nash Counties and the City of Rocky Mount

Green v. City of Rocky Mount

The City of Rocky Mount lies on the Tar River in North Carolina with parts of the city divided between Edgecombe and Nash Counties. Based on the 1980 census, the city was 42% black.

Over several decades, the City of Rocky Mount engaged in numerous tactics that diluted black voting strength. Prior to 1961, the 13 member Rocky Mount City Council was elected by wards with two members elected from each of six wards and the

[891] Dan Patterson to Ben Shivar, Town Manager, June 11, 1989.

remaining council member elected from a seventh. In 1961, the city switched to at-large elections but retained seven residency wards. In 1973, the city reduced the size of the council to seven members, with two members appointed at large, and two members elected at-large from residency wards. In 1975, the city increased the terms for council members from two to four years.

In 1977, the city submitted 67 different annexations for preclearance, 36 of which the Department of Justice objected to because they would have diluted black voting strength. The department found that:

> [T]he information you have provided leads to the conclusion that the annexations have decreased the black population of Rocky Mount by between 2.4 and 3.1 percentage points. Our information regarding elections in Rocky Mount indicates that the city council is elected on an at-large basis and that racial bloc voting exists generally.
>
> Under these circumstances . . . we cannot conclude that the 36 annexations in question will not have a racially dilutive effect on voting in Rocky Mount.[892]

Under the at-large system, and given the prevalence of white bloc voting, only one black candidate had ever been elected to the city council. In 1983, undeterred by its previous unsuccessful efforts to annex areas that would dilute black voting strength, the city tried again to annex 11 new areas. The city prepared a ward map and redistricting plan that would accommodate the new areas but which was severely gerrymandered to limit black voting strength. Under that plan, approximately 42.1% of the city's black

[892] Drew S. Days, III, Assistant Attorney General, to Richard J. Rose, December 9, 1977

population was packed into Ward 2, resulting in a minority population of 87%. The remaining black population was spread evenly across Wards 3, 4, and 5, each having a majority white population. The city submitted the proposed annexation plan to the Justice Department in July 1983, and the proposed redistricting plan a month later. In a letter dated September 6, 1983, the department informed the city that it needed extensive additional information before it could approve the annexations.

On September 28, 1983, the ACLU, representing black residents of Rocky Mount, sued the city council and the boards of elections of Nash and Edgecombe Counties for violations of Sections 2 and 5 and the Constitution.[893] The complaint alleged that the city was preparing to implement the annexations and redistricting plan in municipal elections to be held in October without Section 5 preclearance, and the ACLU asked for an order enjoining the city from doing so. The court granted a temporary restraining order on October 7, 1983, four days before the elections were to take place. The city then consented to be permanently enjoined from implementing the annexations and redistricting plan until they were precleared. The Department of Justice objected to the proposed annexations, saying:

> [E]ven though blacks constitute over 42 percent of the city's population, at no time has more than one black been elected to the city council, which appears to be the result of a general pattern of racially polarized voting occurring in the context of Rocky Mount's at-large election system with its residency and majority vote requirements. While our analysis of available

[893] Green v. City of Rocky Mount, N.C., Civ. No. 83-81-CIV-8 (E D N.C.)

> data indicates that the proposed annexations will initially reduce the city's minority population by only 1.1 percent, the planned development of the areas to be annexed would over time most likely result in a substantially larger percentage dilution. In the context of the at-large election system that exists in Rocky Mount, we view this prospect as significantly enhancing the ability of the white majority to control the election of all councilmembers. The city must, in such circumstances, provide significant and credible nonracial justifications for these proposed annexations sufficient to offset the apparent discriminatory effect. This the city has failed to do, notwithstanding our request for further information.
>
> Our analysis of these annexations, along with the past history of annexations to the City of Rocky Mount, lead us to note, also, that annexing additional areas to the city in the future likely will be problematic when the projected population of such annexations will have an additional adverse impact on minority voting strength. However, should the city adopt an electoral system that would afford minorities a realistic opportunity to elect candidates of their choice in the expanded city, such a change would enhance the city's ability to obtain the required Section 5 preclearance of future annexations.[894]

The ACLU also challenged the 1983 redistricting plan for the council, with at-large elections and residential districts, as diluting black voting strength. The city stipulated that the black population in the city was sufficiently populous and concentrated so that, of seven wards, three could be drawn that were majority black.

In February 1985, the city adopted, and plaintiffs approved, a new electoral plan that provided for seven single member districts or wards. Three of the wards had a minimum of 64.9% black residents, while a fourth had a black population of 42.12%.

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[894] William Bradford Reynolds, Assistant Attorney General, to Richard J. Rose, February 21, 1984

The plan would remain in effect until 1990. Furthermore, for any plan adopted after 1989, the city agreed to:

> comply with its duty to construct an electoral system that does not result in any denial or abridgment of the right to vote on the basis of race, color, or previous conditions of servitude and shall not implement any change in voting procedure that would have the purpose or effect of denying or abridging the right to vote on account or race, color or membership in a language minority group.[895]

On May 9, 1985, the Attorney General approved the new electoral plan. Today four of the seven city council members are African American.

The Edgecombe County School District also drew an objection from the Department of Justice in 1984, when it sought to establish residency districts for the election of six of the seven school board members:

> [O]ur analysis indicates that in the context of an at-large election system such as exists in the Edgecombe County school district, the proposed residency districts would operate essentially as designated posts, separating what has been a single contest for several seats into several contests for single positions on the school board. In such a situation we note that when the black electorate is in the minority, as it is in the Edgecombe County school district, and racially polarized voting exists, as it seems to in the Edgecombe County School District, the opportunity to engage in single-shot voting offers minority voters a realistic chance to elect a candidate of their choice to office. Indeed, past success for the black electorate in Edgecombe County would seem to have occurred because several positions were open and the presence of a number of candidates caused the white vote to be split, thus allowing a candidate of the black voters' choice to win.

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[895] Green v. Rocky Mount, First Set of Stipulations, September 20, 1985.

> However, in the context of an at-large election system and the racially polarized voting which seems to exist in Edgecomb [sic] County, the imposition of the proposed residency districts would appear to decrease significantly the opportunities for minority voters to elect a representative of their choice. Such a result would constitute impermissible "retrogression" for black voters in the Edgecombe County school district.[896]

Hartford County and the Town of Ahoskie

Hines v. Callis

Ahoskie is a small town located in northeastern North Carolina and the economic center of rural Hertford County. In the late 1980s and early 1990s, Ahoskie was the center of a conflict over annexations that left the town "reeling under a burden of racial tensions that has polarized voters and pitted neighbor against neighbor."[897] At the time, Ahoskie's population of approximately 5,000 people was almost evenly divided between blacks and whites.

In 1988, Ahoskie commissioned a study to determine the feasibility of annexing three surrounding areas. Although the study ultimately recommended approval, the white dominated town council voted in early 1989 to exclude two predominantly black neighborhoods from the proposed annexation. Many households in the excluded areas did not have water and sewer service, and the residents strongly supported annexation.

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[896] William Bradford Reynolds, Assistant Attorney General, to Joseph J. Harper, Jr., January 16, 1984

[897] Marcia Stutts, "Blacks, whites in Ahoskie seek common ground," The Virginian-Pilot, November 19, 1989, p. B1.

The remaining areas proposed for annexation consisted of several predominantly white neighborhoods, including one relatively affluent neighborhood whose residents spoke out against joining the town. The mayor sought to justify the exclusion of the black neighborhoods on the grounds of economic feasibility.

African American residents of Ahoskie objected to the revised annexation plan. Some publicly charged the town with racism, claiming that race, not economics, was behind the council's decision to exclude the black neighborhoods. Others suggested that the council wanted to add white voters to the city in order to maintain control over the town council.

Black residents held a rally at a local church to discuss the issue and later voiced their opposition at a meeting of the Ahoskie Town Council. Despite the black residents' opposition, the five member council voted 4 to 1 to proceed with the revised annexation plan. The council's only black member cast the lone dissenting vote.

The final hurdle for the annexation was Section 5 preclearance. Ahoskie submitted the town's new boundaries to the Attorney General in March 1989. The Justice Department's review turned up five prior annexations since 1964, for which the town had not obtained preclearance, and the Attorney General asked the town several times for more information. The ACLU submitted comments on behalf of black residents. Ahoskie's mayor expressed confidence that the Attorney General would ultimately preclear the plan despite objections from black residents, saying "I don't

anticipate any problems with this. We have a handful of malcontents who are raising a smokescreen and making unsubstantiated claims."[898]

When the Department of Justice subsequently advised Ahoskie in late October that the Attorney General would not be able to make a determination on the town's submission in time for the municipal elections scheduled for November 7, 1989, the town council voted unanimously to postpone the election until the Attorney General made his decision.

Leaders of the African American community opposed the delay. Two black candidates were running for vacancies on the town council, and many believed that the annexation of white neighborhoods would hurt their chances of success.

On November 1, 1989, the ACLU filed suit in federal district court on behalf of Edna Hines and other African American voters in Ahoskie.[899] The plaintiffs alleged that the town's failure to obtain preclearance for prior annexations and its decision to postpone the election violated Section 5. The plaintiffs further alleged that the town's at-large method of electing its five member town council violated Section 2 and the Constitution. Among other things, the plaintiffs sought a temporary restraining order requiring the town to proceed with the election and to exclude voters living in the annexed areas that had not yet been precleared.

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[898] Marcia Stutts, "Ahoskie annexation gets funding nod," The Virginian-Pilot, June 21, 1989, p. D1.

[899] Hines v. Callis, No. 89-62-CIV-2-BO (E.D.N.C)

The district court granted the plaintiffs' request on November 3, and the election went ahead as scheduled. According to the local media, the election was marked by an abnormally large voter turnout[900] and voting "appeared to be motivated almost entirely by race."[901] Both black candidates were defeated.

Shortly after the election, the Attorney General precleared Ahoskie's five prior annexations but objected to the proposed annexation of several predominantly white neighborhoods. The Attorney General observed that "even though the town is close to 50 percent black in total population, black candidates have had extremely limited success in winning seats on the five-member town council." According to the Justice Department, the black candidates' lack of success was due "largely to a pervasive pattern of racially polarized voting in town elections in combination with the existing at-large electoral structure for the town council." The Attorney General further indicated that the annexation may have been motivated by a discriminatory purpose, finding that the town's decision to annex the predominantly white neighborhoods and not to annex the predominantly black neighborhoods "cannot be reconciled on the basis of . . . [race] neutral considerations."[902]

Following the objection, Ahoskie abandoned efforts to extend its boundaries, and

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[900] "Surprising voter turn-out in Ahoskie," Roanoke-Chowan News-Herald, November 8, 1989, p. A1.

[901] Marcia Stutts, "Blacks, whites in Ahoskie seek common ground," The Virginian-Pilot, November 19, 1989, p. B1.

[902] James P. Turner, Acting Assistant Attorney General, to Larry S. Overton, December 19, 1989, p. 2.

the parties agreed that the plaintiffs' Section 5 claims had been resolved. Litigation then moved forward on the plaintiffs' challenge to the town's at-large method of elections.

Ahoskie eventually agreed not to contest the plaintiffs' claim that at-large elections violated Section 2, but the parties were unable to agree on a remedial plan. The town council proposed a plan that divided the town into two districts, one majority black and the other majority white. Two members of the town council would be elected by the voters of each district, with a fifth member elected at-large. The plaintiffs opposed the plan on the grounds that an at-large election for the fifth seat would give white voters an unfair advantage. Because of the town's history of racially polarized voting, they argued, white voters would be able to control three out of five seats under the town's proposed plan. The plaintiffs proposed that the fifth council member be elected from a "swing" district in which black and white voters would have a roughly equal opportunity for success. With the parties' negotiations at an impasse, the defendants asked the court to impose their plan over the plaintiffs' objections.

In January 1991, after the district court ruled that the town had to preclear the defendants' plan before the court could consider it, Ahoskie submitted the plan to the Attorney General for preclearance. The plaintiffs opposed preclearance, filing several objections with the Department of Justice, but the Attorney General precleared the plan on August 19, 1991.

Ahoskie then re-submitted its plan to the district court for approval in the form

of a motion for summary judgment. The plaintiffs opposed the motion, arguing that the at-large election for the fifth council seat violated Section 2. The court held a hearing on the motion in February 1992.

Six months later, after reviewing the evidence, the district court found that Ahoskie's plan "effectively provided [whites] with three 'safe' seats" and would therefore violate Section 2.[903] The court also rejected the plaintiffs' proposed plan because there was not enough data in the record to determine whether the proposed swing district would actually give black and white voters an equal opportunity to elect the fifth council member. The court instead adopted its own plan which eliminated the fifth seat altogether and retained a four member town council with two members to be elected from a majority black district and two from a majority white district.

Both sides appealed. The court of appeals reversed, holding that the district court should have adopted the defendants' plan.[904] The court of appeals acknowledged that its review of election results from Ahoskie and Hertford County "reveals a history of racially polarized voting."[905] It cited black and white cohesion levels above 90% and white crossover voting of only 16.2% for a recent black mayoral candidate. The court also found that seven African Americans had run for the Ahoskie town council but only

[903] Hines v. Callis, Order of September 3, 1992, at 14.

[904] Hines v. Mayor and Town Council of Ahoskie, 998 F.2d 1266 (4th Cir. 1993).

[905] Id. at 1269.

two had ever been elected. There was clearly no dispute that the town's at-large election system violated Section 2.

The court of appeals nonetheless found that it was impossible to create a true swing district in Ahoskie and that the inability to do so required the district court to defer to the town's proposed plan as the best feasible remedy under the circumstances. The court also rejected the plaintiffs' proposed plan on the grounds that creating three majority black districts would dilute white voting strength because African Americans might be over represented on the town council.

The court of appeals also relied on the Supreme Court's ruling in Shaw v. Reno, decided just days before, in which the Court held for the first time that a "bizarrely shaped" voting district might violate the equal protection clause if it could only be understood as an effort to segregate voters on the basis of race and was not narrowly tailored to achieve a compelling governmental interest. Even though the defendants had not alleged that the plaintiffs' plan was unconstitutional, and the parties had not presented any evidence on that issue, the court of appeals nonetheless held that the plaintiffs' proposed plan "would violate the equal protection rights of white voters."[906]

Ahoskie held its first election under the new plan in November 1993. All five seats were up for election, and two black candidates were successful in the majority black district. Events in Ahoskie clearly show the role played by Section 5 in deterring

[906] Id. at 1274.

annexations likely to dilute black voting strength. This case also illustrates the often complex interplay among annexation decisions, election structure, and legal challenges brought by black voters under the Voting Rights Act to preserve their right to participate equally in the political process.

Martin County and the Cities of Williamston, Robersonville and Jamesville

Daniels v. Board of Commissioners of Martin County

In October 1989, black residents of Martin County, represented by the ACLU, filed suit challenging at-large elections for the county commission and the city commissions of Williamston, Robersonville, and Jamesville as diluting minority voting strength in violation of Section 2 and the Constitution.[907] The county, located in Eastern North Carolina, was 44.5% black, but only one black person had ever been elected to its five member commission. The town of Williamston was 47.52% black, but only one black person, William Honeyblue, had ever been elected to its six member commission. Robersonville was 47.3% black, but only one black person had ever been elected to its five member commission. Jamesville was 40% black, but only one black person, John Cabarrus, had ever been elected to its five member commission. Cabarrus died in office in 1987, and the town commission appointed a white person to fill the vacancy.

[907] Daniels v. Board of Commissioners of Martin County, Civ. No. 89-137-CIV-4-H (E.D. N.C.).

Plaintiffs further alleged that Jamesville, which along with Martin County is covered by Section 5, extended its corporate limits in 1967, and changed its method of elections after 1971, but failed to submit either change for preclearance.

Voting in Martin County was sharply polarized on racial lines. In 1967, the method of electing the county board of education was changed from appointments by the legislature to nonpartisan at-large elections with plurality voting and no residency districts. In 1971, the size of the board was increased from five to six members with five residency districts, including one two member district. Then in 1975, a seventh at-large seat was added to the board. Despite the fact that all of these changes were subject to Section 5, the board did not submit any of them for preclearance until 1986. The Attorney General objected to the adoption of residency districts, because they deprived black voters of "the opportunity to single-shot, or 'bullet,' vote for the candidate(s) of their choice from among the entire field of candidates that appeared on the ballot at each election." The Attorney General also noted:

> a prevailing pattern of racially polarized voting in county-wide elections involving black candidates in Martin County. Black candidates seem generally to be the choice of black voters, but only one black candidate has ever won election to the board, despite a significant number of black candidacies. . . . Our analysis further reveals that the black community apparently was not consulted about the adoption of residency districts until after that change effectively had become an accomplished fact. . . . [T]he school board's imposition of residency districts has had an unmistakable retrogressive effect on the ability of minority voters to elect

> candidates of their choice, particularly in light of the high degree of racial bloc voting that seems to exist.[908]

Following this objection, the school board adopted a plan in 1987, providing for elections from seven single member districts.

After extensive negotiations, the county agreed to adopt a system of limited voting for the county commission using two multi-member districts, an Eastern District, which included Williamston and Jamesville, and a Western District, which included Robersonville. The plan provided for the five commission members to be elected at-large by plurality vote in partisan elections, with three members elected from the Eastern District, with each voter casting two votes, and two members elected from the Western District, with each voter casting one vote. The decree also provided that "[i]t appears, after reasonable discovery, that the Plaintiffs can present a prima facie case that the method of electing the Board of Commissioners of Martin County is in violation of Section 2."[909]

The Attorney General precleared the plan on January 11, 1991, and it became effective in the 1992 elections when all five county commission seats were up for election.

The City of Robersonville

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[908] William Bradford Reynolds, Assistant Attorney General, to Daniel A. Manning, October 27, 1986.

[909] Daniels v. Board of Commissioners, Consent Order of October 16, 1990.

Approximately six months after the county settled its portion of the case, the city of Robersonville stipulated by consent decree that "the plaintiffs have presented a plausible claim under Section 2."[910] The decree provided for a five member commission, with one member elected at-large and the remaining four elected from two double member districts, one majority black and one majority white. Soon thereafter, the 1990 census showed Robersonville's black population had increased to 54.8%. The city, with the approval of the plaintiffs, revised the district boundaries in light of the new census. The plan was submitted to the Justice Department, which precleared it on July 19, 1991.[911]

The City of Williamston

In November 1989, Williamston had moved to stay the plaintiffs' suit, arguing that the town would eventually adopt a new voting system which would render the case moot. While the motion was pending, the town created a redistricting committee composed of three commissioners, two white and one black, and four citizens, two white and two black, to review alternative districting plans. The district court denied the city's motion for a stay on April 10, 1990, and the following week, the city renewed its motion for a stay representing that it was in the process of adopting a new method of elections based on the recommendations of its districting committee.

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[910] Id., Order of March 12, 1991.

[911] John R. Dunne, Assistant Attorney General, to Michael Crowell, Attorney for Martin County, July 19,

On April 19, 1990, the committee recommended that the city commission have five members, with three elected from single member districts, one majority black, two majority white, and two members elected at-large. The commission adopted the committee's recommendations, and without consulting the plaintiffs. Given the patterns of racial bloc voting that existed in the city, the plan ensured that black residents, despite the fact that they were almost 50% of the population, would be able to elect a candidate of their choice to only one of the five commission seats.

On April 27, 1990, plaintiffs renewed their objections to Williamston's motion for a stay, arguing that the proposed plan was inadequate because it continued the use of at-large elections and created only one majority black district. On May 25, 1990, the district court denied Williamston's motion, finding that even if the new redistricting plan was adopted and precleared, a controversy still existed between the parties as to the election scheme.

The plan was enacted by the state legislature, and the city submitted it to the Attorney General for preclearance. The Attorney General requested Williamston to submit additional information, but rather than comply with the request, the city reconvened the redistricting committee to consider alternative plans. The committee recommended a different plan, which plaintiffs and the majority of black citizens supported. The new plan provided for five commissioners, one elected at-large and the

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1991.

remaining four elected from two double member districts, one majority white and one majority black.

The city withdrew its initial plan, submitted the new one to the Justice Department, which precleared it on August 22, 1991. The parties then consented to a voluntary dismissal of the suit against Williamston.

The City of Jamesville

After the lawsuit was filed, Jamesville submitted its 1967 annexation, and the subsequent change from partisan to non-partisan elections, for preclearance. In comment letters to the Attorney General, plaintiffs noted that the annexation had excluded several black families who lived in the area.[912] The Attorney General precleared the change in the method of elections, but asked for additional information concerning the annexation.

In February 1992, the parties entered into a consent decree in which the city, which was 40% black, stipulated that "[i]f this lawsuit were to be tried, plaintiffs would be able to produce evidence to support their claim that the current method of electing town commissioners violates Section 2 of the Voting Rights Act."[913] Pursuant to the consent decree the five member commission would be elected at-large by plurality vote and by limited voting. Each voter could cast only two votes and vote for no more than two candidates. Any ballot containing more than two candidate names would be considered invalid. Jamesville submitted the new plan to the Department of Justice and it was precleared on April 10, 1992.

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[912] Kathleen Wilde, ACLU staff counsel, to Teresa Lynn, U.S. Department of Justice, February 7, 1991; April 17, 1991; August 20, 1991.

[913] Daniels v. Board of Commissioners, Order of February 5, 1992.

Moore County and the Town of Southern Pines

Person v. Moore County Board of Commissioners

Moore County is located in the Sandhills region of central North Carolina, approximately 50 miles southwest of Raleigh and 100 miles east of Charlotte. Over the last 20 years, Moore County has been one of the fastest growing counties in the state, with a large influx of retirees and affluent residents attracted to the county's many recreational amenities, including 43 golf courses, among them the famous Pinehurst Resort and Country Club.

In 1989, at the beginning of the population boom, the ACLU represented a group of black voters in a lawsuit against the Moore County Commission, the Moore County Board of Education, and the Town Council of Southern Pines, the county's largest municipality.[914] At the time, both the five member county commission and the eight member board of education were all white, even though African Americans made up 21.2% of the county population according to the 1980 census. In Southern Pines, where African Americans made up 37.8% of the population, four out of five members of the town council were white. The plaintiffs alleged that the at-large method of electing each governing body violated Section 2 and the Constitution.

Soon after the law suit was filed, the plaintiffs sought to enjoin the 1989 municipal elections in Southern Pines, but the district court denied the injunction on the

[914] Person v. Moore County Board of Commissioners, Civ. No. C-89-135-R (M.D.N.C.).

grounds that African Americans had been able to elect one black candidate to the town council in every election since the mid-1950s, through the use of single shot voting and white crossover voting for black candidates. Moreover, because the African American political community had never run more than one candidate for the town council in any election, the court found no basis on which to conclude that the at-large election system had limited black representation to a single seat.

In January 1991, the district court granted the town's motion for summary judgment on the same grounds. By then, however, the town had reduced the number of council members from five to four, and the court subsequently allowed the plaintiffs to amend their complaint to challenge the new election structure as a violation of Section 2 and the Constitution.

The case languished in the courts over the next three years while the parties conducted discovery. During that time, one of the original plaintiffs was elected to the board of education under the existing at-large system and the legal landscape changed with the Supreme Court's decision in Shaw v. Reno. In addition, the 1990 census showed significant increases in the white population of Moore County and Southern Pines, making it difficult to draw reasonably compact majority black districts. As a result, the plaintiffs voluntarily dismissed their claims in 1994.

Person County

Webster v. Board of Education of Person County

Located in the rolling hills of North Carolina's Central Piedmont region, and bordering Virginia to its north, Person County was 30.2% African American, according to the 1990 census. The Person County Board of Education consisted of five members elected at-large by majority vote to serve four year staggered terms. The elections were partisan, with nominations made in primary elections. Only one black person, Henry Eily, had ever been nominated or elected to the board since 1974.

In November 1991, James Webster, a black county resident represented by the ACLU, filed a federal lawsuit challenging at-large board of education elections as diluting black voting strength.[915] After negotiations, the parties agreed on a new system of elections. Although most vote dilution lawsuits have been settled on the basis of single member districts, the parties in Person County agreed upon a system that would retain at-large voting but remove the devices identified by the courts as "enhancing" the opportunities for discrimination. Thus, elections would be nonpartisan, terms of office would be concurrent, and election would be by plurality vote. Such a system would allow a cohesive minority to focus its votes on one or more candidates and elect them to office. The court approved the plan in a consent order, but also allowed the parties an opportunity after the 2000 election, and in the event the new system failed to provide

[915] Webster v. Board of Education of Person County, North Carolina, No. 1:91CV00554 (M.D.N.C.).

black voters with an equal opportunity to elect candidates of their choice, to reopen the litigation and request additional changes in the method of elections.[916]

Sampson County and the City of Clinton

Hall v. Kennedy

Sampson is a rural county in southeastern North Carolina, with the City of Clinton as its county seat. Based on the 1980 census, the county had a black population of 33.7%, and Clinton had a black population of 42.8%. Like many other counties in the state, Sampson had a history of discriminating against its black residents in the areas of education, employment, housing, and voting. Although more than 30 black candidates had run for countywide and city office, only a token number had ever been elected.

The county's board of commissioners and board of education each had five members elected at-large by majority vote to four year staggered terms. In a 1988 letter to the county attorney, commenting on the exclusion of African Americans from the county commission and board of education, the Department of Justice found that "black residents have been and are being denied an opportunity equal to that afforded other residents of Sampson County to participate in the political process and to elect candidates of their choice to these bodies." The department based its conclusions on several factors, including "the absence of any elected blacks on either board, the

[916] Id., Order of November 30, 1995.

minimal electoral success of black candidates in the past, the presence of racially polarized voting patterns, and a history of racial discrimination that is reflected in the continued socio-economic disparities between whites and blacks."[917]

The Clinton City Council consisted of a mayor, elected at-large by plurality vote to serve a two year term, and four council members elected at-large by plurality vote to serve four year staggered terms. Prior to 1973, no black candidate was known to have run for a council seat. Between 1973 and 1988, black candidates ran for council eight times, but were elected only twice. In both instances, the same person won, but was defeated for re-election.

The city board of education had five members whose chairperson was elected by the board. Three of the board members were elected at-large by plurality vote to four year terms, and the other two members were appointed by the elected board members. Between 1976 and 1988, black candidates ran in at least five of seven elections, but were only elected twice. A newspaper article reported that during the 1988-89 school year, 107 students had transferred from county schools to city schools, taking with them valuable tax dollars and causing racially mixed county schools to become predominately black.[918] The county school supervisor also disclosed that the county

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[917] William Bradford Reynolds, Assistant Attorney General, to Cyrus Faircloth, Esq. and Maurice Holland, Esq. , October 26, 1988.

[918] Julie King, "Leaders Don't Blame Racism for Heavily Black Schools,," The Sampson Independent, October 19, 1988.

schools were given an average of $12 less per student than city schools for the 1988-89 school year.[919] As a result, the school district had a deficit of more than $80,000.

In November 1988, black city residents, represented by the ACLU, filed a federal lawsuit challenging the method of elections for the city council and school board as racially discriminatory in violation of the Constitution and Section 2.[920] The plaintiffs requested a permanent injunction against further use of the challenged election schemes.

In December 1988, the Department of Justice filed a complaint in federal court against the county based on the department's earlier findings.[921] The department sought a restraining order prohibiting continued use of the at-large system. The department and the county later entered into a settlement agreement, in which the county agreed to adopt single member districts. However, several black residents were concerned the department would accept a plan with only one majority black district. In July 1989, those residents, represented by the ACLU, moved to intervene in the Department of Justice's lawsuit to ensure that racially fair districts would be drawn. The court granted the motion and in October 1989, the county adopted a plan providing for five single member districts, two of which were majority black.

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[919] Ruthie Matthews, "County May Face Discrimination Suit on At-large Election of School Board,," The Sampson County Review, November 3, 1988.

[920] Hall v. Kennedy, Civ. No. 88-117-CIV-3 (E.D. N.C.).

[921] United States v. Sampson County, North Carolina, Civ. No. 88-121-CIV-3, Compl. (E.D. N.C.).

As for the suit against the city council, the court determined that "[t]he present method of electing the Clinton City Council has the effect of denying black voters an equal opportunity to elect candidates of their choice, in violation of Section 2."[922] The parties agreed on a new council redistricting plan with five members elected from single member districts by plurality vote to four year staggered terms. Two of the five districts were majority black, and the mayor continued to be elected at-large by plurality vote.

The city's board of education also settled with plaintiffs, stipulating that "if this case were to be tried under Section 2 . . . the court would find from the evidence that the present at-large method of electing Clinton City Board of Education members has the effect of denying black voters an equal opportunity to elect candidates of their choice."[923] The new plan provided for a six-member council elected from single member districts, two of which were majority black, by plurality vote to serve four year staggered terms.

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[922] Hall v. Kennedy, Order of July 13, 1989.

[923] Id., Order of August 14, 1989.

Scotland County and the City of Laurinburg

Speller v. City of Laurinburg

The City of Laurinburg is located in southeastern North Carolina, halfway between Charlotte and Wilmington, and just a few miles north of the South Carolina border. Although not incorporated until 1877, Laurinburg traces its origins back to 1785, and has been the Scotland County seat since the legislature created the county in 1899.

In 1993, the ACLU sued the city on behalf of five African American voters and the Scotland County Branch of the NAACP.[924] Although African Americans made up more than 45% of the city's population of approximately 11,500, there had never been more than one African American on the five member city council at any one time since 1969. The plaintiffs argued that the city's at-large method of electing the council violated Section 2.

While the lawsuit was pending, the city adopted an annexation ordinance which would have added approximately 4,100 people to the city's population, and thereby reduced the black share of the city's population by 6.5%. The city submitted the annexation to the Department of Justice for preclearance under Section 5. Noting "an apparent pattern of racially polarized voting that has limited the ability of black voters to elect their preferred candidates" in Laurinburg, the Attorney General objected to the

[924] Speller v. City of Laurinburg, No. 3:93 CV 365 (M.D.N.C.).

proposed change on April 25, 1994, concluding that the annexation "would further limit the opportunity of black voters to elect their candidates of choice to the city council."[925]

The parties settled the case shortly after the objection was issued. Under the terms of the settlement, four city council members were to be elected from two dual member districts to four year terms on a staggered basis, and the fifth was to be elected at-large to a two year term. One of the dual member districts had a black population of almost 63%. The new districts included the land contained in the city's proposed annexation, and the entire settlement agreement was contingent upon the Attorney General's preclearance of both the annexation and the settlement.

In a letter dated June 23, 1994, the Attorney General withdrew his prior objection to the proposed annexation and precleared the settlement agreement. In reaching that conclusion, he noted that the new districting plan "would fairly recognize black voting strength in the expanded city," and therefore resolved his prior concerns about the annexation.[926]

The court approved the settlement, and the new redistricting plan was first implemented in the city's 1995 elections. Today, more than 10 years later, the City of

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[925] Deval L. Patrick, Assistant Attorney General, Civil Rights Division, to Michael Crowell, Esq., April 25, 1994. This objection was not the first for Laurinburg. In 1978, the Attorney General blocked the city's attempt to implement a majority vote requirement and numbered post elections for the city council, concluding that "racial bloc voting appears to exist," and the proposed changes "could have the potential for abridging minority voting rights." Drew S. Days III, Assistant Attorney General, Civil Rights Division to Hon. Charles Barrett, December 12, 1978.

[926] Deval L. Patrick, Assistant Attorney General, to Michale Crowell, Esq., June 23, 1994.

Laurinburg is still using a similar election system, and there are three African Americans (including the Mayor Pro Tem) on the five member city council.

Tyrrell County

Rowsom v. Tyrrell County Board of Commissioners and Board of Education

Tyrrell County is located in coastal North Carolina on Albemarle Sound. In 1990, the county had a population of only 3,856 people, 40% of whom were black. Both the county commission and board of education had five members, but only one African American had ever been elected to the commission. And, although blacks had better success in school board elections, there had never been more than one African American to serve on that body at one time. Low black representation persisted, even though between 1982 and 1994, black candidates ran at least seven times for the board of commissioners and at least nine times for the board of education.

In 1993, black voters represented by the ACLU, filed suit challenging the at-large method of elections for both bodies as violating the Constitution and Section 2.[927] Given the sparse population of Tyrrell County, the parties settled the litigation by adopting limited voting. Under such a system, candidates are elected at-large but each voter has fewer votes than the number of seats up for election. Limited voting, like its

[927] Rowsom v. Tyrrell County Board of Commissioners and Board of Education, No. 93-33-CIV-Z-D (E.D.N.C.).

counterpart, cumulative voting, allows a cohesive minority to elect candidates of its choice no matter how the votes of the majority are cast. Under the agreed upon plan, members of both boards would continue to hold four year staggered terms, with two members elected in 1994 and three in 1996, but in each election voters would have only one vote. Both parties agreed that limited voting was preferable in Tyrrell to single member districts because:

> the use of such districts here would result in too small a pool of candidates for each seat, would divide communities with common interests, would limit the opportunities of some qualified candidates who might fare better countywide, would split precincts and thereby cause difficulties for election officials and voters, and would be too easily affected by small shifts in population.[928]

A consent order adopting the agreed upon plan was filed in March 1994, and two black candidates won in primary elections that spring.

Washington County

Wilkins v. Board of Commissioners

Rural Washington County lies on the south side of Albemarle Sound in northeastern North Carolina. In February 1993, the ACLU sued the county on behalf of five black voters, alleging that the county's election scheme for its five member county commission violated both Section 2 and the Constitution.[929]

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[928] Id., Order of March 28, 1994.

[929] Wilkins v. Board of Commissioners, No. 93-12-CIV-2-BO (E.D.N.C.).

The county's election scheme was highly unusual. Four members of the commission were nominated from single member districts in a partisan primary. The fifth member was nominated in an at-large primary in which all county voters could participate. Boundaries of the nomination districts followed township boundaries within the county, with one commissioner nominated from Lees Mill Township, two from Plymouth Township, and one from Scuppernong and Skinnersville Townships. In the general election, however, all five members of the commission were elected at-large. Terms of office were four years and were staggered with elections held every two years. Although African Americans made up 45% of the county's population of approximately 14,000, only one African American had ever been elected to the county commission at the time the plaintiffs filed suit.

In response to the law suit, the board of commissioners voted by a narrow margin to settle the case through negotiation. After several months of negotiations, the parties agreed on a revised election plan providing for four single member districts and one at-large seat, but the settlement stalled when the defendants insisted that the plaintiffs waive any claim to attorneys' fees, which had reached approximately $6,000.

The plaintiffs then moved for partial summary judgment on their claim that the county's nomination districts were malapportioned in violation of the one person, one vote principle of the Constitution, having a total deviation of 26%. The county defended the plan, however, on the basis that the at-large seat reduced the

malapportionment to 21.3%. The district court rejected defendants' argument and granted plaintiffs' motion finding that any reduction still left the nomination districts beyond constitutional limits. "Even if the court accepts the defendants' calculations, the 21.3% population deviation is unacceptable. . . Therefore the court finds that the present plan violates the Fourteenth Amendment 'one person, one vote' standard."[930]

While plaintiffs' motion for summary judgment was pending before the court, the chair of the county commission was defeated in the May 1994 primary. The chair then engineered a settlement proposal by the lame duck commission which called for a system of limited voting, and which would have also provided the chair with a second chance at retaining his seat. When the plaintiffs would not agree to this proposal, the county commission submitted its plan to the Department of Justice for preclearance and asked the district court to enjoin the general election on the grounds that the candidates had been nominated from malapportioned districts.

The plaintiffs opposed the motion, arguing that allowing the lame duck commission to determine the new election scheme would perpetuate rather than remedy the past discrimination. The court agreed and allowed the 1994 general election to go forward. That election resulted in a new county commission that took a markedly different approach to the litigation.

The new commission immediately withdrew the limited voting plan from

[930] Id. Order of June 23, 1984.

consideration by the Department of Justice and agreed to settle the case using the election plan on which the parties had previously agreed. Under the terms of the settlement, four members of the commission were to be nominated and elected from single member districts and one was to be nominated and elected at-large. Two of the new districts were majority black with black voting populations of 59% and 55%, respectively.

The Attorney General precleared the plan on October 23, 1995, and the district court ordered it into effect on December 1, 1995. Defendants agreed to pay plaintiffs' attorney's fees, the case was closed, and the new plan was implemented on a staggered basis over the 1996 and 1998 elections. Again, the critical role played by Section 5 is apparent.

Wayne County and the Town of Mt. Olive

Lewis v. Wayne County Board of Education

The Wayne County Board of Education consisted of seven members elected at-large. County residents living in the majority black City of Goldsboro had a separate school board and were not allowed to vote for members of the county's board of education. Based on the 1990 census, blacks were 24% of the population of the county school district, but for the prior two decades no black candidate had been elected to the board of education.

In 1992, black residents, represented by the ACLU, filed suit against the county

school board arguing that the method of elections diluted black voting strength and denied black residents the opportunity to elect candidates of choice in violation of Section 2.[931] During negotiations, the county agreed to merge the county board with Goldsboro's school board, and adopted a new election system under which black residents had an opportunity to elect their preferred candidates. The plaintiffs accepted the new plan and the case was voluntarily dismissed. Today, the Wayne County Board of Education consists of seven members elected from single member districts to four year terms. Two of the seven members are black.

Fussell v. Town of Mt. Olive

City government of Mt. Olive, located in Wayne County, consisted of a mayor and five member board of commissioners elected at-large by plurality vote. Despite the fact that blacks were 48% of the voting age population, and despite numerous black candidacies, there had never been more than one black elected to the board at any one time.

In 1993, black residents, represented by the ACLU, filed suit challenging the city's at-large method of elections as diluting minority voting strength in violation of Section 2.[932] The city agreed to settle the case in July 1993, by adopting a plan

[931] Lewis v. Wayne County Board of Education, Civ. No. 91-165-CIV-5-H (E.D.N.C.).

[932] Fussell v. Town of Mount Olive, Civ. No. 93-303-CIV-5-D (E.D. N.C.).

containing four single member districts and one at-large seat. However, following a public meeting in August at which whites expressed their opposition to a district system, the city adopted a plan that not only contained two at-large seats, but packed blacks in one district at the level of 97%. The plan was objected to by the plaintiffs and the black community in general.

Subsequently, in November 1993, when one of the black plaintiffs was elected to the board (as its only black member), the board petitioned the court to prohibit her from participating in board discussions or voting on issues raised in the lawsuit. The court denied the board's request.

The board's plan was submitted for preclearance, and the Attorney General entered an objection, concluding: "given the presence of polarized voting and the limited success that black voters have enjoyed when five at-large seats are elected, there is considerable doubt as to whether black voters would have a significant opportunity to elect any at-large member under the proposed election method."[933]

The rejection of the city's plan was not the first Section 5 objection in Wayne County. In 1965, the county had adopted staggered terms of office for its board of commissioners, but failed to submit the change for preclearance until 1986. In objecting to the change, the Attorney General found, based on the county's racially polarized

[933] Deval Patrick, Assistant Attorney General, Civil Rights Division, to William S. Byassee, Attorney for Wayne County, September 13, 1994.

voting pattern, that staggered terms "could well have a retrogressive effect on the ability of minority voters to participate meaningfully in the electoral process and to elect a candidate of their choice."[934]

Mt. Olive, in response to the Attorney General's objection, adopted a new plan which consisted of a five member board, four of whom were elected from single member districts, with one member elected at-large. Two of the single member districts were majority black, and the plan required that all members be elected by plurality vote to serve two year terms. The plan was acceptable to the plaintiffs, and the litigation was settled.

The salutary role played by Section 5 in the equitable resolution of this litigation is apparent.

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[934] William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, to E. B. Borden Parker, Wayne County Attorney, November 4, 1986.

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RHODE ISLAND

State Redistricting

Metts v. Murphy

Charles Walton, an African American, represented Rhode Island State Senate District 9 for many years. Prior to redistricting in 2002, the district was 26% African American in voting age population. The redistricting, which also reduced the number of legislative seats in accord with a state constitutional amendment, dropped the black population in the district to 21% and Walton was defeated in the 2002 primary.

Prior to his loss, a number of African American voters and related organizations had challenged the redistricting plan under Section 2.[935] Though it was not possible to draw a majority black district, plaintiffs contended that African American voters could win an election in which they were less than a majority, but not less than 26% of the voting age population. The Supreme Court has assumed, but not decided, that Section 2 reaches claims of vote dilution where the minority is not large enough to be a majority in a single member district.

The district court dismissed the complaint for failure to state a claim, concluding that the minority group must be large enough to constitute a majority in a single

[935] Metts v. Almond, 217 F. Supp. 2d 252, 254 (D. R.I. 2002). Plaintiffs were represented by the Lawyers' Committee for Civil Rights Under Law and the NAACP.

member district to establish a Section 2 violation.[936] Plaintiffs appealed and the ACLU filed an amicus brief in their support. A panel of the court of appeals for the First Circuit initially reversed the dismissal, but the case was then heard en banc by the full court. The ACLU submitted a supplemental brief.

Drawing on its lengthy experience bringing voting rights cases, the ACLU pointed out that prior to the adoption of the 1982 amendments of Section 2, vote dilution claims were mostly decided on Fourteenth Amendment grounds and those cases never required a majority minority district as a necessary element for a claim. The ACLU argued that because Section 2 was intended to reduce the burden of proof in vote dilution claims, the statute should not be interpreted to impose a higher burden of proof than applied under the Fourteenth Amendment. The brief also pointed out that to reject Section 2 claims when a remedy could be provided which relied on crossover voting, would remove an incentive for candidates and voters of all races to seek common ground.

The en banc court also reversed the dismissal sending the case back for development of a full record. The court noted that the geographic compactness standard of Thornburg v. Gingles was developed in the context of a challenge to multi-member districts. It refused to apply the standard mechanically, noting that Supreme Court opinions dealing with single member districts "have increasingly emphasized the

[936] Id., 217 F. Supp. 2d at 261.

open-ended, multi-factor inquiry that Congress intended for section 2 claims." The court held "plaintiffs are entitled to an opportunity to develop evidence before the merits are resolved."[937]

On remand, an agreement was reached and the legislature redrew the district returning the African American percentage to 26%, and the litigation was closed.

[937] Metts v. Murphy, 363 F. 3d 8, 11 (1st. Cir. 2004)(en banc).

SOUTH CAROLINA

STATEWIDE ISSUES

The Legislative Delegation System

Vander Linden v. Hodges

Residents of Dorchester, Berkeley, and Charleston Counties, represented by the ACLU, filed suit in 1991 challenging the county legislative delegation structure in South Carolina. They contended that it violated one person, one vote, and allowed persons who were neither residents nor voters of a county to elect members of another county's legislative delegation. They also contended that the system was adopted and was being maintained with a racially discriminatory purpose and had a racially discriminatory effect in violation of the Constitution and the Voting Rights Act. A trial was held in 1996, and two years later the district court dismissed the complaint on the grounds that neither the Constitution nor the Voting Rights Act applied to the method of electing county legislative delegations. However, the court of appeals reversed, making extensive findings of the discriminatory origins of the legislative delegation system and its present day unconstitutionality.[938]

Traditionally, the legislative delegation of each of the state's 46 counties consisted of a senator and one or more representatives elected from the county at-large. The house was composed of 124 members apportioned among the counties in accordance

[938] Vander Linden v. Hodges, 193 F. 3d 268 (4th Cir. 1999).

with their populations, with each county being treated as a separate election district. After 1893, the legislative delegation controlled virtually every aspect of local government, and its members were effectively the county legislature and governing board. According to a leading South Carolina historian writing in 1927, "the county is not guaranteed any freedom in managing its own local affairs, but is subject completely to the authority of the state legislature."[939]

The legislative delegation system, as the court of appeals found, took shape at the end of the 19th century as part of Southern Redemption, and after a constitutional amendment in 1890 removed local government from the hands of locally elected officials. The system of locally elected county government was rejected "partly because it had resulted in the election of large numbers of African-American officials." In turn, the replacement system of county government by the legislative delegation was "created out of fear of African-American voting power." It "arose against the backdrop of a white supremacist movement, led by Governor Ben Tillman, that sought to diminish African-American voting power."[940]

In 1973, the state amended its constitution to transfer some - but far from all - of

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[939] David Duncan Wallace, The South Carolina Constitution of 1895 (Bulletin of U.S.C., 1927), p. 91. As late as 1965, "[w]ith the exception of a few counties, the legislative authority in county affairs is still vested in the General Assembly." O'Shields v. McNair, 254 F. Supp. 708, 719 (D.S.C. 1966).

[940] Vander Linden, 193 F. 3d at 270. See also Columbus Andrews, Administrative County Government in South Carolina (Chapel Hill; U. of North Carolina Press, 1933), p. 33 (elected county government was abolished in part because of "the race problem, which cast all else into deep shadow").

the powers exercised by the legislative delegation to locally elected county government.[941] The catalyst for the change was the one person, one vote revolution of the 1960s and the fact that as the result of redistricting some counties were divided into numerous house and senate districts, and some counties were without a resident senator. Under state law and practice, each member of a county's legislative delegation had one vote as to matters determined by the delegation, regardless of the number of county residents the member represented. In some instances, a member represented no residents of the county, only vacant land.

The transfer of some powers of local rule did not solve the one person, one vote problem inherent in the legislative delegation system. The fact that one member of a county's delegation might represent thousands of county residents, and another only a handful, yet each member had equal voting power, was in serious conflict with the equal population standard of the Fourteenth Amendment. In one methodology relied upon by the court of appeals, 45 of the 46 legislative delegations deviated from the equal population standard by amounts that ranged from 75.15% to 330.56%. By another

[941] Among the many powers retained by county legislative delegations were: (1) making and/or recommending appointments to boards and commissions; (2) approving and/or recommending the expenditure of money allocated by the South Carolina General Assembly for highways, parks, recreation, tourism, and other matters; (3) approving the budgets of local school districts; (4) initiating referenda regarding the budgetary powers and the election of governing bodies of special purpose and public service districts; (5) approving the reimbursement of expenses for county planning commissioners; (6) approving county planning commission contracts with architects, engineers, and other consultants; (7) altering or dividing school districts of counties; (8) reducing existing special school levies in counties and school districts; and (9) submitting grant applications for planning, development, and renovating park and recreation facilities. Vander Linden, 193 F.3d at 271. For other powers exercised by country

measure, 44 of the 46 delegations deviated from the standard by amounts ranging from 34.86% to 418.47%.[942] In addition, in 29 (63%) of the legislative delegations, 50% or more of the seats were elected from districts in which more than half of the population resided outside the county.

Under the redistricting system for the house and senate, blacks were underrepresented based upon their percent of the population. African Americans were 30% of the population of the state, but only 20% of the members of the house were black. Only six (13%) of the members of the senate were black. Although there were 12 majority black counties in the state, blacks were a majority of the legislative delegation in only four (9%) counties.

In reversing the district court, the court of appeals found that the delegations were popularly elected bodies that exercised general governmental powers and were thus subject to one person, one vote. The court of appeals also found that the deviations from the equal population standard were unconstitutional. Given its ruling, the court found it unnecessary to reach the plaintiffs' alternative claims involving the racially discriminatory purpose and effect of the delegation system.

On remand, the district court gave the defendants an opportunity to propose a remedy for the one person, one vote violation, but they were unable to do so. As a

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delegations, see id. at 277 n.5.

[942] Id. at 272.

consequence, and at the suggestion of the plaintiffs, the district court in 2000 ordered into effect a system of weighted voting for county legislative delegations based upon the percent of the county's population represented by each delegation member. After more than 100 years, the discriminatory county legislative delegation system, a legacy from the days of Ben Tillman, was finally ameliorated, with increased powers of governance being transferred to county voters.

1980 Redistricting

Graham v. South Carolina

The Republican Party filed suit in federal court in South Carolina in 1984, to require the holding of elections for the state senate at the regularly scheduled time in November 1984.[943] Although a Section 5 declaratory judgment action had been filed by the state in the District of Columbia seeking preclearance of a legislatively enacted plan, the Republicans argued that even if preclearance were granted, it would be impossible to hold the primary and general elections as scheduled in November.[944] As a result, they asked the court to impose an interim plan of its own.

The state defendants in their answers requested the local court, inter alia, to implement the senate reapportionment plan enacted by the legislature or some other

[943] Graham v. South Carolina, Civ. No. 3:84-1430-15 (D. S.C.).

[944] South Carolina v. United States, Civ. No. 83-3626 (D.D.C.).

plan which embodied the policy choices of the legislature - but without requiring preclearance of any such plan under Section 5. The ACLU agreed to represent the state NAACP as a plaintiff intervenor to insure that any plan adopted by the court, interim or otherwise, that reflected the policy choices of the legislature, would be submitted for Section 5 review. Intervenors were concerned that unless such plans were deemed subject to Section 5, jurisdictions prone to discrimination would be encouraged not to reapportion themselves and seek preclearance from the Attorney General or the District of Columbia court. Instead, they would elect to wait until they were sued in local (arguably more sympathetic) courts, and then seek to have legislatively developed plans adopted under the guise of court ordered interim remedies free and clear of the Voting Rights Act. Intervention was allowed.

Following a trial on the merits, the local three-judge court entered an order on July 31, 1984, implementing an interim plan for the senate which had been prepared by the chairman of the House Judiciary Committee, the "Sheheen 1.98% Plan." The court expressly provided that the plan was not required to be precleared under Section 5. Intervenors filed a notice of appeal to the Supreme Court.

After the notice of appeal was filed, the state immediately enacted a second senate reapportionment plan which was precleared by the Attorney General on August 10, 1984. On August 14, 1984, the three-judge court vacated the Sheheen 1.98% Plan, but left in force the language in its order that court implemented interim plans were not

subject to Section 5 review. Intervenors filed a jurisdictional statement asking the Supreme Court to vacate the entire July order on mootness grounds so that it would have no value as a precedent in any other cases. The Court, however, dismissed the request on January 7, 1985, for want of jurisdiction.[945]

1990 Redistricting

Burton v. Sheehan

SRAC v. Theodore

Because of partisan deadlock - the house and senate were controlled by Democrats while the governor was a Republican – South Carolina was unable to redistrict its house, senate, and congressional delegation after the 1990 census, despite their being severely malapportioned. The legislature passed redistricting plans that were essentially incumbent protection plans and which created only a token number of additional majority black districts. The governor vetoed the plans in January 1992, saying "to do otherwise would be viewed as approval of a plan that violated principles established under Federal Constitutional and statutory law."[946]

Prior to the governor's veto in 1992, the Republican Party filed a law suit in federal court alleging that the general assembly and the governor were deadlocked and

[945] NAACP v. Daniel, 469 U.S. 1101 (1985).

[946] Governor Campbell's Veto Message, January 29, 1992, 7.

asked to court to implement interim court ordered redistricting. The ACLU and the NAACP filed a second law suit in October 1991, on behalf of the Statewide Reapportionment Advisory Committee (SRAC), asking the court to enjoin further use of the malapportioned plans and order into effect remedial plans which provided minority voters an equal opportunity to elect candidates of their choice. SRAC was an association of black and civil rights organizations which had participated in the legislative redistricting process by proposing and critiquing various redistricting plans. The two cases were subsequently consolidated for trial.[947]

A three-judge court heard the case and held that the existing plans violated one person, one vote. It considered and rejected plans submitted by SRAC and other parties, and drew court ordered plans for the house and senate that were virtual copies of the vetoed legislative plans. The court acknowledged that it should apply the non-retrogression principal of Section 5, but held it was not "obligated to completely import the standards and requirements of § 2" into its remedial plans. Notably, however, the court acknowledged "the parties' stipulation that since 1984 there is evidence of racially polarized voting in South Carolina."[948]

The SRAC plan for the senate contained 12 districts with majority black voting age populations, as opposed to 10 in the court ordered plan. The SRAC plan for the

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[947] Burton v. Sheheen, 793 F. Supp. 1329 (D.S.C. 1992).

[948] Id. at 1351, 1357-58.

house contained 32 majority black voting age districts, as opposed to 23 in the court ordered plan. The congressional plan adopted by the court was the exception. All parties to the consolidated litigation agreed that the Voting Rights Act required that one of the state's six congressional districts should be majority black. Accordingly, the court drew the sixth district with a 58% black voting age population. James Clyburn won the ensuing Democratic primary and the general election in the district, and became the first black member of Congress from South Carolina since Reconstruction.

The governor and SRAC appealed the decision of the three- judge court as to house and senate redistricting on the grounds that it did not comply with the racial fairness standards of Section 2. On June 14, 1993, the Supreme Court summarily reversed and vacated the judgment of the three-judge court. It remanded for further consideration in light of an amicus brief filed by the Solicitor General in which he argued, as did SRAC, that the district court had given inadequate consideration to, and made inadequate findings concerning, "allegations and evidence of violations of Section 2 of the Voting Rights Act."[949]

The three-judge district court held a hearing on remand but refused to take further action. Instead, it gave the state an opportunity to adopt and preclear permanent legislative plans. The state enacted a congressional plan patterned after the court ordered plan, and it was precleared in May 1994. The state also enacted a plan for

[949] SRAC v. Theodore, 508 U.S. 968 (1993), and Solicitor's Brief, p. 9.

the house, but it was objected to by the Attorney General under Section 5, who noted that:

> the House gave little or no consideration to Section 2 of the Voting Rights Act in formulating the submitted plan, and also did not identify any state redistricting policies that would guide its decisionmaking process. Instead, incumbency protection drove the process as the existing plan was altered only if all the affected representatives agreed. Thus, it was preordained that no change would be make that would increase the number of districts in which black voters would have the opportunity to elect their preferred candidates. Alternative plans that sought to make such changes were voted down with little debate...
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> The proposed plan reduces from 25 to 22 the number of districts with black majorities in voting age population (excluding military populations) compared to the 1992 plan and fragments and packs black population concentrations to avoid drawing additional black-majority districts or enhancing the existing black majorities.[950]

A second plan, which increased the number of majority black house districts to 32, and which had the support of the SRAC plaintiffs, was enacted and was precleared by the Attorney General on May 31, 1994.

The legislature enacted a new redistricting plan for the senate in 1995. It was an improvement over the preexisting court ordered plan and added two additional majority black districts for a total of 12. The Attorney General precleared the plan, and the district court entered a final order dismissing the litigation in August 1995.

As a result of litigation brought under the Voting Rights Act, as well as the objections interposed by the Attorney General, black voters in South Carolina ended up

[950] Deval L. Patrick, Assistant Attorney General, to Hon. Robert J. Sheheen, Speaker of the House, May 2, 1994, pp. 4, 9.

with a total of 44 majority black districts, instead of the 33 that had originally been proposed. Additionally, the election of James Clyburn marked an historic advancement for the state's black voters that would not have been possible without the Voting Rights Act. In light of these notable advances for African Americans, white voters soon challenged the new redistricting plans as racial gerrymanders and asked that they be redrawn.

Shaw/Miller Litigation and State Redistricting in South Carolina

Smith v. Beasley

Leonard v. Beasley

McLeod v. Beasley

White voters filed suit in 1995 challenging three state senate districts. A year later, another group of white voters filed suit challenging nine house districts. In both cases, the plaintiffs claimed that the districts were drawn with race as the predominant factor in violation of the Shaw/Miller line of decisions. The cases were consolidated for trial, and black voters, represented by the ACLU, were allowed to intervene to defend the constitutionality of the challenged districts.[951]

Following a trial, the three-judge court issued an order in September 1996, finding three of the challenged senate districts and nine of the house districts

[951] Smith v. Beasley, 946 F. Supp. 1174 (D.S.C. 1996).

unconstitutional because they "were drawn with race as the predominant factor."[952] The court provided the state legislature an opportunity to adopt and preclear new legislative plans by April 1, 1997. The general assembly adopted a remedial plan for the house which preserved black population majorities in five of the six unconstitutional house districts. The legislature was unable to agree on a new plan for the senate, and accordingly the court implemented a court ordered plan. The court redrew one of the two senate districts into a near majority black district, with a black population of 49%.

A Shaw/Miller challenge was also filed in 1996, against the majority black Sixth Congressional District in South Carolina.[953] The plaintiffs were Republicans but their lawyer, John Chase, was a white Democrat who had been defeated in the 1992 Democratic primary by Jim Clyburn, the black incumbent. Clyburn was the first, and only, black elected to Congress from South Carolina since Reconstruction.

Chase's campaign was controversial and was based upon racial appeals to white voters. One of Chase's television ads was a take-off on American Express commercials running at the time. The ad showed a darkened, cartoon like picture of Clyburn's face in the center of a credit card with a motto beneath urging people to vote against the "welfare express card."

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[952] Id. at 1210.

[953] Leonard v. Beasley, 3:96 CV 3640 (D.S.C.).

Shortly before the trial was to begin, the plaintiffs requested the defendants and minority intervenors, represented by the ACLU, to enter into an agreement dismissing the complaint. An agreement was negotiated and the case was dismissed in August 1997. While the dismissal contained some face saving language for the plaintiffs, i.e., that race was a predominant factor in the construction of the Sixth District, it acknowledged that the Voting Rights Act required the creation of a majority black congressional district in South Carolina and barred the plaintiffs from refiling their complaint until after the 2000 census.

The following year, yet another Shaw/Miller challenge was filed against the Sixth District.[954] The plaintiff, Gary McLeod, a white Republican, was a perennial candidate who had been defeated by Clyburn in the general elections in 1992, 1994, and 1996. The ACLU again intervened on behalf of black voters to defend the constitutionality of the district. McLeod, however, let his suit languish and it too was finally dismissed in August 1998, for laches and failure to prosecute. As a foot note, McLeod ran as the Republican nominee from the Sixth District in the 1998 general election, and again was defeated by Clyburn.

The potential damage to minority voting in South Carolina and the Voting Rights Act from the Shaw/Miller litigation filed in the 1990s was thus significantly contained.

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[954] McLeod v. Beasley, 3:98 CV 859 (D.S.C.).

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2000 Congressional and Legislative Redistricting

Marcharia v. Hodges

The South Carolina legislature, under the control of Republicans for the first time since Reconstruction, passed redistricting plans based on the 2000 census for the house and senate and the congressional delegation. The governor, however, who was a Democrat, vetoed all three plans. The legislature was unable to override the veto and adjourned without taking further action.

Three lawsuits were filed following the legislative impasse, two by members of the legislature and the third, Marcharia v. Hodges, by African American voters represented by the ACLU.[955] All of the law suits, which were consolidated, challenged the existing plans as being in violation of one person, one vote and requested the three-judge court to order into effect interim court ordered plans.

A four week trial was held beginning in January 2002, during which the parties presented evidence of racial bloc voting and proposed remedial plans. The trial showed conclusively that race was a significant factor in South Carolina politics. The court noted the:

> disturbing fact [of racially polarized voting] has seen little change in the last decade. Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary and general elections. Statewide, black citizens generally are a highly politically cohesive group and whites engage

[955] Marcharia v. Hodges, Civ. No. 01-3892 (D.S.C.).

in significant white-bloc voting.[956]

Black voters were also caught in the middle of a partisan fight. The litigation pitted Republicans against Democrats, each of whom sought to use black voters to advance their partisan interests. The Democrats sought to maximize the number of Democratic districts by reducing black majority districts to the 40% range. The Republicans, by contrast, sought to increase the black percentages in existing districts to limit the number of Democratic majority districts. The three-judge court took special note that the governor and the legislature "have proposed plans that are primarily driven by policy choices designed to effect their particular partisan goals." Those choices included protecting incumbents and assigning the minority population to maximize the parties' respective political opportunities. As the court explained:

> By increasing the BVAP percentage in Republican-held districts, the Governor increases the probability of a white Democrat ousting the Republican incumbent in the general election but at the expense of lowering the BVAP in a adjoining majority minority district and the concomitant ability for blacks to elect a black Democrat in that district over a white Democrat. By increasing the BVAP in current majority minority districts, the Senate Republicans avoid that result and make the adjoining 'superwhite' districts Republican strongholds.[957]

Minority voters were at risk of being either "packed" by Republicans or "cracked" by Democrats. The ACLU plaintiffs, as minority voters, viewed their role in the litigation as seeking to insure that any plans adopted by the court cured the one person,

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[956] Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 641 (D.S.C. 2002).

[957] Id. at 628, 659.

one vote violation, complied with the non-retrogression standard of Section 5, and did not result in the dilution of minority voting strength under Section 2.

The court refused to adopt any of the plans proposed by the governor or the legislature, noting that "it is inappropriate for the court to engage in political gerrymandering."[958] The court concluded that it was obligated to comply with Sections 2 and 5 of the Voting Rights Act, and proceeded to draw plans that maintained the state's existing majority black congressional district and actually increased the number of majority black house and senate districts.[959]

The governor, who was a Democrat, had argued that districts with black populations as low as 44.61% provided black voters an equal opportunity to elect candidates of their choice within the meaning of the Voting Rights Act, but the court disagreed. Citing the "high level of racial polarization in the voting process in South Carolina," it concluded that "a majority-minority or very near majority-minority black voting age population in each district remains a minimum requirement."[960] Notably, none of the parties to the law suits appealed.

The litigation underscores once again the critical role that Section 5 plays in

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[958] Id. at 629.

[959] The court ordered plan increased the number of majority black house districts from 25 to 29. It also maintained the existing nine majority black senate districts, and created an additional district which contained a sufficient minority population to allow minority voters an equal opportunity to elect a candidate of their choice. 201 F. Supp. 2d at 655-56, 661, 666.

[960] Id. at 643 and n.22.

redistricting, including court ordered redistricting. Were the legislature given a free hand to redistrict in the absence of the retrogression standard, there is little doubt that minority voting strength would have been significantly diluted.

NVRA and Section 5 Enforcement in South Carolina

Grass Roots Leadership v. Beasley

On January 24, 1995, South Carolina sued the United States seeking to enjoin enforcement of the National Voter Registration Act (NVRA), which was designed to increase access to voter registration, particularly among the poor, the disabled, and minority groups. According to South Carolina, the NVRA was unconstitutional "as a federal regulation imposed on and interfering with a state function."[961] Charles Condon, the attorney general of the state, was reported as saying South Carolina will "take a hard stand" against enforcement of the NVRA, and will "fight it all the way."

The following month the United States sued the state to require it to implement the NVRA. Two days later, the ACLU filed a similar enforcement action on behalf of voter registration organizations and unregistered voters.[962] The three cases were consolidated, and the district court granted the ACLU plaintiffs' motion to certify a plaintiff class of all eligible but unregistered voters in South Carolina.

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[961] Condon v. Reno, 913 F. Supp. 946, 948 (D.S.C. 1995).

[962] Grass Roots Leadership v. Beasley, No. 3:95CV345 (D.S.C.).

A trial on the merits was held, and on November 20, 1995, the court held the NVRA was constitutional: "Congress' goals are legitimate, its means are appropriate and limited, and the NVRA fully meets all constitutional requirements."[963] The court cited the extensive history of discrimination in voting in South Carolina, and noted that as late as 1990, only 52% of the eligible population of the state was registered to vote. The court permanently enjoined the state from refusing to comply with the NVRA, and ordered it to submit a plan for implementation within 30 days. The state filed a notice of appeal and requested the district court to stay its judgment. After the district court refused to do so, the state withdrew its appeal.

In December 1995, South Carolina submitted to the court and the parties its proposal for implementing the NVRA. After reviewing the state's plan and deposing election officials charged with implementing it, the ACLU plaintiffs and the United States jointly filed a motion for the court to approve the plan, with certain modifications. On January 31, 1996, the court approved the state's plan with the requested modifications.

The ACLU plaintiffs and the United States subsequently moved the court to grant additional relief to citizens denied an opportunity to register under the NVRA in 1995, during the pendency of the litigation. After several hearings on the matter, on April 2, 1996, the district court ordered the state to: (1) provide individuals denied an

[963] Condon v. Reno. 913 F. Supp. at 949.

opportunity to register in 1995 a postage prepaid mail-in voter registration form; (2) inform individuals previously notified that they were purged from the registration books of their subsequent reinstatement; (3) provide voter registration at two additional agencies serving the disabled; and (4) provide the parties and the court monthly implementation and compliance reports until after the November election.

Despite the fact that the NVRA implementation plan was a voting change covered by Section 5, the state refused to submit it for preclearance. On March 18, 1996, the United States filed a motion to convene a three-judge panel to order the state to submit the plan under Section 5. At the end of the 1996 legislative session, the general assembly adopted NVRA enabling legislation which the governor signed into law. And in August 1996, the state submitted the legislation for preclearance. The Attorney General did not interpose an objection, thus bringing to a close the state's efforts to block implementation of a landmark federal law designed to expand opportunities for voter registration and political participation.

COUNTY AND MUNICIPAL LITIGATION IN SOUTH CAROLINA

Abbeville County

Robinson v. Abbeville

Abbeville, South Carolina, prides itself on being "both cradle and deathbed of the Confederacy." John C. Calhoun, twice Vice-President of the United States and author of the doctrine of "nullification," which formed the philosophical underpinning of

Southern secession, and who declared that slavery was "a positive good," practiced law in Abbeville in the early 1800s before beginning his political career as a state representative. On November 22, 1860, the first meeting to launch the state's secession from the Union was held in Abbeville; one month later South Carolina became the first state to secede.

After the defeat of the Confederate army and the fall of Richmond in April 1865, Jefferson Davis and his cabinet fled south and stopped in Abbeville at the home of Armistead Burt, a friend of Davis's. There, Davis convened what was to be the last meeting of the Confederate cabinet. On May 2, 1865, in the front parlor of Burt's home, which had been built with slave labor, he announced the dissolution of his government and the end of the Confederacy.

Ironically, the first president to serve after the Civil War and preside over Reconstruction also had ties to Abbeville. Andrew Johnson, who fled from an apprenticeship in Tennessee, worked for a tailor whose shop was just off the town square. The effects of past discrimination have persisted in the modern era in Abbeville.

Based on the 1980 census, blacks were 44% of the population of the City of Abbeville, and 33% of the population of the county. The city council consisted of a mayor and eight members elected at-large, and the county board of commissioners consisted of seven members also elected at-large. Only one black person had ever been

elected to the city council, and no blacks had been elected to the board of commissioners.

Black residents of the city and county, represented by the ACLU, filed suit in 1988, alleging that the at-large method of elections for both bodies violated the Constitution and Section 2.[964] In an effort to resolve the litigation, the parties agreed to a consent order postponing the pending elections. Settlement negotiations followed, and the parties agreed to single member district plans for both the city and county. The court entered a consent decree on January 23, 1989, providing that "black voters have been unable to elect candidates of their choice under the at-large system." The plan for the county called for seven single member districts, two of which were majority black. The plan for the city contained eight single member districts, four of which were majority black. Elections under both plans were held in July 1989.

NAACP v. Board of Trustees of Abbeville County School District No. 60

The Board of Trustees of Abbeville County School District 60 traditionally consisted on nine members, five of whom were elected from single member districts and two each from two multi-member districts. Blacks were 32% of the population of the school district, but all the districts were majority white and only one member of the board was African American. The election plan had been adopted in 1953 and was

[964] Robinson v. Abbeville, South Carolina, Civ. No. 9-88-0096-17 (D.S.C.).

severely malapportioned, with a total deviation of 149%.

Black residents of the school district, and the local NAACP chapter, represented by the ACLU, filed suit in 1993 challenging the method of electing the board of trustees as violating one person, one vote and diluting minority voting strength in violation of Section 2.[965] They also alleged that the board had adopted a designated post requirement for the two multi-member districts in 1987, but had failed to seek preclearance for the change under Section 5.

The parties agreed to allow the pending elections to go forward, and the court entered an order that the existing plan for the board "is an unconstitutionally malapportioned plan, and is in violation of Sections 2 and 5 of the Voting Rights Act."[966] The parties subsequently agreed upon a single member district plan for the nine member board containing three majority black districts. The plan was implemented pursuant to court order, and new elections were held in June 1994.[967]

Barnwell County

Houston v. Barnwell County

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[965] NAACP v. Board of Trustees of Abbeville County School District No. 60, Civ. No. 8:93-1047-03 (D.S.C.).

[966] Id., Order of May 21, 1993.

[967] Id., Order of December 14, 1993.

In 1988, Barnwell County was 41% black, and the county council was comprised of five members, all elected at-large to staggered terms. A black candidate ran for the council the first time that year and was defeated. African Americans had run for other offices in the county on numerous occasions, including for school boards and city councils in Blackville, Williston, and Elko, and had been successful, but primarily in majority black districts. School board elections were at-large, but they were non-partisan, candidates were not required to run for a numbered post, and election was by plurality vote. Thus, even in majority white school districts, black candidates had achieved some success. Black voter registration rates were higher than white rates, though whites were a majority of registered voters and white turnout was higher than black turnout (69.4% vs. 57.9%).

The Barnwell County Voters League, a majority black organization, had previously written to the county council complaining of "[i]nadequate and/or lack of Black representation in Barnwell County Government at [the] Administrative level," the absence of blacks from appointed boards and commissions, inadequate distribution of county services, and discriminatory employment practices. The league specifically requested the county to adopt district elections for the county council to provide blacks an opportunity to elect candidates of their choice.[968]

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[968] Barnwell County Voters League to Barnwell County Council, February 25, 1985.

In July 1987, the ACLU, in conjunction with the Voters League, began discussions with the county and proposed increasing the number of seats on the council from five to seven, with districts elections. The county refused to enter into an agreement, but instead called for a referendum to be held in November 1988, on whether to enlarge the council to seven members and adopt some form of districting. Believing the referendum would likely fail, the ACLU filed suit on behalf of black voters on May 20, 1988, challenging the at-large method of electing council members as violating the Constitution and Section 2.[969] A local newspaper reporting on the lawsuit noted that given the "racial mix" in Barnwell County, it was "highly unlikely that a black could get elected . . . in an 'at-large' voting method."[970]

The district court stayed formal discovery until after the referendum, which was defeated by a majority of the voters. Settlement discussions were resumed, and the parties agreed to resolve the case by increasing the size of the council to seven members elected from single member districts. Three of the districts were majority black. The parties also agreed that interim elections would be held in January 1990, at which all seven positions would be elected. The court entered a consent order that the new plan would provide "black voters of the county, a greater opportunity than previously

[969] Houston v. Barnwell County, South Carolina, Civ. No. 1-88-1321-8 (D.S.C.).

[970] "In Lawsuit Against County," The Banner, March 1, 1989.

existed to elect candidates of their choice."[971] The plan was precleared by the Department of Justice and, at the ensuing election three African American candidates ran unopposed and were elected.

Beaufort County

Shorr v. McBride and Campbell

William McBride and Morris Campbell were black members of the County Council of Beaufort County, South Carolina. McBride was also a public school teacher, as was Campbell's wife. The two men were charged in 1983, by several local whites with violating the state's Ethics Act by voting on teacher salaries and approving the school budget.[972] Under state law, the county governing body approves the budget of the public schools. The Ethics Act provided that no elected official could deliberate or vote on any matter as to which he or she had a substantial financial interest. Under procedures existing at the time the complaints were filed, the council was required to approve the school budget as a whole, as opposed to on a line item basis. Thus, the only way McBride and Campbell could have avoided voting on their own salaries or that of a spouse, would have been to abstain from voting on the entire school budget. But according to McBride and Campbell, refusing to vote on the school budget would

[971] Houston v. Barnwell County, Order of August 21, 1989.

[972] Shorr v. McBride and Campbell, C-83-018, 019, 037, 039, and C-84-001 (State Ethics Commission).

have violated their oath of office and disfranchised their constituents, most of whom were black.

"Disenfranchising any person, especially a public official, would be a real disservice to the people who worked for our campaigns because of our pro-education platforms," Campbell said.[973]

The complainants, most of whom were members of a group known as the Taxpayers Defense Fund, were adamantly opposed to public spending, particularly for the public schools in the wake of desegregation in the early 1970's. Beaufort County was also one of those places which had established a "white flight" academy, which was strongly supported by the white community. The Taxpayers Defense Fund, many of whose members were retirees with no children in the public schools, had engaged in numerous actions to block expenditures for public education: they had filed a law suit in 1979, to enjoin a school bond issue (the suit was dismissed); they had the members of the school board indicted in 1983, for allegedly overspending the school budget (the indictments were dismissed); they had sued the school board in state court for exceeding its budget (the suit was dismissed); and they had filed prior charges against McBride and Campbell for similar Ethics Act violations.

The first charges against McBride and Campbell were dismissed by the State Ethics Commission because a majority of members of the county council had similar

[973] "Budget votes," The Beaufort Gazette, June 16, 1981.

ties with the school district, and if all were disqualified from voting the school budget could not have been approved. The second round of complaints, according to Campbell, "was just another attempt by certain elements in the community who have no interest in public education - and I equate that with no real interest in the future of our county - to strangle the public schools with the rhetoric of saving taxpayers' dollars."

In their answers to the Ethics Act complaints, McBride and Campbell, represented by the ACLU, charged that the plaintiffs were conspiring to injure them in their reputations and deprive them of constitutionally protected rights. They sought damages and requested that the case be referred to the solicitor for prosecution under the criminal provisions of the act making it unlawful to file a frivolous Ethics Act charge.

A hearing on the merits of the complaints was scheduled for January 1984. Prior to the hearing, McBride and Campbell negotiated an agreement between the board of education and county council whereby a separate line item in the budget would be prepared for McBride's salary and that of Campbell's wife. As to those two items - but only those two - McBride and Campbell agreed to abstain from voting. In consideration of the agreement between the board and the council, the plaintiffs agreed to dismiss their complaint and the defendants agreed to dismiss their demands for damages and

criminal prosecution. The Ethics Commission approved the agreements and closed the cases.[974]

[974] Shorr v. McBride, Notice of Withdrawal of Complaints, January 24, 1984.

Charleston County

United States v. Charleston County

Moultrie v. Charleston County

Charleston, the premier tourist mecca in South Carolina, has long prided itself on its aristocratic traditions. As one northern visitor has gushed, Charleston "was not a stereotypical southern racist city" but has "an aristocratic respect for civility."[975] But the findings of the district court in a recent voting rights case show that racial division and polarization are today's political and social realities in Charleston County.

The United States and private plaintiffs, represented by the ACLU, brought suit in 2001 challenging the at-large method of electing the nine member Charleston County Council as diluting black voting strength in violation of Section 2. The two cases were consolidated, and after a lengthy trial the court issued an order invalidating the at-large system. The decision was affirmed on appeal, and the Supreme Court denied the county's petition for a writ of certiorari.[976]

The courts, applying the analysis in Thornburg v. Gingles, found that blacks in Charleston County were geographically compact and politically cohesive, and that whites voted sufficiently as a bloc usually to defeat the candidates preferred by black

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[975] Abigail M. Thernstrom, Whose Votes Count? Affirmative Action and Minority Voting Rights (Cambridge: Harvard University Press, 1987), p. 166.

[976] United States v. Charleston County and Moultrie v. Charleston County Council, 316 F. Supp. 2d 268 (D.S.C. 2003), aff'd 365 F.3d 341 (4th Cir. 2004), cert. den'd 125 S. Ct. 606 (2004).

voters. The defendants' own expert found "there was racially polarized voting in 25 of the 33 (75.8%) contested general elections for the County Council between 1988 and 2000." Moreover, in the 10 general elections that involved black candidates, he found that "white and minority voters were polarized 100% of the time." These conclusions were corroborated by the expert for the United States who found racially polarized voting in 94% of the elections between 1984 and 2000. There was also evidence that in school board elections, which are non-partisan, racial polarization was if anything more extreme, with white and black voters being polarized in every one of the ten contests that pitted white candidates against black candidates. Overall, the court of appeals found that "evidence presented by both parties supported the district court's conclusion 'that voting in Charleston County Council elections is severely and characteristically polarized along racial lines.'"[977]

Turning to the "totality of circumstances," the courts looked at minority electoral success, one of the "most important" factors identified in Gingles[978] in assessing a vote dilution claim. Of the 41 people elected to the county council since 1970, "only three have been minorities." The exclusion of blacks from elected office had been most

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[977] 365 F. 3d at 350; U.S. Ex. 25. These findings of polarized voting are consistent with those of other courts in South Carolina. See Colleton County v. McConnell, 201 F. Supp. 2d 618, 641 (D.S.C. 2002) (three-judge court) ("[v]oting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary elections and general elections"); Burton v. Sheheen, 793 F. Supp. 1329, 1357-58 (D.S.C. 1992) (three-judge court) ("since 1984 there is evidence of racially polarized voting in South Carolina").

[978] 478 U.S. at 48 n.15.

pronounced during the recent decade. From 1992 to 2002, all nine black candidates supported cohesively by black voters were defeated in the general elections. Eighteen (86%) of the 21 candidates of whatever race supported cohesively by black voters were defeated. In 1998, two white Democrats supported cohesively by black voters were elected, but two black Democrats supported cohesively by blacks lost. As the court of appeals further noted, "the rarity with which minorities are elected is not unique to the County Council; disproportionately few minorities have ever won any of the at-large elections in Charleston County."[979]

Following the election of five black school board members to the nine member school board in 2000, the county legislative delegation, in what the district court described as an "episode of racial discrimination against African-American citizens attempting to participate in the local political process," tried to change the method of elections to the system used by the county council and to limit the board's fiscal authority. The measures were passed by the legislature, but were vetoed by the governor. After the 2002 elections, only one African American remained on the school board.[980]

Other factors contributing to minority vote dilution found by the lower courts included: "the County's sheer size;" the use of staggered terms and residency districts;

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[979] 365 F. 3d at 350.

[980] 316 F. Supp. 2d at 280, 286 n. 23.

"a de facto majority vote requirement;" "fewer financial resources" available to minority candidates to finance campaigns; "past discrimination that has hindered the present ability of minorities to vote or to participate equally in the political process;" "[t]he on-going racial separation that exists in Charleston County–socially, economically, religiously, in housing and business patterns–[which] makes it especially difficult for African-American candidates seeking county-wide office to reach out to and communicate with the predominantly white electorate;" "significant evidence of intimidation and harassment" of blacks "at the polls during the 1980s and 1990s and even as late as the 2000 general election;" and "incidents of subtle or overt racial appeals" in campaigns, such as white candidates distributing darkened photos of their black opponents to call attention to their race.[981]

The lower courts also "thoroughly examined all of the County's evidence" that racial polarization was caused by partisanship, and found it "insufficiently comprehensive or persuasive." The County's expert "acknowledged that he could not assess the extent to which racial bias has caused polarized voting in Charleston County and he agreed with other expert witnesses that partisanship and race as determinants of voting are 'inextricably intertwined.'" The court of appeals concluded that "even

[981] 365 F. 3d at 351-53; 316 F. Supp. 2d at 286 n.23, 294-95.

controlling for partisanship in Council elections, race still appears to play a role in the voting patterns of white and minority voters in Charleston County."[982]

Moreover, there was substantial evidence of partisanship being infused by race. The district court found that there was "significant 'white flight' from the Democratic Party in Charleston County since the 1970s," and that the "[r]easons for this flight include the Democratic Party's position on civil rights." Race has become a "wedge issue" used by the Republican Party, whose literature has identified the Democratic Party with the "black block vote" and the NAACP. As the district court found, in recent years the Democratic Party in Charleston County has been "referred to as the party of the African-Americans" or "'controlled' by African-Americans." The trial court concluded that "there is no evidence that anything other than race explains the severe polarization observed in Charleston County elections."[983]

The private plaintiffs further alleged that the County's at-large system, which was adopted in 1969 to replace an existing system of district elections, was invalid because it had been adopted with a discriminatory purpose. Charleston County is one of only three counties in South Carolina which continue to elect their county governments at-large.[984]

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[982] 365 F. 3d at 352-53.

[983] 316 F. Supp. 2d at 278 n.13, 296-97, 304; U.S. Ex. 16, pp. 18-19.

[984] 316 F. Supp. 2d at 275.

The historical background of the adoption of at-large elections in Charleston County in 1969 reveals a series of official actions at the local and state levels over an extended period of time taken for invidious purposes. At-large elections were adopted after passage of the Voting Rights Act of 1965 at a time when there were substantial increases in black voter registration in Charleston County and increased black political activity. At-large elections, with a majority vote requirement, were a well known and widely understood way of diluting minority voting strength, particularly in a place like Charleston County with its sprawling size, majority white electorate, and pervasive white bloc voting.[985]

The City of Charleston had earlier adopted at-large elections in 1954, to replace its system of single member districts following abolition of the white primary system in the state. Historians have acknowledged that this was done for the purpose of diluting the black vote and to keep African Americans from being elected to the city council.[986]

In 1956 and 1964, the general assembly, upon the recommendation of the county legislative delegation, abolished elections for school board members in predominantly black districts and made the positions appointive by the delegation. Elections for school board members were retained, however, in the majority white districts. Defendants'

[985] 316 F. Supp. 2d at 305; Pl. Ex. 1, pp. 35-36; Tr. Trans. 1151-55 (Testimony of O. Vernon Burton).

[986] 316 F. Supp. 2d at 305; Pl. Ex. 1, p. 36.

expert admitted that the appointed/elected system for the school board depending on the racial composition of the district was "very discriminatory."[987]

The City of Charleston began a series of annexations in 1960, the purpose of which was "to change the City from predominantly African-American to predominantly white," and to keep the city from being controlled by so-called "slum dwellers." The Department of Justice ultimately objected in 1974, to seven annexations by the city as "racially motivated."[988]

Charleston County School District 20 was one of the first school districts in the state ordered to desegregate after the Brown decision in 1954.[989] In response, whites fled the public schools in large numbers. Between 1963 and 1968, the number of white students enrolled in the public schools declined about 50%.[990]

In the 1964 elections, voters in heavily black Charleston precincts were systematically challenged. Blacks were subjected to literacy tests as a condition for registering to vote. On the eve of passage of the Voting Rights Act of 1965, only 37% of the black voting age population was registered, and there were no black elected officials

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[987] 316 F. Supp. 2d at 305; Pl. Ex. 1, pp. 37, 44; Tr. Trans. 3015 (Testimony of William V. Moore).

[988] 316 F. Supp. 2d at 305; Pl. Ex. 1, pp. 34-5; Tr. Trans. 1146 (Burton).

[989] Brown v. Board of Education, 347 U.S. 483 (1954).

[990] United States v. Charleston County, U.S. Ex. 16, pp. 13-4; Tr. Trans. 936 (Testimony of Dan Carter).

in the entire state. As late as 1970, there was only one black elected official in Charleston County.[991]

In 1967, the state legislature, at the request of the county delegation, enacted a consolidation bill that created the Charleston County School District composed of the existing eight "Constituent" school districts. The bill blocked any transfers, and thus desegregation, across district lines. The consolidation bill also continued the discriminatory appointed/elected scheme for school board members. The legislative delegation that set up the appointed/elected system was the same delegation that had proposed at-large voting for the county council in 1967.[992]

The chief sponsors of the change to at-large voting for the county council had proven records of opposing equal voting and other rights for blacks. No supporter of at-large elections argued that it was a reform measure needed to promote or insure good government. To the extent that "good government" was discussed, it was in support of maintaining the existing district system. The county's argument that the at-large system was enacted because the Supreme Court had applied the one person, one vote rule to county level elections is rebutted by a letter from the state attorney general that the decision did not require the adoption of at-large elections.[993]

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[991] U.S. Ex. 16, p. 26; Tr. Trans. 633-34 (Testimony of Marjorie Amos-Frazier); Pl. Ex. 1, p. 10; Tr. Trans. 1186 (Burton).

[992] Pl. Ex. 1, p. 44-5; Tr. Trans. 3016 (Moore).

[993] Tr. Trans. 1147, 1161 (Burton); Pl. Ex, 1, pp. 30, 42; U.S. Ex. 74(D) ("[i]f the populations are fairly close,

Plaintiffs' expert, Dr. O. Vernon Burton, concluded that the change to at-large elections in 1969 had been made for a racially discriminatory purpose. The district court, while it held that "the timing of the General Assembly's adoption of the at-large system raises suspicions," ruled against the discriminatory purpose claim. The court of appeals held that "because we affirm the district court's finding that the County's at-large system violated § 2 by diluting minority voting strength, we do not need to reach the private plaintiffs' claim that the at-large system violated § 2 by intentionally discriminating against minority voters."[994]

Following the decision of the federal courts, a system of single member districts was adopted for the county council. At the ensuing elections, four blacks were elected from the four majority black districts.

In 2003, the state again enacted legislation adopting the identical method of elections for the Board of Trustees of the Charleston County School District that had earlier been found in the county council case to dilute minority voting strength in violation of Section 2. Under the pre-existing system, school board elections were non-partisan, which allowed minority voters the opportunity to "bullet vote" and elect candidates of their choice in multi-seat contests. That possibility would have been effectively eliminated under the proposed new partisan system.

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separate elections may be provided for from each district").

[994] 316 F .Supp. 2d at 306; 365 F.3d at 347 n2.

In denying preclearance to the county's submission, the Department of Justice concluded that "[t]he 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." It noted further 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.[995]

Section 5 thus prevented the state from implementing a new and retrogressive voting practice, one which everyone understood was adopted to dilute black voting strength and insure white control of the school board. It also prevented the need for an expensive and time consuming lawsuit seeking to invalidate the new method of elections under Section 2. Charleston County is one of many covered jurisdictions that strongly makes the case for the extension of the preclearance requirement.

Cherokee County

NAACP v. Cherokee County School District No. 1

In 1991, the South Carolina legislature changed the method of electing the school board of Cherokee County School District No. 1 from at-large to single member districts. The plan was submitted for preclearance, but a few weeks before the election,

[995] R. Alexander Acosta, Assistant Attorney General, to C. Havird Jones, Jr., February 26, 2004.

which was scheduled for November 3, 1992, the Department of Justice requested additional information. Despite the lack of preclearance, county officials proceeded to allow the election to go forward under the new plan.

Black residents of the county and the local NAACP, represented by the ACLU, filed suit seeking to enjoin implementation of the new plan absent preclearance.[996] They also charged that the plan had been adopted without input from the minority community, and diluted black voting strength in violation of Section 2. Based on the 1990 census, blacks were 21% of the county population, and while two majority black districts could be drawn, the school board's plan contained one majority black district and another that was only marginally so.

The plaintiffs and the county board of education agreed to a consent order which: provided that the submitted plan "results in a dilution of minority voting strength;" postponed the elections; and directed the parties to develop a "racially fair districting plan and implementation schedule" for new elections.[997] A new plan was subsequently agreed upon which created nine single member districts, two of which were majority black. The plan was adopted by the court in March 1993, precleared by the Department of Justice, and implemented at a special election held on May 25, 1993.

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[996] NAACP v. Cherokee County School District No. 1, C.A. No. 7:92-2948-3 (D.S.C.).

[997] Id., Order of October 27, 1992.

Section 5 played an obvious and critical role in blocking the implementation of an admittedly discriminatory plan for the school board, as well as the adoption of a new plan that complied with Section 2.

Chesterfield County

South Carolina State Conference of Branches of NAACP v. The District Board of Education of the Chesterfield County, South Carolina School District

The Chesterfield County Board of Education consisted of nine members, seven of whom were elected from single member districts, and two at-large. Based on the 1990 census, the county was 34% black, but all of the districts were majority white and only one member of the board was black. The districts were also malapportioned, with a total deviation of 23.4%

The state legislature, which has the duty to reapportion local school boards, failed to enact a constitutional redistricting plan for the board of education at its 1992 legislative session, and as a result the 1992 elections were scheduled to be held under the unconstitutional plan.

Black voters of the county and the NAACP, represented by the ACLU and the NAACP, filed suit in 1992, seeking to enjoin further use of the malapportioned plan and requested the court to supervise the implementation of a plan that complied with one

person, one vote and the Voting Rights Act.[998] The parties reached an agreement, which they submitted to the court in the form of a consent order, allowing the 1992 elections to go forward under the existing plan, but requiring a special election in 1993, under a new plan that complied with one person, one vote and the Voting Rights Act.[999] Subsequently, the court entered an order on May 10, 1993, noting that the parties had reached an agreement on a new plan containing nine single member districts, three of which were majority black, and that the plan had been adopted by the general assembly, precleared by the Department of Justice, and implemented at elections held in March 1993.

Edgefield County

Edgefield is a rural "upcountry" county with a substantial black population and a long and notorious racial past. Francis Hugh Wardlaw, a local attorney and newspaper editor, was one of the signers of the Ordinance of Secession of 1860, which led South Carolina and the rest of the South out of the Union in an effort to preserve the institution of slavery. After the Civil War, Confederate General Martin Witherspoon Gary, another Edgefield attorney, led a white insurrectionist movement, known as the Edgefield Plan, designed to keep the ballot out of the hands of newly enfranchised

[998] NAACP v. District Board of Education of Chesterfield County, C.A. No.: 4:92-2863-21 (D.S.C.).

[999] Id., Order of October 26, 1992.

blacks and defeat the Reconstruction experiment. The person who had the greatest impact on post-Reconstruction politics in South Carolina was an Edgefield native, former Governor and U.S. Senator B. R. "Pitchfork Ben" Tillman. In the 1890s, Tillman orchestrated the complete disfranchisement of blacks through a variety of devices, including literacy tests, a poll tax, and the abolition of locally elected county and township commissioners. Another Edgefield native, Strom Thurmond, was a leader of the Democratic Party's Dixiecrat movement of 1948, which opposed federal civil rights laws and embraced a platform of white supremacy. This history is well established, but what is less well known about Edgefield County is its continuing resistance to equal voting rights in the modern era.[1000]

McCain v. Lybrand

The most protracted voting rights litigation in Edgefield County involved a challenge to the at-large method of electing the five member county council, which was not finally resolved until 1984. In 1974, Tom McCain, Ernest Williams, and William Spenser, represented by the ACLU, filed suit alleging that the at-large system diluted black voting strength in violation of Section 2 and the Constitution. The plaintiffs also claimed that the residency districts used in county elections were malapportioned in

[1000] For more on the history of Edgefield County, see e.g., O. Vernon Burton, In My Father's House Are Many Mansions: Family and Community in Edgefield, South Carolina (Chapel Hill: University of North Carolina Press, 1985); Francis B. Simpkins, Pitchfork Ben Tillman: South Carolinian (Baton Rouge:

violation of the one person, one vote standard. The one person one vote issue was litigated initially and was ultimately resolved against the plaintiffs.[1001] Subsequently, after lengthy discovery and a trial, the district court issued an opinion on April 17, 1980, striking down the at-large system. In doing so, it made detailed findings of the long and extensive history of discrimination in virtually every aspect of county life:

> *[I]t was quite difficult, and often impossible, [for blacks] to register to vote until approximately 30 years ago.
>
> *At the time of the passage of the Voting Rights Act in 1965 less than 20% of the voting age blacks of Edgefield County were registered.
>
> *Blacks were excluded from participation in the Democratic primaries until Elmore v. Rice [was decided in 1947 invalidating the all white primary] . . . But even after this landmark decision blacks in Edgefield County found it very difficult to register and threats were made against some blacks who did register.
>
> *No black has ever received a Democratic nomination or been elected to public office in a contested election in Edgefield.
>
> *No black has been elected to County Council, the state legislature or any countywide office.
>
> *[T]he majority vote requirement, run-off elections and even staggered terms of the members of council tend to dilute the voting strength of the blacks.
>
> *There is bloc voting by the whites on a scale that this Court has never before observed.
>
> *[W]hites absolutely refuse to vote for a black.
>
> *[A]ll advances made by the blacks have been under some type of court order.

Louisiana State University Press, 1944).

[1001] McCain v. Lybrand, 509 F. 2d 1049, 1054 (4th Cir. 1974).

*Until 1970, no black had ever served as a precinct election official, and since that year the number of blacks appointed to serve has been negligible.

*Of the 17 precincts in Edgefield County, fully 8 have never had a black person serve at the polls.

*[T]here is still a long history of racial discrimination in all areas of life.

*Blacks were historically excluded from jury service in Edgefield County.

*The Edgefield County Council historically kept the county chain gang segregated by race.

*Blacks have been excluded from county employment by the County Council, even up to the present. No current black employee began service before 1971.

*Blacks have been excluded by the County Council in appointments to county boards and commissions.

*[The County Council consented to the formation of a Human Relations Committee, but only on condition]"that there be a white majority and white chairman.

*The public schools of Edgefield County were historically segregated by race.

*After formal desegregation began to take place there was an effort by school trustees to maintain the racially discriminatory character of the schools.

*Blacks in Edgefield County have a much lower socio-economic status than do blacks.

*[There was] stark proof of official neglect and unconcern on the part of the Edgefield County Council [to the needs of black citizens].[1002]

[1002] McCain v. Lybrand, slip. op. at 8-14, 18-9.

The court concluded that "the rights of the blacks to due process and equal protection of the laws in connection with their voting rights have been and continue to be constitutionally infringed and the present system must be changed."[1003]

But five days after the district court issued its opinion, the Supreme Court decided City of Mobile v. Bolden and held that a voting practice violated the Constitution and the Voting Rights Act only if it was adopted or was being maintained with a racially discriminatory purpose or intent.[1004] Since the district court's decision had been based on the result of the challenged at-large system, the court vacated its order and provided the parties an opportunity to submit additional evidence on whether the at-large system was conceived or operated as a purposeful device to further racial discrimination.[1005]

During the course of the litigation, plaintiffs had discovered that the 1966 state statute establishing the at-large system of elections for Edgefield County which replaced the Tillman era appointed system, had never been submitted for preclearance as required by Section 5. Fortunately, Congress extended Section 5 in 1982, in the absence of which the failure of the county to comply with the preclearance requirement

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[1003] Id. at 20.

[1004] 446 U.S. 55 (1980).

[1005] McCain v. Lybrand, Order of August 11, 1980.

would have been academic.[1006] McCain and the others amended their complaint and asked the court to enjoin further use of the unprecleared at-large system pending compliance with federal law.

The three-judge court which heard the amended complaint dismissed it on the grounds that the Attorney General had, in 1971, precleared an increase in the size of the county council from three to five members elected at-large, which had the effect of preclearing the underlying 1966 change. The Supreme Court, in an opinion issued in 1984, disagreed. It held that the 1966 change had never been brought to the attention of the Attorney General in a clear and unambiguous manner, and that preclearance could not be inferred or implied from preclearance of the 1971 change.[1007]

On remand the county was given an opportunity to prepare and submit an election plan to the Attorney General for preclearance. Despite the extensive findings of the district court that at-large elections diluted minority voting strength, the county decided to submit the 1966 act providing for three at-large seats on the assumption that if the act were precleared all five council seats could continue to be elected at-large.

Included in the county's submission was a "To Whom It May Concern" letter written by Charles Coleman, the county attorney. He claimed that when at-large

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[1006] Congress, moreover, cited the McCain litigation as "the most drastic evidence" of the need to amend Section 2 to include a discriminatory "results" standard for violations. S.Rep. No. 97-417, 97th Cong., 2d Sess. 26(1982).

[1007] McCain v. Lybrand, 465 U.S. 236, 257 (1984).

elections were adopted in 1966, W. A. Reel and W. Hugh Clark, members of the general assembly, had appointed a committee to study the method of elections, and that two black citizens were appointed to the committee, Jerry Wilson and Jethro McCain. According to Coleman, "the Blacks were totally in favor of At-Large with resident requirements," and "[a]t no time that I can recall anyone was in favor of Single-Member Districts." Coleman added that it would be a waste of time to contact Wilson and McCain for verification because "these two individuals are somewhat senile and cannot discuss the matter intelligently."

Both Wilson and McCain wrote to the Attorney General and disputed Coleman's representations. According to McCain, "I have never talked to W. Hugh Clark in my life, nor have I ever been appointed by him or W. A. Reel to any committee." He had never attended a meeting to discuss the method of elections for the county. "Anyone familiar with Edgefield, as I am," he wrote, "would know that blacks and whites would never have met in 1966 to discuss governance of the County. Whites have always made those kind of decisions by themselves and without consulting and without regard for the wishes of the black community." The claim that blacks favored at-large elections was "totally false. Blacks know that at-large elections discriminate and make it just about impossible for blacks to elect a candidate of their choice." As for the charge that

he was senile, Wilson attached a statement from his doctor certifying that he was "oriented" and "of sound mind."[1008]

Jethro McCain wrote in a similar vein. Coleman's letter was a "complete fabrication," he said. He had never had a discussion of any kind with Clark and had never been appointed to any committee by Clark or Reel. Integrated meetings of blacks and whites in Edgefield County "did not take place." The claim that blacks favored at-large elections was "quite simply, absurd." It was "an affront to the black community to claim . . . that it has ever supported a system of elections that totally excludes it from effective participation in county politics." He took "personal offense" at Coleman's claim that he was "somewhat senile," and attached a statement from his doctor that he enjoys "good health and a clear mind."[1009]

The Attorney General objected to the county's submission. Citing the findings of the district court, he concluded that the proposed at-large elections have "the potential for impermissibly diluting minority voting strength."[1010] Joe Anderson, a member of the county legislative delegation, had by this time replaced Charles Coleman as the Edgefield county attorney. Following the Section 5 objection, Anderson took the lead in

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[1008] Jerry Wilson to William Bradford Reynolds, Assistant Attorney General, May 14, 1984.

[1009] Jethro McCain to William Bradford Reynolds, Assistant Attorney General, May 17, 1984.

[1010] William Bradford Reynolds, Assistant Attorney General, to C. Havird Jones, Jr., June 11, 1984.

preparing a plan using all single member districts. The plan was acceptable to the plaintiffs and was approved by the court.

In the ensuing election held under the new plan in 1984, three African Americans were elected to the county council, the first in the county's modern history. In the absence of Section 5, it is impossible to assume that black voters in Edgefield County would have the opportunity to participate in the political process on an equal basis with whites and elect candidates of their choice.

Jackson v. Edgefield County School District

The suit against the Edgefield County Council was only the beginning of voting rights litigation in Edgefield County. In addition to the detailed findings of discrimination in the county council case, the amendment of Section 2 of the Voting Rights Act to incorporate a discriminatory "results" standard set the stage for further successful litigation.

In 1985, Nathaniel Jackson, Odell Glover, and George Smith filed suit, represented by the ACLU, challenging the at-large system for electing the board of school trustees, which had been adopted in 1968.[1011] Prior to that time the members of the board, like the county council, had been appointed by the governor under the Tillman era system.

[1011] Jackson v. Edgefield County, South Carolina School District, Civ. No. 9:85-709-3 (D.S.C.).

A trial was conducted in the summer of 1986, and a ruling issued in September that the at-large system violated the new results standard of Section 2. The court noted many of the factors found by the court in the previous case against the county council, finding:

> *There was a long and continuing history of "pervasive racial discrimination [which] has left the County's black citizens economically, socially, and politically disadvantaged."
>
> *State law enforced racial segregation in most areas of life, including marriage, public accommodations, business licensing, private and public employment, juries, and prisons, and the degree of discrimination was "nowhere worse than in Edgefield County."
>
> *Not only were "discriminatory registration and balloting procedures created by the State, but also there were incidents of physical intimidation and violence exhibited by organized groups of white supremacists in Edgefield County."
>
> *During the 1950's and into the mid-60's the principal obstacle to black voter registration "was the hostility displayed by the white registration clerks."
>
> *There was "a severe degree of racial bloc voting" and only a "minimal degree of electoral success by minority candidates."

Based upon "the totality of the circumstances," the at-large system diluted black voting strength in violation of Section 2 of the Voting Rights Act.[1012]

The board of trustees adopted a remedial plan and submitted it to the Department of Justice for preclearance under Section 5. The plaintiffs urged the Attorney General to object on a number of grounds, including that the plan failed to

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[1012] Jackson v. Edgefield County, 650 F. Supp. 1176, 1180-1183, 1203-1204 (D.S.C. 1986).

provide blacks with an equal opportunity to elect candidates of their choice. The Attorney General agreed and denied preclearance. He concluded that the existence of racial bloc voting and other factors "strongly suggest that blacks will have a realistic opportunity for electing candidates of their choice in only two of the school board's proposed districts - as opposed to the four claimed by the county." Not only were blacks "firmly" opposed to the trustees' plan, but they "were afforded no input into the development of the plan." The plan was apparently drawn "in a manner calculated to minimize black voting strength," a fact that was evident from alternative configurations that would have provided black voters "an equal opportunity to participate in the electoral process."[1013] Faced with the Section 5 objection, the board of trustees adopted an alternative plan that met with the plaintiffs' approval. The plan was submitted for preclearance, approved by the Attorney General, and implemented in November 1987.

Thomas v. Mayor and Town Council of Edgefield

Jackson v. Mayor and Town Council of Johnston

Also in 1987, black residents, again with the assistance of the ACLU filed suit challenging the at-large method of electing the town councils in Edgefield and Johnston, the two largest towns in the county. Following the decision in the case against the school trustees, both municipalities settled by adopting districting plans rather than go

[1013] William Bradford Reynolds, Assistant Attorney General, to James B. Richardson, Esq., May 22, 1987.

to trial to defend their at-large systems. In both cases the parties stipulated that the plaintiffs could present "a prima facie case" that the challenged system diluted black voting strength in violation of the Voting Rights Act.[1014]

The plan for the town of Johnston provided for six single member districts, and at the ensuing election three black candidates were elected from three majority black districts. The release of the 1990 census showed the districts to be malapportioned, and the council adopted, over the objections of the three black members, a plan which overconcentrated, or packed, black residents in three districts at 94.5%, 82.7%, and 82% of the population respectively. This change left the three the remaining districts majority white. Given the existence of racial bloc voting, the plan ensured that whites, who were now 40% of the town population of approximately 2,500, would control 50% of the council seats.

The plan was submitted for preclearance under Section 5, but the Attorney General objected in June 1992, concluding that the plan unnecessarily packed black voters, and had been approved by a vote "along racial lines" without any legitimate nonracial reason given for its adoption.[1015] The town then submitted a marginally revised plan, but it too drew an objection. According to the Attorney General, the plan persisted in "unnecessarily 'pack[ing]' black voters into three districts," and the

[1014] Thomas v. Mayor and Town Council of Edgefield, South Carolina, Civ. No. 9:86-2901-16 (D.S.C. May 27, 1987); Jackson v. Johnston, South Carolina, Civ. No. 9:87-955-3 (D.S.C. September. 30, 1987).

"proffered reasons for rejecting [an] alternative proposal [recommended by its demographer and endorsed by the black community] appears pretextual."[1016] The town was finally forced to submit an alternative plan that provided a fairer opportunity for black voters to elect candidates of their choice, and it was precleared.

Fairfield County

Walker v. Fairfield County Council

In 1988, just prior to the November 8 election, the ACLU filed suit on behalf of black voters in Fairfield County challenging at-large elections for the county council under the Constitution and Section 2.[1017] The county's election system had been challenged by other plaintiffs in 1986, but that suit had been withdrawn because of failure to join the county elections commission as a defendant.

At-large elections in the Town of Winnsboro, the Fairfield County seat, had also been challenged. In July 1988, the District Court ruled that black plaintiffs had established a prima facie case that Winnsboro's at-large system violated Section 2 and ordered the implementation of a remedial district plan.[1018]

[1015] John R. Dunne, Assistant Attorney General, to W. Bernard Welborn, June 5, 1992.

[1016] James P. Turner, Acting Assistant Attorney General, to W. Bernard Welborn, July 6, 1993 & October 26, 1993.

[1017] Walker v. Fairfield County, South Carolina, County Council, Civ. No. 0-88-2927-6 (D.S.C.).

[1018] Broome v. Winnsboro, South Carolina Mayor and Town Council, Civ. No. 0-88-1160-16 (D.S.C.).

A rural county in the middle of the state with a population under 25,000, Fairfield County had a history of racially polarized voting. And, in the days leading up to the November 1998 election, a black councilman told the state's leading newspaper that whites had "threatened blacks to stay away from the polls." Councilman Robert Davis, who had been the only black candidate nominated in the June primary that year, described "a plantation mentality, [which] has included threats against job security, exploitation of 'financial problems,' and outright asking blacks to stay away from the polls."[1019]

In the case against the county, black plaintiffs did not seek to enjoin the election, but simply to invalidate the at-large method of elections and replace it with a fair district plan. In late November, the ACLU sought an injunction to block the county from failing to "conduct special elections for the Fairfield County Council pursuant to a new apportionment and method of elections" and enjoining the candidates elected on November 8, 1988 from taking office. The court ruled that plaintiffs could establish a prima facie case of a violation of Section 2, and the parties agreed in December to submit a new plan for district elections with a schedule for holding a special election within 30 days.

This suit was the 21st voting rights law suit the ACLU had filed in South Carolina.

[1019] Jeff Miller, "Fairfield elections protested," The State, November 4, 1988, p. 1-C.

Georgetown County

Schooler v. Harper

Watkins v. Scoville

Georgetown County, South Carolina, was governed by a five member council elected at-large. Black residents, organized as the Committee for Single Member Districts for Georgetown County, secured enough signatures to require the county to conduct a referendum to increase the number of council seats to seven, with elections held in single member districts. The referendum was held in February 1983, and was approved by 56% of the voters.

Whites who opposed the change, and who were supported by the county council, then filed an election protest and instituted a suit in state court challenging implementation of the district system on the grounds that the referendum had not been conducted in conformity with state law. They claimed the method of electing the chairman was not specified, with the result that the referendum question was "ambiguous" and thus void under state law.[1020]

Black residents of the county, who had been active in the Committee for Single Member Districts for Georgetown County, and represented by the ACLU, then filed suit in federal court in March 1983, contending that at-large elections diluted minority voting strength, and that the election challenge and state court suit were attempts to

[1020] Schooler v. Harper, Case No. 83-CP-22-143 (Ct. of Common Pleas).

deny or abridge the right of blacks to vote. Plaintiffs also contended that state law required any ambiguities in referenda or election ballots to be challenged prior to the referendum elections or be waived, and that allowance of the challenge and state court law suit constituted changes in voting which could not be implemented absent preclearance under Section 5.[1021]

The ACLU also represented certain of the defendants in the state court lawsuit, who were also plaintiffs in the federal court action. The state court ruled in December 1983, that the local board of elections had exclusive jurisdiction over election challenges, and denied the plaintiffs relief. The board of elections subsequently heard, and dismissed, the election challenge on the grounds that the challengers had waived any objection to the referendum ballot by failing to file a contest prior to the election, and the ballot was not in any event ambiguous.

Despite continuing delaying tactics by the county council, a single member district plan was finally adopted in 1984, and plaintiffs accordingly consented to the dismissal of their Voting Rights Act claims.[1022] The new plan was implemented, and three black candidates were elected in the 1984 election.

[1021] Watkins v. Scoville, Civ. No. 83-0648-8 (D.S.C.).

[1022] Id., Order of May 21, 1984.

Laurens County

On March 12, 1785, the general assembly established Laurens and five other counties out of the old Ninety-Six District in northwestern South Carolina. During the late 19th century, Laurens County was home to many prominent African Americans. Charles H. Duckett, a prominent businessman, was the only African American in the southeastern United States operating a retail lumber business. Henry McDaniel, a distinguished black politician from Laurens County, served in the South Carolina Legislature from 1868 until 1872.

The vitality of black political participation was short lived. During Reconstruction, white residents of Laurens County resented the enfranchisement of newly freed blacks, most of whom supported the despised Republican Party. Whites organized rifle and saber clubs that used intimidation and violence to suppress the black vote. As a result of Ku Klux Klan activity in lower Piedmont counties, and the Laurens race riot of 1870 near the Courthouse Square, Laurens and eight other South Carolina counties were placed under martial law in 1871. But Reconstruction ended in 1877, bringing with it the systematic disfranchisement of black residents.

As late as the 1970s, black political participation in local government in Laurens County was severely depressed. Though blacks comprised a sizable minority within the various municipalities and government entities in the county, few blacks were elected to office. As a result, the ACLU brought several lawsuits on behalf of black

residents in the late 1980s, challenging the use of discriminatory at-large elections in various jurisdictions in the county.

Beasley v. Laurens County

The Laurens County Council consisted of five members elected at-large, with the chair selected by the members. Majority vote and numbered post requirements were in effect. According to the 1980 census, the population of the county was 52,214 people, of whom 15,165 (29%) were black. Despite numerous attempts, no black candidate had ever been elected to the county council. In 1987, a group of African American voters represented by the ACLU sued in federal court under Section 2 and the Constitution, seeking single member districts.[1023]

On November 17, 1987, the court entered a consent judgment and decree in which defendants agreed to implement a system of district elections for the county council. Subsequently, the defendants adopted a single member district plan, it was precleared by the Department of Justice, and approved by the Court on April 28, 1988. The plan increased the number of representatives from five to seven and created two majority black districts. In the consent order, the defendants did not admit all of plaintiffs' allegations, but "recognize[d] that black voters have given significant support to black candidates seeking election to the Laurens County Council, and despite this

[1023] Beasley v. Laurens County, South Carolina, County Council, Civ. No. 6:87-1122-3 (D.S.C.).

support, black voters have never been able to elect candidates of their choice." The county further acknowledged:

> Black candidates supported by black voters were defeated in at-large elections for . . . County Council in 1970, 1974, 1976, 1978, 1984, and 1986 . . . [t]he black population of Laurens County is sufficiently geographically concentrated in certain parts of the county that a system of single member districts . . . under which black voters would obtain an opportunity to elect candidates of their choice to the county council on an equal basis with white voters.

The single member district plan was implemented for the 1988 election and black candidates won election to the county government.

Smith v. Laurens County School Districts 55 and 56

Traditionally, the boards of trustees for School Districts 55 and 56 in Laurens County were composed of seven members appointed by the county board of education from six attendance districts, with the chair appointed at-large. In the event 12 or more qualified electors in a particular district endorsed a candidate and requested an election, the board of education was required to hold an election in that district. Only qualified electors in the district were eligible to vote for that district's trustee. Then, in 1971, the general assembly adopted at-large elections for members of both boards. The state submitted the changes for preclearance under Section 5, but was advised by the Department of Justice that no determination could be made until additional information

was submitted.[1024] The county nonetheless implemented at-large elections for the trustees.

On January 14, 1987, the county resubmitted the change adopting at-large trustee elections to the Department of Justice for preclearance, and it did so in tandem with another act that altered the attendance areas for District 55. African American voters in Districts 55 and 56 then brought suit in March 1987, charging that the at-large method of electing the trustees had not been precleared under Section 5, and violated the Constitution and Section 2.[1025] On April 7, 1987, however, the Attorney General advised the state that at-large elections for the school districts had, in fact, been precleared in 1972, when the Attorney General, in connection with a submission of voting changes at that time, failed to object within sixty days after he was informed that certain requested information was unavailable.[1026] In view of the preclearance letter, the plaintiffs advised the court that their Section 5 claim was now moot, and proceeded with their Section 2 vote dilution claim.

Following settlement discussions, the parties were able to agree on plans using single member districts for both boards, which the general assembly enacted. Each board had seven districts, two of which were majority black. On December 15, 1987, the

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[1024] David L. Norman, Department of Justice, to Hardwick Stuart, Jr., August 18, 1972.

[1025] Smith v. Laurens County, South Carlina School District 55, Civ. No. 6:87-512-1 (D.S.C.).

[1026] William Bradford Reynolds, Assistant Attorney General, to C. Havird Jones, April 7, 1987.

court entered a consent order approving single member districts for both school districts and providing for special elections.

Paden v. Laurens County School District 55

The 1990 census showed that the districts for the Board of Trustees of District 55 were severely malapportioned, with a total deviation of 54.2%. African American residents of the district, represented by the ACLU, filed suit challenging the plan on one person, one vote grounds, and alleging that it diluted the voting strength of black voters in violation of Section 2.[1027] The parties subsequently entered into a consent decree on May 10, 1995, in which the general assembly was called upon to enact a constitutional districting plan and submit it for preclearance. A special election was to be conducted under the plan once it was precleared. Plaintiffs thereafter dismissed their claims as moot.

Glover v. Laurens

Laurens, the county seat of Laurens County, had a population of 10,587 in the 1980s of whom 39% were black. City government consisted of a mayor and six member council elected at-large and by majority vote. Because of bloc voting by the white majority, no black person had ever been elected mayor or to the city council. As a

[1027] Paden v. Laurens County School District 55, Case No. 6:95-878-21 (D.S.C.).

result, black residents of Laurens and the local NAACP, represented by the ACLU and the NAACP, brought suit in federal court in 1987, challenging at-large city council elections.[1028]

The plaintiffs moved for summary judgment, which the defendants did not oppose. In its order granting the motion, the court found "at-large elections for the Mayor and City Council are in violation of [Section 2]." The court enjoined elections under the at-large system and directed the defendants to propose a "new system of district elections for the City of Laurens," which "shall fairly represent black residents."[1029] The city submitted a plan, which was approved by the plaintiffs, providing for a mayor and six member council elected from districts, three of which were majority black. The plan was approved by the court, precleared under Section 5, and implemented in 1988.

The City of Clinton

In 2002, the Department of Justice objected to annexations that would have hampered black electoral success in the City of Clinton, another municipality in Laurens County. The city council was composed of seven single member districts, three of which were majority black. The annexation would have reduced the minority

[1028] Glover v. Laurens, South Carolina Mayor and Council, Civ. No. 6:87-1663-17 (D.S.C.).

[1029] Id., Order of March 18, 1988.

percentage in Ward 1 from 59.3% to 50.0%, and the percentage of black voting age residents to less than 50%. In issuing its objection, the Department of Justice determined that a reduction in the voting strength of African Americans was avoidable:

> The effect of the designation of the annexations to Ward 1 significantly reduces the level of black voting strength in that district, and according to our election analysis, eliminates the ability that black voters currently have to elect their candidate of choice in the district. Concomitantly, the elimination of Ward 1 as a district in which black voters can elect a candidate of choice reduces the level of minority voting strength in the expanded city from three out of seven (42.9 percent) to two out of seven (28.6 percent), while their relative share of the city-wide electorate drops no more than a percentage point to not less than 37 percent.
>
> [W]e sought to ascertain whether the elimination of the district as one in which black voters could elect a candidate of choice, and the resulting inability of the electoral system in the expanded city boundaries to reflect minority voting strength, was unavoidable. As part of that analysis, we prepared an illustrative limited redistricting plan that affects only Wards 1 and 2. Our conclusion is that the failure to provide a fair recognition of minority voting strength in the expanded city is avoidable, through either a city-wide or a limited redistricting. We recognize that the city is aware that such redistricting is feasible, and has indicated it expects to redistrict in this manner in the future, but has chosen not to do so at this time.
>
> Where annexations significantly decrease minority voting strength, the reasons for the annexations must be objectively verifiable and legitimate, and the post-annexation election system must fairly reflect the voting strength of the minority community in the expanded electorate.[1030]

Since the city failed to carry its burden of proof, the reduction of black voting strength under the proposed plan was objectionable under Section 5 and the potential discriminatory change was blocked.

[1030] Ralph F. Boyd, Jr., Assistant Attorney General, to C. Samuel Bennett II, December 9, 2002.

Lexington & Saluda Counties

R.O. Levy vs. Lexington County, South Carolina, School District Three Board of Trustees

Lexington School District 3 is one of five school districts lying wholly or partially within Lexington County in the central part of the state. Beginning in 1994, its seven member board of education was elected at-large in nonpartisan elections held in even number years with staggered terms. Although blacks constitute 28.5% of the population of the school district, prior to a vote dilution lawsuit filed by the ACLU on behalf of black residents in 2003, no black person had ever been elected to the school board under the challenged system.[1031]

After the lawsuit was filed, Cora Lester, a retired black school teacher, was elected in 2004, after a former school trustee declined to seek reelection. Lester was advised by members of the board that they would support her election. Indeed, one of the board members who solicited her candidacy did so after seeing that the plaintiffs' proposed remedial plan would place him in a majority black district. Still, only 38% of white voters actually cast one of their four ballots for Lester.

Lexington County has a long history of racial discrimination. Schools were racially segregated; town ordinances required segregation in places of public accommodation; there was racial discrimination in hiring; the Ku Klux Klan was active

[1031] Levy v. Lexington County School District Three, Civ. No. 03-3093 (D.S.C.)

in the county; blacks were excluded from juries; election campaigns were characterized by racial appeals; whites fled the Democratic Party because of its support of civil rights laws; and housing was constructed on a segregated basis.

Horace King, a resident of Lexington County, was head of the South Carolina chapter of the Christian Knights of the Ku Klux Klan. To promote the organization's white supremacist goals, he encouraged Klan members to burn black churches. In 1998, a member of the local Ku Klux Klan pled guilty to shooting three black teenagers outside a rural nightclub in Pelion in Lexington County.

The City of Batesburg, which is in School District 3, adopted a council form of government and a majority vote requirement in 1986. On February 24, 1986, the Department of Justice objected to the majority vote requirement:

> Our analysis of elections in Batesburg raises a clear inference that voting in elections involving black candidates is polarized along racial lines and that this voting pattern has hampered the ability of black voters to elect candidates of their choice. The city has not provided us with sufficient information to counter this conclusion.
>
> In this context, the incorporation of a majority vote requirement, which increases the probability of "head-to-head" contests between black candidates and white candidates, will in all likelihood dilute minority voting strength and thereby exacerbate the election difficulties currently faced by black voters.[1032]

Seventeen years later, local officials once again tried to impose the same discriminatory mechanism after Batesburg and the adjoining town of Leesville, also located in District Three, consolidated in 1993. The new City of Batesburg-Leesville

[1032] William Bradford Reynolds, Assistant Attorney General, to Richard J. Breibart, February 24, 1986.

adopted a majority vote requirement for council and mayoral elections. Again, the Department of Justice objected to the majority vote requirement on June 1, 1993:

> Our analysis reveals an apparent pattern of racially polarized voting in town elections for both Batesburg and Leesville that has hampered the ability of black voters to elect candidates of choice and has deterred potential candidates of choice of the black community from competing for at-large offices. Indeed, single-member districts were adopted for the election of councilmembers for the consolidated town as a way to address the concern that municipal elections in the respective towns had been racially polarized.
>
> With regard to the majority vote requirement, we note that on February 24, 1986, the Attorney General interposed a Section 5 objection to the majority vote requirement for the mayor and council for the Town of Batesburg. In our objection letter we stated that in the context of an at-large electoral scheme, the proposed change might, 'dilute minority voting strength and exacerbate the election difficulties currently faced by black candidates.' Thus, the change now before us would impose in the consolidated town the same electoral feature, i.e., a majority vote requirement, to which we interposed an objection in 1986 in Batesburg.
>
> We recognize that a majority vote requirement in councilmanic elections in the single-member districts, four of which have black voting age population majorities, does not raise the same concerns as its use in an at-large system. But the mayor of the consolidated town will be elected at large. It is well recognized that where a jurisdiction has a significant minority population and a pattern of racially polarized voting exists, the adoption of a majority vote requirement in an at-large election system may further limit the opportunity of minority voters to elect candidates of choice by increasing the probability of 'head-to-head' contests between minority and white candidates.[1033]

The case against Lexington County School District Three is presently scheduled for trial in March 2006.

[1033] Letter of James P. Turner, Acting Assistant Attorney General, to Jonathan R. Hendrix, June 1, 1993.

Marion County and the City of Mullins

Reaves v. City Council of Mullins

The City of Mullins, South Carolina, was governed by a mayor and six member council elected at-large and by plurality vote. African Americans comprised about half of the city population, but whites were a majority of registered voters. After passage of the Voting Rights Act and increased black voter registration, the city adopted an ordinance in 1977, providing for elections by majority vote. The voting change was submitted to the Department of Justice but was objected to because the change "could have the potential for abridging minority voting rights."[1034] The city asked for reconsideration, but it was denied by the Attorney General who concluded that, "our analysis of election returns reveals evidence of racial bloc voting, and our research indicates that black candidacies may be deterred by the existence of a majority vote requirement."[1035]

Seventeen years later, black residents of the town, represented by the ACLU, filed suit in federal court challenging at-large elections as diluting minority voting strength.[1036] At the time of the lawsuit, only one black person had ever been elected to city government. Three years later, the court issued an order invalidating the at-large

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[1034] Drew S. Days III, Assistant Attorney General, to Raymond Pridgen, June 30, 1978.

[1035] Drew S. Days III, Assistant Attorney General, to Raymond Pridgen, September 28, 1978.

[1036] Reaves v. City Council of Mullins, South Carolina, Civ. No. 4:85-1533-2 (D.S.C.).

system under Section 2 and made detailed findings, including a "history of both public and private discrimination" that "has hindered, both directly and indirectly, the ability of Mullins' blacks to participate effectively in the political process," and "racially polarized voting . . . and the general inability of the minority-preferred candidates to win elections."[1037]

Rather than accept a plan formulated by the city, the court adopted a plan prepared by the state Division of Research and Statistical Services which called for six single member districts with the mayor elected at-large. Three of the council districts were majority black, ensuring that racially polarized voting would not prevent minority voters from electing candidates of their choice.[1038]

Orangeburg County and the City of Orangeburg

Owens v. City Council of Orangeburg

Orangeburg County, which is majority black, is home to two historically black institutions of higher learning, Claflin College and South Carolina State College. The county also has a stark history of racial discrimination and conflict.

In the aftermath of Reconstruction, Samuel Dibble, a former legislator from Orangeburg, designed a congressional redistricting plan that packed as many blacks as

[1037] Id., Order of August 8, 1988.

[1038] Id., Order of February 6, 1990.

possible in one district, the Seventh, to allow white Democrats to control the remaining six. The Seventh District, also known as the Boa Constrictor District:

> began on the banks of the Savannah River and meandered up the coast (excluding the city of Charleston) to Winyah Bay in Georgetown County; it then moved inland to include lower Richland and Sumter Counties. Also included were all or portions of Berkeley, Charleston, Clarendon, Colleton, Orangeburg and Williamsburg Counties.[1039]

After the plan was adopted in 1882, only the Seventh District elected a black congressman, despite the fact that a majority of the state population was black. The following year, Dibble was elected to Congress from one of the white controlled districts.

In more recent times, Orangeburg was the site of the infamous Orangeburg Massacre, in which three black students were killed and 27 others wounded on February 8, 1968, by members of the state highway patrol in the aftermath of civil rights protests over a segregated bowling alley. The protestors had built a bonfire on the campus of South Carolina State University, and when the highway patrol moved in to extinguish it, one patrolman fired his carbine in the air and others started shooting. Nine highway patrol officers were charged with violations of federal law, but all were acquitted.[1040]

[1039] Walter Edgar, South Carolina: A History (Columbia, South Carolina: University of South Carolina Press, 1998) pp. 415-16.

[1040] CNN.com, "South Carolina Marks 'Orangeburg Massacre' Anniversary," February 8, 2001, found at:

The state blamed the massacre on Cleveland Sellers, a black civil rights organizer for the Student Nonviolent Coordinating Committee (SNCC). Sellers was convicted under state law for inciting a riot, and served a year in prison, but was granted a full pardon by the governor in 1994. Sellers, who went on to get a Ph.D. in history, now teaches at the University of South Carolina in Columbia.[1041]

The 1980 census showed the City of Orangeburg, including its student population, was 49% black, but no black person had ever been elected mayor or to the four member council, all of whom were elected at-large. In May 1985, state representative Larry Mitchell urged the city council to adopt single member districts and presented a map containing one majority black district out of four. The council rejected Rep. Mitchell's plan.

In the summer of 1986, the ACLU, on behalf of black voters in Orangeburg, sued the city council alleging that its at-large system diluted black voting strength in violation of Section 2 and the Constitution.[1042] The case was scheduled for trial in May 1987, but on the eve of trial, and in the face of strong evidence of white bloc voting and racial polarization, the defendants agreed to settle the case. The plaintiffs' analysis of elections was confirmed by the South Carolina Advisory Committee to the U.S.

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http://archives.cnn.com/2001/US/02/08/orangeburg.masscre/ Last accessed February 7, 2006.

[1041] Sellers has written an autobiography, River of No Return: The Autobiography of a Black Militant and the Life and Death of SNCC (Jackson, Mississippi: University Press of Mississippi, 1990).

[1042] Owens v. City Council of Orangeburg, S.C., 5:86-1564-6 (D.S.C.).

Commission on Civil Rights, which found "racial polarity in voting" in Orangeburg.[1043] In a subsequent consent order, the court found "plaintiffs would present a prima facie case" that the at-large system violated Section 2.[1044] The parties agreed to settle the case based on a plan using six single member districts for city council elections.

Orangeburg County also has a history of Section 5 objections. In 1984, Elloree, a rural town in eastern Orangeburg County, adopted staggered terms for its council members and a majority vote requirement for town council members and water commission elections. The Department of Justice objected to the changes, saying:

> We note that blacks constitute 34.43 percent of the town's population. Our analysis also indicates that, in the context of the racial bloc voting patterns that seems to exist in Elloree, a change from concurrent elections by a simple plurality to staggered terms and a majority vote requirement adversely affect the ability of minorities to elect candidates of their choice to office, particularly where, as here, single—shot voting is permitted under state law.[1045]

Prior to 1976, Orangeburg County was governed by a five member commission elected at-large. Although the county was majority (56%) black, no black person had ever been elected to the commission. In 1976, under the Home Rule Act, the county chose a commission/administrator form of government with seven commissioners elected from single member districts, three of which were majority black and black

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[1043] Briefing Memorandum, South Carolina Advisory Committee (Atlanta; 1985).

[1044] Owens, Order of June 3, 1987.

[1045] William Bradford Reynolds, Assistant Attorney General, to Charles Whetstone, Jr., June 11, 1984.

candidates were subsequently elected from the majority black districts on a consistent basis.

After the 1980 census, the state's demographer prepared a redistricting plan for the commission containing four majority black districts. But in a racially divided vote, the commission rejected the plan and adopted one containing four majority white districts instead. To accomplish this, blacks were packed in one district at the level of 98%, and in another at 70%. The plan was not submitted to the Department of Justice until 1985, and commission elections were held in violation of Section 5 in 1982 and 1984. When the Department of Justice objected to the plan, it noted that:

> Our review of the information submitted to us revealed that several alternative plans were developed and considered by county officials, but that the plan ultimately selected, and submitted, failed to give any meaningful recognition to the significant increase in the county's minority population over the past decade. . . . While the Act imposes no obligation on a jurisdiction to maximize minority voting strength, it does prohibit the drawing of a redistricting plan so as to unfairly minimize the voting strength of black citizens.
>
> In light of the county's failure to reflect in its submitted redistricting the measurable increase in the county's minority voters, and the absence of a satisfactory explanation for this oversight, I cannot conclude, as I must to preclear this plan, that Orangeburg County has met its burden under Section 5 in this instance.[1046]

[1046] William Bradford Reynolds, Assistant Attorney General, to Robert R. Horger, September 3, 1985 (internal citations omitted).

The commission took up redistricting again in 1986, and in light of the Section 5 objection adopted a plan containing four majority black districts. The Department of Justice precleared the plan in April 1986.

Following the 1990 census, the county council attempted once again to dilute black voting strength but the Department of Justice objected, saying:

> According to the 1990 census, black persons comprise approximately 58 percent of the total population in Orangeburg County. The seven members of the Orangeburg County Council are elected from single-member districts and there appears to be a pattern of racially polarized voting in county elections.
>
> Our review of the redistricting process has shown that the black community consistently sought from the earliest stages a redistricting plan that would contain at least four districts in which black citizens would have the opportunity to elect candidates of their choice. A series of alternative redistricting plans was presented to the council by representatives of the black community. None of these alternative plans was adopted, nor does it appear that they received serious consideration by the council majority. While Orangeburg County was not required to adopt any particular plan advocated by the black community, the county is required to show that the plan it adopted was not motivated, at least in part, by a desire to deny or abridge the right to vote on account of race or color.
>
> In this regard, many of the reasons presented to us for rejecting these alternative plans appear to be pretextual. Furthermore, it appears that the protection of incumbents, particularly white incumbents, and the desire to confine the black population percentage in District 5 to a predetermined and unnecessarily low level, were dominant factors in the council's redistricting choices.
>
> Moreover, as you are aware the 1990 census showed that the current redistricting plan is malapportioned and that District 5 in particular is significantly overpopulated. Our analysis indicates that the proposed

> redistricting plan unnecessarily removes black population from existing District 5 in the process of reducing the district's population deviation. We note also what appears to be unnecessary fragmentation of a majority-black areas within the City of Orangeburg.[1047]

As a result of this objection, the county was again forced to adopt a plan that complied with Section 5. As these developments clearly show, Section 5 has been critical to preventing the adoption of discriminatory voting changes even in jurisdictions with minority black populations during the 1980s and 1990s.

Richland County

NAACP v. Richland County

The NAACP, represented by John Harper, a black lawyer in Columbia, filed suit in 1987, asking the court to enjoin a referendum on whether to reduce the size of the Richland County Council from 11 to 9 members absent preclearance under Section 5.[1048] On the day the complaint was filed, Harper issued a news release and held a press conference at which he said the NAACP opposed a reduction in the size of the council, and thus a reduction in the number of majority black districts, because it would have a negative impact on black voters. In response, defendants filed a motion for sanctions

[1047] John R. Dunne, Assistant Attorney General, to Robert R. Horger, July 21, 1992.

[1048] NAACP v. Richland County, South Carolina, Civ. No. 3-87-2597-17 (D.S.C.).

against the plaintiffs and their attorney for prejudicial pre-trial publicity "based upon a press conference and news release which was held and given out."[1049]

The district court entered an order enjoining the referendum absent compliance with Section 5, and the ACLU agreed to represent the plaintiffs and their lawyer on the motion seeking sanctions. In its response to the motion, the ACLU cited numerous federal court decisions invalidating under the First Amendment local court regulations prohibiting attorney extrajudicial comments during litigation, particularly civil litigation before a judge alone. The ACLU further pointed out that attacks upon lawyers representing minority plaintiffs in civil rights cases was one of the long standing, and most dubious, traditions of the white southern bar.

A number of southern states enacted statutes aimed at civil rights lawyers and civil rights lawsuits, making it a crime to "engage in exciting and stirring up" litigation. The Supreme Court invalidated one such statute in Virginia noting that "[w]e cannot close our eyes to the fact that the . . . civil rights movement has engendered the intense resentment and opposition of the politically dominant white community. . . . In such circumstances, a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression."[1050] Despite the ruling of the Supreme Court, the South Carolina Supreme Court subsequently issued a public reprimand to a lawyer

[1049] Id., Defendants' Memorandum in Support of Motion for Sanctions, September 25, 1987, p. 1.

[1050] NAACP v. Button, 371 U.S. 415, 435-36 (1963).

for offering the free legal assistance of the ACLU to indigent black women who had been sterilized by their doctor as a condition for receiving Medicaid benefits. The reprimand was set aside by the U.S. Supreme Court, which, relying upon its prior decision in the Virginia case, held that the conduct in question was protected by the First Amendment.[1051] The district court in the Richland County case issued an order denying the defendants' motion for sanctions, similarly concluding that the conduct of plaintiffs and their lawyers was protected by the First Amendment.

Washington v. Finlay

The City of Columbia, which has a black population of about 35%, is the capital of South Carolina and the county seat of Richland County. In the 1970's, the city's mayor and four member council were elected at-large, but no black person had ever been elected to city office, although black candidates had run numerous times. The city had a significant history of discrimination, as did the rest of the state, the legacy of which extended to racial bloc voting and polarization.

On the eve of passage of the Voting Rights Act, blacks were only 13% of the registered voters in Richland County. As late as 1970, Albert Watson, a former member of the general assembly from Richland County and a member of the U.S. House of Representatives, ran a strong campaign as the Republican Party's nominee for governor

[1051] In re Primus, 436 U.S. 412 (1978).

on a platform of segregation and white supremacy. To dramatize his commitment to white dominance, he wore a white tie on the campaign trail.[1052]

In 1977, black voters of Columbia, represented by the ACLU, filed a lawsuit challenging at-large elections for the city council.[1053] Shortly thereafter, the city adopted a resolution to hold a referendum whether the size of the council should be increased to six members, with three members plus the mayor elected at-large, and three members elected from single member districts. The so-called 3-3-1 plan would have created only one majority black district. The state's demographer, who drew the plan, admitted "it would be difficult . . . for a minority to get elected" in the two majority white districts or to an at-large position.[1054] Although it would have been possible to draw a plan with additional majority black districts, the council was determined to limit the number of such districts to one.

There was resistance to the 3-3-1 plan in both the black and white communities. Many blacks opposed it because they felt it was an effort to limit black representation on the council to a mere token. Many whites opposed the plan because, in the words of one council member, "It's - what's the name of that movie - 'Apocalypse Now,' is the attitude I'm getting from a lot of old line Columbians. They think it is changing a way

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[1052] NAACP v. City of Columbia, Civ. No. 3:92-914-17 (D.S.C.) Tr. Trans. 1794-95 (testimony of Jack Bass).

[1053] Washington v. Finlay, Civ. No. 77-1791 (D.S.C.).

[1054] Id., Tr. II 188-89.

of life."[1055] The referendum was defeated, with a majority of both blacks and whites voting "no."

At trial, none of the witnesses, white or black, disputed that at-large elections made it more difficult for blacks to win. Cultural and social barriers erected by segregation denied minority candidates access to white voters and white support. As one unsuccessful black city council candidate put it:

> We cannot depend, as voting practices have proven in the past, on the white vote to elect a black candidate to city council. That's it, and I'm not being racist in what I'm saying, and I'm certainly not being anti-white or pro-black. I'm speaking from the facts as they have proven themselves in past campaign results.[1056]

Douglas McKay, an expert for the plaintiffs in electoral geography, said that race was "very significant" in explaining voting behavior, and that at-large elections clearly disadvantaged blacks.[1057] Earl Black, a professor of government at the University of South Carolina and another expert for the plaintiffs, said that for many white voters "it's most unlikely that they are going to take seriously the question of whether they vote for a black candidate." In Columbia, there was a "typical pattern of widespread racial polarization," and "at-large elections of this type put black candidates at a severe disadvantage."[1058]

[1055] "Council OKs New Political Boundary Lines For City," The State, October 18, 1979.

[1056] Washington v. Finlay, R. IV 139.

[1057] Id., Tr. I 20.

[1058] Id., Tr. I 56, 69.

Despite this evidence, the district court ruled against the plaintiffs, concluding that there was no evidence of "any racially discriminatory intent or purpose on the part of the Defendants in maintaining a City Council with four councilmen elected at large."[1059]

Following the district court's decision, the city conducted a second referendum in April 1981, involving a 6-2-1 plan, which called for six single member districts and two members and the mayor elected at-large. The referendum was defeated in a sharply polarized vote, with 100% of blacks voting "yes," and 85% of whites voting "no." After the referendum, one council member said that Columbia "is about as polarized as I've ever seen it."[1060]

Plaintiffs appealed the decision of the district court. While the appeal was pending, the council, in response to pressure from the minority community and a recommendation from the Columbia Community Relations Council (CRC), adopted a resolution setting yet another referendum for December 15, 1981, on whether the method of elections should be changed to provide for the election of the mayor and two council members at-large and four council members from single member districts (the 4-2-1 plan). In its recommendation, the CRC said that the existing at-large system

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[1059] Id., Order of March 23, 1980.

[1060] "Community Leaders Urged To Help Heal Referendum Injuries," The State, April 10, 1981.

"prohibits Blacks from being elected."[1061] A month later, the court of appeals affirmed the decision of the district court on the grounds that "no racially discriminatory purpose had been shown."[1062]

The 4-2-1 referendum was supported by the mayor and two members of the council, but two other members formed a group called The Committee to Save Columbia in opposition to the proposal. Angus "Red" McLendon, former chair of the city election commission, said the 4-2-1 proposal was a mistake. "We redheads are minorities," he said. "This thing of calling people minorities is sickening. They (blacks) just want something handed to them on a silver platter - that's a lot of crap."[1063] The council's resolution was precleared under Section 5 and the 4-2-1 plan was approved by the voters in December 1981.

The effect of the referendum was to render the plaintiffs' challenge to the at-large system moot. Accordingly, plaintiffs filed a petition for writ of certiorari asking the Supreme Court to vacate the opinions of the lower court on mootness grounds, but the petition was denied.[1064]

[1061] Quote in NAACP v. City of Columbia, Order of August 26, 1993, p. 13.

[1062] Washington v. Finlay, 664 F. 2d 913, 924 (4th Cir. 1981).

[1063] "4-2-1 Lines Forming," The State, November 15, 1981.

[1064] Washington v. Finlay, 457 U.S. 1120 (1982).

The new plan was implemented at the next election in March 1983, and two black candidates were elected to the city council - the first in the city's modern history.

The 4-2-1 plan worked in practice as many in the black community had predicted it would. Although blacks frequently ran for at-large positions on the city council, none was ever elected. The only black candidates to win were elected from the two majority black single member districts.

Simkins v. City of Columbia

Modjeska Simkins was the Rosa Parks of South Carolina. Born Modjeska Monteith in 1899, Simkins attended Benedict College in South Carolina, and went on to become a school teacher at the Booker T. Washington School in Columbia, although she was forced to resign her position after marrying because the local public school system did not permit married women to teach. Simkins was forced out of her next job as Director of Negro Work with the South Carolina Tuberculosis Association in 1942, because she refused to quit the NAACP. As secretary of the South Carolina Conference of the NAACP, she helped lead efforts to equalize teacher salaries for blacks and whites, challenge the white primary, campaigned against lynching, fought segregation in the public schools, and achieved national recognition as a civil rights leader and political activist.

In 1984, Simkins and other black residents of Columbia, represented by the ACLU, filed suit to enjoin a special election for the city council because of the city's

failure to comply with Section 5.[1065] The city had changed the date of its regular election, thereby shortening the time candidates had to qualify and campaign against white incumbents. Although the city had submitted the change for preclearance, it immediately began to implement it without waiting for a decision from the Department of Justice. In its answer to the complaint, the city contended that opening candidate qualifying and setting the dates for the election were merely "administrative" matters and were not practices or procedures subject to Section 5.

A three-judge court was convened and a trial was set for February 15, 1984. The day before the trial, however, the Attorney General precleared the special election and plaintiffs voluntarily dismissed their complaint as moot. The defendants moved for costs and attorneys' fees, but the request was denied by the court in August 1984.

NAACP v. City of Columbia

By 1990, the black population in Columbia had increased to 45%. And in 1992, the NAACP filed suit challenging the 4-2-1 plan as diluting minority voting strength in violation of Section 2.[1066]

Following the illness of one of the NAACP lawyers, and just prior to trial, the ACLU was asked to assist in the trial of the case and agreed to do so. The district court

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[1065] Simkins v. City of Columbia, South Carolina, Civ. No. 84-65-15 (D.S.C.).

[1066] NAACP v. City of Columbia, Civ. No. 3:92-914-17 (D.S.C.).

concluded that "racially polarized voting does exist in white versus black elections," but blacks were able to elect candidates of their choice in white/white contests and thus there was no minority vote dilution.[1067] The plaintiffs appealed but the decision was affirmed.[1068] The Supreme Court denied a petition for writ of certiorari on February 21, 1995.[1069]

The litigation over the method of elections in Columbia spanned 18 years. And regardless of the rulings by the courts on legal issues, no honest observer could deny the continuing existence of racial division and polarization in the electorate.

Saluda County

Lewis v. Saluda County

Historically, Saluda County was majority black, but by 1980, the black population had dwindled to approximately 35%. No black person within memory had ever been elected to the county council, which was composed of five members, all elected at-large. In June 1983, black residents of the county, represented by the ACLU, filed suit, challenging the at-large system as violating Section 2 and the Constitution.[1070]

[1067] NAACP v. City of Columbia, 850 F. Supp. 404, 414, 416 (D.S.C. 1993).

[1068] NAACP v. City of Columbia, 33 F. 3d 52 (4th Cir. 1994).

[1069] NAACP v. City of Columbia, 513 U.S. 1147 (1995).

[1070] Lewis v. Saluda County, South Carolina, C.A. No. 13-1514-3 (D.S.C.).

Saluda County, like its neighbor Edgefield, was at the forefront of the movement to disfranchise and remove blacks after Reconstruction. According to an 1895 editorial in The Saluda Sentinel, "we propose gradually to get rid of our negro population and build up our county for our own children . . . We will gradually let them drift out and let our children occupy the country. Other counties can do as they please."[1071] In 1896, the Saluda County Democratic Party adopted rules that "Every negro applying for membership in a Democratic club or offering to vote in a Democratic primary election must produce a written statement of 10 reputable white men, who shall swear that they know of their own knowledge that the applicant or voter, voted for General Hampton in 1876 and has voted the Democratic ticket continuously since."[1072] The same year the paper called for "PURE WHITE DEMOCRACY forever," and urged "Patriots of Saluda be worthy of they trust, and trail not the robes of thy bride in the dust. Shake from her garments the hands once enslaved, And let white Democracy ever o're us be waved."[1073] In the 1920 presidential election, only two black voters in the entire county cast a ballot.[1074]

[1071] "Butler Family," The Saluda Sentinel, November 7, 1895.

[1072] "The New Rules," The Saluda Sentinel, June 11, 1896.

[1073] "The Padgett Big Picnic," The Saluda Sentinel, July 1, 1896.

[1074] "Few Votes In County," The Saluda Sentinel, November 11, 1920.

After the abolition of the white primary, several blacks in Saluda County registered to vote for the 1948 election. One of them was Ernest Townsend, who said he was advised shortly thereafter by a white man not to vote "because it wasn't a good idea." John Graham, who had also registered, was physically assaulted by a precinct worker when he went to vote. The poll official told him he was at the wrong precinct and then proceeded to hit him over the head with a stick. After the election, a number of houses owned by blacks who had voted were shot into. John Daniels said, "they shot into my brother in law's house. It had been shot into with shotguns and rifles. George Dean, another black man also had his house shot into"

After the ACLU filed suit in 1983, the defendants proposed to conduct a referendum at the next regularly scheduled election on whether to adopt single member districts. Plaintiffs agreed to hold their complaint in abeyance pending the referendum, in return for defendants' promise that they would actively promote the adoption of single member districts at the election. In fact, only one of the council members supported passage of the referendum. The other four chose not to take a public position one way or the other.

The referendum was held against a background of racial confrontation and was defeated by a substantial margin, after which plaintiffs reactivated their case. At a pretrial hearing, the presiding judge said the failure of the referendum "didn't shock anybody, did it?" Counsel for the defendants said he was willing to cooperate and

could stipulate "to about ninety percent" of the plaintiffs' case, and that "I can't argue that in the forties, fifties, sixties, and early seventies that there wasn't racial discrimination that affected black voting rights in my county. For me to do so would be ludicrous."[1075] The court responded, "Well, if you're interested in cooperating so, why can't y'all draw some single-member district lines?"[1076]

Prior to trial, the defendants sought a settlement and the parties agreed to a new plan containing four single member districts, one of which was majority black, with the chair elected at-large. The district court entered an order on July 19, 1985, finding that "the plaintiffs have established a prima facie case that the present method of at-large elections for the County Council is in violation of 42 U.S.C. § 1973," and ordered into effect the agreed upon plan. Elections under the new plan were held in August 1986.

Despite the modest progress made through the courts by the black community, securing greater opportunity to elect representatives of choice, race relations remained sharply polarized in the county. In 1989, three black teenagers who were volunteers for a United Methodist Church program repairing homes for the poor, were denied access to a swimming pool owned and operated by the Saluda Jaycees. Church volunteers in the church program had been given permission by the Jaycees to use the facility, but when a group showed up to take a swim they were told all were welcome, except the

[1075] Lewis v. Saluda County, Transcript of Hearing, July 24, 1984, p. 3.

[1076] Id., p. 6.

three black teenagers. The entire group then left. Willie Teague, the editor of the church's newspaper, said "It's a rather sad commentary on the progress that we hoped we had made but apparently had not. It says that racism is still alive and well in South Carolina."[1077]

Sumter County

County Council of Sumter County, South Carolina v. United States

Sumter County is named for General Thomas Sumter, the "Fighting Gamecock" of the American Revolutionary War. It was also home to Citadel Cadet George Edward "Tuck" Haynsworth, who is credited with firing the first shot of the Civil War, as well as renowned African American educator Mary McCleod Bethune.

In more modern times, Sumter County has been distinguished by its Section 5 objections. Prior to 1976, the members of the Sumter County Board of Commissioners were appointed by the governor on recommendation of the local legislative delegation. As long as the appointive system was in effect, no black person was ever appointed to the commission. In mid-1967, the governor began appointing African Americans to various offices, and that same year the legislature enacted Act 371 providing for a seven member county council elected at-large by majority vote. The act was not submitted for preclearance, and the county held elections in 1968, 1970, 1972, 1974, and 1976 in

[1077] "3 black teens bared from Jaycees' pool," The State, July 25, 1989.

violation of Section 5. In August 1976, the county submitted Act 371 for preclearance, and the Department of Justice noted an objection:

> Our analysis reveals that although blacks represent a substantial proportion of the population of Sumter County, only one black has ever been elected to the Sumter County Commission. Our analysis further reveals that bloc voting along racial lines likely exists in Sumter County. Where such a phenomenon does exist, under an at-large system of elections blacks have little chance of electing a candidate of their choice. On the other hand, we note that the black population of Sumter County is relatively concentrated and a fairly drawn single-member district plan would assure blacks of some representation on the Commission. Under these circumstances, therefore, I must, on behalf of the Attorney General, interpose an objection to the at-large election provisions of Act No. 371 and of the resolution and ordinance implementing the South Carolina Home Rule Act.[1078]

An election was scheduled for 1978, and black residents of Sumter County, represented by the ACLU, filed suit seeking to enjoin further use of the unprecleared at-large system.[1079] A similar suit was filed by the United States, the two cases were consolidated, and the three-judge court permanently enjoined county elections under the at-large system until the requirements of Section 5 were met. However, the three-judge court subsequently held that an intervening referendum adopting at-large elections, which had been precleared, and a letter from the county which it labeled "a submission for preclearance," had the effect of preclearing the at-large system.[1080] The

[1078] J. Stanley Pottinger, Assistant Attorney General, to E. M. Dubose, December 3, 1976.

[1079] Blanding v. DuBose, Civ. No. 78-764 (D.S.C.).

[1080] Blanding v. DuBose, 509 F. Supp. 1334 (D.S.C. 1981).

private plaintiffs, but not the United States, appealed and the Supreme Court reversed. It held the letter from the county was in fact a "request for reconsideration" of the prior Section 5 objection, and that the Attorney General had acted in a timely manner in denying the request.[1081]

In 1982, the county filed suit in the District of Columbia seeking preclearance of Act 371.[1082] Black residents of the county, represented by the ACLU, intervened to urge denial of preclearance of the at-large voting change as denying black voters the opportunity to elect candidates of their choice.[1083] One of the arguments raised by the county was that Section 5 was no longer constitutional because Congress made no findings in 1982 of the extent of voter registration in 1975 and 1982 that would justify the extension, and that in any event as of May 28, 1982, more than half of blacks were registered to vote in Sumter County and in South Carolina. In rejecting the county's claim, the court noted that a similar challenge to the constitutionality of the 1975 amendment had been dismissed by the Supreme Court,[1084] and that the 1982

[1081] Blanding v. DuBose, 454 U.S. 393 (1982).

[1082] County Council of Sumter County v. United States, Civ. A. No. 82-0912 (D.D.C.).

[1083] County Council of Sumter County v. United States, 555 F. Supp. 694 (D.D.C. 1983).

[1084] City of Rome v. United States, 446 U.S. 156 (1980).

amendments "had a much larger purpose than to increase voter registration in a county like Sumter to more than 50 percent."[1085]

On May 25, 1984, the three-judge court denied preclearance to Act 371 on the grounds that Sumter County had not carried its burden of proving that the proposed change would not have an unlawful purpose or effect. The county:

> failed to carry their burden of proving 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, because the at-large method of voting may have diluted the value of the then-increasing voting strength of the black minority, may have prevented formation of a black majority senate district, and probably prevented appointment by the Governor of blacks to the Sumter County Council. . . [and] failed to carry their burden of proving that the at-large system was not maintained after 1967 for racially discriminatory purposes and with racially discriminatory effect.[1086]

In reaching its conclusion the court also found:

> *Racial segregation was, and in large measure remains, the way of life in much of the private sector of Sumter County.
>
> *Voting in Sumter County is racially polarized.
>
> *Act 371 . . . was formulated without significant input from Sumter County's black community.
>
> *[R]acial considerations influenced the Council's decision not to hold a referendum [permitted under state law to allow the voters to select a form of local government].[1087]

[1085] County Council of Sumter County, 555 F. Supp. at 707.

[1086] County Council of Sumter County v. United States, 596 F. Supp. 35, 38 (D.D.C. 1984).

[1087] Id. at 37-8.

Following the decision of the three-judge court, the state legislature enacted a single member district plan for the county council. A special election was held for all seven council seats on October 8, 1984, and three black candidates were elected.

The Department of Justice also objected in 1976, to the adoption of at-large elections with residency requirements for the county school board to replace an existing system of multi-member districts:

> We have noted particularly information concerning the predominantly white appointive body prior to 1974, and the election of black candidates under the 1974 multi-member district system. Additionally, we have not been apprized [sic] of any compelling reasons for the use of the candidate residency districts with at-large voting in lieu of the multi-member district method.
>
> The use of the candidate residency districts in effect creates separate offices and permits each voter to vote for only one candidate in each place. In the context of an at-large electoral system, the opportunity for minority voters to elect a representative of their choice to the board of trustees is significantly lessened [citation omitted].[1088]

Still another Section 5 objection was entered by the Department of Justice after the City of Sumter attempted to annex portions of the county in 1985:

> At the outset, we note that even though black citizens constitute almost 40 percent of the city's population, and although there have been several minority candidacies, no black has been elected to the city council in recent times. This appears in substantial part to be the result of a general pattern of racially polarized voting occurring in the context of Sumter's at-large election system--a system that

[1088] J. Stanley Pottinger, Assistant Attorney General, to Treva Ashworth, October 1, 1976.

> includes a majority vote requirement and staggered terms. Against this electoral milieu, the proposed annexations, which our analysis shows have decreased the city's minority population by approximately 4.98 percent, serve to enhance the ability of the white majority to exclude blacks totally from participation in the governing of the city through membership on the city council, an effect not permissible under the Voting Rights Act. [Citation omitted] In addition, we are concerned that what appears to be a pattern of annexation which seems calculated to take in only whites while excluding predominantly black areas has not been satisfactorily explained.[1089]

The city submitted other changes for preclearance in 1986, including an increase in the size of the council from four to six members, four of whom would be elected from single member districts. The city also asked the department to reconsider its objections to the annexations in light of these new changes; however, the department, citing "the uncontroverted existence of racial bloc voting in the city," declined to do so:

> The plan increases the size of the city council from four to six members and maintains the full voting power of the mayor, thus effectively creating a seven-member council. Four councilmembers would be elected from single-member districts and two other councilmembers and the mayor would be elected at large. Two of the four single-member districts have black voting age majorities providing blacks a realistic opportunity, given existing racial polarization, to elect two of the seven voting members of the council. At the same time, because the proposed plan provides for the election of three members at-large, the city's pattern of racial bloc voting effectively eliminates all prospects for minority representation in those positions. Our concern is that this proposal fails in its particulars to ameliorate the retrogressive effect of the

[1089] William Bradford Reynolds, Assistant Attorney General, to Lourena N. English, October 21, 1985.

> annexations in a sufficient manner to permit preclearance of both.[1090]

The 2000 census showed that Sumter County had gained an additional majority black district, District 7, on its county council, increasing the number of majority black districts from three to four. Blacks made up approximately 47% of the population of the county. District 7 had a black voting age population of 58.6%, and had little deviation from ideal district size. Thus, there was no reason to adjust the district to comply with one person, one vote. However, when the council drew a new plan, it lowered the black population in District 7 to 49.3%. At the outset of the redistricting process, white council members said they were going to create a plan that contained three majority white districts, three majority black districts and one "even" district. The Department of Justice denied preclearance:

> Under 2000 census data, four of the seven districts in the current, or benchmark, plan have both total and voting-age populations that are majority black. In three of these four, black voters will continue to have the ability to elect candidates of their choice. Our analysis, however, shows that this is not true for the fourth district, District 7. Under the benchmark plan, black voters in that district have the ability to elect their candidates of choice, and they will not have that same ability under the proposed plan, which decreases the black total population by 8.7 percentage points to 54.2 percent and the black voting-age population by 9.6 percentage points to 49.3 percent.
>
> Our analysis shows that elections within District 7 are marked by a pattern of racially polarized voting. Moreover, we analyzed several

[1090] William Bradford Reynolds, Assistant Attorney General, to Jack W. Erter, Jr., April 10, 1986.

> county-wide elections to determine whether black voters would have the present ability to elect candidate of choice [sic] under the benchmark plan District 7. We determined that, while under the benchmark plan black voters did indeed have the ability to elect a candidate of choice, under the proposed plan they would not; analysis of two prior elections demonstrates that under District 7 as configured under the proposed plan, the black candidate of choice would lose, or at best win by an extremely narrow margin. Accordingly, the implementation of the proposed plan will result in a retrogression in the minority voters effective exercise of their electoral franchise.
>
> This retrogression was avoidable. Our analysis of the information submitted indicates that the reduction of the black population percentage in District 7 was not required to comply with the county's stated redistricting criteria. First, the district had the lowest deviation of all districts and did not require any modification. Second, the county's own consultant presented an alternative plan, Version 1, which satisfied the county's initial redistricting criteria and maintained the demographics of the benchmark district.[1091]

Following the department's denial, county politics became even more racially charged. County elections were fast approaching and the current plan was malapportioned. One council member said the council should take its case to the Supreme Court and challenge the constitutionality of Section 5 because "the Constitution states the majority will rule."[1092] This sentiment was reiterated at council meetings in 2003, when the council decided to consider redistricting yet again. The county offered compromises claiming that black voters who were a majority in District

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[1091] Ralph F. Boyd, Assistant Attorney General, to Charles T. Edens, June 27, 2002.

[1092] Memorandum of Randy Singleton, August 8, 2002.

7 should be content with a minor variation on the council's original 3-3-1 plan. Councilman Burr refused to vote for any plan that included four majority black districts. More than a dozen proposals were reviewed by the community and county council. A local newspaper editor wrote: "The very fact that voting lines must be determined by race is inherently an insult to every Sumter resident who queues up at a polling place each November. What it states, bluntly, is that 200 years after Abraham Lincoln, we, blacks and whites, still are unable to see past the color of a candidate's skin."[1093]

Following the council's refusal to allow certain black citizens to speak during public meetings, two black citizens of District 7 showed up at the next council meeting holding signs saying "Don't Reduce the Black Vote." Some council members walked out of council meetings. One resident yelled at a meeting, "I didn't know the NAACP was going to run it [the meeting]."[1094]

The council finally adopted a plan that preserved District 7 as majority black, and the Department of Justice granted preclearance. Sumter County now has four black council members. As with other counties in South Carolina and across the South having similarly high levels of racial polarization, the events in Sumter County strongly support the continued need for Section 5 preclearance.

[1093] The Item, October 16, 2003.

[1094] Id.

Union County

Rodgers v. Union County

In 2002, white voters in Union County filed suit claiming that one of the two majority black districts for the county council was racially gerrymandered in violation of the Fourteenth and Fifteenth Amendments.[1095] The challenged district, District 2, had elected a black representative for over two decades and was represented by the widow of the first black county councilman.

Under the 1990 plan, the City of Jonesville was split between Districts 1 and 2. During the 2000 round of redistricting, a group of disgruntled, predominately white voters complained to the county council that they did not want Jonesville split again under the new plan. Over their objections, county council approved a plan that split Jonesville because the county council did not want to dismantle District 2 – which was the only district that elected a black representative – and violate the retrogression standard of Section 5. The Department of Justice precleared the county's plan.

Dissatisfied with the outcome, three residents of District 2 sued Union County alleging that the council had racially gerrymandered District 2 by splitting Jonesville. They said they did not mind being represented by a black councilwoman, but objected

[1095] Rodgers v. Union County, 7:02cv1390 (D.S.C.).

to being joined with politically active black precincts in Carlisle and other areas where there were trailer parks.

The ACLU, representing black residents and the Union County Branch of the NAACP, moved to intervene to defend the challenged plan and protect the rights of minority voters. The plaintiffs made several implausible arguments. First, they argued that black voters in District 2 had no interest in the outcome of the litigation, despite the fact it could diminish their ability to elect candidates of their choice. Second, plaintiffs claimed black citizens should not be allowed to intervene because they would divert the court's attention from racial gerrymandering and focus it instead on vote dilution and Section 2. The court was not persuaded by the plaintiffs' arguments, and granted the motion to intervene as of right.

The ACLU asked Dr. John C. Ruoff, an expert in racially polarized voting in South Carolina, to analyze voting patterns in Union County. He concluded that voting was racially polarized. In every contest involving black and white candidates, including those for Districts 2 and 5, black voters and white voters were both cohesive and cast ballots for different candidates. Black candidates were only successful in contests in majority or near majority black districts. In addition, black voters experienced the chilling effect of knowing they constituted a minority in the county, with little likelihood of effective political participation except in voting for less preferred white Democratic candidates. Intervenors argued that the maintenance of

District 2 as a majority black district was necessary to comply with Section 2 and avoid retrogression under Section 5. Intervenors further argued that the configuration of District 2 complied with the racial fairness standards of the Voting Rights Act while respecting, and not subordinating, the redistricting principles of contiguity, compactness, respect for traditional values, maintaining communities of interest, and party competitiveness.

After intervention was granted, the parties settled the case by redrawing District 2 so that Jonesville was not split, but, as important, maintaining the district as majority black. As part of the settlement agreement, intervenors introduced the findings of Dr. Ruoff as evidence of a Section 2 violation justifying maintaining two of the districts as majority black.

Williamsburg County

NAACP v. Hemingway

Williamsburg County, South Carolina, is majority (64%) black, but Hemingway, the county seat, is only 3% black. The racial disparity is explained in large measure by a series of annexations conducted by the town of almost exclusively white areas, and its refusal to annex adjacent majority black areas of the county.

Racial tensions have long simmered in Williamsburg County. As recently as 1995, members of the Ku Klux Klan torched the Mt. Zion AME Church in Greeleyville. Two of the Klansmen responsible for the arson also pleaded guilty to state charges of

stabbing a black man, and burning another black church in neighboring Clarendon County. According to news reports, lawyers for the Klansmen said the two decided to set the church fires after attending a Klan rally at which "black churches were blamed for promoting the interests of blacks to the detriment of whites."[1096]

On October 18, 1993, black residents of Hemingway and Williamsburg County, represented by the ACLU, filed suit alleging that the town had failed to preclear several of its recent annexations of white areas, and that the town's annexation policies were racially selective and discriminatory.[1097] The plaintiffs included county residents who had submitted a petition for annexation to the town in 1993. The town initially refused to consider the petition and then later rejected it saying that it did not comply with state law concerning the percent of area residents signing the petition and the percent of property they owned.

On February 22, 1994, the three-judge district court granted plaintiffs' motion for summary judgment and enjoined further use of the disputed annexations absent Section 5 approval. The defendants submitted the annexations for preclearance, and the Attorney General objected. He noted that the selective approach to annexations "raise significant doubts as to the town's motivations."[1098] Rather than take in the disputed

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[1096] "Former Klansmen plead guilty in church fires", CNN, August 14, 1996.

[1097] NAACP v. Mayor and Council of Hemingway, South Carolina, 4:93cv2733 (D.S.C.).

[1098] Deval L. Patrick, Assistant Attorney General, to Gregory B. Askins, Esq. and Jeffrey N. Thordahl, Esq., July 22, 1994.

black areas, or apply its annexation policy in a non-discriminatory manner, the town elected instead to deannex the white areas, thus maintaining its overwhelmingly white population majority.

The Attorney General also objected to another proposed change which would have transferred a portion of Williamsburg County, including Hemingway, to adjacent Florence County, which was majority (61%) white. In denying preclearance, the Attorney General concluded that "the town's discriminatory definition of its town boundaries in turn infects the definition of the proposed transfer area."[1099]

After additional discovery, plaintiffs determined that their annexation petition was in fact defective, owing primarily to the fact that many petition signers owned and lived in trailers which were not counted as real estate for purposes of complying with state law petition requirements. Plaintiffs moved to dismiss their selective annexation claim as moot, which the court did on June 2, 1995. Because of the dismissal on mootness grounds, plaintiffs were free to file a new annexation petition that complied with state law.

[1099] Id.

TENNESSEE

STATEWIDE ISSUES

Although Tennessee is not covered by Section 5, it has a history of voting discrimination against blacks similar to that of covered jurisdictions elsewhere in the South.[1100] That history, and its continuing effects, discussed in the cases below, demonstrate the pervasiveness of racial division throughout the region and further supports the extension of the special provisions of the Voting Rights Act in the covered jurisdictions.

Tennessee permitted slavery, and its antipathy to free blacks was so marked that in 1833 the legislature authorized the payment of $10 to the American Colonization Society for each free black removed by the society to the coast of Africa.[1101] Following the Civil War, blacks were granted the right to vote, but conservative white Democrats quickly won control of the state legislature and adopted a new constitution in 1870, which contained a number of discriminatory provisions. Racial intermarriage was prohibited, segregation in the public schools was required, and payment of a poll tax was made a condition for voting.[1102]

[1100] Tennessee used many techniques to deprive blacks of the franchise, but unlike the jurisdictions covered by Section 5, it never used a literacy or understanding test for voting, which is part of the Section 5 "trigger."

[1101] Tenn. Acts 1833, ch. 64.

[1102] Tenn. Acts 1870, ch. 39, art. 11, §§ 4, 12, 14.

As evidence of general white hostility toward black rights, the legislature adopted a resolution in 1875, to use "all honorable means" to prevent passage of a federal bill defining and guaranteeing equal rights for blacks under the Fourteenth Amendment because "its passage will be fraught with the greatest evil to the people of both races."[1103] In 1885, the legislature affirmed the "existing right" to maintain segregation in places of public accommodation. Four years later it enacted a series of laws designed to disfranchise blacks. One was the "Dortch Law," which required the use of a secret, Australian style ballot. The effect of the law was to impose a literacy test for voting, and it had a severe impact on illiterate blacks. Another was the "Myers Law," which required registration by race 20 days prior to each election. The act had the predicable effect of disfranchising many minority voters. A third law, the "Lea Law," provided for separate ballot boxes for state and federal elections in an attempt to remove state elections, including whatever fraud white officials might practice on black voters, from federal oversight.[1104] In the ensuing years, segregation in the public schools was repeatedly affirmed, as was segregation in railroad passenger cars, and even in coal mines.[1105]

[1103] Tenn. Acts 1875, ch. 22.

[1104] Tenn. Acts 1889, chs. 188, 207, 218. These laws and their operation are discussed at Buchanan v. City of Jackson, 683 F.Supp 1515, 1523 (W.D.Tenn. 1988), and Cousin v. McWhereter, 840 F. Supp. 1210, 1213 (E.D.Tenn. 1994).

[1105] Tenn. Acts 1905, ch. 150; Tenn. Acts 1921, ch. 24; Tenn. Acts 1941, ch. 43.

1990 Redistricting

RWTAAAC v. McWherter

Residents of Rural West Tennessee, which includes Fayette, Hardeman, Haywood, Lauderdale, Madison, and Tipton Counties, as well as residents of Shelby County, filed suit in 1992, represented by the ACLU, challenging the redistricting of the state house and senate.[1106] The plaintiffs, organized as the Rural West Tennessee African-American Affairs Council (RWTAAC), contended that the redistricting plans diluted minority voting strength in violation of Section 2 and the Constitution by creating only majority white districts in Rural West Tennessee. Although 34% of the population in Rural West Tennessee was African American, no black person in modern times had ever been elected to the house or senate from that area. At least one majority black house district could have been drawn in that part of the state, as well as two additional majority black senate districts.

The legal challenges to house and senate redistricting proceeded on two different tracks. The house plan was held to violate one person, one vote, in a case brought by other plaintiffs that was consolidated with the Rural West case, and the decision was affirmed by the Supreme Court.[1107] While the appeal was pending, the court held a trial

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[1106] RWTAAAC v. McWherter, Civ. No. 92-2407 (W.D. Tenn.).

[1107] RWTAAAC v. McWherter, 836 F. Supp. 447, 452 (W.D.Tenn. 1993), aff'd, sub nom. Millsaps v.

and ruled in the challenge to the senate plan brought by the Rural West plaintiffs. On November 4, 1993, the three-judge district court held that the 1992 senate plan diluted minority voting strength in violation of Section 2, and directed that an additional majority black district be drawn in the Rural West Tennessee area. In doing so, the court made extraordinary findings of past and continuing discrimination, including that:

> *[Blacks in west Tennessee are geographically compact within] the first element of Gingles.
>
> *[T]he African-American communities of rural southwest Tennessee . . . are politically cohesive.
>
> *[There is] a high level of white bloc voting which usually enables the majority to defeat the black community's candidate of choice."
>
> *[Racial polarization is so extreme that] black candidates cannot expect to succeed in majority-white districts.
>
> *[N]o black from a majority white district has won a seat in the state Senate this century.
>
> *[Blacks are discouraged from running in majority-white districts because of the lack of] white support in the form of votes or fundraising, [and because a l]ower economic status inhibits the ability of potential black candidates to raise funds in the black community.
>
> *[B]lack community leaders . . . have tried to recruit qualified blacks to run for elective office and found it difficult . . . [because] they often see a black candidacy in a majority-white district as a futile gesture.
>
> *Historical black political disenfranchisement also limits potential black electoral success," and black candidates "are not now in a position to enjoy the benefits of incumbency and political sponsorship which comes with being part of the political mainstream.

Langsdon, 510 U.S. 1160 (1994).

*[The] effects of past discrimination are still apparent and there remains some evidence of official discrimination against blacks in the last 15 years.

*[T]he political gains by black citizens during the civil rights movement of the 1950's and 60's were accompanied by increased official discrimination in voting.

*Government officials manipulated voter registration requirements to discourage black voters, and supported or initiated physical and economic intimidation of those blacks who did manage to register.

*The strongest example of economic intimidation was the eviction of more than 400 black sharecropping families, most of them in Fayette County after the 1960 election.

*These mass evictions led to the formation of two 'tent cities' for displaced sharecroppers, one in Fayette County and one in Haywood County. The tent cities became national symbols of the struggle of west Tennessee blacks for equal access to the polls.

*[O]ne federal court has found evidence of intentional discrimination against black candidates and voters in west Tennessee.

*[In Taylor v. Haywood County, 544 F.Supp. 1122, 1131 (W.D. Tenn. 1982), the court found that a change from district to at-large elections for the Haywood County Board of Highway Commissioners was] a result of the purposeful intention to dilute black voting strength in Haywood County, Tennessee.

*[In addition to the Haywood County case, the adoption of a new majority vote requirement by the City of Bolivar in Hardeman County in response to the success of two black candidates for mayor in 1981,] indicate to the court that official discrimination against blacks in voting is not entirely a thing of the past in west Tennessee.

*[P]ast discrimination, especially that which took place during the civil rights movement, affects present-day politics. It has had a psychological effect upon black citizens who lived through it, creating in some a lingering sense of disillusionment, frustration, and mistrust.

*[Official discrimination in the 1950s and 60s] also means that today there are few entrenched and powerful black elected officials from that era. There is no tradition of black electoral success.

> *[I]n west Tennessee there is a history of official discrimination against blacks in voting which has present-day effects.
>
> *In west Tennessee, black citizens are more likely than white citizens to live in poverty, to be unemployed, and to live in substandard housing.
>
> *Black citizens are less likely to have completed high school, to own their own homes, to have access to a car, or to have telephones in their homes.
>
> *[W]hite supporters of black candidates are often unwilling to display bumper-stickers or yard signs or to otherwise publicly announce their support.
>
> *[Taking into account the] totality of the circumstances . . . black voters in west Tennessee [have] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[1108]

The state appealed and the Supreme Court, without elaboration, vacated and remanded for further consideration in light of a voting case from Florida decided the same day.[1109] On remand the court held that the senate redistricting plan did not violate Section 2 (RWTAAAC II), and the Supreme Court affirmed.[1110]

In RWTAAAC II, the court reaffirmed its factual findings of discrimination in RWTAAAC I as being "correct," but held that the existence of three "influence" districts in which blacks constituted 31% to 33% of the voting age population precluded a

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[1108] RWTAAAC v. McWherter, 836 F. Supp. 453, 457, 459, 460-61, 463, 466 (W.D.Tenn. 1993) (RWTAAC I).

[1109] McWherter v. RWTAAAC, 512 U.S. 1248 (1994). The Rural West plaintiffs also appealed, arguing that two majority black districts were required to remedy the vote dilution in the Rural West area, but their appeal was dismissed. RWTAAAC v. McWherter, 512 U.S. 1249 (1994).

[1110] RWTAAAC v. McWherter, 877 F. Supp. 1096 (W.D.Tenn. 1995) (RWTAAAC II), aff'd, RWTAAAC v. Sundquist, 516 U.S. 801 (1995).

Section 2 violation. The court acknowledged that as a factual matter blacks did not have the equal opportunity to elect candidates of their choice under the senate plan, and "were we still unable to consider the existence of influence districts, we would reinstate our holding in Rural West I." The court further held that influence districts were not a substitute for majority minority districts, and concluded that:

> We do not imply that the legislature could adopt a plan under current circumstances with no majority-minority districts at all if it created a sufficient number of influence districts. Under current doctrine, the facts in this case require some majority-minority districts.[1111]

The court was also of the view that white elected officials were often responsive to the needs of blacks and that "adding an additional majority-minority district in western Tennessee would actually reduce the influence of black voters in the Tennessee Senate." It found "most probative" for this proposition the testimony of a white senator (Stephen Cohen) from west Tennessee concerning passage of a bill to make the birthday of Dr. Martin Luther King, Jr. a state holiday. According to Senator Cohen, the bill passed the state senate by only one vote (17 to 16), with Senator Cohen and another white senator from west Tennessee voting with the majority. Senator Cohen concluded, and the district court found, that the creation of an additional black senate district would have caused the election of "at least one more conservative white senator" who "would have been inclined to vote against the Martin Luther King holiday" ensuring

[1111] RWTAAAC II, 877 F.Supp at 1099, 1107 n.11.

that the measure would not have passed.[1112] Senator Cohen and the court, however, were mistaken. According to the Senate Journal, only eight senators voted against the Martin Luther King, Jr. bill, with 18 "Ayes" and six "Present, not voting." The bill would have passed without Senator Cohen's "influence" vote.[1113]

In January 1994, the state legislature enacted a three-part redistricting plan for the house; Plan A, the enacted plan, and alternative Plans B and C. Plan A created 12 majority African American house districts, but none in the Rural West Tennessee area. The legislation provided that should a court find that Plan A diluted minority voting strength, Plan B would be implemented. Plan B created 13 majority black districts, including one in Rural West Tennessee containing portions of Hardeman, Haywood, and Madison Counties. The legislation further provided that should the state prevail on its appeal in the one person, one vote case, the house redistricting plan of 1992, Plan C, would be reinstated.

The Rural West plaintiffs amended their complaint to challenge Plan A solely under Section 2, with the result that their claim would be heard by a single judge of the district court. As the result of various delays the case was not decided until November 1998, when the court adopted the findings of discrimination and its continuing effects in education and employment that had been made in the senate case, and concluded that

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[1112] Id. at 1106.

[1113] Tennessee Senate Journal, May 24, 1984, p. 2831.

plaintiffs had demonstrated that the house plan violated Section 2. Blacks were found to be geographically compact and politically cohesive, with whites voting as a bloc usually to defeat the candidates preferred by black voters. Few blacks had been elected to office and none to the legislature from Rural West Tennessee.

One of the significant findings of the district court was that white voters "targeted" black candidates for the legislature. In contests with no black candidates, whites voted together for the winning white candidate at an average rate of 59%. In contests with a black candidate, however, white cohesion for the winning white candidate jumped to an average of 86%. According to the court, "[t]his increase in cohesion . . . shows that when a black candidate is in a race, whites are even more likely to vote as a bloc to defeat the black preferred candidate."[1114] The court of appeals unanimously affirmed the decision of the trial court, and the Supreme Court denied the state's petition for review.[1115]

Plan B, to which the plaintiffs had no objections, was implemented at the 2000 elections. A black minister, Rev. Johnny Shaw, won the Democratic primary in August in the majority black district in the Rural West Tennessee area and had no opposition in the November 2000 general election. Thus, he became the first African American in

[1114] RWTAAAC v. Sundquist, 29 F. Supp. 2d 448, 457 (W.D. Tenn. 1998).

[1115] RWTAAAC v. Sundquist, 209 F.3d 835 (6th Cir. 2000), cert. den'd, 531 U.S. 944 (2000).

history to be elected to the state legislature from the six county area of Rural West Tennessee.

Hamilton County and the City of Chattanooga

Brown v. Board of Commissioners of Chattanooga

The first case brought by the ACLU in Tennessee after the 1982 extension and amendment of the Voting Rights Act was in 1987, against the City of Chattanooga in Hamilton County. The law suit, which was brought on behalf of black residents, challenged the at-large method of electing the members of the city board of commissioners, as well as state and municipal laws that permitted nonresident property owners to vote in city elections. [1116] Following a trial in the spring of 1989, the court concluded that the at-large system had been adopted with a discriminatory purpose and diluted minority voting strength in violation of Section 2. It also held that the property qualified voting scheme was unconstitutional under the Fourteenth Amendment.

Based on the 1980 census, Chattanooga had a population of 170,000 people, 32% of whom were black. Prior to the Civil War, few blacks lived in the city. As a result of federal occupation during the war years, however, hundreds of African Americans fled to Chattanooga as refugees until they constituted nearly half the population. Given their numbers and the implementation of federal Reconstruction, newly enfranchised blacks voted, and served on the city government, on the board of education, in fire

[1116] Brown v. Board of Commissioners of Chattanooga, Tenn., Civ. No. 1-87-388 (E.D.Tenn.).

companies, as justices of the peace, and as constables and deputy sheriffs. But as the district court found, black participation in city governance "rankled whites," who undertook "to minimize black political strength." In 1883, the city charter was amended to institute a poll tax and special voting registration procedures, which, according to a local black lawyer of the time, were "aimed at the negro and nothing else." In 1901, the legislature enacted the "Peak bill," which revised the city charter by creating a bicameral form of government (aldermen and councilmen) and "had the effect of eliminating all black aldermen after 1902."[1117]

The city enacted its at-large and elected commission form of government in 1911. It also made it a crime to pay another person's poll tax and eliminated "ward workers," who had been used to assist blacks in voting. An important goal of the new commission system, as the district court found, "was the elimination of the last vestiges of black electoral power." The views of blacks who opposed the commission system were reported in The Chattanooga Times "in Uncle Remus-like dialect." From 1911, until the filing of the vote dilution lawsuit 76 years later, only one black person had been elected to the Chattanooga City Commission.[1118]

Throughout the modern era, Chattanooga and Hamilton County have been plagued with racial conflict and division. City parks, churches, public libraries,

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[1117] Brown v. Board of Commissioners of Chattanooga, Tenn., 722 F. Supp. 380, 386-87 (E.D. Tenn. 1989).

orphanages, public hospitals, schools, restaurants, movie theaters, and the American Legion all were segregated. A number of blacks narrowly escaped lynching by an angry mob of whites in 1912 after they were arrested in connection with the slaying of a police officer. In 1927, city police raided the office of the Universal Negro Improvement Association because of an alleged plan of the association to purchase and distribute to its members "high power repeating rifles." Blacks were excluded from membership on city boards and agency staff positions.[1119]

The Grand Dragon of the Ku Klux Klan claimed in 1946 that there was "a strong Chattanooga Klan." The National Urban League issued a report in 1947 documenting the continued existence of segregation at every level in Chattanooga and the depressed socio-economic conditions of blacks. A black policeman was suspended from the force in 1948, for arresting a white man in violation of department policy.[1120] Black policemen also had to come to work at a different time because they were not allowed to line up in formation with white officers.[1121]

[1118] Id. at 387.

[1119] Id., Pl. Exs. 208, 212. This history is detailed in many places, including Cousin v. McWherter, 840 F. Supp. 1210, 1216-19 (E.D. Tenn. 1994).

[1120] Id.

[1121] Brown v. Board of Commissioners, Pl. Ex. 319.

In 1953, lots were deeded in a local subdivision "subject to covenants forbidding sale or rental 'to any Negro, mulatto, or other person of color . . . [or] to any person of Jewish or Hebrew blood."[1122]

When a black person took a seat in the "whites only" section of the city auditorium during a dance in 1956, a fight broke out. In 1957, after the Southern Coach Lines removed the segregated seating signs from its buses following a decision of the Supreme Court that the segregation was unlawful, someone hung an effigy on the Walnut Street bridge on which was written "All NAACP bus-riding niggers." Two dynamite explosions were set off within one week in 1958 at the Phyllis Wheatley Branch of the YMCA for Negroes.[1123] The NAACP was linked in the press with communism. [1124]

The first modern civil rights demonstration in Chattanooga took place in 1960 when black high school students staged sit-ins at downtown lunch counters to protest segregation. Whites assaulted the protestors precipitating the most massive racial clash in the city's history. Scores of people were arrested and black homes were bombed, in

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[1122] Cousin v. McWherter, 840 F. Supp. at 1217.

[1123] Id.

[1124] Brown v. Board of Commissioners, Pl. Ex. 218.

what the mayor described as an "organized effort to terrorize the Negroes in this community."[1125]

The city hired its first black bus driver in 1963. He was taunted by racial slurs, and someone shot the bus he was driving. Public housing was built and operated on a racially segregated basis. As late as 1964, an official of the Chattanooga Housing Authority said that we "have always been segregated and we have never had any complaints." The University of Chattanooga was operated on a racially segregated basis until 1965. Erlanger Hospital did not desegregate until the government threatened to cut off federal funds in 1966. When the hospital's board finally agreed to sign a certificate of compliance with the Civil Rights Act of 1964, the president of the board resigned in protest.[1126]

Violence erupted in the city again in 1968 as blacks protested the assassination of Rev. Martin Luther King, Jr. The city proclaimed a "civil emergency" and imposed a 3:00 p.m. curfew. Blacks protested employment discrimination by picketing three downtown stores in 1969. The home of Rev. H. H. Wright, a spokesperson in the black community, was burned the same year. A race riot broke out in Alton Park in 1970 after a policeman attempted to arrest a man for assaulting a waitress. [1127]

[1125] Id., Pl. Exs. 132, 238, 239, 240, 244, 245, 247.

Cousin v. McWherter, 840 F. Supp. at 1217 .

[1127] Id., Pl. Exs. 264, 265, 275, 298.

In 1971, another race riot erupted following the cancellation of a performance at the city auditorium. The riot lasted for several days and the National Guard was called out to quell the disturbance. There were numerous incidents of sniper fire, arson, fire bombing, and rock and bottle throwing. [1128]

Schools were desegregated in Chattanooga as the result of litigation begun in 1960, but not concluded until 1986.[1129] There were racial incidents and confrontations of varying duration and intensity throughout the late 1960s and early 1970s. Racial tensions in city schools in 1969 were described as "nearing exploding point." "[S]warms" of city policemen converged on Brainerd High School in 1970 as whites and blacks "shouted and shoved their way to a near riot." Eighty students were suspended at Central High in 1971, after two days of racial disturbances.[1130] In an opinion written in 1975, a court noted that resegregation had occurred in the public schools and that it was a "subtle and lingering malaise of fear and bias in the private sector which persisted after curative action had been taken to eliminate the dual system itself." By 1988, "22 of the 52 schools in the city system were racially identifiable (90% or more of one race."[1131]

[1128] Id., Pl. Ex. 299-306.

[1129] Mapp v. Board of Education, 648 F. Supp. 992 (E.D. Tenn. 1986).

[1130] Brown v. Board of Commissioners, Pl. Exs. 287, 289, 290, 291, 318.

[1131] Quoted in Cousin v. McWherter, 840 F. Supp. at 1218.

In April 1980, three Klan members burned wooden crosses in a predominantly black neighborhood in Chattanooga. Afterwards, they drove through the neighborhood and shot four elderly black women who were standing on the sidewalk. They also shot into a parked car, shattering glass which struck and injured a fifth black women who was watering flowers in her yard. The Klansmen were subsequently tried and acquitted by an all white state court jury touching off another round of racial violence. Eight police officers were wounded by gun fire in three days of rioting that followed.[1132] The five black victims later filed a lawsuit in federal court, which enjoined the defendants and the Klan from assaulting black residents of the city and attempting to deprive them of their constitutional rights.[1133]

In 1986, however, Klan members drove through black neighborhoods in Chattanooga playing "Dixie" and burned a cross on the lawn of a local black family. A van owned by Rev. H. H. Wright was bombed the same year. In 1987, the Klan held a rally on Lookout Mountain attended by some 200 people. Klan spokespersons blamed Jews and blacks for the "problems" facing America. The same year, another Klan rally was held in downtown Chattanooga. In 1989, a Klan rally was held in nearby Rockmart.[1134]

[1132] Brown v. Board of Commissioners, Pl. Exs. 164, 165, 354, 358-360.

[1133] Crumsey v. Justice Knights of KKK, CIV-1-80-287 (E.D. Tenn. March 1, 1982).

[1134] Brown v. Board of Commissioners, Pl. Exs. 116, 378, 391-394.

After the filing of the voting rights lawsuit in 1987, the city appointed a charter study commission which recommended a mayor/council form of government, with council members elected from districts. The proposal was put to a referendum and was defeated, with a majority of blacks voting for the change and a majority of whites voting against it.[1135]

In addition to finding that the challenged system had been adopted in 1911 with a discriminatory purpose, the court found that it violated the results standard of Section 2. Blacks were geographically compact, politically cohesive, and whites voted as a bloc, usually to defeat the candidates of choice of black voters. Except for one black candidate first elected to the commission in 1971, the white crossover rate for black candidates "averages only 1.8%." The court also found that the city used a number of other voting practices that enhanced the opportunity for discrimination, including a majority vote requirement, an unusually large election district, and an anti-single shot provision.[1]

Tennesse[illegible]g statute that allows municipalities to enact ordinances permitting nonresident property owners to vote in city elections. Chattanooga had enacted su[illegible]nce and as a result 547 nonresidents, almost all of whom were white and lived in afflu[illegible]an areas around Chattanooga, were qualified to vote

[1135] Cousin v. McWherter, 840 F. Supp. at 389.

[1136] Id. at 395.

in city elections. In addition, the ordinance was so broad that even residents of other states or foreign countries, including non-citizens, could vote in Chattanooga elections, provided they owned property - even a small fractional share was sufficient - within the city. The plaintiffs contended that such a voting scheme, aside from diluting the voting strength of city residents, and particularly black residents, was arbitrary and irrational. The court held that because the system "permits a nonresident who owns a trivial amount of property to vote in municipal elections, it does not further any rational governmental interest," and was unconstitutional.[1137]

In a subsequent order entered on January 18, 1990, the court adopted a new form of government for the city consisting of a mayor and nine member council elected from districts. At the special election to implement the plan held in May 1990, four black candidates won election to the council.

The district court, with the consent of the parties, also exercised its authority under the "pocket trigger" of the Voting Rights Act to require the defendants to seek Section 5 preclearance of any new reapportionment plan for the city necessitated by the 1990 census.[1138] The new census showed that the existing districts were malapportioned and the city adopted a redistricting plan sponsored by Leamon Pierce, one of the plaintiffs in the 1987 law suit and a member of the city council. The city presented the

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[1137] Id. at 399.

[1138] The provisions for the "pocket trigger" are found at 42 U.S.C. § 1973a (c).

plan to the district court for Section 5 approval, the plaintiffs had no objections, and on January 17, 1992, the court approved the plan.

Cousin v. McWherter

In 1990, black residents of Hamilton County, assisted by the ACLU, challenged the at-large method of electing county judges as violating Section 2. Hamilton County has a substantial black population but no black person had ever won a judicial post running at-large. Plaintiffs contended that at-large elections discouraged blacks from running for office and deprived the minority community of the equal opportunity to elect candidates of its choice. [1139]

In 1994, the district court ruled that the challenged elections diluted black voting strength, and that the state's interest in conducting judicial elections at-large, while a factor to be considered, did not outweigh the interest in minority political participation protected by the Voting Rights Act. The court, taking note of the findings in the suit against the Chattanooga Board of Commissioners, held that "Blacks in Hamilton County, as a result of past and continuing discrimination in education, employment, and other areas, have been isolated from the economic and political main stream. They remain a socioeconomically depressed minority with a limited ability to fund and

[1139] Cousin v. McWherter, 840 F. Supp. at 1217 (E.D. Tenn. 1994).

mount political campaigns." In addition, the court held that: blacks were geographically compact, politically cohesive, and whites voted as a bloc usually to defeat the candidates preferred by black voters; "[b]ased upon the most recent voting patterns the level of racial bloc voting is increasing in Hamilton County making it more difficult than ever for a black to win a countywide judicial office;" "[i]n 1942 the state supreme court held that qualified blacks could be denied admission to the College of Law of the University of Tennessee;" and although there were blacks qualified for judicial office, "no black has ever won a majority of the votes in a county-wide judicial contest."

The court gave the state an opportunity to propose a remedy for the vote dilution but it declined to do so. The court accordingly ordered into effect a system of cumulative voting by which each voter could cast all or some of his/her votes for one or more candidates. Cumulative voting, which has occasionally been adopted by consent of the parties in Section 2 cases, allows a politically cohesive minority a better chance of electing a candidate of its choice when compared to a pure at-large system. The district court justified the use of cumulative voting on the grounds that it provided an adequate remedy for the vote dilution and at the same time retained at-large elections, thus preserving the state's asserted interest in maintaining a link between a judge's electoral and jurisdictional base. The state, however, appealed to the Sixth Circuit which vacated and remanded for further findings and clarification. It held that the court had not made

specific findings of the Gingles factors and failed adequately to consider the state's interest in at-large elections of judges.[1140] The appellate court expressed no view as to the merits.

On remand the district court held another hearing and once again invalidated the circuit wide method of electing judges on the grounds that it diluted black voting strength. It made specific findings of the existence of the Gingles factors, and held that the state's interest in at-large judicial elections was "substantial" but "will not suffice to overcome a violation of Section 2."[1141]

The court directed the state to adopt a remedial plan within 90 days, but it refused to do so. Following the state's refusal, the district court implemented a court ordered plan in July 1996, providing for cumulative voting for the election of all judges. The state appealed, and again the appellate court set aside the district court's order. It held that cumulative voting was prohibited by Section 2 and that the alternative remedy of single member districts was against state policy. The essence of the ruling was that the Voting Rights Act does not apply to the method of electing state court judges.[1142] The plaintiffs filed a petition for a writ of certiorari, but despite the fact that the Court

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[1140] Cousin v. McWherter, 46 F.3d 568 (6th Cir. 1995).

[1141] Cousin v. McWherter, 904 F. Supp. 686, 712 (E.D.Tenn. 1995).

[1142] Cousin v. Sundquist, 145 F. 3d 818 (6th Cir. 1998).

had held that Section 2 applied to the method of electing judges, the petition was denied.[1143]

[1143] Cousin v. Sundquist, 525 U.S. 1138 (1999).

TEXAS

Section 5 Enforcement and Public Education

Texas v. United States

In an attempt to address problems with its public school system, the Texas legislature enacted a statute in 1993, allowing the state to appoint management teams to supervise underachieving or failing school districts. In 1995, when the state attempted to appoint a management team to oversee one of its school districts, a district court issued a preliminary injunction against implementation of the plan for failure to comply with Section 5.[1144] The district court reasoned that the appointment of a management team might result in the replacement of an elective body or office with an appointive one, thus requiring preclearance.

Shortly thereafter, in 1995, the legislature repealed the 1993 statute and enacted a comprehensive scheme by which the state could monitor a school district's academic performance, financial and accounting practices, and the actions of superintendents and trustees. If a school district did not meet the state's accreditation criteria, the commissioner of education could impose various sanctions against the school district, including (1) appointing someone to oversee a district's operation; and (2) appointing a management team to direct the operations of the district in areas of unacceptable

[1144] Cassius v. Moses, Civ. No. SA-95-CA-0221 (W.D. Tex.).

performance or require the district to obtain certain services under a contract with another person.[1145]

Once the legislature passed the bill, Texas submitted it to the Attorney General for a determination whether any of the sanctions affected voting and required preclearance. Although the Attorney General did not object to the sanctions outlined in the bill, she cautioned that under certain circumstances their implementation might result in a Section 5 violation. On June 6, 1996, the Attorney General precleared Texas's appointment of a management team for the Wilmer-Hutchins School District under the new law.

On June 7, 1996, Texas filed a complaint in the District Court for the District of Columbia, seeking a declaratory judgment that Section 5 did not apply to the sanctions in the new law because they did not affect voting rights, and were consistent with the conditions upon which the state received federal financial assistance. Texas thus sought preclearance not only of the enabling statute, but of any future applications of the law. The district court did not reach the merits of the case because it concluded that Texas's claim was not ripe for adjudication.[1146]

The state appealed, and the ACLU, along with the NAACP Legal Defense and Educational Fund, filed an amicus brief in the Supreme Court supporting the district

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[1145] Texas Education Code, Chapter 39, §§ 39.131(a)(7) and (8).

[1146] Texas v. United States, Civ. No. 96-1274 (D. D.C.), Order of March 5, 1997).

court's decision. The amicus contended there was no way to determine in the abstract, and in the absence of specific facts of a particular jurisdiction, the impact of future applications of the statute upon minority voting rights.[1147] The ACLU also argued that if, for example, the authority of the commissioner were invoked predominantly in majority minority school districts, the result could be the effective disfranchisement of a disproportionate number of minority voters.

The Supreme Court denied Texas the prospective preclearance it sought and held that a claim resting upon "contingent future events that may not occur as anticipated, or indeed may not occur at all," is not fit for adjudication.[1148] The Court further concluded that the hardship to Texas of withholding judicial consideration until the state chose to implement one of the sanctions was insubstantial. The Court thus rejected the state's attempt to circumvent the Voting Rights Act, and affirmed the need to look carefully at Texas's implementation of sanctions to ensure that minority voting rights were not abridged.

[1147] Amicus Brief for the American Civil Liberties Union and NAACP Legal Defense and Educational Fund, Texas v. United States, No. 97-29.

[1148] Texas v. United States, 523 U.S. 296, 300 (1998).

VIRGINIA

In 1974, when the State of Virginia sought to bail out from Section 5 coverage, the continuing effects of discrimination and racial polarization were apparent in state and local electoral systems. The District of Columbia court found that Virginia's maintenance of inferior schools for minorities hindered their ability to pass the state's literacy test and thus the state could not show that it had employed a test or device free of a racially discriminatory effect. The court concluded that:

- The state's literacy test was "motivated primarily by a desire to exclude blacks from voting in any significant number;"
- The racially segregated schools for blacks were substantially inferior to those for whites;
- Black voter registration was depressed compared to that of whites;
- The state had failed to demonstrate that its dual school system had no discriminatory effect of the ability to pass the literacy test.[1149]

Seven years later, the U.S. Commission on Civil Rights noted that only four of the 100 members of the Virginia House of Delegates were black, and that "the drawing of legislative boundaries and the extensive use of multimember districts has limited black

[1149] Commonwealth of Virginia v. United States, 386 F. Supp. 1319, 1322 (D.D.C. 1974), aff'd, 420 U.S. 901 (1975).

opportunities for elected office." Virginia also had the lowest number of black elected officials at the federal, county, and municipal levels of any state covered by Section 5.[1150]

Although a total of 10 Virginia cities and counties have successfully bailed out of Section 5 coverage since 1997, the legal cases below offer ample evidence of continued racial polarization, and the lack of equal political opportunity for black voters, at the state and local level in Virginia to the present day.[1151]

STATEWIDE ISSUES

1990 Redistricting

Moon v. Meadows

Following the 1990 census, the Virginia General Assembly created the first majority black congressional district in the Commonwealth's long history. African Americans comprised approximately 63% of the new Third Congressional District,

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[1150] U.S. Commission on Civil Rights, The Voting Rights Act: Unfulfilled Goals (Washington, D.C.; September 1981), pp. 12, 56-7.

[1151] Statement of Bradley J. Schlozman, Acting Assistant Attorney General, Civil Right Division, Department of Justice, Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives, October 25, 2005. The 10 Virginia jurisdictions that have bailed out, and the dates bailout was granted, are: Fairfax City (October 21, 1997), Frederick County, (September 9, 1999), Shenandoah County (October 15, 1999), Roanoke County (January 24, 2001), Winchester City (May 31, 2001), Harrisonburg City (April 17, 2002), Rockingham County (May 21, 2002), Warren County, (November 25, 2002) Greene County (January 19, 2004), Augusta County (November 30, 2005). See: Statement of J. Gerald Hebert, Committee on the Judiciary, Subcommittee on the Constitution, Oversight Hearing on "The Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act," October 20, 2005.

which stretched from Norfolk to Richmond, in southeastern Virginia. When the Third District elected State Senator Bobby Scott as its first congressman in 1992, he became only the second African American to be elected to the United States House of Representatives from Virginia, and the first since Reconstruction.

In 1995, several voters challenged the Third District in federal court as an unconstitutional racial gerrymander.[1152] The ACLU, along with the NAACP Legal Defense and Educational Fund, represented other residents of the district who intervened in the suit as defendants to defend the challenged plan.

A three-judge district court heard the case in September 1996. The defendants introduced extensive evidence to show that political considerations, not race, were the primary factors motivating the general assembly when it drew the district. Specifically, the defendants argued that the general assembly sought to protect most incumbents and to divide the Commonwealth's shipbuilding interests among three congressional districts, thus ensuring that at least three members of Congress would support those interests. The district court nonetheless invalidated the district in February 1997, finding that race had predominated in drawing the district and that the defendants could not adequately justify their use of race as a districting factor. The defendants

[1152] Moon v. Meadows, 952 F. Supp. 1141 (E.D. Va. 1997) (three-judge district court).

appealed, but the Supreme Court affirmed the district court's decision without an opinion.[1153]

In 1998, the general assembly redrew the Third District and four surrounding districts to comply with the district court's order. The revised Third District reunited several formerly split towns and counties but left the core of the old district intact. The revised Third District remained majority black, with African Americans making up just under 55% of the district's total population and 50.47% of the district's voting age population. Voters reelected incumbent congressman Bobby Scott to the revised district in 1998, and he continues to represent the Third Congressional District today.

2000 Redistricting

Wilkins v. West

Following the 2000 census, Virginia redrew its house and senate districts to comply with one person, one vote. The new plan created essentially the same number of majority minority districts as under the 1990 benchmark plan, and so was precleared by the Justice Department.

In 2001, 46 complainants filed suit in state court against state officials challenging the reapportionment of 13 house and 5 senate districts as racial gerrymanders and

[1153] Meadows v. Moon, 521 U.S. 1113 (1997) (mem.) and Harris v. Moon, 521 U.S. 1113 (1997).

violating the state constitution.[1154] Among other things, the complainants, all Democrats, argued that African Americans had been unfairly packed into legislative districts by the Republican controlled legislature in order to confine black voting strength to the smallest possible number of districts. As a remedy, the plaintiffs sought a plan that would disperse minority voters, thus creating greater opportunities for Democrats.

The trial court found for the plaintiffs, and on March 13, 2002, struck down 12 house and 6 senate districts as unconstitutional, saying the general assembly had subordinated traditional redistricting principles to race in drawing district lines. The court invalidated a number of districts as unnecessarily packed along racial lines and found that other districts improperly separated minority communities. The court also held some districts were not contiguous, which it believed violated state law.

The defendants appealed and the ACLU filed an amici brief to assert two legal points. First, the ACLU argued the court should not adopt a restrictive definition of a contiguous district. For example, the trial court held if a candidate had to drive outside a district to reach all of its parts then the district was invalid for lack of contiguity. In Virginia's Tidewater area, contiguity by water has been the accepted practice for decades, and the ACLU was concerned that this more restrictive definition would inhibit the drawing of majority minority districts in the future. The ACLU also argued

[1154] The litigation is discussed in Wilkins v. West, 264 Va. 447, 571 S.E.2d 100 (Va. 2002).

that freeways often split minority communities, and the lack of exits often made it difficult to travel within a minority community, but this should not be a basis for refusing to recognize a viable minority community in the redistricting process. Second, the ACLU argued the trial court had invalidated several districts as being packed without relying upon evidence of racially polarized voting. In the absence of such evidence, the court's findings were made upon assumptions.

The state supreme court reversed the trial court, finding the legislature had not subordinated traditional redistricting principles to race.[1155] The court did not reach the ACLU's contention that in some instances the trial court had made racial assumptions based on the percentage of African Americans in a district, but for each district at issue it held there was insufficient evidence to find that race predominated, thereby crediting the defense that race had been properly correlated with partisan performance.

The court also adopted a functional definition and flexible standard of contiguity, holding that in the current era of ease of communication, physical contact among voters is not necessary. The supreme court thus approved non-contiguous districts, if there were a reason for the separation and if the separation were not extreme.

[1155] Id.

This litigation in Virginia, and the 1990 redistricting case that follows, shows how blacks remain at the center of redistricting disputes, and are at risk of being packed by Republicans and fragmented by Democrats to advance their partisan goals.

Modern Day Poll Taxes and Access for Party Delegates

Morse v. Oliver North

During the post-Reconstruction period, most Southern states adopted a variety of measures to deny recently freed blacks the right to vote. One of the most effective deterrents to voting, given the poverty of the black community, was a requirement that voters prove they had paid a poll, or head, tax as a condition for casting a ballot.

The Supreme Court upheld the constitutionality of poll taxes well into the 20th century.[1156] Congress subsequently made numerous attempts to abolish the tax, but it was not until 1964, with ratification of the Twenty-fourth Amendment, that the poll tax was banned in federal elections. Section 10 of the Voting Rights Act, passed the following year, contained a congressional declaration of policy against poll taxes as a discriminatory device that "has the purpose or effect of denying persons the right to vote because of race or color," and created a cause of action to enjoin use of the tax.[1157]

In 1966, in a case from Virginia, the Supreme Court reversed its earlier decisions and declared use of the poll tax in state elections unconstitutional because "the affluence of the voter or payment of any fee" was not a proper "electoral standard."[1158] Despite abolition of the poll tax, many states have continued to impose fee requirements as a

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[1156] See Breedlove v. Suttles, 302 U.S. 277 (1937).

[1157] 42 U.S.C. § 1973h.

[1158] Harper v. Virginia State Board of Elections, 383 U.S. 663, 666 (1966).

condition for participating in the electoral process, which has resulted in challenges brought by the ACLU.

The Republican Party of Virginia adopted a requirement that delegates to the party's 1994 U.S. Senate nominating convention pay a registration fee of $35 to $45. Three state residents filed suit challenging the requirement on the grounds that it had not been precleared under Section 5, and that the fee was an unlawful poll tax prohibited by the Constitution and the Voting Rights Act. The three-judge district court dismissed the Voting Rights Act claims because it was of the opinion that the registration fee was not subject to Section 5, and only the Attorney General was authorized to enforce Section 10.[1159] The plaintiffs appealed to the Supreme Court, and the ACLU filed an amicus brief on their behalf.

Amicus, together with the appellants, contended that the requirement that delegates to the party's nomination convention pay a registration fee was subject to Section 5, given the role the party and its nominating convention played in the state's electoral process. They also argued that the legislative history made clear that private parties could challenge the fee under the Voting Rights Act as an impermissible poll tax. The Supreme Court agreed, reversed the dismissal of the complaint by the district court, and sent the case back for further proceedings.[1160] On remand, rather than seek

[1159] Morse v. Oliver North for U.S. Senate Committee, 853 F. Supp. 212 (W.D.Va. 1994).

[1160] Morse v. Republican Party of Virginia, 517 U.S. 186 (1996).

preclearance, the defendants elected not to enforce the fee requirement for those participating in the nomination convention.

NVRA Enforcement in Virginia

Richmond Crusade for Voters v. Allen

The compliance deadline for the 1993 National Voter Registration Act (NVRA) for the majority of states was January 1, 1995, but Virginia and two other states with constitutional provisions in conflict with the NVRA, were given an extension to allow them to adopt and implement any necessary amendments to their state constitutions. Three provisions of Virginia's constitution were in direct conflict with the NVRA: a requirement that voter registration be "in person;" a requirement that voter registration be taken "under oath;" and a requirement that registered voters be purged for failure to vote. In 1994, Virginia voters ratified amendments to the state constitution eliminating the conflicts with the NVRA, and the following year the general assembly passed legislation that would have brought the Commonwealth into substantial compliance with the NVRA by January 1, 1996.

On May 5, 1995, however, Governor George Allen vetoed the NVRA enabling legislation, and on the same day he and the Commonwealth filed suit against the United States seeking to have the NVRA permanently enjoined and declared

unconstitutional.[1161] Like South Carolina, another state that challenged the constitutionality of the NVRA, the Commonwealth argued in its complaint that, "the NVRA exceeds Congress' power." Governor Allen was reported as saying the NVRA was an "unfunded mandate on the states" from the "nannies" in Washington "treating us like puppets and minions."[1162]

On July 3, 1995, the ACLU, the ACLU of Virginia, and the NAACP Legal Defense and Educational Fund, Inc., filed suit on behalf of several public interest organizations against the Commonwealth to require it to implement the NVRA.[1163] The complaint noted that only 65.4% of eligible voters were registered in Virginia. The League of Women Voters filed a similar suit, while the United States in its answer asked the court to find the NVRA constitutional and order the state to comply with its provision.[1164] Upon motion of the private plaintiffs, the three cases were consolidated.

All parties filed motions for summary judgment, and the Commonwealth moved to dismiss the suits by the private plaintiffs as premature. A hearing in the consolidated cases was held on October 3, 1995. The district court, in a ruling from the bench, held the NVRA constitutional and set March 6, 1996, as the date by which the

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[1161] Commonwealth of Virginia v. United States, Civ. No. 3:95-CV357 (E.D. Va.).

[1162] Id., Complaint, p. 17.

[1163] Richmond Crusade for Voters v. Allen, 3:95CV531 (E.D. Va.).

[1164] League of Women Voters of Virginia v. Allen, Civ. No. 3:95CV532 (E.D. Va.).

Commonwealth must comply with its provisions. According to the court, "the National Voter Registration Act falls within the powers explicitly delegated to the federal government under the Constitution." The court also dismissed the private plaintiffs' lawsuits for lack of standing because the "Act is not yet effective so there can be no actual violations."[1165]

On October 18, 1995, the court issued a final written order holding the NVRA constitutional. It also ordered Virginia not to enforce the provision of its constitution in conflict with the NVRA after March 6, 1996, "to avoid the confusion presented by a dual system of voter registration," until such time as the constitution was amended to eliminate the conflict.

In early 1996, the Virginia legislature passed NVRA enabling legislation and submitted it to the Attorney General, who precleared it.

COUNTY AND MUNICIPAL LITIGATION IN VIRGINIA

Brunswick County and the City of Emporia

White v. Daniel

Smith v. Board of Supervisors

[1165] Richmond Crusade of Voters v. Allen, Excerpts of Hearing, October 3, 1995.

Brunswick is a rural, majority black county located in Southside Virginia. It elects its five member board of supervisors from districts, and in 1975, two black candidates were elected to the board, the first since Reconstruction. In 1988, the ACLU of Virginia filed suit on behalf of black residents of the county alleging that the districting plan, which had been adopted in 1971, diluted minority voting strength in violation of Section 2. The district court agreed. On appeal by the county, however, the court of appeals dismissed the complaint and vacated the decision of the district court on the grounds that the plaintiffs were guilty of laches (inexcusable delay) because they had not challenged the plan at the time it was first enacted. In addition, the court held that since no new elections were scheduled until after release of the 1990 census, it was likely that the county would have to adopt a new redistricting plan.[1166]

The ACLU assisted with the preparation of a petition for a writ of certiorari. The issues presented for review were: whether the doctrine of laches applied where (1) the Section 2 violation was continuing in nature, and (2) a challenge under amended Section 2 was unavailable at the time the disputed voting practice was adopted; whether the timing of a law suit is a factor more properly to be taken into account in formulating a remedy for a Voting Rights Act violation; and whether the restoration of a plan found by the district court to dilute minority voting strength erroneously deprived plaintiffs of a non-discriminatory benchmark for measuring retrogression of any new plan

[1166] White v. Daniel, 909 F.2d 99 (4th Cir. 1990).

submitted for preclearance under Section 5 following the 1990 census and reapportionment.

After the petition for certiorari was filed, the Supreme Court asked for the views of the Solicitor General. He submitted an amicus brief in June 1991, in which he agreed that the decision of the court of appeals was wrongly decided, but said the case did not warrant plenary review by the Supreme Court. The court, following the recommendation of the Solicitor General, denied review.[1167]

The ACLU filed a second suit on behalf of black residents of Brunswick County in 1991, following the adoption of a new redistricting plan for the board of supervisors based on the 1990 census.[1168] Plaintiffs contended that the plan diluted minority voting strength in violation of Section 2, and that the county intended to use the plan at the November 1991 election despite the fact that it had not been precleared. A three-judge court was convened and enjoined the November 1991 election until the new plan had been precleared "or until further order of this court." The Attorney General precleared the plan, and the district court scheduled a special election for April 1992.[1169] The election was held, and both black incumbents were defeated in head to head contests with whites. A third black candidate, George Smith, who was a plaintiff in the second

[1167] White v. Daniel, 501 U.S. 1260 (1990).

[1168] Smith v. Board of Supervisors, 801 F. Supp. 1513 (E.D.Va. 1992).

[1169] Id. at 1514-15.

voting rights lawsuit, was also defeated in another head to head contest against a white candidate.

The plaintiffs contended that because of extreme racial bloc voting in Brunswick County, African Americans would need to constitute 65% of the population to have an effective opportunity to elect candidates of their choice. Under the challenged plan, only one of the five districts had a 65% black majority. Following a trial, the district court invalidated the challenged system as diluting minority voting strength and made detailed findings of fact, including:

> *Historically, both Virginia and Brunswick County enforced laws that discriminated against African American residents. Brunswick County has a particularly long and sorry record in this regard. Black citizens of the County suffered the effects of this bias publicly and privately. Such discrimination included de jure and de facto sanctions of race-based denial of public accommodations, state requirements for segregation in schools and housing, and denial of equal access to the ballot.
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> *Segregation persists in nearly all aspects of the Brunswick County community. Not a single witness denied that churches, clubs and political organizations split along racial lines in Brunswick County . . . [and] [t]he same disparity exists in County committees, commissions and boards.
>
> *[Blacks in Brunswick County have made repeated requests for increased opportunities for voter registration which were consistently denied by local white registration officials. Finally, in 1982, the long time Registrar of Brunswick County] resigned rather than maintain longer office hours, as required by law, so that minority citizens had greater opportunities to sign up.
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> *No African American has ever been appointed to the Board of Supervisors, despite two recent openings.
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> *[The Democratic Party in Brunswick County, which was historically white, began to lose its white members once blacks began to participate in party affairs in the 1970s and 1980s.] Today, the Democratic Party membership is virtually all black, the Republicans predominantly are white.

> *[Blacks are substantially underrepresented as poll officials in Brunswick County.] Mr. Alvin Rice serves as the sole African American precinct captain in all Brunswick County.
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> *In the November 1991 general election, a white election official, aiding a black voter who is blind, apparently would have cast a vote for the white candidate against his wishes, but for the intervention of the voter's relative.
>
> *The evidence strongly suggests that black candidates continue to encounter harassment, subtle and overt, when attempting to run for political office.
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> *In the 1991 election for Virginia State Senate from the 18th District, Ms. Louise Lucas, a black woman, was characterized as a 'welfare bureaucrat' and 'an inner-city resident' in her opponent's campaign literature. Her photograph appeared next to these depictions of her character.
>
> *[N]o black candidate for a county office has ever won a countywide head-to-head contest against a white candidate, nor has a black candidate ever won a majority of the votes cast.
>
> *[White voters voted for white candidates at the rate of 98%, a level of racial bloc voting that was]extraordinary [and] at the mathematical maximum.[1170]

The court also accepted the conclusion of Dr. Alan Lichtman, an expert who testified on behalf of the plaintiffs, that despite the active and substantial participation of blacks in the election process, they had not been sufficiently successful because "they are essentially blocked from any significant electoral success by the monolithic wall of votes cast by the white voters for white candidates." Dr. Lichtman gave his opinion that

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[1170] Id. at 1517-19, 22-24.

the minimum black population necessary in any Brunswick County voting district "to create an equal opportunity for a black candidate to win would be 65 percent."[1171]

On appeal, the court reversed, despite the fact that it did not find any of the district court's findings of fact or the ultimate finding of racial vote dilution to be clearly erroneous. Instead, it adopted a per se rule that no districting plan could violate Section 2 or the Constitution where blacks "represent the majority" or "have the numbers necessary to win."[1172] The court's legal conclusion, however, cannot disguise the continuing racial polarization and division that characterizes life in Brunswick County, Virginia.

Brunswick County League for Progress/Southern Christian Leadership Conference v. Town Council of Lawrenceville, Virginia

The ACLU also challenged at-large elections for the town council of Lawrenceville, a small town (population 1,486) with an extensive history of discrimination similar to that documented by the court in the case against Brunswick County.[1173] Lawrenceville was 58.8% black (42.9% black if the predominantly black student body of St. Paul's College were excluded), but no black person had been elected

[1171] Id. at 1523.

[1172] Smith v. Board of Supervisors, 984 F.2d 1393, 1401-02 (4th Cir. 1993).

[1173] Brunswick County League for Progress v. Town Council of Lawrenceville, Civ. No. 3:91CV00091 (E.D. Va.).

to the seven member town council since Reconstruction.

In February 1991, the ACLU filed suit on behalf of black voters in Lawrenceville, as well as the Brunswick County League for Progress, a local organization affiliated with the Southern Christian Leadership Conference. On April 23, 1991, the town council adopted a resolution announcing its intent to implement a system with two multi-member districts, one majority black, which would elect three members of the council, and the other majority white, which would elect four members. The resolution also stipulated that following voluntary resignations of the three council members whose terms were set to expire in 1994, new elections for all seven seats would take place in May 1992. The court approved the terms of the resolution in a consent decree signed November 1991.

Person v. Ligon

While Brunswick County was 60% majority black in the 1980s, the town of Emporia, located just north of the North Carolina border, was 60% majority white. Black residents of Emporia, represented by the ACLU, filed suit in April 1984, challenging at-large elections for the nine member city council as violating the Constitution and Section 2. Only one of the members of the council was black.[1174]

[1174] Person v. Ligon, Civ. No. 84-0270-R (E.D. Va.).

After the complaint was filed, the defendants moved to stay the proceedings so the city could decide by referendum whether to merge with the county, or alternatively to annex a large area of the county. Merger of the city and county, and its racial implications, had been an ongoing controversy. In 1981, Charles Sabo, the chair of the county board of supervisors, said that fear of black dominance lay behind the city's opposition to merger. For that reason, he said, the city favored annexation of an area in the county that would maintain the same 60-40 white/black ratio as the city currently had. "That's the reason they want to annex," said Sabo.[1175]

In February 1985, a city/county commission recommended that the city be consolidated with the surrounding county and the new government be composed of eight commissioners from residential wards plus a mayor, all elected at-large. The city and county signed an agreement under which a referendum would be held on consolidation. If the referendum failed, the city would then annex a large populated area of the county.

The city council was strongly opposed to merger because, it said, the new council would be dominated by rural interests. According to the city manager, Emporia voters "would be absolutely crazy to support this thing."[1176] Gilbert Hudson, co-chair of a citizens committee supporting consolidation, said "It's a shame, but race is a part of this.

[1175] "Sabo charges city has racial motive," Southside Sun, December 10, 1981.

[1176] Id.

Black and white. To some people, that's really what the terms rural and urban mean."[1177]

The merger referendum was held on July 1, 1987, and was soundly defeated in the city. The county, with its majority black population, heavily favored merger, but the referendum had to pass separately in each jurisdiction. Following the failure of the referendum, the city annexed a large area of the county and maintained its majority white status.

The vote dilution case was finally settled on January 12, 1988, by a consent decree that reduced the size of the council from nine to eight members, and created three single member districts and two multi-member districts. According to the decree, the new method of elections would provide "black voters of the City of Emporia, a greater opportunity than previously existed to elect candidates of their choice." The plan was precleared by the Department of Justice on March 14, 1988, and was implemented at the elections held in May 1988, at which three black candidates were elected to the city council.

Halifax County and the Town of Halifax

Carr v. Covington

The town of Halifax is located in the heart of Virginia's tobacco growing

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[1177] "Merger proposal heads to the wire," Times-Dispatch, May 4, 1986.

Southside region along the North Carolina border. Established in 1777, it is the county seat of rural Halifax County, which had a thriving plantation and railroad economy prior to the Civil War. During the Civil Rights Movement of the 1950s and '60s, Halifax participated in Virginia's "Massive Resistance" campaign to preserve segregation, successfully staving off racial integration in its public schools until 1970. Although African Americans constituted approximately one quarter of the town's population, the seven member town council remained all white until 1973, when an African American was appointed to fill a vacancy. The council regained its all white status, however, when the African American appointee was defeated in his bid for election in 1974.

By the time the ACLU filed suit on behalf of three African American voters in early 1985, not a single African American candidate had won election to the town council in the more than 100 years since the town's incorporation in 1875. The plaintiffs alleged that the at-large method of electing the town council diluted black voting strength in violation of Section 2 and the Constitution.[1178]

Hoping to avoid the expense of protracted litigation, the town quickly entered into settlement negotiations and the parties ultimately agreed on a proposed consent decree under which four members of the town council would be elected from single member wards and three members, including the mayor, would be elected at-large. African Americans constituted 96% of the population in one of the four proposed

[1178] Carr v. Covington, No. 85-0011-D (W.D. Va.).

wards.

The federal court approved the settlement in 1986. An African American who had been appointed to the council in late 1985 ran unopposed in the majority black Ward A in 1986, and has represented the ward ever since. He remains the only African American ever elected to the Halifax Town Council.

Lancaster County

Taylor v. Forrester

Lancaster County is located on Virginia's Northern Neck peninsula, between the Rappahannock River and Chesapeake Bay, and was one of 19 counties in the state in 1988, with a sizeable black population, but little black representation. Although African Americans made up approximately one-third of the county population, three single member districts drawn by the county council in 1981, failed to yield black representation. Qualified black candidates had run for office, but no black person had been elected in the county since the 19th century, when Armistead Nickins represented the county in Virginia's House of Delegates from 1871 to 1875.[1179]

By the late 1980s, the number of retirees migrating to this Tidewater county - most of whom were white - was increasing. At the same time, declining employment in the region's fishing and farming communities also meant that the area's black population was decreasing.

In July 1988, the three member county council had supported the idea of expanding to five members and creating one 54% majority black district. The council agreed to hold public hearings, but then decided to postpone consideration of the proposal until after data from the 1990 census would be available.

[1179] Ashlea Ball Ebeling, "ACLU suit aims to give Lancaster politics a new look," The Daily Press, January 1, 1990, p. 1.

In December 1989, acting on behalf of black voters, the ACLU challenged the election districts of the all white, three member Lancaster County Board of Supervisors as violating Section 2 and the Constitution.[1180] In a consent decree signed just six months later, the defendants stipulated that the county's single member districts had "the effect of violating Section 2 of the Voting Rights Act," and agreed to expand the council to five members and appoint two African Americans to the council.[1181] The new members, from a two member, county wide district, would hold seats with terms to run concurrently with the elected members. The agreement anticipated that a new five district plan would be drawn following the 1990 census, subject to preclearance, with elections to follow. The consent decree also expanded the county's redistricting committee - an advisory body - from seven to nine members, with two new members selected by the plaintiffs. The court expressly noted that the interim remedial measures would not require preclearance, but retained jurisdiction until the 1991 redistricting process was complete.

City of Newport News

Pegram v. City of Newport News

[1180] Taylor v. Forrester, Civ. No. 89-00777-R (E.D. Va. 1989).

[1181] Id., Interim Consent Decree, May 17, 1990.

The City of Newport News, a major shipping and ship building center on the Virginia coast, was governed by a mayor and six council members elected at-large. During the 1980s, African Americans achieved moderate electoral success in city elections, winning three council seats. By 1994, blacks made up one-third of the city's population of 170,000, but unlike the previous decade, African Americans had begun to experience difficulties electing their candidates of choice. For example, in the four election cycles preceding 1994, only one black candidate managed to win an election.

In July 1994, the ACLU filed suit challenging the at-large method of city elections.[1182] On October 26, 1994, a consent decree was entered in which the city admitted that its at-large system violated Section 2 as well as the Fourteenth and Fifteenth Amendments. The consent decree required the city to implement a racially fair election plan beginning with the next regularly scheduled elections in May 1996. Under the new plan, the city was divided into three two member districts for council elections with the mayor continuing to be elected at-large. One of the two member districts is predominantly African American. Currently the vice-mayor and at least one other council member are African American.

Nottoway County and the Town of Blackstone

Neal v. Harris

[1182] Pegram v. City of Newport News, Virginia, 4:94cv79 (E.D.Va.).

The town of Blackstone, Virginia, is located in rural Nottoway County, approximately 50 miles southwest of Richmond. Founded before the Revolutionary War, the town was originally known as the village of Blacks & Whites – named after the two rival taverns that stood at the intersection of three stagecoach routes – until 1885, when residents adopted the name of the English jurist William Blackstone. Blackstone is the largest of three towns in Nottoway County, which had a thriving plantation and railroad economy prior to the Civil War.

A century later, Blackstone had not yet outlived its history of racial discrimination. Town leaders participated actively in Virginia's Massive Resistance campaign opposing desegregation, establishing a separate "academy" in 1965, so that white children would not have to attend integrated schools. The local drugstore removed the stools from its lunch counter to avoid being forced to serve blacks and whites on an equal basis. And when an African American ran for the Blackstone town council for the first time in 1965, the all white county electoral board struck his name from the ballot on the grounds that he had not paid his poll taxes for the previous six months. Even though African Americans constituted almost 45% of the Blackstone's population, not a single African American candidate won election to the town council until 1984.

In September 1985, the ACLU filed suit on behalf of seven African American voters, alleging that the at-large method of electing the seven member town council

diluted black voting strength in violation of Section 2 and the Constitution.[1183] The town initially decided to fight the lawsuit. Shortly before trial, however, and after its expert witness admitted in a deposition that the at-large scheme was indefensible under Section 2, the town agreed to settle the case.

On June 4, 1986, the district court adopted a remedial plan under which five members of the town council would be elected from single member wards and two would be elected at-large. African Americans were a majority in three of the five wards, constituting 65.3%, 62%, and 65.9% of the total population, respectively. The court rejected the defendants' preferred plan, which would have contained only two majority black wards, because "race conscious voting that occurred amongst both the black and white electorate in Blackstone" would likely have resulted in the continued under representation of African Americans on the town council.[1184]

Because the next regular elections were almost two years away, the plaintiffs asked the court to order a special election to implement the remedial plan. The defendants objected. They argued that the district court had no authority to order a special election because they had not admitted that the previous plan was unlawful. When the district court granted the plaintiffs' motion the defendants appealed and sought a stay of the order requiring a special election.

[1183] Neal v. Harris, No. 85-0738-R (E.D. Va.).

[1184] Id., Order of June 4, 1986.

The court of appeals refused to enjoin the special election and it went ahead as scheduled on March 17, 1987.[1185] Two African Americans won election from the majority black wards and a third lost by a single vote. A black incumbent who had opposed the remedial plan was defeated by a large margin.

On July 28, 1987, the court of appeals affirmed the district court, holding that the special election and the cutting short of incumbents' terms were authorized by the terms of the consent agreement.[1186]

Prince Edward County

Eggleston v. Crute

Prince Edward County, Virginia, which was one of the original defendants in the Brown school desegregation case, has an aggravated history of racial discrimination, polarization, and white intransigence. [1187] After the Brown decision, rather than operate its public schools on a desegregated basis, the county shut them down in 1959, and authorized tuition grants to students to attend private, racially segregated, all white schools, including the Prince Edward Academy. The public schools were not reopened

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[1185] Neal v. Harris, No. 86-1734 (4th Cir. March 16, 1987) (per curiam).

[1186] Neal v. Harris, 837 F. 2d 632 (4th Cir. 1987) (per curiam).

[1187] Brown v. Board of Education, 347 U.S. 483, 486 (1954).

until five years later, in 1964, and only then under order of the federal courts.[1188] But even then, the schools remained segregated, with blacks attending the public schools and whites, supported by tuition grants, attending all white private schools. The practice of county support of racially segregated private schools was ultimately invalidated by the federal courts.[1189]

As for the Prince Edward Academy, it was enjoined from discriminating in admissions on the basis of race, and in 1979, it was denied tax exempt status because it continued to maintain a racially discriminatory admissions policy, and "retained, and in fact teaches, its belief that racial segregation is desirable . . . . [and] seeks to inculcate the merits of segregation in the value system of its students."[1190] As recently as 1982, Charles B. Pickett, the chair of the Board of Supervisors of Prince Edward County, was quoted in The Washington Post as defending segregation in the county school system. "This is a southern county," he said. "I've just been raised that way, raised that there were two separate races. It's a way of life."[1191]

In 1983, black residents of Prince Edward County and the county seat of Farmville, represented by the ACLU and the NAACP, filed suit under the Constitution

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[1188] Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 232, 234 (1964).

[1189] Griffin v. Board of Supervisors of Prince Edward County, 339 F. 2d 486 (4th Cir. 1964).

[1190] Runyon v. McCrary, 427 U.S. 160 (1976); Prince Edward School Foundation v. United States, 450 U.S. 944, 948-49 (1981).

[1191] "Farmville's School Without Blacks," The Washington Post, January 26, 1982.

and Section 2, challenging at-large elections for the Farmville Town Council and the multi-member district for the Prince Edward County Board of Supervisors.[1192] The plan for the board of supervisors used a combination of single member districts for county residents and a three seat, at-large district for city residents. Blacks were 38% of the population of the county, and 23% of the population of Farmville. While several African Americans had had been elected to the board of supervisors, all but one was elected from a majority black - or near majority black - single member district, and no African Americans had ever been elected to the Farmville town council.

The county defendants offered to settle shortly after the complaint was filed and the parties agreed on a single member plan for the three seat town district. The county's case was then severed by consent from that of the town's and the new county plan was implemented at the election held in 1985.

After extensive discovery, the town also agreed to settle, and the parties adopted a plan establishing five single member districts, two of which were majority black, and retaining two at-large seats. The plan was precleared by the Attorney General and was implemented at the regularly scheduled elections in May 1984. Carl Eggleston, one of the plaintiffs, ran in one of the majority black districts and was elected to the town council.

[1192] Eggleston v. Crute, Civ. No. 83-0287-R (E.D.Va.).

VOTING RIGHTS LITIGATION IN INDIAN COUNTRY

Despite the application of the Voting Rights Act to American Indians, both in its enactment in 1965 and in its extension in 1975, relatively little litigation to enforce the act, or the Constitution, was brought on behalf of Native American voters in the West until fairly recently. For example, from 1974 to 1990, only one law suit was brought in Montana challenging at-large elections as diluting Indian voting strength, despite the presence in the state of seven Indian reservations, a significant Indian population, and the widespread use of at-large voting.[1193] In Georgia, by contrast, during the same period of time, lawsuits were brought by African Americans against 97 counties and cities challenging their use of at-large elections.[1194] Indian country was largely bypassed by the extensive voting rights litigation campaign being waged elsewhere, particularly in the South after the amendment of Section 2 to incorporate a discriminatory results standard.

The lack of enforcement of the Voting Rights Act in Indian Country was the result of a combination of factors, including: a lack of resources and access to legal assistance by the Native American community, lax enforcement of the Voting Rights Act by the Department of Justice, the isolation of the Indian community, and the

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[1193] Windy Boy v. County of Big Horn, 647 F. Supp. 1002 (D.Mont. 1986).

[1194] Laughlin McDonald, et al., "Georgia," in Quiet Revolution, Davidson and Grofman, eds. (1994), p. 81.

debilitating legacy of years of discrimination by the federal and state governments. But where there has been litigation, the courts have invariably found patterns of widespread discrimination against Indians in the political process, including chronic racial bloc voting. And in response to these findings, the courts have often ordered remedies that have enabled Native American voters, some for he very first time, to elect representatives of their choice.

In addition to documenting various discriminatory election systems impacting American Indians, this report also sheds light on another facet of voting discrimination which bears close resemblance to the experiences of black and Latino voters in other jurisdictions: the willful failure of elected officials to comply with the requirements of Section 5.

COLORADO

Montezuma County

Cuthair v. Montezuma County

Members of the Ute Mountain Ute Tribe in Montezuma County, represented by the ACLU, brought a successful challenge in 1989, to the at-large method of electing their local school board. The court made extensive findings of past and continuing discrimination against Indians in voting and other areas, which are summarized below.

During much of the 19th century "[t]he battle cry in Colorado seemed to be to exterminate the Indians." The governor, for example, issued an appeal on August 10,

1864, for "the people to defend themselves and kill Indians." This anti-Indian sentiment precipitated a surprise attack three months later by the state volunteers on a Cheyenne and Arapahoe village at Sand Creek in eastern Colorado. "Newspapers of the day greeted reports of the massacre with unanimous approval." Citing the persistent efforts of whites to exterminate and remove the Utes and expropriate their land, the court said "[i]t is blatantly obvious" that Native Americans "have been the victims of pervasive discrimination and abuse at the hands of the government, the press, and the people of the United States and Colorado." The evidence revealed "a keen hatred for the Ute Indians and their way of life."[1195]

Anti-Indian attitudes have persisted in Colorado and in Montezuma County well into the 20th century. Communities surrounding the Ute Reservation "treated Indians as second-class citizens. They were discouraged from attending public schools. Discrimination was rampant against Ute children. They were perceived to be unhealthy, unsanitary, and most of all, unwelcome." The plight of the Ute Mountain Utes among Indian tribes was especially dire. In the 1960s "there were only just over 900 tribal members and their infant mortality rate was so high that their death as a viable cultural group could be predicted."[1196]

[1195] Cuthair v. Montezuma-Cortez, Colorado School Dist. No. RE-1, 7 F. Supp. 2d 1152, 1156-57, 1160 (D. Colo. 1998).

[1196] Id. at 1159-60.

The attitude of whites changed somewhat after the tribe began to receive funds from oil and gas leases, as well as revenue from various federal programs and judgments before the U.S. Court of Claims reimbursing the tribe for land that had been ceded to the United States in the late 19th century at prices "so inadequate as to be unconscionable." But despite the economic benefit to the surrounding community from this influx of funds, "[s]harply divided interests and attitudes over Indian rights remained . . . and abuses abounded such as discrimination in law enforcement, health care, and employment as well as incidents of double pricing and disputes over hunting rights." Disputes over land claims remained particularly contentious. "Water rights and tribal sovereignty issues were hotly contested and the local populous made clear their continuing objections to the nonpayment of taxes by Indians. . . The public generally still harbored attitudes that Indians were lazy and not to be trusted." The numerous and existing divides "made it extremely difficult for the Indians to establish any alliances with the whites in the cultural and political arena."[1197]

Indians were not allowed to serve on juries in Montezuma County until 1956. They were historically denied the right to vote in Colorado, and it was not until 1970, that the state constitution was amended to allow tribal members residing on the reservation to vote. Until the late 1980s or early 1990s, Utes were not allowed to register at the tribal headquarters at Towaco, despite the fact that the non-Indian population

[1197] Id. at 1160-61.

was allowed satellite registration at several communities in the county. Prior to the trial of the ACLU voting rights case in 1997, no Indian had ever been elected to public office in Montezuma County.[1198]

A major concern of the Utes has been the extremely high drop out rate (89%-90%) of Indian students from the predominantly white schools in Cortez, the only schools for Indian children in the county. Part of the problem has been the indifference of school officials to the needs and concerns of Indian students and, as a result, Indians have never felt they were a part of the local school system. For example, when Indian parents requested that bilingual education and Indian education programs be included in the school district's mission statement, the school board denied the request saying that the mission statement "must be 'ethnically clean.'"[1199]

In ruling for the plaintiffs, the federal court concluded that Indians were geographically compact, politically cohesive, and the candidates favored by Indians were usually defeated by whites voting as a bloc. The court also found "a history of discrimination-social, economic, and political, including official discrimination by the state and federal government," and a depressed socio-economic status caused in part by the past history of discrimination. As a remedy for the Section 2 violation, the court

[1198] Id. at 1161-62.

[1199] Id. at 1170.

ordered into effect a single member district plan for election of school board members, containing a majority Indian district encompassing the reservation.

MONTANA

1990 Redistricting

Old Person v. Cooney

Earl Old Person, the chair of the Blackfeet Indian Tribe, and other tribal members in Montana, brought suit in 1996, challenging the 1992 redistricting plans for the state house and senate. They contended that the plans diluted Indian voting strength in the area encompassed by the Blackfeet and Flathead Reservations (including portions of Flathead, Lake, Glacier, and Pondera Counties) where an additional majority Indian house district and a majority Indian senate district could be drawn.[1200]

Since 1972, the Montana constitution has granted the exclusive power to conduct legislative redistricting to a Districting and Apportionment Commission. The commission is reconstituted every 10 years in advance of the release of the federal census and consists of five members, four of whom are chosen by the majority and minority leaders of each house. The fifth member is selected by the four commissioners, and if they cannot agree, by the state supreme court. Upon the filing of

[1200] Plaintiffs also challenged redistricting in the area encompassed by the Fort Peck, Fort Belknap, and Rocky Boy Reservations, but those claims were later abandoned.

the redistricting plan by the commission with the secretary of state, the plan becomes law and the commission is dissolved.[1201]

Based on the 1990 census, Indians were 6% of the total population and 4.8% of the voting age population of Montana. While the state population increased by 1.6% between 1980 and 1990, the Indian population increased 27.9%. Approximately 63% of the Indian population lived on the state's seven Indian Reservations.[1202]

The preexisting 1982 plan contained only one majority Indian district, HD 9 on the Blackfeet Reservation in Glacier County.[1203] The 1982 plan also effectively fragmented the Indian population in other parts of the state by dividing the Fort Belknap Reservation between two senate districts, the Fort Peck Reservation among three senate districts, the Rocky Boy Reservation between two house districts, and the Blackfeet Reservation among four house districts. The Flathead Reservation was divided among eight house districts.

As a result of the growth in Indian population reflected in the 1990 census, three majority white districts under the 1982 plan had become majority Indian, HD 20 (portions of Fort Peck), HD 99 (portions of Crow), and SD 50 (portions of Crow and

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[1201] Article V, Section 14, Constitution of Montana.

[1202] Old Person v. Cooney, No. CV-96-004-GF (D.Mont. October 27, 1998), slip op. at 4-5.

[1203] Id. at 8, 11-12.

Northern Cheyenne).[1204] Another district, HD 100 (portions of Crow and Northern Cheyenne), was approximately 50% Indian in light of the new census.

The five-member commission appointed in 1990 had no Indian representation. It held 12 hearings on redistricting around the state, each of which was usually preceded by an afternoon work or planning session. All the sessions were recorded on audio tapes, which were later transcribed for use at trial. The statements made by the commissioners during their planning sessions, as opposed to during the public meetings when they were more circumspect, can only be described as overtly racial and showed an intent to limit Indian political participation.

Commission members ridiculed the redistricting proposals submitted by tribal members as "idiotic" and "a bunch of crap." As one commissioner put it when he looked at a plan that would have created a majority Indian district in the area of the Rocky Boy and Ft. Belknap Reservations, "I can feel anger coming on and I might as well spew it here tonight . . . before tonight, I mean. Now, just to be really blunt, this is a bunch of crap." They called the tribes' demographer, whom they had never met, a "jackass," "some turkey from God-Knows-Where," a "dingaling," and an "S.O.B." One commissioner said that if "that bugger" shows up at a meeting "I'll toss him in the trees someplace." When a staff member mistakenly gave some of the commissioners blank

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[1204] Id. at 5, 11-13.

pieces of paper instead of a tribal redistricting proposal, one commissioner remarked, "I got a blank one too . . . . [t]his is typical of them Indians."[1205]

In response to requests from tribal members that any districting plan provide equal electoral opportunities to Indian voters, commission members suggested that all the Indians in the state be packed in one district to minimize their voting strength. As one commissioner put it, "give them one District and we go from there." The Indians, according to another commissioner, didn't know what was going on: "you get somebody that's getting in there and stirring them up, yeah, they'll get to thinking hell's an icebox." Another commissioner declared that "[i]f the federal government wants to redistrict Montana according to the Indian Tribes and the Reservations, they are going to have to do it. I am not going to do it." When the commission felt obligated to draw a majority Indian district, one commissioner lamented that "[w]e're being had here, ladies and gentlemen." Another commissioner added, "[a]nd we can't do anything about it." Placing white residents in a majority Indian district would, according to one commissioner, "emasculate" white voters.[1206]

The attitudes of members of the commission towards Indians were a reflection of a more general "white backlash" against Indians. The United States Commission on Civil Rights reported in 1981 that:

[1205] Old Person v. Cooney, Pl. Exs. 38, 44, 45.

[1206] Id.

> During the second half of the seventies a backlash arose against Indians and Indian interests. Anti-Indian editorials and articles appeared in both the local and the national media. Non-Indians, and even a few Indians as well, living on or near Indian reservations organized to oppose tribal interests. Senator Mark Hatfield (R-Ore.) said during Senate hearings in 1977 said that '[w]e have found a very significant backlash [against Indians] that by any other name comes out as racism in all its ugly manifestations.'[1207]

So called "white rights" groups have proliferated in Montana, including Montanans Opposed to Discrimination (MOD), Citizens Rights Organization (CRO), Interstate Congress for Equal Rights and Responsibilities (ICERR), and Citizens Equal Rights Alliance (CERA). In general, these organizations advocate that the states should have exclusive jurisdiction over all non-Indians and non-Indian lands wherever located. The organizations are also interested in eliminating or terminating the Indian reservations, and have clashed with the tribes over specific issues such as taxation, tribal sovereignty, hunting and fishing rights, water rights, and appropriation and development of tribal resources. Joe Medicine Crow, a Crow tribal historian and anthropologist, says the mentality of MOD is "do not give the Indians the opportunity to enjoy those rights that have been traditionally the white man's rights, don't let them have it."[1208]

A political party that is gaining a foothold in Montana is the Constitution Party, which has a controversial, distinctly anti-Indian platform. As appears from its website,

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[1207] United States Commission on Civil Rights, Indian Tribes: A Continuing Quest for Survival (Washington; U.S. Government Printing Office, 1981), p. 1.

[1208] Windy Boy v. County of Big Horn, Tr. Trans. 113.

its 2000 National Platform included: repeal of the Voting Rights Act; opposition to bilingual ballots; an end to all federal aid, except to military veterans; repeal of welfare; and abolishing the U.S. Department of Education.[1209]

In the 2000 general election for the Montana legislature, there were 11 Constitution Party candidates on the ballot. Where they faced candidates from both major parties, they did poorly. Where they faced only one major party candidate, they did better, with one candidate getting 25% of the vote - except in HD 73 in Lake County, the home of the Flathead Reservation and where the only major party candidate was an Indian. There, the Constitution Party candidate got 49% of the total vote, 62% of the white vote, and came within fifty-four votes of being elected.[1210]

Because of the polarization that exists, white politicians are often reluctant to openly campaign or solicit votes on the reservations for fear of alienating white voters. According to Joe MacDonald, one of the plaintiffs in the Old Person case and the president of the Salish-Kootenai College at Flathead, when U.S. Representative Pat Williams, who was chairman of the Post-secondary Education Committee, visited the tribal college, he didn't want any publicity or even to attend a reception to meet members of the faculty. According to MacDonald, "[h]e slid in the side door, he and I

[1209] See: http://www.constitutionparty.com/ustp-p1.html.

[1210] Old Person v. Cooney, Report of Steven P. Cole, p. 18, Table 1; p. 20, Table 3.

went around the campus, [he] went to his car and he was gone."[1211] Another plaintiff, Margaret Campbell, echoed MacDonald's comments:

> Non-Indians come to the Native Americans for their support, but they would prefer that . . . we do not support them publicly among the non-Indian community. For example, they don't bring us bumper stickers and huge yard signs, that sort of thing. . . . If a non-Indian candidate were to make it known that they had the broad support of the Native American community, it would be the kiss of death to their campaign.[1212]

The redistricting plan ultimately adopted by the state commission maintained the existing majority Indian districts and created one additional majority Indian district in the area of the Rocky Boy and Ft. Belknap Reservations. It did not, however, create the additional house and senate seats in the area of the Flathead and Blackfeet Reservations sought by the plaintiffs.

Following a trial, the district court dismissed the complaint on the grounds that the redistricting plan did not dilute Indian voting strength. The court was of the view that white bloc voting was not legally significant, and that the number of legislative districts in which Indians constituted an effective majority was proportional to the Indian share of the voting age population of the state. It did note, however, "[t]he

[1211] Id., Testimony of Joe MacDonald, T. Vol. I, p. 178.

[1212] Id., Testimony of Margaret Campbell, T. Vol. IV, p. 650.

history of official discrimination against American Indians during the 19th century and early 20th century by both the state and federal government."[1213]

The district court also found that "Indians continue to bear the effects of past discrimination in such areas as education, employment and health, which, in turn, impacts upon their ability to participate effectively in the political process." The effects of discrimination included low Indian voter participation and turnout, and very few Indian candidates.[1214]

As for plaintiffs' claim of purposeful discrimination, the court held that the challenged plan had not been adopted with a discriminatory purpose. The patently derisive and condescending comments made by the commissioners about Indians were dismissed as "moment[s] of levity."[1215] Plaintiffs appealed and the court of appeals reversed and remanded for further proceedings.[1216]

The court of appeals held that plaintiffs established the three primary factors identified in Thornburg v. Gingles as probative of vote dilution under Section 2 (geographic compactness and political cohesion of the minority group and legally significant white bloc voting), and that "in at least two recent elections in Lake County .

[1213] Id., slip op. at 39.

[1214] Id. at 42, 44.

[1215] Id. at 51.

[1216] Old Person v. Cooney, 230 F.3d 1113, 1131 (9th Cir. 2000).

. . there had been overt or subtle racial appeals." The court directed the district court to reconsider its ruling in light of its "clearly erroneous finding that white bloc voting was not legally significant," and its erroneous finding of "proportionality between the number of legislative districts in which American Indians constituted an effective majority and the American Indian share of the voting age population of Montana."[1217]

As for the anti-Indian comments made by the commissioners, the appellate court acknowledged that they were "inflammatory," but declined to reverse the ruling of the district court that there was no discriminatory purpose in the adoption of the commission's plan.[1218] An unwillingness of many local federal judges, who are, after all, political appointees, to find that members of their state or community committed acts of purposeful discrimination, and the unwillingness of appellate judges to reverse those decisions, underscore the wisdom of Congress in dispensing with any requirement of proving racial purpose to establish a violation of Section 2, or retrogression under Section 5.

Prior to the decision of the court of appeals, a new commission was appointed by the legislature in 1999, to redistrict the state in anticipation of the 2000 census. The four appointed members could not agree on the fifth member to serve as chair, and accordingly the state supreme court did the appointing. It chose Janine Windy Boy, a

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[1217] Id. at 1121, 1127, 1129, 1130-31.

[1218] Id. at 1130.

Crow Indian who had been the lead plaintiff in a voting rights case in Big Horn County.[1219] Having a Native American, for the first time, on the commission would insure that the language of the commissioners would not be as "inflammatory" as it had been in the past. It would also help to ensure that Indians would be treated fairly in the redistricting process. The subsequent adoption of a redistricting plan creating a new majority Indian house district and a new majority Indian senate district in the area of the Flathead and Blackfeet Reservations would also render the Old Person lawsuit moot.

The Attorney General of Montana, Mike McGrath who was also counsel for the defendants, appeared before the commission at its meeting in April 2001, to discuss the Old Person case. He publicly acknowledged that the existing redistricting plan violated Section 2. According to McGrath:

> I think ultimately that we will not prevail in this litigation; that the Plaintiffs will indeed prevail in the litigation . . . I think the Ninth Circuit opinion is fairly clear and I think it's ultimately the state of Montana is going to have to draw a Senate district that is at least somewhat similar to that that the Plaintiffs have requested.[1220]

Joe Lamson, another member of the redistricting commission, shared the views of McGrath. He was of the opinion that the 1993 plan did result in "voter dilution of our Native American population in Montana. And that when you look at

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[1219] Windy Boy v. County of Big Horn, 647 F. Supp. at 1004, 1013.

[1220] Old Person v. Cooney, on remand sub nom. Old Person v. Brown, Pl. Ex. 3, p. 14.

proportionality, they're certainly entitled to another Senate district." A third commissioner, Sheila Rice, who was a member of the state legislature when the existing plan was enacted, said that "I actually sat on that House Committee that reviewed this exact plan that was taken to Court - it must have been the 1993 session, and argued pretty strenuously that we were diluting the Native American population, and that we should redraw that district."[1221]

The commission conceded that the 1992 plan diluted Indian voting strength, and adopted a resolution to create "an additional majority Indian House District and an additional majority Indian Senate District in the region of Montana that is dealt with in Old Person, in recognition of the rights of Indians on the Blackfeet and Flathead Reservations under Section 2 of the Federal Voting Rights Act of 1965."[1222]

A second trial was held in Old Person after the remand from the court of appeals, and the district court again dismissed the complaint. It held that the three Gingles factors continued to be met taking into account intervening elections in 1998 and 2000, and that the gap between the number of majority minority districts to minority members' share of the relevant population had increased based on the 2000 census. It reaffirmed the prior findings that American Indians suffered from a history of discrimination, that Indians have a lower socio-economic status than whites, that these

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[1221] Id. at 20, 28.

[1222] Id., Expert Report for Susan Byorth Fox, Attachment 1.

social and economic factors hinder the ability of Indians in Montana to participate fully in the political process, and that in at least two recent elections in Lake County there had been overt or subtle racial appeals.

Despite these findings, the court ruled that three Indian preferred candidates (one white, one Indian who had no major party opposition in the general election, and another Indian from a majority Indian district) had been elected to the legislature from the Blackfeet-Flathead area. The court also emphasized the difficulty of redistricting only part of the state using the 2000 census, and "the very real prospect that comprehensive and long-term relief designed to address vote dilution throughout the State of Montana is in the offing within a year under the auspices of the Montana Districting and Apportionment Commission."[1223]

Plaintiffs appealed once again, but this time the court affirmed. It affirmed all the court's prior findings showing vote dilution. In addition, and setting aside the finding of the district court once again, the panel held that Indians' share of majority-minority districts "is not proportional under either a four-county or a statewide frame of reference, [and that] the proportionality factor weighs in favor of a finding of vote dilution." But despite proof of the Gingles and other factors showing vote dilution, including the lack of proportionality, the panel concluded that Indian voting strength was not diluted because of "the absence of discriminatory voting practices, the viable

[1223] Old Person v. Brown, 182 F. Supp. 2d 1002, 1012 (D.Mont. 2002).

policy underlying the existing district boundaries, the success of Indians in elections, and official responsiveness to Native American needs."[1224] The court ignored the evidence presented by the plaintiffs of the resolution of the 2000 Districting and Apportionment Commission, and statements of its individual members, that the 1993 plan diluted Indian voting strength. But in any event, the 2000 redistricting would shortly render the case moot.

After holding a series of hearings around the state, the new commission submitted its redistricting plan to the legislature for comments on January 6, 2003. The plan provided for 100 house districts, six of which were majority Indian, and 50 senate districts, three of which were majority Indian. An additional majority Indian house district (HD 1) was created that included parts of the Flathead and Blackfeet Indian Reservations. House District 1, when combined with the preexisting majority Indian house district on the Blackfeet Reservation (HD 85), created an additional majority Indian senate district (SD 1).[1225] The districts for the house contained a total deviation of 9.85%.[1226]

[1224] Old Person v. Brown, 312 F.3d 1036, 1039, 1046, 1050 (9th Cir. 2002).

[1225] Old Person v. Brown, Response to Appellants' Petition for Rehearing and Rehearing En Banc, Exhibit (Adopted House and Senate District, December 2002).

[1226] Joint Legislative Committee on Districting and Apportionment, Minority Report on SR 2 and HR 3 Regarding the Recommendation to the Montana Districting and Apportionment Commission 2 (January 29, 2003).

Both the house and senate immediately condemned the proposed plans and demanded that the commission adopt new ones. The house, in a resolution passed on February 4, 2003, charged that "the 5% population deviation allowance contained in the plan was used for partisan gain," that the plan was "mean-spirited," "unacceptable," and that "the legislative redistricting plan must be redone." It also condemned the creation of majority Indian districts as being "in blatant violation of the mandatory criterion that race may not be the predominant factor to which the traditional discretionary criteria are subordinated."[1227] The senate leveled virtually identical charges, and concluded that "the legislative redistricting plan must be redone."[1228]

The legislature then enacted HB 309, which the governor signed into law on February 4, 2003, which sought to invalidate the commission's plan and alter or amend the provisions of the state constitution. While Article V, § 14(1) of the state constitution provides that "[a]ll districts shall be as nearly equal in population as is practicable," HB 309 provided that the districts must be "within a plus or minus 1% relative deviation from the ideal population of a district." HB 309 further provided that "[t]he secretary of state may not accept any plan that does not comply with the [1% deviation] criteria."

On February 5, 2003, the commission formally adopted its plan for legislative redistricting and filed it with the secretary of state. The secretary of state, however,

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[1227] House Resolution No. 3, February 4, 2003.

[1228] Senate Resolution No. 2, February 4, 2003.

refused to accept it and on the same day filed a complaint against the commission in state court for declaratory judgment that the plan was unconstitutional and unenforceable for failure to comply with the population equality standard of HB 309.[1229] The tribal chairs from the various reservations, represented by the ACLU, were granted permission to intervene as defendant to defend the commission's plan. Following a hearing, the state court ruled on July 2, 2003, that HB 309 was unconstitutional and that the secretary of state was required to accept the commission's plan. The secretary of state did not file a notice of appeal but accepted the commission's plan for filing. It thus became the state's redistricting plan, superseding the 1993 plan and rendering the plaintiffs' challenge to the prior plan moot. The Supreme Court, however, denied without comment a petition for a writ of certiorari seeking to vacate the final decision of the lower court on mootness grounds.

As a result of the litigation, which spanned eight years, and despite the concerted opposition of the legislature and secretary of state to the commission's redistricting plan, eight tribal members, as of the 2004 elections, are now members of the Montana state house and senate, the largest Native American delegation of any state legislature. A recent report by the First American Education Project described the success of Native

[1229] Brown v. Montana Districting and Reapportionment Commission, No. ADV-2003-72 (Mont. 1st Jud. Dist. Ct. Lewis & Clark County).

Americans elected to the Montana State Legislature as "a testament [to] the power of Native voters at the smaller geographic and jurisdictional levels."[1230]

City of Billings

Hartung v. Billings

Billings, known as the Magic City because of its rapid growth from the days of its founding as a railroad town in 1882, has a population today of nearly 100,000 people. Not surprising, the 2000 census showed the five districts used to elect the city council were severely malapportioned. The city adopted a new plan in 2005, but it was under the mistaken impression that an individual district with a deviation of plus or minus 10% from average district size was acceptable. The 10% "safe harbor" rule applies, of course, to the total deviation in a plan, as opposed to the deviation in a given district. The plan the city adopted had a deviation of 15.66%, and there was noting in the legislative history to justify the failure to comply with the one person, one vote standard. The plan also unnecessarily divided an area of the city that contained a growing American Indian population.

Local residents, represented by the ACLU, filed suit in August 2005, seeking to enjoin use of the malapportioned plan.[1231] Having no defense to the one person, one

[1230] First American Education Project, Native Vote 2004: A National Survey and Analysis of Efforts to Increase the Native Vote In 2004 and the Results Achieved (Washington, D.C.: National Congress of American Indians, 2004), p. 7.

vote claim, the city requested the litigation be stayed to give it an opportunity to adopt a plan that complied with the equal population standard. The city ultimately adopted a plan in November 2005 that cured the one person, one vote violation, and avoided the unnecessary fragmentation of the Indian population. The plan was acceptable to the plaintiffs, and they dismissed their complaint as moot.

[1231] Hartung v. City of Billings, Montana, Civ. No. CV 05-96-BLG-RWA (D. Mont.).

Big Horn County

Windy Boy v. County of Big Horn

The first Section 2 challenge in Montana was brought in 1983, in Big Horn County. The plaintiffs were members of the Crow and Northern Cheyenne Tribes and were represented by the ACLU. They contended that the at-large method of electing the members of the county commission and one of the school districts in the county allowed the white majority to control the outcome of elections and prevented Indian voters from electing candidates of their choice.[1232] At the time the complaint was filed, no Indian had ever been elected to the county commission or the school board, despite the fact that Indians were 41% of the voting age population of the county.

Following a lengthy trial, the district court issued a detailed order in 1986, finding that the challenged at-large system diluted Indian voting strength in violation of Section 2. Among the court's findings were:

> *the right of Indians to vote has been interfered with, and in some cases denied, by the county;
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> *Indians who had registered to vote did not appear on voting lists;
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> *Indians who had voted in primary elections had their names removed from voting lists and were not allowed to vote in the subsequent general elections;
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> *[Indians were] refused voter registration cards by the county;
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> *evidence of official discrimination touching on the right to participate in elections concerned the failure of the county to appoint Indians to county boards and commissions;

[1232] Windy Boy v. County of Big Horn, Civ. No. 83-225-BLG-ER (D. Mont.).

*discrimination in the appointment of deputy registrars of voters and election judges limiting Indian involvement in the mechanics of registration and voting;

*in the past there were laws prohibiting voting precincts on Indian reservations and effectively prohibiting Indians from eligibility for positions such as deputy registrar;

*there is racial bloc voting in Big Horn County;

*there is evidence that race is a factor in the minds of voters in making voting decisions;

*[w]hen an Indian was elected Chairman of the Democratic Party, white members of the party walked out of the meeting;

*[u]nfounded charges of voter fraud have been alleged against Indians and the state investigator who investigated the charges commented on the racial polarization in the county;

*[the size of the county] is huge (5,023 square miles), the roads are poor, and travel is time consuming;

*the use of staggered terms along with residential districts promotes head-to-head contests . . . making it more difficult for Indian supported candidates to successfully participate in the political process;

*Indians have lost land, had their economics disrupted, and been denigrated by the policies of the government at all levels;

*[there was] discrimination in hiring by the county;

*race is an issue and subtle racial appeals, by both Indians and whites, affect county politics;

*[i]ndifference to the concerns of Indian parents" [by school board members];

*the polarized nature of campaigns;

*a strong desire on the part of some white citizens to keep Indians out of Big Horn County government;

*the effects on Indians of being frozen out of county government remain and will continue to exist in years to come;

*English is a second language for many Indians, further hampering participation;

> *[a depressed socio-economic status that makes it] more difficult for Indians to participate in the political process and there is evidence linking these figures to past discrimination.

The court concluded that "this is precisely the kind of case where Congress intended that at-large systems be found to violate the Voting Rights Act."[1233] Following the implementation of a remedial plan consisting of single member districts, an Indian (from a majority Indian district) was elected to the county commission for the first time in history.

Blaine County

United States v. Blaine County

Blaine County, located in north central Montana, is 45% Native American and home to the Fort Belknap Reservation and the Gros Ventre and Assiniboine Tribes. The county was sued by the United States in November 1999, for its use of at-large voting for its three member commission, which was alleged to dilute Indian voting strength in violation of Section 2.[1234] Both the district court and court of appeals agreed that the challenged system violated the statute. Indians were geographically compact and

[1233] Windy Boy v. County of Big Horn, 647 F. Supp. at 1007-22.

[1234] United States v. Blaine County, Montana, No. CV 99-122-GF-DWM (D.Mont.).

politically cohesive, while whites voted sufficiently as a bloc usually to defeat the candidates preferred by Indian voters.[1235]

Turning to the totality of circumstances, the courts concluded: (1) there was a history of official discrimination against Indians, including "extensive evidence of official discrimination by federal, state, and local governments against Montana's American Indian population;" (2) there was racially polarized voting which "made it impossible for an American Indian to succeed in an at-large election;" (3) voting procedures, including staggered terms of office and "the County's enormous size [which] makes it extremely difficult for American Indian candidates to campaign county-wide," enhanced the opportunities for discrimination against Indians; (4) depressed socio-economic conditions existed for Indians; and, (5) there was a tenuous justification for the at-large system, in that at-large elections were not required by state law while "the county government depends largely on residency districts for purposes of road maintenance and appointments to County Boards, Authorities and Commissions."[1236]

Tribal members, represented by the ACLU, were granted leave to participate in the remedy phase of the trial, at which the court approved a plan using three single

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[1235] United States v. Blaine County, Montana, 363 F.3d 897, 900, 909-11 (9th Cir. 2004).

[1236] Id. at 913-14.

member districts, one of which was majority Indian.[1237] At the next election under the plan, an Indian from the majority Indian district was elected for the first time to the county commission.

Blaine County was represented by the Mountain States Legal Foundation, which agreed to represent the defendants on the condition they allow it to challenge the constitutionality of Section 2 as applied in Indian country. Both the district court and the court of appeals rejected the Foundation's arguments and held that Section 2 was a valid exercise of congressional authority to enforce the Constitution. In doing so, the courts relied upon the Supreme Court's recent "federalism" decisions, such as City of Boerne v. Flores,[1238] which invalidated various acts of Congress on the grounds that they were not "congruent" and "proportionate," or appropriately tailored to remedy the constitutional violation at issue. The court of appeals noted that when Boerne "first announced the congruence-and-proportionality doctrine . . . it twice pointed to the VRA as the model for appropriate prophylactic legislation," and that "the Court's subsequent congruence-and-proportionality cases have continued to rely on the Voting Rights Act

[1237] Tribal members also filed a separate Section 2 lawsuit challenging the county's at-large system, but it was stayed pending disposition of the suit brought by the United States and was ultimately dismissed as moot. McConnell v. Blaine County, No. CV 01-91-GF (D.Mont.).

[1238] 521 U.S. 507 (1997).

as the baseline for congruent and proportionate legislation."[1239] The Supreme Court denied the county's petition for a writ of certiorari.[1240]

[1239] Blaine County, 363 F.3d at 904-05.

[1240] Blaine County, Montana v. United States, 125 S. Ct. 1824 (2005).

Rosebud County

Alden v. Rosebud County

Matt v. Ronan School District 30

In 1999, tribal members, represented by the ACLU, sued Rosebud County (Northern Cheyenne) and the Ronan School District 30 (Flathead) for their use of at-large elections as diluting Indian voting strength, Rather than face prolonged litigation, the two jurisdictions entered into settlement agreements adopting district elections.[1241]

The difficulty Indians have experienced in getting elected to office was particularly evident in the Ronan school district. From 1972 to 1999, 17 Native American candidates had run for the school board, and only one, Ronald Bick, who had no formal or announced tribal affiliation at the time, was elected to the board. Bick was elected in 1990. However, when he ran for reelection in 1993, and after it became known that he had joined the Flathead Nation, he was defeated. The settlement plan agreed to by the parties called for an increase in the size of the school board from five to seven members, and the creation of a majority Indian district that would elect two members to the school board. At the ensuing election held under the new plan, two Indians were elected from the majority Indian district.

[1241] Alden v. Rosebud County Board of Commissioner, Civ. No. 99-148-BLG (D.Mont. May 10, 2000), and Matt v. Ronan School District, Civ. No. 99-94 (D.Mont. January 13, 2000). The United States filed a similar vote dilution suit in Roosevelt County, which was also settled by agreement of the parties. United States

NEBRASKA

Thurston County

United States v. Thurston County

Stabler v. Thurston County

Thurston County in eastern Nebraska is home to members of the Omaha and Winnebago Tribes, who in 1975, made up approximately 28% of the county population. Historically, the county elected its board of supervisors from districts, however following the election of an Indian in 1964, and passage of the Voting Rights Act of 1965, the county abandoned its district system and adopted at-large elections in 1971. The practice of switching from district to at-large elections following increased minority registration or office holding was, as we have seen, widespread in the South following passage of the Voting Rights Act. Seven years later, in 1978, the United States sued Thurston County alleging that its adoption of at-large elections diluted Indian voting strength and was in violation of the Constitution and the Voting Rights Act. The county, while specifically denying liability, entered into a consent decree returning to district voting and adopting a plan containing two majority Indian districts out of seven districts overall. The county also consented to being placed under Section 5 for five

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v. Roosevelt County Board of Commissioners, No. 00-CV-50 (D.Mont. March 24, 2000).

years so that its compliance with the court's order could be "more effectively monitored."[1242]

When the 1990 census showed the Indian population in Thurston County had grown to nearly 44%, and that the supervisor districts were malapportioned, the county adopted a new plan to comply with one person, one vote, but the plan still contained only two majority Indian districts. Indians were "packed" in those two districts at 88% and 97% respectively, leaving the other districts majority white. Tribal members, with the assistance of the ACLU, sued the county in 1993, alleging that the new plan diluted Indian voting strength in violation of the Voting Rights Act and the Constitution. The plaintiffs sought the creation of a third majority Indian district to reflect the increase in Indian population in the county.

The district court, in ruling for the plaintiffs, found: "Native Americans vote together and choose Native American candidates when given the opportunity;" "whites vote for white candidates to defeat the Native American candidate of choice;" "it is obvious that Native Americans lag behind whites in areas such as housing, poverty, and employment;" and there was evidence of "overt and subtle racial discrimination in the community."[1243] The court invalidated the at-large plan under Section 2 and held that plaintiffs were entitled to a new plan creating a third majority Indian district. The

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[1242] United States v. Thurston County, Nebraska, Civ. No. 78-0-380 (D.Neb. May 9, 1979).

[1243] Stabler v. County of Thurston, Nebraska, 8: CV93-00394 (D.Neb. August 29, 1995), slip op. at 14-6.

court, however, dismissed similar challenges brought by the plaintiffs against a county school board and the board of trustees of the Village of Walthill because Indians were not sufficiently compact to form a majority in a single member district. Both sides appealed, but the court of appeals affirmed the decision of the trial court.[1244]

SOUTH DAKOTA

2000 Redistricting

Emery v. Hunt

Bone Shirt v. Hazeltine

Steven Emery, Rocky Le Compte, and James Picotte, residents of the Cheyenne River Sioux Reservation, and represented by the ACLU, filed suit in 2000, challenging the state's 1996 interim legislative redistricting plan. In the 1970s, a special task force consisting of the nine tribal chairs, four members of the legislature, and five lay people undertook a study of Indian/state government relations. One of the staff reports of the commission concluded that "[w]ith the present arrangement of legislative districts, Indian people have had their voting potential in South Dakota diluted." The report recommended the creation of a majority Indian district in the area of Shannon, Washabaugh, Todd, and Bennett Counties.[1245] Under the existing plan, there were 28

[1244] Stabler v. County of Thurston, 129 F.3d 1015 (8th Cir. 1997).

[1245] Staff Report, Legislative Apportionment and Indian Voter Potential (Task Force on Indian-State Government Relations, 1974), 17, 25.

legislative districts, all of which were majority white and none of which had ever elected an Indian. Thomas Short Bull, a member of the Oglala Sioux Tribe and the executive director of the task force, said the plan gerrymandered the Rosebud and Pine Ridge Reservations by "divid[ing them] into three legislative districts, effectively neutralizing the Indian vote in that area." The legislature, however, ignored the task force's recommendation. According to Short Bull, "the state representatives and senators felt it was a political hot potato. . . . [T]his was just too pro-Indian to take as an item of action."[1246]

After the release of the 1980 census, the South Dakota Advisory Committee to the U.S. Commission on Civil Rights made a similar recommendation that the legislature create a majority Indian district in the area of the Pine Ridge and Rosebud Reservations. The committee issued a report in which it said the existing districts "inherently discriminate against Native Americans in South Dakota who might be able to elect one legislator in a single member district."[1247]

As a result of the 1975 amendments of the Voting Rights Act, two counties in South Dakota, Shannon and Todd, which are home to the Pine Ridge and Rosebud Indian Reservations respectively, became subject to Section 5 preclearance.[1248] The

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[1246] Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 981 (D.S.D. 2004).

[1247] Report, South Dakota Advisory Committee to the U.S. Commission on Civil rightsRights (1980).

[1248] 41 Fed. Reg. 784 (January 5, 1976).

Department of Justice, pursuant to its oversight under Section 5, advised the state it would not preclear any legislative redistricting plan that did not contain a majority Indian district in the Rosebud/Pine Ridge area. The state bowed to the inevitable, and in 1981, drew a redistricting plan creating for the first time in the state's history a majority Indian district, District 28, which included Shannon and Todd Counties and half of Bennett County.[1249] Thomas Short Bull ran for the senate the following year from District 28 and was elected, becoming the first Indian ever to serve in the state's upper chamber.

In 1991, the South Dakota legislature adopted a new redistricting plan using data from the 1990 census. The plan divided the state into 35 districts and retained the majority Indian district, renumbered as District 27, in the Todd/Shannon/Bennett Counties area. The plan also provided, with one exception, that each district would be entitled to one senate member and two house members elected at-large from within the district. The exception was the new House District 28. The 1991 legislation provided that "in order to protect minority voting rights, District No. 28 shall consist of two single-member house districts."[1250] District 28A consisted of Dewey and Ziebach Counties and portions of Corson County, and included the Cheyenne River Sioux Reservation and portions of the Standing Rock Sioux Reservation. District 28B

[1249] Bone Shirt, 336 F. Supp. 2d at 981.

[1250] An Act to Redistrict the Legislature, ch. 1, 1991 S.D. Laws 1st Spec. Sess. 1, 5 (codified as amended at

consisted of Harding and Perkins Counties and portions of Corson and Butte Counties. According to 1990 census data, Indians were 60% of the voting age population of House District 28A, and less than 4% of the voting age population of House District 28B.

Five years later, despite its pledge to protect minority voting rights, the legislature abolished House Districts 28A and 28B, and required candidates for the house to run in District 28 at-large.[1251] Tellingly, the repeal took place after an Indian candidate, Mark Van Norman, won the Democratic primary in District 28A in 1994. A chief sponsor of the repealing legislation was Eric Bogue, the Republican candidate who defeated Van Norman in the general election.[1252] The reconstituted House District 28 contained an Indian voting age population of 29%. Given the prevailing patterns of racially polarized voting, which members of the legislature were surely aware of, Indian voters could not realistically expect to elect a candidate of their choice in the new district.

The Emery plaintiffs claimed the changes in District 28 violated Section 2 of the Voting Rights Act, as well as Article III, Section 5 of the South Dakota constitution, which mandated reapportionment every tenth year, but prohibited all interstitial reapportionment. The South Dakota Supreme Court had expressly held "when a

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S.D.C.L. §§ 2-2-24 through 2-2-31).

[1251] An Act to Eliminate the Single-member House Districts in District 28, ch. 21, 1996 S.D. Laws 45 (amending S.D.C.L. § 2-2-28).

[1252] Minutes of House State Affairs Committee, January 29, 1996, p. 5.

Legislature once makes an apportionment following an enumeration no Legislature can make another until after the next enumeration."[1253]

Plaintiffs analyzed the six legislative contests between 1992-1994 involving Indian and non-Indian candidates in District 28 held under the 1991 plan to determine the existence, and extent, of any racial bloc voting. Indian voters favored the Indian candidates at an average rate of 81%, while whites voted for the white candidates at an average rate of 93%. In all six of the contests the candidate preferred by Indians was defeated.[1254]

White cohesion also fluctuated widely depending on whether an Indian was a candidate. In the four head-to-head white-white legislative contests, where there was no possibility of electing an Indian candidate, the average level of white cohesion was 68%. In the Indian-white legislative contests, the average level of white cohesion jumped to 94%.[1255] This phenomenon of increased white cohesion to defeat minority candidates has been called "targeting," and illustrates the way in which majority white districts operate to dilute minority voting strength.[1256]

[1253] In re Legislative Reapportionment, 246 N.W. 295, 297 (S.D. 1933).

[1254] Emery v. Hunt, Civ. No. 00-3008 (D.S.D.), Report of Steven P. Cole, Tables 1 & 2.

[1255] Id., Tables 1 & 3.

[1256] See Clarke v. City of Cincinnati, 40 F.3d 807, 457 (6th Cir. 1994) ("[w]hen white bloc voting is 'targeted' against black candidates, black voters are denied an opportunity enjoyed by white voters, namely, the opportunity to elect a candidate of their own race").

Before deciding the plaintiffs' Section 2 claim, the district court certified the state law question to the South Dakota Supreme Court. That court accepted certification and held that in enacting the 1996 redistricting plan "the Legislature acted beyond its constitutional limits."[1257] It declared the plan null and void and reinstated the preexisting 1991 plan. At the ensuing special election ordered by the district court, Tom Van Norman was elected from District 28A, the first Indian in history to be elected to the state house from the Cheyenne River Sioux Indian Reservation.

Section 5 Compliance

Quiver v. Hazeltine

In addition to bringing Shannon and Todd counties under Section 5 preclearance, the 1975 amendments of the Voting Rights Act also required eight counties in the state (Todd, Shannon, Bennett, Charles Mix, Corson, Lyman, Mellette, and Washabaugh), because of their significant Indian populations, to comply with the language assistance provisions of Section 203 of the act and provide ballots and/or oral assistance in certain American Indian languages.[1258]

William Janklow, the Attorney General of South Dakota, was outraged over the extension of Section 5 and the language assistance provisions of Section 203 to his state.

[1257] Emery v. Hunt, 615 N.W.2d 590, 597 (S.D. 2000).

[1258] 41 Fed.Reg. 30002 (July 20, 1976).

In a formal opinion addressed to the secretary of state, he derided the 1975 law as a "facial absurdity." Borrowing the States' Rights rhetoric of southern politicians who opposed the modern civil right movement, Janklow condemned the Voting Rights Act as an unconstitutional federal encroachment that rendered state power "almost meaningless." He quoted with approval Justice Hugo Black's famous dissent in South Carolina v. Katzenbach (which held the basic provisions of the Voting Rights Act constitutional) that Section 5 treated covered jurisdictions as "little more than conquered provinces."[1259] Janklow expressed the hope that Congress would soon repeal "the Voting Rights Act currently plaguing South Dakota." In the meantime, he advised the secretary of state not to comply with the preclearance requirement. "I see no need," he said, "to proceed with undue speed to subject our State's laws to a 'one-man veto' by the United States Attorney General."[1260]

Of course, the 1975 amendments were never in fact repealed, but state officials followed Janklow's advice and essentially ignored the preclearance requirement. From the date of its official coverage in 1976 until 2002, South Dakota enacted more than 600 statutes and regulations having an effect on elections or voting in Shannon and Todd Counties, but submitted fewer than 10 for preclearance.

[1259] 383 U.S. 301, 328 (1966).

[1260] 1977 S.D. Op. Atty. Gen. 175; 1977 WL 36011 (S.D.A.G.).

The Department of Justice, which has primary responsibility for enforcing Section 5, was surely aware of the failure of the state to comply with the preclearance requirement. It had, for example, sued the state in 1978 and 1979, for its failure to submit for preclearance reapportionment and county reorganization laws affecting the covered counties.[1261] But after that, the department turned a blind eye to the state's failure to comply with Section 5.

A number of the voting changes which South Dakota enacted after it became covered by Section 5, but which it refused to submit for preclearance, had the potential for diluting Indian voting strength. One was authorization for municipalities to adopt numbered seat requirements. A numbered seat provision, as the Supreme Court has noted, disadvantages minorities because it creates head-to-head contests and prevents a cohesive political group from single shot voting, or "concentrating on a single candidate."[1262] Another unsubmitted change was the requirement of a majority vote for nomination in primary elections for United States senate, congressman, and governor.[1263] A majority vote requirement can "significantly" decrease the electoral opportunities of a racial minority by allowing the numerical majority to prevail in all

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[1261] United States v. Tripp County, South Dakota, Civ. No. 78-3045 (D.S.D. February 6, 1979) (ordering state to submit reapportionment plan for preclearance); United States v. South Dakota, Civ. No. 79-3039 (D.S.D. May 20, 1980) (enjoining implementation of law revising system of organized and unorganized counties absent preclearance).

[1262] Rogers v. Lodge, 458 U.S. 613, 627 (1982).

[1263] Ch. 59, 1966 S.D.Laws 104; ch. 110, 1985 S.D. Laws 295.

elections.[1264] Still another voting change the state failed to submit was its 2001 legislative redistricting plan.

The 2001 plan divided the state into 35 legislative districts, each of which elected one senator and two members of the House of Representatives.[1265] No doubt due to the litigation involving the 1996 plan, the legislature continued the exception of using two subdistricts in District 28, one of which included the Cheyenne River Sioux Reservation and a portion of the Standing Rock Indian Reservation. The boundaries of the district that included Shannon and Todd Counties, District 27, were altered only slightly under the 2001 plan, but the demographic composition of the district was substantially changed. Indians were 87% of the population of District 27 under the 1991 plan, and the district was one of the most underpopulated in the state. Under the 2001 plan, Indians were 90% of the population, while the district was one of the most overpopulated in the state. As was apparent, Indians were more "packed," or over concentrated, in the new District 27 than under the 1991 plan. Had Indians been "unpacked," they could have been a majority in a house district in adjacent District 26.

Indeed, James Bradford, an Indian representative from District 27, proposed an amendment reconfiguring Districts 26 and 27 that would have retained District 27 as majority Indian and divided District 26 into two house districts, one of which, District

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[1264] City of Rome, Georgia v. United States, 446 U.S. 156, 183-84 (1980).

[1265] S.D.C.L. § 2-2-34.

26A, would have had an Indian majority. Bradford's amendment was voted down 51 to 16. Thomas Short Bull criticized the way in which District 27 had been drawn because there were "just too many Indians in that legislative district," which he said diluted the Indian vote. Elsie Meeks, a tribal member at Pine Ridge and the first Indian to serve on the U.S. Commission on Civil Rights, said the plan "segregates Indians," and denied them equal voting power.[1266]

Despite enacting a new legislative plan affecting Todd and Shannon Counties, which were covered by Section 5, the state refused to submit the 2001 plan for preclearance. Alfred Bone Shirt and three other Indian residents from Districts 26 and 27, with the assistance of the ACLU, sued the state in December 2001, for its failure to submit its redistricting plan for preclearance. The plaintiffs also claimed the plan unnecessarily packed Indian voters in violation of Section 2 and deprived them of an equal opportunity to elect candidates of their choice.

A three-judge court was convened to hear the plaintiffs' Section 5 claim. The state argued that since district lines had not been significantly changed insofar as they affected Shannon and Todd Counties, there was no need to comply with Section 5. The three-judge court disagreed. It held "demographic shifts render the new District 27 a change 'in voting' for the voters of Shannon and Todd counties that must be precleared

[1266] Bone Shirt, 336 F. Supp. 2d at 985.

under § 5."[1267] The state submitted the plan to the Attorney General who precleared it, apparently concluding the additional packing of Indians in District 27 did not have a retrogressive effect.

The district court, sitting as a single-judge court, heard plaintiffs' Section 2 claim and in a detailed 144 page opinion invalidated the state's 2001 legislative plan as diluting Indian voting strength. The court found the plaintiffs had established the three Gingles factors. Turning to the totality of circumstances analysis, the court found there was "substantial evidence that South Dakota officially excluded Indians from voting and holding office." Indians in recent times have encountered numerous difficulties in obtaining registration cards from their county auditors, whose behavior "ranged from unhelpful to hostile." Indians involved in voter registration drives have regularly been accused of engaging in voter fraud by local officials, and while the accusations have proved to be unfounded they have "intimidated Indian voters." According to Dr. Dan McCool, the director of the American West Center at the University of Utah and an expert witness for the plaintiffs, the accusations of voter fraud were "part of an effort to create a racially hostile and polarized atmosphere. It's based on negative stereotypes, and I think it's a symbol of just how polarized politics are in the state in regard to Indians and non-Indians."[1268]

[1267] Bone Shirt v. Hazeltine, 200 F. Supp. 2d 1150, 1154 (D.S.D. 2002).

[1268] Bone Shirt, 336 F. Supp. 2d at 1019, 1025-26.

Following the 2002 elections, which saw a surge in Indian political activity, the legislature passed "laws that added additional requirements to voting," including a law requiring photo identification at the polls. Rep. Van Norman said that in passing the burdensome new photo requirement "the legislature was retaliating because the Indian vote was a big factor in new registrants and a close senatorial race." During the legislative debate on a bill that would have made it easier for Indians to vote, representatives made comments that were openly hostile to Indian political participation. According to one opponent of the bill, "I, in my heart, feel that this bill . . . will encourage those who we don't particularly want to have in the system." Alluding to Indian voters, he said "I'm not sure we want that sort of person in the polling place."[1269]

Bennett County did not comply with the provisions of the Voting Rights Act enacted in 1975 requiring it to provide minority language assistance in voting until prior to the 2002 elections, and only then because it was directed to do so by the Department of Justice.

The district court also found "[n]umerous reports and volumes of public testimony documenting the perception of Indian people that they have been discriminated against in various ways in the administration of justice." Thomas Hennies, Chief of Police in Rapid City, has said "I personally know that there is racism

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[1269] Id. at 1026 (comments of Rep. Stanford Addelstein).

and there is discrimination and there are prejudices among all people and that they're apparent in law enforcement." Don Holloway, the sheriff of Pennington County, concurred that prejudice and the perception of prejudice in the community were "true or accurate descriptions."[1270]

The court concluded that "Indians in South Dakota bear the effects of discrimination in such areas as education, employment and health, which hinders their ability to participate effectively in the political process." There was also "a significant lack of responsiveness on the part of elected officials to Indian concerns." Rep. Van Norman said in the legislature any bill that has "[a]nything to do with Indians instantly is, in my experience treated in a different way unless acceptable to all." "[W]hen it comes to issues of race or discrimination," he said, "people don't want to hear that." One member of the legislature even accused Van Norman of "being racist" for introducing a bill requiring law enforcement officials to keep records of people they pulled over for traffic stops.[1271]

Some of the most compelling testimony in the Bone Shirt case, and which was credited by the district court, came from tribal members who recounted "numerous incidents of being mistreated, embarrassed or humiliated by whites." Elsie Meeks, for example, told about her first exposure to the non-Indian world and the fact "that there

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[1270] Id. at 1030.

[1271] Id. at 1041, 1046.

might be some people who didn't think well of people from the reservation." When she and her sister enrolled in a predominantly white school in Fall River County and were riding the bus, "somebody behind us said . . . the Indians should go back to the reservation. And I mean I was fairly hurt by it . . . it was just sort of a shock to me." Meeks said that there is a "disconnect between Indians and non-Indians" in the state. "[W]hat most people don't realize is that many Indians, they experience this racism in some form from non-Indians nearly every time they go into a border town community... [T]hen their . . . reciprocal feelings are based on that, that they know, or at least feel that the non-Indians don't like them and don't trust them."[1272]

When Meeks was a candidate for lieutenant governor in 1998, she felt welcome "in Sioux Falls and a lot of the East River communities." But in the towns bordering the reservations, the reception "was more hostile." There, she ran into "this whole notion that . . . Indians shouldn't be allowed to run on the statewide ticket and this perception by non-Indians that . . . we don't pay property tax . . . that we shouldn't be allowed [to run for office.]" Such views were expressed by a member of the state legislature who said he would be "leading the charge . . . to support Native American voting rights when Indians decide to be citizens of the State by giving up tribal sovereignty and paying their fair share of the tax burden."[1273]

[1272] Id. at 1032, 1036.

[1273] Id. at 1035-36, 1046 (comments of Rep. John Teupel).

Craig Dillon, a tribal member living in Bennett County, told of his experience playing on the varsity football team of the county high school. After practice, members of the team would go to the home of the mayor's son for "fun and games." The mayor, however, "interviewed" Dillon in his office to see if he was "good enough" to be a friend of his son's. Dillon says that he flunked the interview. "I guess I didn't measure up because . . . I was the only one that wasn't invited back to the house after football practice after that." He found the experience to be "pretty demoralizing."[1274]

Lyla Young, who grew up in Parmalee, said that the first contact she had with whites was when she went to high school in Todd County. The Indian students lived in a segregated dorm at the Rosebud boarding school, and were bussed to the high school, then bussed back to the dorm for lunch, then bused again to the high school for the afternoon session. The white students referred to the Indians as "GI's," which stood for "government issue." Young said that "I just withdrew. I had no friends at school. Most of the girls that I dormed with didn't finish high school . . . . I didn't associate with anybody." Even today, Young has little contact with the white community. "I don't want to. I have no desire to open up my life or my children's life to any kind of discrimination or harsh treatment. Things are tough enough without inviting more." Testifying in court was particularly difficult for her. "This was a big job for me to come

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[1274] Id. at 1032.

here today. . . . I'm the only Indian woman in here, and I'm nervous. I'm very uncomfortable."[1275]

The testimony of Young, Meeks, and the others illustrates the polarization that continues to exist between the Indian and white communities in South Dakota, which manifests itself in many ways, including in patterns of racially polarized voting.

The court gave the state an opportunity to submit a new, constitutional apportionment plan, but instead it asked the court to certify the question to the state supreme court whether the legislature had the power to redistrict in a year other than the year following the decennial census. The federal court did so, and the state supreme court held that the legislature was authorized to enact a plan to remedy a violation of Section 2. Despite that ruling, the state informed the federal court that it "respectfully declined to submit a new apportionment plan or a remedial proposal to the Court." Accordingly, the court issued an order in August 2005, which adopted the plan proposed by the plaintiffs.[1276]

As for the approximately 600 other unsubmitted voting changes, Elaine Quick Bear Quiver and several other members of the Oglala and Rosebud Sioux Tribes in Shannon and Todd Counties, and again represented by the ACLU, brought suit against the state in August 2002, to force it to comply with Section 5. Following negotiations

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[1275] Id. at 1033.

[1276] Id., Order of August 18, 2005.

among the parties, the court entered a consent order in December 2002, in which it immediately enjoined implementation of the numbered seat and majority vote requirements absent preclearance, and directed the state to develop a comprehensive plan "that will promptly bring the State into full compliance with its obligations under Section 5."[1277] The state made its first submission in April 2003, and thus began a process that is expected to take up to three years to complete.

Bennett County and the City of Martin

Cottier v. City of Martin

Located in southwestern South Dakota, Martin is a small city of slightly more than 1,000 people, nearly 45% of whom are Native American. The city is the county seat of Bennett County, which was created out of the Pine Ridge Indian Reservation in 1909, and today has a slight Indian population majority (52%). Like many border towns in the American West, Martin has seen more than its share of racial conflict. In the mid-1990s, for example, there were deep racial divisions over the homecoming ceremony at the local high school, in which male students designated as the "Big Chief" and "Little Chief" selected a "Princess" in a mock Indian ceremony while wearing traditional Indian regalia.[1278] Also in the mid-1990s, the federal government successfully sued the local

[1277] Quick Bear Quiver v. Hazeltine, Civ. No. 02-5069 (D.S.D. December 27, 2002), slip op. at 3.

[1278] See generally, Paula L. Wagoner, They Treated Us Just Like Indians: The Worlds of Bennett County,

bank for systematic lending discrimination against Native Americans.[1279] Although Bennett County was required by the 1975 amendments of the Voting Rights Act to provide minority language assistance in voting to Indians, it failed to do so until 2002, and only then because it was directed to do so by the Department of Justice.[1280]

In early 2002, Native Americans organized two peaceful marches in Martin to protest what they viewed as racial discrimination and police brutality by the non-Indian sheriff and his deputies. Just weeks after the 2002 march, the ACLU sued the city on behalf of two Native American voters, alleging the city's recently adopted redistricting plan violated the constitutional principle of one person, one vote.[1281] The city responded by changing its election plan to correct the malapportionment, but it did so in a way that fragmented the Indian community and gave white voters an overwhelming supermajority in all three council wards. The city also refused to reopen the candidate qualification period so that prospective candidates could decide whether to run under the new plan.

After a hearing in May 2002, the district court held on technical grounds that the plaintiffs could not challenge the city's decision not to reopen the candidate

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South Dakota (Lincoln; U.: University of Nebraska Press, 2002).

[1279] United States v. Blackpipe State Bank, No. 93-5115 (D.S.D.).

[1280] Bone Shirt, 336 F. Supp. 2d at 1028.

[1281] Wilcox v. City of Martin, No. 02-5021 (D.S.D.).

qualification period because none of the plaintiffs had expressed an intention to run for office under the new plan. The court did, however, allow the plaintiffs to amend their complaint to allege that the new plan violated Section 2 and the Constitution.

After more than two years of pretrial discovery, the case went to trial in June 2004. The plaintiffs demonstrated, among other things, that no Indian preferred candidate had ever been elected to the city council under the challenged plan. The court nonetheless ruled against the plaintiffs in March 2005, finding on the basis of county elections that the plaintiffs had not shown that whites voted as a bloc usually to defeat the candidates preferred by Indian voters.

The plaintiffs appealed, and the Eighth Circuit heard argument in January 2006.[1282] A decision is expected in early 2006.

Buffalo County

Kirkie v. Buffalo County

One of the most blatant schemes to disfranchise Indian voters in South Dakota was used in Buffalo County. The population of the county was approximately 2,000 people, 83% of whom were Indian, and members primarily of the Crow Creek Sioux Tribe. Under the plan for electing the three member county commission, which had been in effect for decades, nearly all of the Indian

[1282] Cottier v. City of Martin, No. 05-1895 (8th Cir.).

population - some 1,500 people - was packed in one district. Whites, though only 17% of the population, controlled the remaining two districts, and thus the county government. The system, with its total deviation among districts of 218%, was not only in violation of one person, one vote, but had clearly been implemented and maintained to dilute the Indian vote and insure white control of county government.

Tribal members, represented by the ACLU, brought suit in 2003 alleging that the districting plan was malapportioned and had been drawn purposefully to discriminate against Indian voters. The case was settled by a consent decree in which the county admitted its plan was discriminatory and agreed to submit to federal supervision of its future plans under Section 5 of the Voting Rights Act through January 2013.[1283] Following the law suit, the Native American community was able to elect two candidates of choice and thereby secure control of the county commission which had eluded them previously, despite the overwhelming Indian population majority in the county.

Charles Mix County

Weddell v. Wagner Community School District

In March 2002, Native Americans, represented by the ACLU, filed suit challenging the at-large method of electing the board of education of the Wagner

[1283] Kirkie v. Buffalo County, S.D., Civ. No. 03-3011 (D.S.D. February 12, 2004).

Community School District in Charles Mix County as violating Section 2. The parties eventually agreed on a method of elections using cumulative voting to replace the at-large system, and a consent decree was entered by the court on March 18, 2003.[1284] At the next election John Sully, a Native American, was elected to the board of education.

Blackmoon v. Charles Mix County

In 2005, tribal members filed suit against the county alleging that the three county commission districts were malapportioned and had been drawn to dilute Indian voting strength. The total deviation among the districts was 19%, and almost certainly unconstitutional. Each district had a majority white voting age population, despite the fact that Indians were 30% of the population of the county and it was possible to draw a compact majority Indian district.

South Dakota law prohibited the county from redistricting until 2012.[1285] In an effort to avoid court supervised redistricting in the event of a finding of a violation of one person, one vote or the Voting Rights Act, the county asked the state legislature to pass legislation establishing a process for emergency redistricting. The legislature complied and passed a bill, which the governor promptly signed,

[1284] Weddell v. Wagner Community School District, Civ. No. 02-4056 (D.S.D. March 18, 2003).

[1285] SDCL 7-8-10.

allowing a county to redistrict, with the permission of the governor and secretary of state, any time it became "aware" of facts that called into question whether its districts complied with federal or state law.[1286] Despite the fact that the new law applied to every county in the state, including Shannon and Todd, and was thus required to be precleared under Section 5, as well as the consent decree in Quick Bear Quiver, Charles Mix County immediately sought permission from the governor to draw a new plan. The plaintiffs in Quick Bear Quiver then filed a motion for a preliminary injunction before the three-judge court to prohibit the county from proceeding with redistricting absent compliance with Section 5. The court granted the motion.

In a strongly worded opinion, the court noted that state officials in South Dakota "for over 25 years . . . have intended to violate and have violated the preclearance requirements," and that the new bill "gives the appearance of a rushed attempt to circumvent the VRA."[1287] Implementation of the new emergency redistricting bill was enjoined until the state complied with Section 5. The state submitted the redistricting bill for preclearance and petitioned the Supreme Court

[1286] House Bill 1265.

[1287] Quick Bear Quiver v. Nelson, 387 F. Supp. 2d 1027, 1031, 1034 (D.S.D. 2005).

for review. The Department of Justice granted preclearance, and at the Indian plaintiffs' request, the Supreme Court dismissed the case as moot.[1288]

[1288] Nelson v. Quick Bear Quiver, 126 S. Ct. 1026 (2006).

WYOMING

Fremont County

Large v. Fremont County, Wyoming

Fremont County is the site of the Wind River Indian Reservation, home to the Northern Arapaho and Eastern Shoshone Tribes. The reservation spans 2,268,008 acres in Wyoming's Wind River Basin, and is the third largest reservation in the country. The total population of the county is 35,804 persons, of whom 7,113 (19.9%) are Native Americans.

Between 1900 and 1938, the tribes suffered extreme hardship resulting from a prohibition on off-reservation hunting, minimal government and outside investment, meager rationing, and epidemics of tuberculosis and measles which ravaged the population. Conditions improved after 1938, as the result of the reactivation of oil, gas, and uranium mining leases, and better health care. But today, tribal members continue to have a depressed socio-economic status. The unemployment rate of Indians on the reservation is 54%. The percentage of Indian families living below the poverty level is 27%.

The Board of Commissioners consists of five members elected at-large, to staggered, four year terms. Despite the fact that Indian candidates have frequently run for the commission, and received strong support from Indian voters, no Indian

has ever been elected. The constant complaint of tribal members is that Native Americans and the reservation are totally ignored by the all white commission.

In October 2005, members of the Northern Arapaho and Eastern Shoshone Tribes, represented by the ACLU, filed suit challenging the at-large method of elections for the commission as diluting Indian voting strength.[1289] By way of a remedy, the plaintiffs seek a five member commission elected from single member districts, one of which would be majority Indian. The case is in discovery.

Challenging the "Reservation" Defense

Defendants in Indian voting rights cases frequently argue that Indians are mainly loyal to their tribes and simply don't care about participating in elections run by the state. In the lawsuit over the 1996 interim redistricting plan in South Dakota, the state conceded Indians were not equal participants in elections in District 28, but argued it was the "reservation system" and "not the multimember district which is the cause of [the] 'problem' identified by Plaintiffs."[1290] The argument overlooked the fact that the state, by historically denying Indians the right to vote, had itself been responsible for denying Indians the opportunity to develop a "loyalty" to state elections. As the court concluded in Bone Shirt, "the long history of discrimination

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[1289] Large v. Fremont County, Wyoming, No. 05-CV-270J (D.Wyo.)

[1290] Emery v. Hunt, State Defendants' Response, p. 26.

against Indians has wrongfully denied Indians an equal opportunity to get involved in the political process."[1291]

An alleged lack of Indian interest in state elections was also used by South Dakota to justify denying residents of the unorganized counties the right to vote or run for county office. In one case the state argued that a majority of the residents were "reservation Indians" who "do not share the same interest in county government as the residents of the organized counties." The court rejected the defense noting that a claim that a particular class of voters lacks a substantial interest in local elections should be viewed with "skepticism," because "'[a]ll too often, lack of a 'substantial interest' might mean no more than a different interest, and '[f]encing out' from the franchise a sector of the population because of the way they may vote.'" The court concluded that Indians residing on the reservation had a "substantial interest" in the choice of county officials, and held the state scheme unconstitutional.[1292] In a second case, the state argued that denying residents in unorganized counties the right to run for office in organized counties was justifiable because most of them lived on an "Indian Reservation and hence have little, if any, interest in county government." Again, the court disagreed. It held the

[1291] Bone Shirt, 336 F. Supp. 2d at 1022.

[1292] Little Thunder, 518 F.2d at 1255-56.

"presumption" that Indians lacked a substantial interest in county elections "is not a reasonable one."[1293]

The "reservation" defense has been similarly raised - and rejected - in other voting cases brought by Native Americans in the West.[1294] It may be convenient and self-reassuring for a jurisdiction to blame the victims of discrimination for their condition, but it is not a defense to a challenge under Section 2.

Some Indians have undoubtedly felt their participation in state and federal elections would undermine their tribal sovereignty. But the importance of the Indian vote in recent elections has convinced most that there is no downside to participating in elections that affect the welfare of the Native American community.

In the 2002 election in South Dakota for U.S. Senator, Democrat Tim Johnson defeated Republican John Thune by only 524 votes, a margin of victory credited to the increase in the number of Indian voters. The increasing awareness of the importance of the Indian vote is reflected in the dramatic growth in Indian participation in recent elections. In the 2000 presidential election, the average

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[1293] United States v. South Dakota, 636 F.2d at 244-45.

[1294] See, for example, Windy Boy v. County of Big Horn, 647 F. Supp. at 1021 ("[r]acially polarized voting and the effects of past and present discrimination explain the lack of Indian political influence in the county, far better than existence of tribal government"); Cuthair v. Montezuma-Cortez, Colorado School Dist., 7 F. Supp. 2d at 1161 (the alleged "reticence of the Native American population of Montezuma County to integrate into the non-Indian population" was "an obvious outgrowth of the discrimination and mistreatment of the Native Americans in the past"); United States v. Blaine County, Montana, 363 F.3d at 911.) (rejecting the argument that low Indian voter participation was a defense to a vote dilution claim).

turnout for Buffalo, Dewey, Shannon, and Todd Counties in South Dakota was 42.7%. Turnout in the same counties in the 2004 election, which was driven almost exclusively by Indian voters, grew to 65.2%, an increase of 22.5 percentage points, while turnout for the state as a whole grew by only 9.9 percentage points.[1295] Similar increases in Indian turnout were reported for reservation areas in other states, including Arizona, Minnesota, Montana, New Mexico, and Wisconsin.

The Right of Native Americans to Use Tribal Identification to Vote

ACLU of Minnesota v. Kiffmeyer

Shortly before the 2004 presidential election, several Native Americans, joined by the National Congress of American Indians and the American Civil Liberties Union of Minnesota, challenged Minnesota's restrictions on the use of tribal photo identification cards at the polls.[1296] At issue was a statute prohibiting election officials from accepting a tribal identification card, which bore a picture of the member, as identification at the polls unless the tribal member lived on a tribal reservation. After a brief hearing, the district court issued a temporary restraining

[1295] First American Education Project (2004), p. 37.

[1296] ACLU of Minnesota v. Kiffmeyer, 04-CV-4653 (D.Minn.).

order requiring election officials to accept tribal identification cards regardless of whether the member lived on or off their tribal reservation.[1297]

Some tribal identification cards contained addresses and others did not, and some did not have a current address. On October 29, 2004, the court issued a preliminary injunction that tribal identification cards with addresses "are sufficient proof of identity and residency" in order to register and vote. The court further ruled that a tribal ID that did not contain any address or a current address could, consistent with the state's treatment of other photo identification (e.g., passports, military, and student IDs), be used to register to vote if accompanied with a current utility bill.

In 2005, Minnesota amended its registration statute to eliminate the requirement that American Indians live on their tribe's reservation(s) before their tribal ID could serve as a valid ID for voting.[1298] The change in state law resolved one of plaintiffs' claims, but did not resolve the claim that rejecting tribal photo IDs for registration, while accepting other IDs, violated the Equal Protection Clause, as well as the Help American Vote Act (HAVA).

On September 12, 2005, the parties agreed to a final consent judgment, which was approved and entered by the court. After noting that the parties agreed that the

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[1297] Id, Consent judgment of September 12, 2005, p. 4.

[1298] Minn. Stat. § 201.061. subd. 3.

off-reservation issue had been mooted by the legislation, the judgment directed that tribal IDs that did not have an address, coupled with a utility bill, were also sufficient to meet state law standards for registering and voting on election day. It further directed, by agreement, that the Minnesota Secretary of State implement rules that would incorporate the standard of the court's judgment.

Section 5 Should be Expanded in Indian Country

As is apparent from the documentation contained in this report, as well as extensive findings of past and continuing discrimination against Indians in other recently litigated cases, a strong case can be made for expanding Section 5 coverage to ensure the equal right to vote for all Native Americans. One straightforward way of accomplishing this would be to extend Section 5 coverage to all jurisdictions currently required to provide minority language assistance in voting under Section 203 of the Voting Rights Act because of their significant Indian populations.

Eighty-one local jurisdictions in 18 states currently are required to provide language assistance in voting to American Indians.[1299] (See table, Appendix 3) Under the existing Section 5 "trigger," 31 of these jurisdictions are already covered by the preclearance requirement. Some, like Shannon and Todd Counties in South

[1299] Fed. Reg., Vol. 67, No. 144 (July 26, 2002).

Dakota, Jackson County in North Carolina, and Apache, Coconino, Navajo, and Pinal Counties in Arizona, are covered because of their American Indian populations. The remaining jurisdictions are covered because of the presence of non-Indian populations. For example, Indians in Arizona benefit from the protection of Section 5 because the entire state is covered due to its Hispanic population. Indians in Mississippi and Louisiana are protected because those states are covered in their entirety by Section 5 due to the history of discrimination against African Americans. Once a jurisdiction is covered by Section 5, regardless of the reason, the courts have applied the protection of preclearance to all racial or language minorities.[1300]

However, if coverage were extended to all 81 of the Native American language minority jurisdictions, Indians living in an additional 50 counties would enjoy the protection afforded by Section 5. See table 2. Although such an extension would not capture all of the problematic jurisdictions in Indian country, because not all counties with sizeable native populations necessarily meet the criteria for Section 203 coverage, the benefit to Indians would be direct and palpable. More than

[1300] For example, in City of Port Arthur, Texas v. United States, 517 F. Supp. 987, 1023-24 (D. D.C. 1981), aff'd 459 U.S. 159 (1982), where the state was covered because of its Hispanic population, the court denied preclearance to proposed voting changes because of their discriminatory impact on black voters.

doubling the number of local jurisdictions with sizeable Indian populations covered by Section 5 would be a significant improvement.

The expansion of Section 5 in Indian country would promote the fundamental purpose of Section 5, which is "to shift the advantage of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims."[1301] The bulk of litigation enforcing Section 2 in Indian country, particularly since its amendment in 1982, has been brought by the Indian community, but only with the assistance of national civil rights organizations such as the ACLU, the National Indian Youth Council, the Native American Rights Fund, the Indian Law Resource Center, and the Legal Services Corporation. Like other minority groups, local Indian communities simply lack the resources to bring such litigation on their own, and requiring them to enforce the vote denial and vote dilution standards of Section 2 is a prescription for non-enforcement and will only prolong and perpetuate discrimination in voting.

Litigation is not only expensive but can drag on for years. As Attorney General Katzenbach explained to Congress in 1965 in urging passage of the Voting Rights Act, "[l]itigation on a case-by-case basis simply cannot do the job." And even when a case is finally won, "local officials intent upon evading the spirit of the law are adept at devising new discriminatory techniques not covered by the letter of the

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[1301] South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

judgment."[1302] The oversight of state and local voting practices provided by Section 5, as well as its undeniable deterrent effect, argue strongly for the expansion of preclearance in Indian country.

The "inequalities in political opportunities that exist due to vestigial effects of past purposeful discrimination," and which the Voting Rights Act was designed to eradicate, still persist throughout Indian country.[1303] Of all the modern legislation enacted to redress these problems, the Voting Rights Act provides the most effective means of advancing political equality which is essential to realizing the goals of self-development and self-determination that are central to the survival and prosperity of the Indian community in the United States.

[1302] Hearings on S. 1564 before the Senate Comm. on the Judiciary, 89th Cong., 1st Sess., pt. 1, 14 (1965).

[1303] Thornburg v. Gingles, 478 U.S. 30, 69 (1986).

CHALLENGING RESTRICTIVE LEGAL SERVICES CORPORATION REGULATIONS

Texas Rural Legal Aid, Inc. v. Legal Services Corporation

In March 1989, the Legal Services Corporation (LSC) proposed a regulation banning legal services attorneys from participating in redistricting cases approved by their local boards. The LSC considered such representation "political activity," prohibited by federal law and contended that such representation also violated federal law because it would benefit everyone in a district, "result[ing] in an allocation of resources for the benefit of non-eligible persons."

The ACLU filed comments opposing the proposed regulation as contrary to statutory authorization and as an unwarranted effort to limit the rights of poor citizens who were being denied rights protected by the Voting Rights Act. While Congress prohibited legal services lawyers from engaging in political activity, it did not prohibit litigation which affects people's political rights. To the contrary, the LSC statute expressly allowed advice and representation for election activity and voter registration. The ACLU also pointed out that LSC lawyers were valuable resources who knew a given area, including its electoral history and potential witnesses, and that the regulation would prohibit LSC lawyers from assisting other lawyers.

The LSC modified the regulation slightly in response to public opposition by allowing LSC lawyers to work on election cases, but only on their own time and provided no LSC resources were expended. The regulation also allowed a LSC office to spend money on election cases including redistricting cases provided the money did not come from LSC.

In December 1989, three legal services offices - Texas Rural Legal Aid, California Rural Legal Assistance, and North Mississippi Rural Legal Services - sued the LSC challenging the validity of the new regulation.[1304] The ACLU joined with other civil rights organizations as amicus curiae in support of the plaintiffs.

On June 25, 1990, the district court enjoined the enforcement of the regulation ruling that LSC did not have the authority to restrict the type of cases that could be funded by legal services appropriations. Congress, the court said, had already exercised that power by specifying in the statute the types of cases that could be funded.

LSC appealed the decision, and the ACLU participated as amicus curiae on appeal. On August 2, 1991, the court of appeals unanimously reversed, reinstating LSC's ban on use of its funds for election redistricting work.[1305] It concluded LSC had authority to prohibit recipient programs from engaging in redistricting

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[1304] Texas Rural Legal Aid Inc. v. Legal Services Corporation, 740 F. Supp. 880 (D.D.C. 1990).

[1305] Texas Rural Legal Aid Inc. v. Legal Services Corporation, 940 F.2d 685 (D.C. Cir. 1991).

litigation, and the regulations were not inconsistent with the authority of LSC under federal law.

On remand the district court rejected plaintiffs' alternative theories that the regulations were invalid because they were "arbitrary and capricious," and violated the free speech rights of legal services attorneys.[1306] The court left open the door to a First Amendment challenge to the regulations where a lawyer was required by LSC to withdraw from an ongoing redistricting case over a judge's objection.

As a consequence of the appellate court decision, it will be more difficult for poor and minority voters to secure representation to protect their interests in the redistricting process, while the resources of organizations such as the ACLU will be stretched even further.

[1306] Texas Rural Legal Aid Inc. v. Legal Services Corporation, 783 F. Supp. 1426 (D. D.C. 1992).

1189

CHALLENGING FELON DISFRANCHISEMENT

Many of the southern states, as part of the process of White Redemption following the Civil War and Reconstruction, adopted laws disfranchising persons convicted of selected crimes.[1307] The offenses chosen were those blacks were thought more likely to commit, typically petty theft and various domestic crimes. In 1985, in a suit brought by the ACLU, the Supreme Court held that Alabama's law disfranchising those convicted of misdemeanors was unconstitutional because the enactment of the statute "was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect."[1308] Despite their roots in past discrimination and their continuing disproportionate racial impact, modern day felon disfranchising schemes have frequently survived court challenges. But their existence underscores the need to continue the protections afforded racial minorities by the special provisions of the Voting Rights Act.

[1307] For a general discussion of disfranchising schemes adopted in the post-Reconstruction South, see C. Vann Woodward, Origins of the New South, 1877-1913 (Baton Rouge: Louisiana State University Press, 1971). For an assessment of current felon disfranchisement provisions in all 50 states, see, PURGED! How a patchwork of flawed and inconsistent voting systems could deprive millions of Americans of the right to vote, (ACLU, Right to Vote, Demos, 2004).

[1308] Hunter v. Underwood, 471 U.S. 222, 233 (1985).

Florida

Johnson v. Bush

The ACLU, along with several other public interest groups (Demos, Legal Defense Fund, Mexican American Legal Defense and Educational Fund, NAACP, People for the American Way, and The Sentencing Project) filed an amicus brief in the Eleventh Circuit Court of Appeals in Johnson v. Bush[1309] on the side of the appellants, who had argued unsuccessfully in the district court that Florida's felon disfranchisement law violated both the Constitution and Section 2 of the Voting Rights Act. The challenged state law is a permanent ban on voting in state and federal elections by persons convicted of a felony unless they have been pardoned by the governor. The evidence showed that at present 10.5% of voting age blacks in Florida - over 167,000 men and women - were disfranchised as ex-felons, compared with 4.4% of all others.

The challenged law was a 1968 re-enactment of an 1868 constitutional provision that plaintiffs contended had been adopted as part of the state's post-Civil War effort to disfranchise black voters. Amici argued that the district court erred in not requiring the state to demonstrate that passage of the 1968 law was not tainted by its antecedent, and that any connection between the two had been clearly severed.

[1309] 353 F.3d 1287 (11th Cir. 2003).

A panel of the court of appeals reversed and remanded for further proceedings on the grounds that "the record before the district court does not show that the 1968 Constitution gave effect to an independent, non-discriminatory purpose in keeping the felon disfranchisement provision."[1310] The panel also held that the plaintiffs were entitled to a trial on their Section 2 claim. The state filed a petition for rehearing en banc, which was granted. At the rehearing the en banc court upheld the dismissal of the complaint by the trial court, concluding that the statute had been "reenacted in 1968 in the absence of any discriminatory racial bias," and that "Congress never intended the Voting Rights Act to reach felon disenfranchisement provisions."[1311] A petition for a writ of certiorari has been filed by the plaintiffs and is pending.

New Jersey

NAACP v. Harvey

Several civil rights organizations and private plaintiffs, represented by the ACLU, filed suit on January 6, 2004, in state court challenging New Jersey law disfranchising convicted felons on probation or parole.[1312] The law suit makes two

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[1310] Id. at 1301

[1311] Johnson v. Bush, 405 F.3d 1214, 1225, 1232 (11th Cir. 2005).

[1312] New Jersey State Conference/NAACP v. Harvey, No. UNN-C-4-04 (N.J. Sup. Ct. Ch. Div).

basic claims. First, that the state disfranchisement law has a disproportionate impact on African Americans and Hispanics and thus denies them the equal right to vote in violation of the state constitution. Second, that the disproportionate impact of the state disfranchisement law dilutes the voting strength of the minority community, consisting of persons of African American and Hispanic descent, and deprives both communities of the ability to elect candidates of their choice in violation of the state constitution. Plaintiffs also contend that the state's interest in rehabilitation of offenders negates any claim that disfranchisement of persons on probation or parole serves a legitimate governmental purpose or interest.

The state court granted the state's motion for summary judgment and held that the complaint failed to state a claim.[1313] The case is pending on appeal.

New York

Muntaqim v. Coombe

A convicted felon imprisoned in New York brought a pro se complaint alleging that New York law disfranchising incarcerated felons, as well as those on probation or parole, had a disproportionate racial impact and violated the discriminatory results standard of Section 2. The district court dismissed the complaint on the grounds that Section 2 did not apply to state disfranchisement

[1313] Id., Order of July 12, 2004 .

laws, and the court of appeals affirmed.[1314] The court subsequently amended its order, and directed the case be heard by the entire court en banc.[1315] Notably, the court invited a list of public officials and civil rights organizations, including the ACLU, to submit amicus briefs addressing various issue, one of which was whether Section 2 can be constitutionally applied to state disfranchising laws.

The ACLU submitted its brief in January 2005, and argued that: Section 2 has been held to be constitutional and has been repeatedly applied by the courts; the Supreme Court has consistently rejected constitutional challenges to the provisions of the Voting Rights Act; recent so-called "federalism" decisions of the Supreme Court did not cast doubt on the constitutionality of Section 2; the legislative history strongly supports the constitutionality of Section 2; and a state may not disfranchise persons convicted of offenses in a racially discriminatory manner. The case is under advisement by the en banc court.

Washington State

Daniel Madison v. State of Washington

Washington, like most other states, denies convicted felons the right to vote. In Washington, once a person has completed all terms of his sentence, he may

[1314] Muntaqim v. Coombe, 366 F.3d 102 (2d Cir. 2004).

[1315] Id., 396 F.3d 95 (2004).

receive a "certificate of discharge" restoring his civil rights. But to get a certificate, he must also pay "any and all legal financial obligations" (LFOs) of the sentence.[1316] All felony convictions include LFOs, such as a victim penalty assessment (whether or not the crime had a victim), restitution, trial costs including fees for court appointed attorneys and jury fees, costs of incarceration, community supervision, and the cost of putting one's DNA into a law enforcement database. Interest accrues on unpaid LFOs at 12% per year from the date of judgment.[1317] Counties can assess up to $100 per year for handling the collection of LFOs.[1318] Payment schedules, set by the sentencing court or the department of corrections, often include minimum monthly payments that do not cover the rate at which interest accrues.[1319] The variety and size of LFOs continue to increase. For example, the required payment to the victims' compensation fund has risen from $25 in 1977 to $500 today.[1320]

The Washington Department of Corrections estimated that as of December 2001, 46,500 convicted felons remained disfranchised solely because of failure to pay

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[1316] RCW 9.94A.637.

[1317] RCW 10.82.090.

[1318] King's County (Seattle) Superior Court Fees, ch. 4.71.160.

[1319] RCW 9.94A.760, et seq.

[1320] RCW 7.68.035.

LFOs.[1321] According to the state, only 970 certificates of discharge were recorded in 2004, while more than 32,000 felons were released or discharged from supervision that year.[1322]

Five citizens, represented by the ACLU, who have completed their felony sentences except payment of their LFOs, filed suit in Washington state court in 2005, asserting that barring them from voting because of a financial obligation violated the Equal Protection Clause and several provisions of the state constitution.[1323] The lawsuit does not challenge the state's authority to disfranchise convicted felons while they are in prison or under supervision, nor does it challenge the state's ability to impose or collect financial obligations as part a sentence.

LFOs can, and do, operate to disfranchise some felons permanently. For example, plaintiff Beverly DuBois was convicted of manufacture and delivery of marijuana in 2002, and assessed $1,610 in fees. She is unable to work due to a permanent disability resulting from an automobile accident. Her only income is her social security payments. She has made regular payments of $10 a month as ordered by the court, but she now owes $1,895.69.[1324] Plaintiff Donald Madison was

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[1321] Department of Corrections, Agency Fiscal Note for Senate Bill 6519 (2002).

[1322] Daniel Madison v. State of Washington, No. 04-2-33414-4 SEA (October 21, 2004, Superior Court of Kings County, Washington), State's response to interrogatories, April 16, 2005.

[1323] Id.

[1324] Id., Plaintiffs' Motion for Summary Judgment, Declaration of DuBois.

convicted in August 1996, and assessed $483.25 in restitution plus another $100 victim assessment fee. State records show that another $200 in fees were later added. Madison is indigent, receiving only social security payments. And though he pays the $15 a month set by court order, he receives monthly notices from the court that his monthly obligation is $25. In 2004, the issuance of a bench warrant regarding his LFO payments temporarily made him ineligible to receive social security payments.[1325]

Plaintiffs contend that while the Supreme Court has held the Fourteenth Amendment allows states to disfranchise persons convicted of felonies, it does not allow states to condition the right to vote on payment of court costs and other fees. Under the state's scheme, ex-felons who can afford to pay the costs and fees can vote, but those who cannot are disfranchised. States should not be allowed to make economic distinctions affecting the fundamental right to vote.

Plaintiffs and the state have moved for summary judgment. Argument was held before the Superior Court in February 2006, and a decision is pending.

[1325] Id., Plaintiffs' Motion for Summary Judgment, Declaration of Madison.

PUNCH CARDS & VOTING TECHNOLOGY

The problems with punch card voting are numerous and have been well documented, particularly in the wake of the 2000 presidential election. Among other problems, punch cards:

- Don't notify voters of undervotes (failure to vote for an office).
- Allow overvoting (voting more than once for the same office).
- Result in uncounted ballots because of hanging chads and other malfunctions.
- Cause misvoting because of improper alignment of the card in the voting machine.
- Are fragile and deteriorate during any recounting process.
- Rely on antiquated technology and machines that are no longer even being manufactured, with repairs made by scavenging old machines.

Punch card voting discounts the votes of all who use it, but it also has a disparate racial impact. More black voters than white are typically exposed to the technology, producing higher rates of uncounted, or denied, black votes, and inevitably the dilution of minority voting strength as a whole. The need for oversight of new voting technology strengthens the case for continuation of the special provisions of the Voting Rights Act.

Georgia

Andrews v. Cox

The first challenge to punch card voting after the 2000 presidential election was brought in federal court on January 5, 2001, by the ACLU and several private attorneys on behalf of Georgia voters in four counties.[1326] The plaintiffs alleged that the use of punch card machines in some, but not all, of the counties in the state deprived voters of equal treatment under the Fourteenth Amendment and had a disparate racial impact in violation of Section 2 of the Voting Rights Act. The plaintiffs also contended that the erratic and disparate results in counting votes throughout the state, no matter what type of election device was used, violated the Fourteenth Amendment.

The Southern Regional Council in Atlanta did a study of the 2000 presidential election based on data compiled by the Georgia Secretary of State's office.[1327] It showed that there were substantial differences in vote counting depending on the technology used. The punch card system, used in 17 counties and by 30.5% of Georgia voters, performed worst, with 4.67% of the ballots registered as uncounted votes, whether because of undervoting, overvoting, or some other cause. By

[1326] Andrews v. Cox, 1:01-CV-0318- ODE (N.D.Ga.).

[1327] New Evidence of Voting Equipment Disparities in Georgia Counties (Atlanta: Southern Regional Council, 2001).

contrast, the optical scan system used in 66 Georgia counties, resulted in 2.72% of votes being discarded as uncounted votes. All told, the ballots of 94,681 (3.51%) Georgia voters were not counted in the presidential election. Nationally, the average undervote rate was 1.9%.

Punch card voting also had a disparate racial impact because of the greater use by black voters of the unreliable technology. Almost half (46.23%) of Georgia's black voters lived in punch card counties, while less than one-quarter (24.73%) of whites voters did so. Conversely, white voters were 1.5 times more likely than black voters to use the more reliable optical scan systems. Slightly more than one-third of black voters (36.53%) used optical scan compared to more than half of white voters (57.88%).

Punch cards also had a disparate partisan impact. Fifty-five percent of Gore voters cast their votes on punch card systems, compared to 43% of Bush voters. Sixty-one percent of Bush voters used the more efficient optical scan systems, compared to 36% of Gore voters.

Before the case could be tried, the Georgia legislature enacted legislation in 2002, decertifying punch cards, requiring new voting technology, and appropriating money to purchase new touch screen equipment for all 159 counties in the state. Given this development, the voting rights lawsuit was dismissed as moot.

The touch screen equipment, which prohibits overvoting and notifies voters of undervotes, was used for the November 2002 general election, making Georgia the first state to have such uniform equipment in place statewide. The secretary of state reported that the undervote rate in the election for the U.S. Senate was 0.86% and 1.01% in the gubernatorial race. Some undervoting is expected because some voters choose not to vote even in high profile contests. The new voting system at least made it highly likely that undervoting was an intentional choice, not something done by mistake. Given the results of the 2002 election, the new technology was an obvious and significant improvement over the error prone punch cards.

Florida

NAACP v. Harris

The ACLU's second challenge to punch card voting was filed on January 10, 2001, appropriately enough, in Florida. There, a broad coalition of civil rights groups joined forces to represent the NAACP and 24 individual African American and Haitian American voter to challenge the use of punch cards as well as various other practices that resulted in the denial of the right to vote.[1328]

[1328] NAACP v. Harris, No. 01-120-CIV-Gold/Simonton (S.D.Fla.). The organizations involved included: ACLU, NAACP, NAACP Legal Defense and Educational Fund, Lawyers' Committee for Civil Rights Under Law, the Advancement Project, and People for the American Way.

The discriminatory impact of punch card voting in Florida was undeniable. Twenty-five of Florida's 67 counties used punch card machines; the rest used electronic scanners or manually tabulated paper ballots. The percentage of nonvotes (the combination of overvotes and undervotes) in the counties using punch card systems was 3.92%, while the nonvote rate under the more modern electronic systems was only 1.43%. Stated differently, for every 10,000 votes cast, punch card systems resulted in 250 more nonvotes than optical scan systems.

There was also a racial bias in the use of punch cards. According to The New York Times, 64% of Florida's black voters lived in counties that used punch card machines compared to 56% of white voters. Because of the higher error rate of punch card machines, the votes of black voters were disproportionately undercounted, or not counted at all, compared to those of white voters.1329

Other discriminatory practices challenged in the law suit included the wrongful purging of voters (some for allegedly being convicted felons), faulty record keeping, inadequate training of poll workers, inadequate opportunities for casting provisional ballots, inadequate staffing, improper maintenance of voter lists, and the misuse of absentee ballots. The defendants included: the secretary of state of Florida; several other state officials with roles in voter registration and the

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1329 Josh Barbanel and Ford Fessenden, "Contesting the Vote: The Tools; Racial Pattern in Demographics of Error-Prone Ballots," New York Times, November 29, 2000, p. A25.

conduct of elections; the election supervisors of seven counties (Miami-Dade, Broward, Duval, Hillsborough, Leon, Orange, and Volusia) where the most egregious and systematic election irregularities occurred; and the Georgia based company (Choicepoint) which had prepared the faulty list used by local officials to purge alleged felons from the voter rolls.

After the lawsuit was filed, and in response to widespread publicity and criticism of the state's flawed electoral system, the legislature enacted the Florida Election Reform Act of 2001, which, among other things, prohibited further use of punch card voting systems for future elections in Florida. The plaintiffs voluntarily dismissed their punch card claims against the various county defendants as moot after receiving assurance that the replacement systems would not permit overvoting, would notify the voter of any undervotes, would preserve the secrecy of the ballot, would provide a review to enable the voter to validate all ballot choices before finally casting a vote, would provide access to the disabled and the visually impaired, would insure that no votes would ever be lost or altered, and would provide a method of recounting all votes cast in the event of an election contest.

The plaintiffs eventually entered into comprehensive settlement agreements with all defendants, state and county, the last of which were adopted by the district court in September 2002. As part of the agreements the state and counties agreed to take steps to improve how citizens vote in Florida, including making significant

changes in maintaining the central voter database, improving pollworker training and staffing, and implementing alternative voting and voter registration procedures. The agreements also provided for ongoing monitoring by the plaintiffs, as well as mediation, and application to the court to resolve any disputes concerning compliance with the various provisions of the agreements.

Illinois

Black v. McGuffage

The third case brought by the ACLU (in conjunction with its Illiniois affiliate) challenging punch card voting was filed on January 11, 2001, in Illinois, just one day after NAACP v. Harris.[1330] The facts were similar to those in Georgia and Florida. In Illinois, the average residual vote rate in the 2000 presidential election was approximately 3.85%. In Chicago, which used punch cards, the residual vote rate was 7.06%; and in one precinct it was as high as 36.73%. African American and Latino voters had higher exposure to punch cards than other voters. As a result, minority voters were significantly less likely to have their votes counted than non-minority voters.

After extensive litigation, followed by equally extensive settlement discussions ordered by the court and supervised by a magistrate judge, the parties

[1330] Black v. McGuffage, No. 01 C 208 (N.D.Ill.).

reached a settlement agreement. The agreement, which was approved on December 15, 2003, calls for the implementation of new and improved voting technology by March 2006, and the reimbursement of at least some of the plaintiffs costs in bringing suit. In the event defendants fail to implement the new technology by the specified deadline, the agreement provides that the plaintiffs may reinstate the litigation. The court retained jurisdiction until January 21, 2007, to interpret and enforce the settlement agreement.

California

Common Cause v. Jones

In April 2001, the ACLU of Southern California brought a challenge to punch card voting in California on behalf of a broad coalition of plaintiffs that included Common Cause, Southern Christian Leadership Conference of Greater Los Angeles, Southwest Voter Registration Education Project, Chicano Federation of San Diego County, American Federation of Labor and Congress of Industrial Organizations, and eight registered voters. [1331] The plaintiffs alleged that punch card systems were less reliable than other voting systems permitted by the secretary of state, and that individuals living in counties where punch card systems were used were substantially less likely to have their votes counted. There were nine counties that

[1331] Common Cause v. Jones, CV 01-3470 SVW (C.D.Calif.).

used punch cards: Los Angeles, San Diego, San Bernardino, Sacramento, Alameda, Mendocino, Santa Clara, Shasta, and Solano. Together, these counties contained 8.4 million registered voters. The plaintiffs also alleged that counties which choose the punch card system had high racial minority populations in comparison with counties using other voting systems, which caused a denial of the right to vote on the basis of race in violation of Section 2 of the Voting Rights Act.

The defendant secretary of state of California filed a motion to dismiss, which was denied by the district court on August 24, 2001. The court concluded that plaintiffs had stated proper claims under both the Fourteenth Amendment and the Voting Rights Act.

Following the decision of the district court, the secretary of state announced in September that punch cards would be decertified no later than the 2006 elections. The plaintiffs, however, argued that it was feasible for the state to implement new replacement technology in the nine counties by 2004. The district court agreed. In an opinion issued in February 2002, it held that "[it] is plainly feasible for the [punch card counties] to convert to other certified voting equipment by March 2004." Punch card voting in California, as in Georgia and Florida, has now been relegated to history and those minority voters who had been disproportionately impacted – as well as all other voters likely to be adversely impacted – are better off.

Ohio

Stewart v. Blackwell

Voters in Ohio, represented by the ACLU and the ACLU of Ohio, brought a class action lawsuit in 2002, challenging the state's use of punch card ballots and optical scan systems.[1332] Neither of the systems provides notice to voters before they cast a ballot that there may be errors in how they marked the ballot which would prevent it from being counted. Plaintiffs sued the secretary of state, members of the state Board of Examiners for the Approval of Electoral Marking Devices, members of various county boards of elections, and members of various county councils.

Ohio is a large and populous state with a diverse mix of urban and rural voters, and relies predominantly on punch card voting systems. Sixty-nine of the state's 88 counties use punch cards. Those 69 counties include 72.5% of all registered voters in Ohio, and 74% of the state's 11,756 voting precincts. Among the 19 counties that do not use punch cards, two use automatic voting machines, six have electronic voting devices, and 11 use optical scanning equipment.

The suit was brought on behalf of two subclasses of voters. The first asserted that non-notice punch card and optical scan systems violated the Fourteenth Amendment. The second subclass consisted of African American voters from

[1332] Stewart v. Blackwell, No. 5:02 CV 2028 (N.D. Ohio).

Hamilton, Summit, and Franklin Counties who alleged that their votes had a disproportionate risk of being rejected in violation of Section 2.

Through both lay and expert testimony, the plaintiffs demonstrated there was a racial disparity in counted votes due to the flaws of non-notice technology. Election officials in Hamilton County had also repeatedly expressed concern that punch card systems led to disfranchisement of African American voters in the City of Cincinnati. During the 2000 presidential election, punch card voting equipment resulted in greater intra-county racial differences in overvoting and/or undervoting than did notice technology.

The analysis of plaintiffs' expert, Dr. Richard Engstrom, showed that in the 2000 presidential election in Hamilton County, the ballots of African American voters were rejected because of overvoting at nearly seven times the rate of the ballots of non-African American voters. His analysis of undervotes in Hamilton County showed that African Americans undervoted at nearly twice the rate of non-African Americans. Adjusting for the estimated rate of intentional undervotes, African Americans in Hamilton County suffered unintentional undervotes seven and a half times more than non-African American voters did. In Montgomery County, African Americans voter experienced residual voting around two and a half times as often as non-African American voters. Similarly, in Summit County, African American voters experienced overvoting more than nine times the rate of

non-African Americans. African American voters experienced total undervoting almost two and a half times more frequently than non-African Americans and experienced unintentional undervoting more than three times the rate of non-African American voters.

These results were compared with Franklin County, which used Direct Record Electronic (DRE) voting machines, in order to determine if election machinery was the cause of the disparities. DRE devices do not allow overvoting, notify voters when undervoting occurs, and afford voters an opportunity to correct an accidental undervote. There was no racial disparity in the number of overvotes in Franklin County - neither blacks nor whites experienced any overvoting. Moreover, DRE machines greatly reduced the rate of accidental undervoting. For non-African Americans, the rate became negligible, and for African Americans it dropped below 1%, nearly eliminating the racial gap in accidental undervotes.

Plaintiffs' experts testified that racial disparities in the rates of residual votes exist against a backdrop of consistent socioeconomic disparities between African Americans and whites in each of three counties. However, while the racial disparities interacted with error prone punch card machines in Hamilton, Summit, and Montgomery Counties to cause racially disparate rates of residual ballots, the superior voting technology used in Franklin County prevented the socioeconomic disparities from translating into a racial gap in residual ballots. In other words,

unlike the three defendant counties, Franklin County's use of DRE machines overcame ambient racial disparities and ensured that blacks and whites had an equal opportunity to participate in the political process.

The district court ruled against the plaintiffs on December 14, 2004.[1333] The decision was not a surprise. The judge said from the bench during trial that he had been voting on punch cards for 25 years with no problem and that people who had trouble using them were just "stupid." The court also found that because there were majority white counties in the state that also had high residual vote rates, there was no violation of Section 2. The plaintiffs appealed on the grounds that the court made legal errors, including applying a "rational basis" level of scrutiny, finding that the "litigation is an attempt to federalize elections by judicial rule or fiat," and concluding that punch card technology was not in fact "a non-notice system." The court of appeals heard oral argument in December, and a decision is pending.

Washington State

In re Election of Medina City Council Position 4

In a 2003 race for the Medina City Council, a small municipality of just 3,000 people in the Seattle metropolitan area, only one candidate, Daniel Becker, qualified to have his name on the ballot for the general election. But a second candidate Katie

[1333] Stewart v. Blackwell, 356 F. Supp. 2d 791 (N.D. Ohio 2004).

Phelps, qualified to run as a write-in candidate challenging incumbent Becker. The elections used opti-scan equipment, so voters were required to fill in an oval to cast a vote. For a write-in candidate, voters were not only required to write in the candidate's name but also to fill in the oval next to the write-in line for that office.[1334]

The election was extremely close. Becker, whose name was on the ballot, received 441 votes. There were 479 write-in votes, but 29 of these were not initially counted because the voters had not also filled in the oval. Phelps received 438 of the write-in votes that did fill in the oval. A visual inspection showed that she also received the 29 others.

The election was close enough to require an automatic manual recount under state law, however, the county contended that the statute required votes cast without filling in the oval - about which there was no question of the voters' legitimacy or their intent - be discarded. The ACLU filed an amicus brief in superior court in which it argued that the 29 votes should be counted.[1335]

The ACLU argued that the function of the statute was to facilitate the counting of votes by locating write-in ballots. Requiring voters who cast write-in votes to also fill in the oval enables electronic scanners to identify and separate out

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[1334] A state statute provided: "In order for write-in votes to be valid in jurisdictions employing optical-scan mark sense ballot systems the voter must complete the proper mark next to the write-in line for that office." RCW 29.04.180.

[1335] In re Election of Medina City Council Position 4, Superior Court of Washington for Kings County,

ballots which have write-in votes. The write-in votes can then be manually read and counted. But scanners could also look for all ballots on which the oval was not checked for a particular office. That would yield all of the write-in ballots - meeting the function of the statute. It would also separate the ballots on which no vote was cast but that would minimally affect, and certainly not complicate, the vote counting process. In short, the statute serves an administrative purpose, one which speeds and makes vote counting easier. Its purpose was not to put an additional burden on some voters and to discard their votes despite the clarity of their intent to vote for a given candidate.

The ACLU argued further that various state laws and court decisions demonstrated that the overriding principle of state law was to effectuate the intent of the voter. For example, a longstanding principle of Washington case law holds that, "All statutes tending to limit the citizen in the exercise of the right of suffrage should be liberally construed in his favor. ... The important thing is to determine the intention of the voter, and to give it effect."[1336] This suggested that legal votes could only be discarded for specific and important reasons, perhaps for administrative necessity but not administrative convenience. Since counting the votes did not frustrate the purpose of the statute, it should not be read as imposing the loss of

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No. 03-2-41552-9SEA.

[1336] State v. Fawcett, 49 P. 346, 349 (Wash. 1897).

one's vote for failure to adhere to a ballot instruction as long as the voter's intent was clear. Also, relying on decisions of the Supreme Court, the ACLU argued that discarding the votes violated the Fourteenth Amendment because the state's interest was merely one of administrative convenience and was not a sufficient basis for rejecting votes. [1337]

On December 18, 2003, the King County Superior Court entered a one paragraph order, without legal citations, holding that the failure of the election officials to count the disputed ballots was erroneous and directing that "otherwise valid ballots with write ins but without corresponding oval filled in be counted." The effect of the ruling was that Phelps ended up beating incumbent Becker by more than two dozen votes.

[1337] E.g., Burdick v. Takushi, 504 U.S. 428 (1992).

PARTISAN GERRYMANDERING

Pennsylvania

Vieth v. Jubelirer

The ACLU, with the Brennan Center, filed an amicus brief in the Supreme Court on behalf of the appellants in Vieth v. Jubelirer,[1338] a case involving partisan gerrymandering in Pennsylvania. The term "gerrymandering" is generally understood to be a pejorative and has traditionally referred to districts, usually bizarrely shaped, drawn to give an unfair or disproportionate advantage to a particular political group or party.[1339] The practice is named after Governor Elbridge Gerry of Massachusetts, who in 1812, drew a bizarre, salamander shaped district to enhance the political fortunes of the Republican Party.[1340]

The history of redistricting since Gerry is replete with examples of partisan gerrymandering, although modern day computers have greatly facilitated the process. With redistricting software, and with detailed population data furnished by the census down to the block and precinct levels, it is now possible to draw a statewide redistricting plan in a matter of hours. With voter turn-out and election

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[1338] 541 U.S. 267 (2004).

[1339] Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969) (gerrymandering is "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes") (Fortas, J., concurring).

[1340] Davis v. Bandemer, 478 U.S. 109, 164 n.3 (1986) (Powell, J., concurring in part and dissenting in part).

results downloaded into a computer, it is also possible to calculate with a reasonable degree of certainty how districts will perform, i.e., whether they will be safe for Democrats, safe for Republicans, help incumbents stay in office, or likely throw them out.[1341]

In 2002, Democrats in Georgia, who controlled the legislature and the governor's office, used a broad array of redistricting techniques to maximize the opportunities for members of their party. If a seat had to be lost in an area because of a decline in population, the lost seat was one held by a Republican. Republicans were paired where possible to insure that one of them would not return to the legislature. Districts were frequently drawn totally without regard to compactness, but completely with regard to Democratic performance. The state reintroduced multi member districts, a device which had previously been objected to under the Voting Rights Act because it had been used to dilute black voting strength.[1342] For example, rather than drawing four single member districts in an area where one of the districts might elect a Republican, a four member "Democratic performance district" was drawn instead. Black population percentages were reduced as much

[1341] Martinez v. Bush, 234 F. Supp. 2d 1275, 1352 (S.D. Fla. 2002 (three-judge court) ("the 'sea change' of advancing technology . . . has substantially increased the extent of successful political gerrymandering that is achievable") (Hinkle, J., concurring).

[1342] Georgia v. United States, 411 U.S. 526, 529-30 (1973) (affirming an objection by the Attorney General to the state's 1970 house redistricting plan because of its use, inter alia, of multi-member districts).

as possible in majority black districts, without sacrificing black incumbents, to create opportunities for white Democrats in adjoining districts. Democratic leaning districts in the rural and inner-city areas were underpopulated to protect Democratic incumbents and impair the reelection prospects of Republicans. As a three-judge court later concluded, the redistricting was performed "in a blatantly partisan and discriminatory manner, taking pains to protect only Democratic incumbents."[1343]

Democrats in Georgia were not alone in resorting to partisan gerrymandering following the 2000 census. The Republican Party has engaged in similar tactics when presented with the opportunity. In Michigan, the Republican controlled legislature paired six Democrat incumbents in three districts, and as a result sent nine Republicans and only six Democrats to the U.S. House of Representatives after the 2002 election. In the previous Congress, the Michigan delegation to the house was split nine to seven in favor of Democrats.[1344]

In Florida, a court found that in "a state with a notoriously close division of Democratic and Republican voters statewide, 18 of the 25 congressional districts have been drawn to cover areas in which voters have exhibited a clear voting

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[1343] Larios v. Cox, 300 F. Supp. 2d 1320, 1347 (N.D. Ga. 2004). See also, Georgia v. Ashcroft, 195 F. Supp. 2d 25, 96 (D.D.C. 2002) (three-judge court) (noting the "blatantly partisan nature of the redistricting process" in Georgia).

[1344] O'Lear v. Miller, 222 F. Supp. 2d 850, 853 (E.D. Mich.) (three-judge court), aff'd, 537 U.S. 997 (2002); "How to Rig an Election," The Economist, April 27, 2002, at 47.

preference for Republicans."[1345] A similar pattern was found to be present for the Florida state house and senate.

Rep. Thomas M. Davis III, of Virginia, Chair of the National Republican Congressional Committee, said that "Democrats rewrote the book when they did Georgia, and we would be stupid not to reciprocate." Commenting in December 2001, on the upcoming redistricting process in Pennsylvania, Davis promised that redistricting there "will make Georgia look like a picnic."[1346]

In Pennsylvania, Democrats were a slight majority of registered and actual voters, but Republicans were able to draw a plan creating GOP majorities in 13 (68%) of the state's 19 congressional districts.[1347] The new plan split 84 local governments among different congressional districts. By contrast, the 1992 plan split only 27 local governments. Additionally, and according to the district court, nine districts were overpopulated without any legitimate justification, other than maximizing political control.[1348] It is undisputed that Democrats had no input in the final version of the plan, which was signed into law by Governor Schweiker on January 7, 2002.

[1345] Martinez, 234 F. Supp. 2d at 1350-51 (Hinkle, J., concurring).

[1346] Thomas B. Edsall, "Democrats Hold Edge Over GOP in redistricting; Gains Still Possible for Republicans," Washington Post, December 14, 2001, at A55.

[1347] Vieth v. Pennsylvania, 188 F. Supp. 2d 532, 536 (M.D. Pa. 2002) (three-judge court).

[1348] Id. at 536.

The plan, with its significant reduction of Democratic leaning districts, was challenged as being a partisan gerrymander, but the challenge was dismissed on the grounds that as long as the plaintiffs could register and vote and campaign, they were not "shut out of the political process," and as a consequence the challenged plan had "no actual discriminatory effect on them."[1349] The challenged plan was, however, subsequently invalidated on one person, one vote grounds, and a new plan, with the same partisan impact, was enacted by the legislature. [1350] That plan was also challenged as a political gerrymander, and the challenge was again dismissed.[1351]

After the Supreme Court agreed to review the case, amicus filed their brief and urged the court to reverse and adopt a standard that a plan violated the Constitution if it "intentionally creates, or perpetuates, substantial disparities in a voter's or group of voters' influence on the political process." The court, however, by a 5-4 vote splintered among five different opinions, affirmed the decision of the district court. Four members of the court were of the view that partisan gerrymandering claims were not justiciable. The other five members held that such claims were justiciable, but they did not agree on the legal standard for adjudicating

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[1349] Id. at 547.

[1350] Vieth v. Pennsylvania, 195 F. Supp. 2d 672 (M.D. Pa. 2002) (three-judge court).

[1351] Vieth v. Pennsylvania, 241 F. Supp. 2d 478 (M.D. Pa. 2003) (three-judge court).

such claims.[1352] The decision essentially left partisan gerrymandering claims alive in theory but dead in practice.

[1352] Vieth, 541 U.S. at 306.

BALLOT ACCESS CASES

Arkansas

Green Party of Arkansas v. Priest

In 2001, President Bush appointed Representative Asa Hutchinson of Arkansas to lead the Drug Enforcement Administration. Hutchinson's confirmation created a vacancy in Congress, and the Governor of Arkansas called a special election to fill it. The Green Party of Arkansas, which the state had not yet recognized as an official political party, sought to run a candidate in the special election. However, because Arkansas' party recognition procedure made it impossible for political parties to gain recognition in an odd-numbered year, it was impossible for the Green Party to participate in the special election.

The ACLU challenged as unconstitutional Arkansas' party-recognition scheme on behalf of the Green Party and two individual plaintiffs.[1353] Because the Green Party sought to run a candidate in the special election set for November 20, 2001, the plaintiffs also sought a preliminary injunction.

District Judge George Howard, Jr. heard the motion on September 13 and ruled from the bench in the plaintiffs' favor, finding that the state's scheme was not justified by any compelling state interest and failed even the test of rationality. The ruling required Arkansas to give unrecognized political parties a meaningful

[1353] Green Party of Arkansas v. Priest, Civ. No. 4:01-cv-00586-GH (E.D. Ark.).

opportunity to participate in special elections. The Green Party's candidate in the election to fill Hutchinson's seat appeared on the ballot but was soundly defeated.

Georgia

Silver v. Executive Committee of the Democratic Party of Georgia

In 1972, J.B. Stoner, arch-segregationist and perennial candidate, succeeded in getting the federal court to require Georgia to allow candidates an alternative way to get on a ballot other than paying a filing fee. Stoner, a lawyer representing himself, successfully argued that he was financially able to pay the $2,150 filing fee to run for U.S. Senator but was unwilling to do so because he needed the money to conduct his campaign. The court ordered an interim plan into place allowing candidates to qualify by paying a reduced fee, petitioning, or filing an affidavit of poverty.[1354] Some eight years later, Stoner was convicted for participating in the 1958 bombing of Bethel Baptist Church in Birmingham, Alabama.[1355]

The legislature subsequently enacted a statute which gave candidates several ways of getting on the ballot, including by filing a pauper's affidavit. The statute did not, however, provide any standards for determining whether a candidate could not

[1354] Stoner v. Fortson, 359 F. Supp. 579 (N.D.Ga. 1972)(three-judge court).

[1355] "White Supremacist J.B. Stoner Dead at 81," Atlanta Journal Constitution, April 27, 2005.

actually pay a fee or for rejecting an affidavit based on a belief that a candidate could pay the qualifying fee.

In 1986, James Silver sought to file as a candidate in forma pauperis in Georgia's Fourth Congressional District election. The filing fee would have been $2,253. Although the Democratic Party had previously approved pauper applications similar to that of Silver's, it changed its policy and disqualified him. The executive director of the party informed Silver that the rules had changed because of a 1984 state court lawsuit in which the court recommended "that in the future the appropriate officials at least review the information contained in the Pauper's Affidavits in an elementary manner."[1356]

The ACLU filed a suit on behalf of Silver alleging that the new pauper qualification policy of the Democratic Party, as well as the state court order, were unprecleared voting changes subject to Section 5.[1357] The complaint also asserted the new policy would have an adverse racial impact in violation of Section 2 and the Constitution.

The defendants, who were the Democratic Party and the secretary of state, opposed relief. The secretary of state conceded the state court order had not been

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[1356] Tibbs v. Hicks, No. 84-CV-22554 (Superior Court of Clayton County), Order of August 30, 1984, p. 5.

[1357] Silver v. Executive Committee of the Democratic Party of Georgia, No. C86-1628A (N.D. Ga.).

submitted for preclearance, but argued it was "not a change that the State has enacted or sought to administer, and is, therefore, not subject to Section 5 preclearance." In fact, the state had implemented the order by preparing ballots and conducting the primary pursuant to it. Furthermore, the law was clear that state court orders embodying changes in voting are subject to Section 5. Additionally, the secretary argued that if the Democratic Party violated state law concerning paupers' affidavits, "the remedy is not an injunction under Section 5, but an action in State courts to enforce the State statute."[1358]

The court did not credit the secretary's arguments. At a hearing held in chambers 12 days before the primary election, the parties reached an agreement. The court signed a consent order which recited that plaintiff had a substantial likelihood of prevailing on the merits, but that plaintiff may have "rested on his rights to the detriment of the defendants."[1359] Silver's name would be placed on the ballot, but not on the absentee ballots which had already been printed, and many of which already had been mailed to applicants.

Section 5 thus played an important role in blocking the implementation of voting changes that would have restricted access to the ballot, particularly by those

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[1358] Brief of the Secretary of State, p. 6.

[1359] Consent Order of July 31, 1986, p. 1.

with limited financial resources. Silver ran in the Democratic primary, but lost the nomination to Ben Jones.

Duke v. Cleland

David Duke, a member of the Louisiana state legislature and an avowed white supremacist, pursued the Republican Party's nomination for president in 1992, and was on the ballot in Republican primaries in 13 states. Duke had previously run as a Republican candidate for U.S. Senate in 1990, and although he was defeated in the primary, he received 44% of the total vote and a majority of the votes cast by whites. He then ran as a Republican candidate for governor of Louisiana in 1991, and defeated the incumbent Republican, Buddy Roemer in the primary, but lost in the general election, with approximately 39% of the vote.

Under Georgia law, the names of declared candidates "who are generally advocated or recognized in news media throughout the United States as aspirants for that office and who are members of a political party or body which will conduct presidential preference primary," are to be listed on the party's primary ballot.[1360] Duke was listed as a Republican presidential candidate by the secretary of state, but his name was struck from the list by the Republican members of the state's

[1360] O.C.G.A. § 21-2-193.

bipartisan Presidential Selection Committee, which has the duty under state law of selecting candidates to appear on presidential preference primary ballots.

There is no question that Duke was excluded from the Republican Party's ballot because of his political views and beliefs. According to committee member and Republican Party chair Alec Poitevint, there was no room on the Republican ballot for Duke because he "is a fraud and charlatan. . . . By claiming to be a Republican, and by stealing traditional Republican campaign themes like low taxes, welfare reform, and school prayer, Duke is practicing Hitler's 'big lie.'"[1361]

Duke and three Georgia voters, represented by the ACLU, challenged Duke's removal from the Republican ballot as depriving them of the rights of free speech, association, equal protection, to run for office, to vote, and due process in violation of the First and Fourteenth Amendments.[1362] The litigation, which was controversial, took a long and convoluted path through the courts. It was not finally resolved until 1996, long after the presidential preference primary - from which Duke had been excluded - had been held.

The court of appeals concluded that Duke's exclusion from the ballot by the Presidential Selection Committee was state action, but was nevertheless constitutional. It recognized that Duke had a First Amendment right to express his

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[1361] Georgia Republicans, Press Release, December 16, 1991.

[1362] Duke v. Cleland, Civ. No. 1:92-CV-116-RCF (N.D.Ga.).

"political beliefs free from state discrimination no matter how repugnant his beliefs may be to others," but held the Republican members of the state selection committee "did not have to accept Duke as a republican presidential candidate. Duke does not have the right to associate with an 'unwilling partner.'" It said the same analysis applied to Duke's supporters in light of the state's "compelling interest in protecting political parties' right to define their membership."[1363]

Aside from the First Amendment and state action issues raised by the Duke litigation, Duke's success garnering support from white voters underscores the continuing, divisive presence of race in modern day politics, especially in Louisiana and elsewhere he campaigned across the South.

Kansas

Natural Law Party of Kansas v. Thornburgh

In August 2002, the ACLU brought suit on behalf of the Natural Law Party of Kansas in a challenge to Kansas's unique restrictions on political party names.[1364] Under a provision of state law dating back more than 100 years, political parties in Kansas could have only two words in their name, one of which had to be "party." The law was designed by an early Republican legislature to prevent the Democratic

[1363] Duke v. Massey, 87 F.3d 1226, 1234 (11th Cir. 1996).

[1364] Natural Law Party of Kansas v. Thornburgh, Case No. 02-2390-JWL (D. Kan.).

Party from running fusion candidates with the Populist Party under the Democratic-Peoples' Party label. The modern day effect of the law was to diminish the effectiveness of third parties which have more than one word in their name by preventing them from running candidates under their party's name.

The parties agreed to settle the case shortly after it was filed, and the Kansas legislature repealed the law in the spring of 2003.

Minnesota

Candidacy of Independence Party Candidates v. Kiffmeyer

On September 21, 2004, less than two months before the November general election, the Independence Party of Minnesota was notified by the secretary of state that 18 of its 21 legislative candidates, and all 5 of its congressional candidates, would be denied a place on the general election ballot for failure to garner sufficient votes in the primary as required by state law. That same day, party officials filed a petition with the state supreme court seeking an order directing the secretary of state to place names of the party's candidates on the ballot. The court directed that briefs be filed and oral argument heard six days later. The ACLU filed an amicus brief supporting the petition of the Independence Party.[1365] On September 27, the court

[1365] Candidacy of Independence Party Candidates v. Kiffmeyer, 688 N.W. 2d 854 (Minn. 2004).

ordered the candidates' names be placed on the ballot and later issued a full opinion holding the ballot access statutes to violate the First and Fourteenth Amendments.

By any measure, the ballot access statutes were inconsistent and convoluted, and indeed, though the state attorney general defended the secretary's decision, the court noted that the state "acknowledge[d] that there is no rational state purpose served by the primary threshold law."[1366] Under state law, a political party gains "major political party" status by getting 5% of the vote in a general election. This status allows a party's candidates to gain access to the general election ballot without having to undergo a petition process. The party maintains that status until it fails to gain that level of support at another general election.[1367] In 2004, the Independence Party had major party status and could hold primaries to nominate its candidates for the general election ballot.

However, another statute required that in order for a party's nominees to be placed on the general election ballot, a least one of them had to receive a specified threshold vote in the primary balloting. The threshold was that one candidate had to garner votes of at least 10% of the average number of votes the party's candidates received for state constitutional offices in the previous election within the same

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[1366] Id. at 861.

[1367] Minn. Stat. § 200.02, subd. 7 (2002).

electoral area.[1368] For example, if the average votes for governor, etc. received by the Independence Party within a congressional district had been 1,000, and one Independence candidate received at least 100 votes in the primary, then all Independence Party nominees within that district (for state house and senate, county commissioner, etc.) would get their names on the general election ballot.

But state law also provided that if the candidates of a major political party failed to meet the vote threshold standard, they could gain ballot access by a nominating petition process. One of the incongruities of the statutory scheme was that the petition deadline was 56 days before the primary.[1369] In striking down the law, the court noted that incongruity as one aspect of the scheme's irrationality.

The court acknowledged that states have the authority to require candidates to demonstrate some level of support in order to qualify for ballot access. But the court noted the 10% threshold varied by legislative district and by party. For example, in one legislative district the Green Party was able to satisfy its threshold with only 35 votes, but the Independence Party was required to receive over twice as many votes in the same district. The court concluded that "[i]n the absence of any suggested rational purpose for the law, we have no difficulty concluding that . . . the primary threshold law violates petitioners' constitutional rights to vote and to

[1368] Minn. Stat. § 204D.10, subd. 2 (Supp. 2003).

[1369] Minn. Stat. § 204B.09, subd. 1(a)(2002).

associate for the advancement of political beliefs under the First and Fourteenth Amendments."[1370]

Virginia

Libertarian Party of Virginia v. Quinn

In 2001, the ACLU represented the Libertarian Party and six individual plaintiffs in a successful challenge to Virginia's newly enacted ballot labeling procedure.[1371] Among other things, state law required that candidates be identified on the ballot by the name of their party only if they were nominated by a recognized political party. All other candidates, regardless of their actual political affiliation, had to be identified by the term "Independent." The definition of "political party" recognized only the Democratic and Republican parties and left no way for other political parties to gain recognition between election cycles. Thus, there was no way for candidates affiliated with new and emerging (i.e., "unrecognized") political parties to be identified on the ballot by the name of their party.

The plaintiffs alleged that the scheme violated the Constitution, and Virginia's attorney general chose not to defend the law. The parties then signed a consent decree, the terms of which essentially allowed any organized political party to gain

[1370] Candidacy of Independent Party Candidates, 688 N.W. 2d at 861.

[1371] Libertarian Party of Virginia v. Quinn, Civil No. 3:01CV468 (E.D. Va.).

recognition for the purpose of having its candidates appear on the ballot with a proper label.[1372] This made it possible for new and emerging political parties to have their candidates appear on the ballot with an accurate party label, and Libertarian Party candidates for state offices have appeared on the ballot in Virginia with an accurate party label ever since.

[1372] Id., Order of August 15, 2001.

PROTECTING THE RIGHT TO VOTE FOR PERSONS WITH DISABILITIES

Maryland

Poole v. Lamone

In 1994, Maryland approved an optical scan voting system which required poll attendants to read the ballot aloud for a blind person and then mark the ballot on the voter's behalf before inserting it into a scanner. Two years later, William Poole, a blind voter in Baltimore County, and the founder of the advocacy group, Blind Dignity, repeatedly attempted to vote a secret ballot without assistance in the March 5, 1996, presidential primary election but was unsuccessful. He then filed a lawsuit pro se in the Circuit Court of Baltimore County, but the court refused to enjoin his denial of access to voting.

Poole then developed an overlay template which he and two other blind voters were permitted to use during the November 1996, general election, and state election officials provided a braille ballot key that allowed them to vote secretly and independently.

The county then implemented a telephone system for blind voters in November 1998, but Poole refused to use it because of concern that the secrecy of his ballot could not be guaranteed. The county abandoned the phone system for the 2000 elections.

These events, and the issue of the right of voters with visual impairments to cast a ballot secretly and independently, were widely covered in the media. However, in spite of the media attention, Baltimore County did not upgrade its voting systems for blind or visually impaired voters, even though inexpensive systems were available.

In 2001, Maryland enacted legislation that required all jurisdictions to use the same type of voting equipment by 2006. The law explicitly required the new voting systems to provide "[a]ccessibility for all voters with disabilities recognized by the Americans with Disabilities Act."[1373] The law also allowed counties to petition state authorities to delay implementation locally. Because the City of Baltimore had recently purchased new voting equipment that did not facilitate voting by people with visual impairments, and did not want to be forced to replace it immediately, Baltimore petitioned the state for an exemption, but the petition was denied.

In 2002, Poole filed another pro se law suit, this time in federal court, to be allowed to vote without assistance. The federal court issued an order allowing Poole to vote, and invited the ACLU to represent him and expand the claims in the litigation.

The ACLU subsequently filed an amended complaint asserting that the failure of Baltimore County to provide access for the visually impaired violated

Maryland law, the U.S. Constitution, the Americans With Disabilities Act of 1990, and the Rehabilitation Act of 1973.[1374] The National Federation of the Blind of Maryland and others joined as plaintiffs. With 5% of the county's voting age population having some visual impairment, and 1% being blind, the estimated number of affected persons (28,663) in Baltimore County was substantial.

In September 2003, all parties agreed that "the voting system heretofore used in Baltimore County is not adequate to provide blind and severely visually impaired voters with a means of casting a ballot without the assistance of a sighted individual." The parties stipulated that the optical scan voting system certified in 1994, by the State Board of Elections and used from 1996 through 2002, with the limited exceptions of Poole's template system in 1996 and the "phone in" system in 1998, "did not provide a mechanism in Baltimore County that would have allowed blind or severely visually impaired voters to vote without the assistance of a sighted individual." During that period, any blind or severely visually impaired individual "would have had to disclose his or her choices to another person."[1375]

As the trial date of October 2003 approached, the state's planned purchase of an accessible system was delayed by a Johns Hopkins University study that

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[1373] Md. Code Ann., Election Law §9-102d(10).

[1374] Poole v. Lamone, Civ. No. 02-3610-MJG (D. Md.).

[1375] Id., Joint Stipulation of Parties, September 11, 2003.

criticized the new system. The state also commissioned its own security study of the planned system, which led it to decide to purchase electronic voting equipment that could be used by visually impaired persons without the assistance of others. Though the county did not provide relief in time for the March 2004 primary, the equipment was in place for the November 2004 election. The Maryland ACLU continues to monitor implementation on behalf of plaintiffs.

Missouri

Prye v. Blunt

The Missouri state constitution prohibits any person from voting who "by reason of mental incapacity" has a legally appointed guardian.[1376] The ACLU in conjunction with the Bazelon Center for Mental Health Law and the Illinois-based Guardianship and Advocacy Commission, challenged that statute in 2004 on behalf of a plaintiff who required a guardian for certain transactions, but was fully capable of understanding the voting process and voting on his own.[1377]

Born in 1952, the plaintiff was one of the first black students to attend desegregated Central High School in Memphis, Tennessee, in the late 1960s. His commitment to ending discrimination intensified sharply while at Central, after he

[1376] Mo. Const. Art. 8, Section 2.

[1377] Prye v. Blunt, Civ. No. 2:04-CV-04248-ODS (W.D. Mo.).

witnessed some white teachers celebrating the April 4, 1968, assassination of Dr. Martin Luther King Jr. The Lorriane Motel, where Dr. King was shot, was just one mile away from the school. After graduating from Yale University, attending Harvard Law School, and receiving a Master of Laws in taxation from New York University (NYU), the plaintiff taught courses at NYU, Vermont Law School, and the University of Illinois School of Law. At age 49, he was diagnosed with a serious mental illness. A guardian was appointed and in 2004, the plaintiff came to live in Missouri.

The plaintiff challenged the state law which prohibited him from voting, relying upon the Americans with Disabilities Act (ADA), the Rehabilitation Act of 1973, and the Constitution. The Missouri district court acknowledged the importance of voting as preservative of all other rights, but refused to enjoin the state's restriction on voting before the 2004 election. It rejected the plaintiff's equal protection claims and held that the ADA and the Rehabilitation Act did not protect his right to vote. After the election, the plaintiff, joined by the Missouri Office of Protection and Advocacy Services and other individuals, and with the ACLU's assistance, filed an amended complaint, challenging Missouri's blanket denial of the right to vote to persons who have been adjudged incapacitated. Lead plaintiff Prye passed away in January 2006, but the case he initiated is ongoing on behalf of other plaintiffs.

In related work, the ACLU also consulted with the Bazelon Center on similar cases in California, where several veterans' hospitals denied access to representatives of the state protection and advocacy organization who sought to provide voter registration information and assistance to persons with disabilities. Designated protection and advocacy organizations have a statutory obligation to advocate for persons with disabilities, but one California hospital took the position that only the League of Women Voters would be allowed access. After correspondence with hospital administrators, access was granted and no litigation was required.

IMPLEMENTING THE HELP AMERICA VOTE ACT

New Mexico

Kunko v. New Mexico

The ACLU submitted an amicus brief in October 2004, to the New Mexico Supreme Court on behalf of the National Congress of American Indians in a lawsuit challenging a county voter registrar's interpretation of state law implementing the Help America Vote Act (HAVA).[1378] The issue was whether first time voters who registered at a voter registration drive would be required to show identification at the polls on election day. The New Mexico Secretary of State had said the identification requirement would not apply to those voters, but a lone official from Chaves County disagreed.

The ACLU's amicus brief supported the secretary of state's position, arguing that the county official's interpretation would adversely affect Native American voters and would therefore violate Section 2 of the Voting Rights Act. The New Mexico Supreme Court agreed in a decision issued just days before the 2004 election in which it required Chaves County to follow the secretary of state's directions.

[1378] Kunko v. New Mexico, No. 20,888 (N. Mex. Supreme Court).

Rhode Island

Rhode Island Parents for Progress v. Board of Elections

On November 1, 2004, the ACLU filed suit in Rhode Island state court challenging a decision by the State Board of Elections regarding provisional ballots under the Help America Vote Act (HAVA).[1379] The Board of Elections had directed local election officials not to count any provisional ballots cast by first-time voters who registered by mail and who did not show identification at the polls on election day. The ACLU challenged that direction on the grounds that HAVA requires election officials to count provisional ballots notwithstanding a lack of identification if the voter is otherwise qualified to vote under state law.

Shortly after the state court heard the plaintiffs' motion for a temporary restraining order, but before it issued a ruling, the State Board of Elections held an emergency meeting in which it reversed its position and sided with the ACLU.

[1379] Rhode Island Parents for Progress v. Board of Elections, C.A. 04-5902 (R.I. Superior Ct.).

CHALLENGING CENSUS BUREAU DETERMINATIONS

In re the 1990 Census

During its preparations for the 1990 census, the U.S. Census Bureau informed the ACLU and other civil rights organizations that it was considering altering the manner in which it would publish data to be utilized in apportionment. Believing the proposed change would make it significantly more difficult to draw election plans containing legislative districts that would afford minority voters the opportunity to elect their representatives of choice, the ACLU opposed the change and the Census Bureau agreed to abandon the idea.

Beginning in 1950, the Census Bureau suppressed certain information for privacy reasons when data was reported for five or fewer individuals in a reporting jurisdiction. For example, in reporting income levels, if only five white persons in a city had incomes between $25,000 and $50,000, that information was suppressed. As a result, the total number of persons in that category was reported, but the racial breakdown was not. This procedure removed the ability to identify an individual using racial data. In addition, socioeconomic data was only reported jurisdiction-wide - by city or county, for example - and never in smaller units.

In December 1975, Congress enacted legislation requiring the Census Bureau to report data in smaller units called blocks, which contained population data by

race and voting age in order to assist states in apportionment matters.[1380] This information was subsequently used by minority communities and voting rights advocates to determine the feasibility of drawing legislative districts that might better afford minority communities the equal opportunity to participate in the political process. To protect individual privacy, data for race and age from these smaller census block units was never combined with other information such as income, education, occupation, etc. This procedure seemed to work well, as there were no law suits against the Census Bureau for invasion of privacy resulting from the gathering or use of apportionment data.

However, as the 1990 census approached, the bureau proposed, over the opposition of the states, either to suppress the block data if a block had five or fewer persons of one race in it, round the data, or in the bureau's language, "perturb" the data by switching households between blocks.

The ACLU met with census representatives and explained the difficulties that this procedure would pose for the states, as well as for voting rights advocates. While acknowledging the legitimate need to protect privacy, the ACLU explained that the block data would not operate to invade individual privacy. In July 1987, the bureau notified the ACLU that it was abandoning its proposal and that the block data would be reported as it had been in 1980.

[1380] Public Law 94-171

PROTECTING THE RIGHTS OF STUDENT VOTERS

Arkansas

Copeland v. Priest

Just days before the 2002 general election, the ACLU brought a class action lawsuit on behalf of student voters at Ouachita Baptist University in Arkadelphia, Arkansas.[1381] The suit arose out of a state court lawsuit brought by local Democratic Party operatives seeking to disfranchise the mostly conservative students on the grounds that they did not legally "reside" in their college community. With no opposition from the local voter registrar, who was also a Democrat, the state court judge ruled in favor of the Democratic plaintiffs and ordered the registrar to remove from the voter rolls anyone registered at a university address who was not a member of the university staff.

Representing four plaintiffs, including the daughter of Arkansas Governor Mike Huckabee, the ACLU sought a temporary restraining order in federal court to prohibit the registrar from implementing the state judge's order in violation of the students' constitutional rights. The federal court issued an order restoring the students' voting rights less than a week before the election and held a short trial on the merits in mid-November. The court ruled in favor of the plaintiffs in October 2003, and the defendants appealed. The defendants, however, agreed to drop their

[1381] Copeland v. Priest, Civ. No. 4-02-CV-00675 (E.D. Ark.).

appeals in early 2004, and as a consequence the judge's ruling remains in effect.

Maryland

Saunders v. Davis

In 2004, Seth Saunders, a sophomore at the College of William and Mary in Williamsburg, Virginia, tried to register to vote. Following in the political footsteps of Thomas Jefferson, an alumnus of William and Mary, he was one of several students who planned to run for one of three open seats on the five member Williamsburg City Council in an election in May 2004. College students make up about half of the city's population of 12,000.

When he applied to register, Saunders was asked to fill out a special form, the "Williamsburg Voter Residency Questionnaire," which queried students about where their motor vehicles were registered, their community activities, church membership, and whether a parent listed them as a dependent on their income tax forms. The questionnaire was also a new voting practice, but had never been precleared. The city's voter registrar denied Saunders the right to register, saying he should register in Hanover County, where his father, who claimed him as a dependent, resided.

In February 2004, the ACLU filed suit on behalf of Saunders, challenging the city's rejection of voter registration applications from college students as violating

the Constitution, Section 5, and Virginia law.[1382] The suit contended that the city applied standards, as well as a presumption of non-residency, to students that were not applied to other applicants. The court denied relief in time for the May city council elections, precluding Saunders' city council bid, but the registrar permitted Saunders and another student to register in October 2004, and the case was dismissed as essentially moot.

Students have a relatively low level of participation in the electoral process. The registrar's treatment of students in Williamsburg helps explain why.

Texas

Prairie View, Texas Chapter of NAACP v. Kitzman

Prairie View, Texas Chapter of NAACP v. Waller County Commission

Prairie View A & M University (PVAMU) is a historically black college located in Waller County, Texas, and the only college of any description in the county. Prior to the November 2003 election, the Waller County district attorney published a letter to the editor in the local newspaper stating he would prosecute any person who voted in county elections who did not meet his definition of a

[1382] Saunders v. Davis, Civ. No. 4:04 CV 20 (E.D. Va.).

resident.[1383] Illegal voting, he noted, was a felony punishable by 10 years imprisonment and a fine of $10,000. The only group in the county he identified as potential illegal voters were students. "Students," he wrote, "do not, on any campus, have lawful rights to a special definition of 'domicile' for voting purposes."

Efforts to deny students at PVAMU the right to vote were not new to Waller County. In 1979, the Supreme Court had affirmed the decision of a lower court that it was unconstitutional for Waller County election officials to deny PVAMU students the same presumption of residency as other members of the Waller County community.[1384] Despite that decision, PVAMU students were indicted in March 1992, for "illegally voting" based on alleged lack of legal domicile. The charges were eventually dropped and the students' arrest records were expunged.

State officials expressed their disagreement with the Waller County district attorney. The secretary of state issued an advisory opinion on January 22, 2004, that "[n]o more or less can be required of college students during the voting registration process than any other Texas voter." The state attorney general also issued an opinion on February 4, 2004, that "students in Texas may no longer be subjected, whether by statute or practice, to any presumption with respect to 'residence' not also applied to all voters in Texas," and that while local prosecutors may investigate

[1383] Letter to the Editor, Waller Times, November 5, 2003.

[1384] Symm v. United States, 439 U.S. 1105 (1979).

election related crimes, they "are conferred no authority to prevent somebody from registering to vote or to prevent voter registrars from acting on voter registration applications." The Department of Justice weighed in on the matter and wrote a letter to the county district attorney that the "United States fully expects Waller County to abide by the terms and requirements of the permanent injunction ordered by the federal district court."[1385]

Law suits were filed by the local chapter of the NAACP and students at PVAMU, represented by the Lawyers' Committee for Civil Rights Under Law, and assisted by the ACLU, to allow them to vote in the 2004 election "free from threat of improper prosecution."[1386] Given the unambiguous position taken by the state, the law suit was quickly settled and Waller County election officials were required to apply the same presumption of residency to students as to nonstudents. The county district attorney even agreed to have a university student serve as liaison to his office.

[1385] Joseph D. Rich, Chief, Voting Section, to County District Attorney Oliver S. Kitzman, January 24, 2004.

[1386] Prairie View Chapter of NAACP v. Kitzman, No. H-04-459 (S.D.Texas), and Prairie View Chapter of NAACP v. Waller County Commission, No. H-04-0591 (S.D.Texas).

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APPENDIX A
The Permanent & Expiring Provisions of the VRA

Reauthorization of the 1965 Voting Rights Act: What Expires & What Does Not

In August 2007, three crucial sections of the Voting Rights Act will expire unless Congress votes to renew them. These include:

- Section 5 - The requirement that states and local jurisdictions with a documented history of discriminatory voting practices and low voter participation 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 preclearance. A bipartisan Congressional report in 1982 warned that without this provision, discrimination would reappear "overnight."

- Section 4(b) - The specific "coverage formula" which defines which jurisdictions are subject to, or "covered by," Section 5 and other provisions of the act.

- Section 203 - The requirements that certain American citizens who are limited in their ability to speak English can receive assistance when voting.

- The authority to send federal examiners and observers to monitor elections.

These provisions are explained in greater detail, below:

THE VRA 0F 1965: WHAT DOES EXPIRE

1. Section 4 Coverage Formula, 42 U.S.C. § 1973b

Section 4(b) of the Act, 42 U.S.C. § 1973b(b), contains a formula defining jurisdictions subject to, or "covered" by, special remedial provisions of the Act. The special provisions are discussed below. Jurisdictions are covered if they used a "test or device" for voting and less than half of voting age residents were registered or voted in the 1964, 1968, or 1972 presidential elections.[1387] Coverage is determined by the

[1387] The 1975 Amendments to the Voting Rights Act, modified the formula slightly, stipulating that the rates of voter registration and turnout during the 1972 Presidential election should be measuredas a function of voting age citizens, rather than residents.

Attorney General and the director of the census, and is not judicially reviewable. Coverage, and with it the application of the special provisions, is set to expire in August 2007.

2. Section 5 Preclearance, 42 U.S.C. § 1973c

Section 5, 42 U.S.C. § 1973c, know as the "preclearance" requirement, is one of the special provisions of Act whose application is triggered by the coverage formula in Section 4(b). Section 5 requires covered jurisdictions to get approval, or preclearance, from federal authorities (either the attorney general or the federal court for the District of Columbia) prior to implementing any changes in their voting laws or procedures. The jurisdiction has the burden of proving that a proposed change does not have the purpose and would not have the effect of denying or abridging the right to vote on account of race or color or membership in a language minority. Jurisdictions covered by Section 5 are: Alabama, Alaska, Arizona, California (5 counties), Florida (5 counties), Georgia, Louisiana, Michigan (2 towns), Mississippi, New Hampshire (10 towns), New York (3 counties), North Carolina (40 counties), South Carolina, South Dakota (2 counties), Texas, Virginia. U.S. Department of Justice, Section 5 Covered Jurisdictions (January 28, 2002). Section 5, unless extended, will expire in August 2007.

3. Assignment of Federal Examiners and Poll Watchers by the Attorney General, 42 U.S.C. §§ 1973d, e, f & k

The attorney general can assign federal examiners to covered jurisdictions pursuant to Sections 6(b), 7, 9, and 13(a) of the Act, 42 U.S.C. c § 1973d, e, and k, to list qualified applicants who are thereafter entitled to vote in all elections. The attorney general is also authorized by Section 8 of the Act, 42 U.S.C. § 1973f, to appoint federal poll-watchers in places to which federal examiners have been assigned. These provisions are set to expire in August 2007.

4. Bilingual Voting Materials Requirement, 42 U.S.C. § 1973aa-1a

Certain states and political subdivisions are required by 42 U.S.C. § 1973aa-1a to provide voting materials in languages other than English. While there are several tests for "coverage," the requirement is imposed upon jurisdictions with significant language minority populations who are limited-English proficient and where the illiteracy rate of the language minority is higher than the national rate. Covered jurisdictions are required to furnish voting materials in the language of the applicable minority group as well as in English. Jurisdictions required to provide bilingual election procedures for one or more language minorities include the entire states of California, New Mexico,

and Texas, and several hundred counties and townships in Alaska, Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, and Washington. 67 Fed. Reg. 48872 (July 26, 2002). The bilingual voting materials requirement is scheduled to expire in August 2007.

THE VRA 0F 1965: WHAT DOES NOT EXPIRE

1. The Ban on "Tests or Devices," 42 U.S.C. § 1973aa

The Voting Rights Act, 42 U.S.C. § 1973aa, bans the use of any "test or device" for registering or voting in any federal, state, or local election. A "test or device" includes literacy, understanding, or interpretation tests, educational or knowledge requirements, good character tests, proof of qualifications by "vouchers" from third parties, or registration procedures or elections conducted solely in English where a single language minority comprises more than 5% of the voting age population of the jurisdiction. 42 U.S.C. § 1973b(c) and (f)(3). "Language minorities" are defined as American Indians, Asian Americans, Alaskan Natives, and those of Spanish heritage. 42 U.S.C. § 1973aa-1a(e). The ban on tests or devices is nationwide and permanent.

2. The "Results" Standard of Section 2, 42 U.S.C. § 1973

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, prohibits the use of any voting procedure or practice which "results" in a denial or abridgement of the right to vote on account of race or color or membership in a language minority. Section 2 applies nationwide and is permanent.

3. Voter Assistance, 42 U.S.C. § 1973aa-6

By amendment in 1982, the Voting Rights Act, 42 U.S.C. § 1973aa-6, provides that any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or union. The voter assistance provision is nationwide and permanent.

4. Court Appointment of Federal Examiners, 42 U.S.C. § 1973a

In any action to enforce the voting guarantees of the fourteenth or fifteenth amendments a court may, pursuant to Section 3(a) of the Act, 42 U.S.C. § 1973a, appoint

federal examiners to register voters. The federal examiner provision is nationwide and permanent, although it is rarely, if ever, used today.

5. Civil and Criminal Penalties, 42 U.S.C. §§ 1973i and 1973j

Sections 11 and 12 of the Act, 42 U.S.C. §§ 1973i and 1973j, authorize the imposition of civil and criminal sanctions on those who interfere with the right to vote, fail to comply with the Act, or commit voter fraud. These provisions are permanent and nationwide.

6. Pocket Trigger, 42 U.S.C. § 1973a(c)

Section 3(c) of the Act, 42 U.S.C. § 1973a(c), the so-called "pocket trigger," requires a court which has found a violation of voting rights protected by the fourteenth or fifteenth amendments as part of any equitable relief to require a jurisdiction for an "appropriate" period of time to preclear its proposed new voting practices or procedures. The preclearance process provided for in § 1973a(c) is similar to that described in the discussion below of Section 5 of the Act, 42 U.S.C. § 1973c. There is no expiration date for the pocket trigger.

7. Presidential Elections, 42 U.S.C. § 1973aa-1

By amendments in 1970, Section 202, 42 U.S.C. § 1973aa-1, the Act abolished durational residency requirements and established uniform standards for absentee voting in presidential elections. These provisions are permanent and nationwide.

END

APPENDIX B

States Covered Under Special Provisions of the VRA

While most of the Voting Rights Act is permanent, the expiring provisions of Section 5 and Section 203 apply to only certain jurisdictions. A total of 36 states are covered under these provisions, which Congress must vote to renew before they expire in August 2007:

Section 5: Preclearance

Nine States With Complete Coverage:

1. Alabama
2. Alaska
3. Arizona
4. Georgia
5. Louisiana
6. Mississippi
7. South Carolina
8. Texas
9. Virginia

Seven States With Partial Coverage

1. California: 4 out of 58 counties
2. Florida: 5 out of 67 counties
3. Michigan: 2 townships
4. New Hampshire: 10 towns and townships
5. New York: 3 out of 63 counties
6. North Carolina: 40 out of 100 counties
7. South Dakota: 2 out of 66 counties

Section 203: Language Minority Provisions

Approximately 500 Local Jurisdictions Across 31 States are Covered:

Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Washington State.

10 States have overlapping coverage under Sections 5 and Section 203:

1. Alaska
2. Arizona
3. California
4. Florida
5. Louisiana
6. Michigan
7. Mississippi
8. New York
9. South Dakota
10. Texas

For a more detailed listing see: http://www.votingrights.org/states

www.votingrights.org

APPENDIX C

American Indian Populations & Coverage Under Section 5 & 203

TABLE 1: AMERICAN INDIAN LANGUAGES: Currently there are 81 local jurisdictions across 18 states required to provided minority language assistance in voting pursuant to Section 203 because of their American Indian populations. Of these 81 jurisdictions, 31 are already covered under Section 5:

State	Jurisdiction Covered by Sec. 203	Covered by Sec. 5
1. Alaska	6 census areas or boroughs (Bethel, Dillingham, Kenai, North Slope, Wade Hampton, Yukon-Koykuk)	All (6)
2. Arizona	9 counties (Apache, Coconino, Gila, Graham, Maricopa, Navajo, Pima, Pinal, Yuma	All (9)
3. California	2 counties (Imperial and Riverside)	None
4. Colorado	2 counties (La Plata, Montezuma)	None
5. Florida	3 counties (Broward, Collier, Glades)	Collier (1)
6. Idaho	5 counties (Bannock, Bingham, Caribou, Owyhee, Power)	None
7. Louisiana	1 parish (Allen)	All (1)
8. Mississippi	9 counties (Attala, Jackson, Jones, Kemper, Leake, Neshoba, Newton, Scott, Winston)	All (9)
9. Montana	2 counties (Big Horn and Rosebud)	None
10. Nebraska	1 county (Sheridan)	None
11. Nevada	5 counties (Elko, Humbolt, Lyon, Nye, White Pine)	None
12. New Mexico	11 counties (Bernallilo, Catron, Cibola, McKinley, Rio Arriba, San Juan, Sandoval, Sante Fe, Socorro, Taos, Valencia)	None
13. North Carolina	1 county (Jackson)	Jackson (1)

State	Jurisdiction Covered by Sec. 203	Covered by Sec. 5
14. North Dakota	2 counties (Richland and Sargent)	None
15. Oregon	1 county (Malheur)	None
16. South Dakota	18 counties (Bennett, Codington, Day, Dewey, Grant, Gregory, Haakon, Jackson, Lyman, Marshall, Meade, Mellette, Roberts, Shannon, Stanley, Todd, Tripp, Ziebach)	Shannon, Todd (2)
17. Texas	2 counties (El Paso and Maverick)	All (2)
18. Utah	1 county (San Juan)	None
	---	---
	81 Local Jurisdictions	31 currently covered

APPENDIX C - Continued

TABLE 2: List of 50 additional Section 203 American Indian jurisdictions in 12 states that would be covered by Section 5 using Section 203 as a trigger:

State	Counties
1. California	2 counties (Imperial and Riverside)
2. Colorado	2 counties (La Plata, Montezuma)
3. Florida	2 counties (Broward, Glades)
4. Idaho	5 counties (Bannock, Bingham, Caribou, Owyhee, Power)
5. Montana	2 counties (Big Horn and Rosebud)
6. Nebraska	1 county (Sheridan)
7. Nevada	5 counties (Elko, Humbolt, Lyon, Nye, White Pine)
8. New Mexico	11 counties (Bernallilo, Catron, Cibola, McKinley, Rio Arriba, San Juan, Sandoval, Sante Fe, Socorro, Taos, Valencia)
9. North Dakota	2 counties (Richland and Sargent)
10. Oregon	1 county (Malheur)
11. South Dakota	16 counties (Bennett, Codington, Day, Dewey, Grant, Gregory, Haakon, Jackson, Lyman, Marshall, Meade, Mellette, Roberts, Stanley, Tripp, Ziebach)
12. Utah	1 county (San Juan)
	---
	50 Local Jurisdictions

APPENDIX TO THE STATEMENT OF NADINE STROSSEN, "PROMISES TO KEEP: THE IMPACT OF THE VOTING RIGHTS ACT IN 2006"

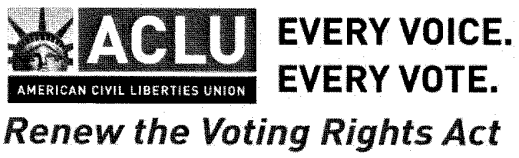
Promises to Keep

The Impact of the Voting Rights Act in 2006

Caroline Fredrickson
Director
Washington Legislative Office

Deborah J. Vagins
Policy Counsel for Civil Rights and Civil Liberties
Washington Legislative Office

March 2006



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Promises to Keep: The Impact of the Voting Rights Act in 2006

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March 2006

INTRODUCTION

August 7, 2006 will mark the 41st anniversary of the Voting Rights Act of 1965 (VRA). The VRA has been one of the most effective civil rights laws in eliminating discrimination and granting access to the ballot box for minorities. By tearing down the barriers to equal opportunity for racial and language minorities in voting, the Act removed the political mechanism that was essential to maintaining the legal structure of segregation. As the Supreme Court has said, the equal right to vote is fundamental because it is "preservative of all rights."[1]

Most of the provisions of the VRA are permanent, but some will expire in 2007 if they are not renewed. The expiring sections include Section 5, which bars certain states or portions of states from changing their election procedures without the advance approval of the U.S. Attorney General or the District Court for the District of Columbia; Section 203, which requires election officials to provide written and oral assistance for certain citizens who have limited English proficiency, and Sections 6–9, which authorize the U.S. Attorney General to appoint examiners and send federal observers to monitor elections when there is evidence to suggest voter intimidation at the polls. This report will examine these provisions, their constitutionality, and their real life impact, as well two U.S. Supreme Court decisions that conflict with congressional intent on Section 5 and severely weaken the effectiveness of the statute.

The VRA not only abolished literacy and other tests, which had been used to deny African Americans and other minorities the right to vote, it also prohibited "covered jurisdictions," now nine states and portions of seven others, from implementing new voting practices without first preclearing them with federal officials. And when the Act was expanded and strengthened in 1975 to include protections for language minorities who had suffered systematic exclusion from the political process, Latinos, Asian Americans, Native Americans and Alaskan Natives also gained new tools to ensure fundamental fairness in the voting process.

As effective as it has been against the discrimination that precipitated its passage, the VRA was never meant to only address those types of barriers to voting. Recognizing that many

[1] *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

states and local governments have continued to erect new barriers to minority political participation, Congress has extended Section 5 coverage three times: in 1970 (for five years), in 1975 (for seven years) and in 1982 (for 25 years). The language minority protections of Section 203 were adopted in 1975 and extended and amended in 1982 and again in 1992. Moreover, Presidents Johnson, Nixon, Reagan, Ford, and George H.W. Bush have supported the enactment or reauthorization of key parts of the law. Most recently, President George W. Bush stated that "many active citizens struggled hard to convince Congress to pass civil rights legislation that ensured the rights of all – including the right to vote. That victory was a milestone in the history of civil rights. Congress must act to renew the Voting Rights Act of 1965."[2]

The VRA has made a tremendous difference in providing representation for previously disfranchised communities. In 1964, there were only approximately 300 African Americans in public office, including just three in Congress. Today, there are more than 9,100 African American elected officials nationwide, with 42 Representatives and one Senator in Congress.[3] The Act has also opened the political process for many of the approximately 6,000 Latino public officials who have been elected and appointed nationwide,[4] including 263 at the state or federal level, 27 of whom serve in Congress. And Native Americans, Asian Americans and others who have historically encountered harsh barriers to full political participation also have benefited greatly.

In the 41 years since the passage of the VRA, it has guaranteed millions of minority voters a chance to have their voices heard in federal, state, and local governments across the country. These increases in representation translate to vital and tangible benefits such as much needed education, healthcare, and economic development for previously underserved communities. Prior to the Act's passage, African Americans had been denied resources and opportunities for many years; their issues were often ignored and discounted. Officials elected because of the equal voting opportunities afforded minority citizens have been more responsive to the needs of minority communities.

Although significant progress has been made as a result of the passage of the VRA, equal opportunity in voting still does not exist in many places. Discrimination on the basis of race and language still deny many Americans their basic democratic rights. Although such discrimination today is often more subtle than it used to be, it must still be remedied to ensure the healthy functioning of our democracy.

This report, therefore, urges Congress to implement the following proposals:

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[2] President George W. Bush, President Celebrates African American History Month at the White House (Feb. 22, 2006) (transcript available at http://www.whitehouse.gov/news/releases/2006/02/20060222-6.html).

[3] Written Testimony of Mark H. Morial, National Urban League, *Oversight Hearing on the Voting Rights Act: To Examine the Impact and Effectiveness of the Act Before the Subcomm. on the Constitution of the H. Comm. of the Judiciary*, 109th Cong. 1 (Oct. 18, 2005), *available at* http://judiciary.house.gov/OversightTestimony.aspx?ID=475.

[4] *Congresswoman Linda Sánchez Speaks Out in Favor of Strengthening the Voting Rights Act* (Oct. 18, 2005), AMERICAN CHRONICLE, Oct. 18, 2005, available at http://www.americanchronicle.com/articles/viewArticle.asp?articleID=3040 [hereinafter *Linda Sánchez Speaks Out*].

1. Renew the Section 5 pre-clearance requirements for 25 years, consistent with the time period adopted with the 1982 extension.

2. Renew Section 203 for 25 years so that citizens who are limited in their ability to speak English can continue to receive assistance when voting.

3. Renew Sections 6–9, which authorize the U.S. Attorney General to appoint federal election observers.

4. Provide for the recovery of expert fees for prevailing parties in voting rights litigation.

5. Clarify the original intent of Congress by addressing two narrowly decided U.S. Supreme Court decisions, which fundamentally weaken the administration of Section 5: *Reno v. Bossier Parish School Board* (2000) and *Georgia v. Ashcroft* (2003).

I. ENACTMENT OF THE VOTING RIGHTS ACT OF 1965

Congress passed the Voting Rights Act in 1965 to enforce rights guaranteed to minority voters nearly a century before by the Fourteenth and Fifteenth Amendments. Although these amendments prohibited states from denying equal protection on the basis of race or color or from discriminating in voting on account of race or color, African Americans and other minorities continued to face disfranchisement in many states. Poll taxes, literacy tests, and grandfather clauses were all used to deny African American citizens the right to register to vote, while all white primaries, gerrymandering, annexation, and at-large voting were used widely to dilute the effectiveness of minority voting strength.

In 1957, Congress passed the first civil rights act since Reconstruction empowering the U.S. Attorney General to bring suits on behalf of citizens denied the right to vote on account of race.[5] These enforcement suits proved to be incredibly time consuming and inefficient – once a practice was declared unlawful, the state and local officials would merely circumvent the court's ruling with a different, but equally discriminatory practice. Case-by-case litigation is costly and time-consuming and the burden of bringing these cases to federal courts was placed on poor and disfranchised minorities. Voting rights advocates began to push for a stronger set of tools, but resistance was fierce.[6]

On March 7, 1965, voting rights supporters planned a march from Selma, Alabama to the state capitol in Montgomery to present then-Governor George Wallace with a list of grievances. They were stopped on the Edmund Pettus Bridge in Selma by state troopers and sheriff's deputies on horseback who, in front of television cameras, attacked the more than 500 demonstrators by firing toxic tear gas, charging the marchers, and beating people with clubs and whips. Scenes of the event were broadcast nationwide and many Americans were outraged.[7]

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[5] 42 U.S.C. § 1971(c).
[6] *See, e.g.,* Victor Rodriguez, *Section 5 of the Voting Rights Act of 1965 after Boerne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769, 777-78 (2003).
[7] *Id.* at 778-79.

On March 15, 1965, President Lyndon Johnson addressed a special joint session of Congress before a national television audience. He delivered what Representative John Lewis has called "the most moving speech ever delivered before the U.S. Congress,"[8] saying:

> I speak today for the dignity of man and the destiny of democracy.... At times history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.... Every device of which human ingenuity is capable has been used to deny this right.... Experience has clearly shown that the existing process of law cannot overcome systematic and ingenious discrimination. No law that we now have on the books...can ensure the right to vote when local officials are determined to deny it.... This time, on this issue, there must be no delay, no hesitation and no compromise with our purpose.... We have already waited a hundred years and more, and the time for waiting is gone.[9]

By August 6, 1965, Congress had passed the Voting Rights Act by an overwhelming majority and President Johnson had signed it into law.[10] The Act represents the most aggressive steps ever taken to protect minority voting rights. The impact was immediate and dramatic. In Mississippi, African American registration went from less than 10% in 1964 to almost 60% in 1968; in Alabama, registration rose from 24% to 57%. In the South as a whole, African American registration rose to a record 62% within a few years of the Act's passage.[11] The Department of Justice (DOJ) has called the Act the "most successful piece of civil rights legislation ever adopted."[12] But the promise of the Act has not yet been fully realized. As this report discusses, progress has been made, but the VRA's protections are still needed today.

II. OVERVIEW OF THE VRA

The VRA contains both temporary and permanent provisions. The temporary, remedial provisions allow for significant federal oversight of state and local voting practices in jurisdictions deemed to have the most persistent and worst histories of voting discrimination. The general provisions of the Act, such as Section 2, are national in scope and permanent.

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[8] Rep. John Lewis, *The Voting Rights Act: Ensuring Dignity and Democracy*, HUM. RTS., A.B.A. SEC. OF INDIV. RTS AND RESP. Vol. 32, No. 2 at 3 (2005).
[9] President Lyndon B. Johnson, Special Message to the Congress: The American Promise (Mar. 15, 1965), *in* 107 Pub. Papers 281, 281-84.
[10] Voting Rights Act of 1965, Pub. L. No. 89-110 (1965) (codified as 42 U.S.C. § 1973 *et seq.*).
[11] Rodriguez, *supra* note 6, at 782.
[12] U.S. Department of Justice, Civil Rights Division, Voting Section, *Introduction to Federal Voting Rights Laws*, http://www.usdoj.gov/crt/voting/intro/intro.htm.

A. Section 2

Section 2 bans race discrimination in voting nationwide and gives victims of discrimination the right to go to court to seek judicial remedies. Specifically, it prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in one of the language minority groups identified in Section 4(f)(2) of the Act.[13] Prior to 1980, courts invalidated election laws proven to be racially unfair without regard to intent. In 1980, in *Mobile v. Bolden*, the Court declared, in a vast departure from earlier established law, that any challenge to an election procedure brought under the Fourteenth or Fifteenth Amendments must include proof that the measure was enacted with the *intent* to discriminate against voters on account of race or color.[14] Under that standard, a plaintiff had to prove that the standard, practice, or procedure was enacted or maintained, at least in part, with an invidious purpose – an onerous and unwarranted standard.

In 1982, Congress reauthorized the VRA and removed this intent requirement by explicitly providing that a discriminatory result constituted a violation of the Act. Congress examined the history of litigation under Section 2 and concluded that the section should be amended to provide that a plaintiff could establish a violation if the evidence established that, in the context of the "totality of the circumstances" of the local electoral process, the standard, practice, or procedure being challenged had the *result* of denying a racial or language minority an equal opportunity to participate in the political process.[15] Now plaintiffs must prove only that a proposed election law or redistricting scheme impaired minority voters' ability to elect representatives of their choice.

B. Section 5: Preclearance Requirements

Recognizing that case-by-case litigation of voting rights abuses under Section 2 alone would not produce the needed widespread reform in those jurisdictions with a history of discrimination, Congress enacted Section 5. Unlike Section 2 of the Act, which applies nationally and permanently, Section 5 is temporary and applies only to those jurisdictions covered by the formula set forth in Section 4(b).[16] Section 5 remains today a powerful tool for deterring state and local governments from adopting discriminatory election procedures and preventing discriminatory practices that have been adopted from being enforced.

Section 5 requires that a covered jurisdiction that wishes to enact any "standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" [or November 1, 1968 or November 1, 1972, depending on the effective date of coverage for that jurisdiction] must seek approval, known as "preclearance," from the U.S. Attorney General or from a three-judge panel of the United States District Court for the District of Columbia.[17] Approval is dependent on the jurisdiction's ability to show that the proposed changes do "not

[13] 42 U.S.C. § 1973(a).
[14] 446 U.S. 55 (1980).
[15] 42 U.S.C. § 1973(b).
[16] 42 U.S.C. § 1973b(b).
[17] 42 U.S.C. § 1973c.

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]."[18]

To comply with Section 5, a jurisdiction must submit its proposed changes to the DOJ in writing.[19] The Attorney General then has sixty days to object to the change. If no objection is filed, after sixty days, the jurisdiction can implement its change. If the Attorney General does object, the jurisdiction may seek preclearance from a three-judge panel of the District Court for the District of Columbia, which will make a determination without deference to DOJ's findings. An appeal from the district court's decision goes directly to the Supreme Court.[20]

In 1976, the Supreme Court established that under Section 5, a jurisdiction is required to ensure "that no voting-procedure changes would be made that would lead to a retrogression in the position of minorities with respect to the effective exercise of the franchise."[21] In other words, the Court held that voting changes could not weaken the voting power of the minority electorate. More recently, as discussed below, two Supreme Court decisions have narrowed the operation of Section 5 and the meaning of "retrogression."[22] While these decisions have weakened Section 5, it remains an important tool for ensuring full minority participation in jurisdictions with a history of voting rights abuses. In light of these decisions, however, it is imperative that during this reauthorization process, Section 5 be renewed and restored to its original vitality.

Preclearance acts as an essential deterrent because it puts modest safeguards in place to prevent backsliding. As a bipartisan report by the U.S. Senate in 1982 said, without Section 5, many of the advances of the past decade could be wiped out overnight with new schemes and devices.[23] Many scholars and voting rights experts agree that without the deterrent effect of Section 5, there will be little to prevent covered jurisdictions from imposing new barriers to minority participation.

1. The Section 5 Trigger Formula

Section 4(b) of the VRA sets out the coverage formula, also known as the "Section 5 trigger formula," for determining which jurisdictions are subject to Section 5's provisions. In the original 1965 Act, the formula applied Section 5 to any state or political subdivision of a state[24] which (1) maintained a test or device[25] on November 1, 1964, and where (2) less than 50 percent

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[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Beer v. United States*, 425 U.S. 130, 141 (1976).
[22] *See Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) ("Bossier II").
[23] S. REP. NO. 97-417, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 187.
[24] The Act defines "political subdivision" as "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. § 1973*l*(c)(2).
[25] "Test or device" is a term of art and includes any requirement that a registrant or voter must "(1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." 42 U.S.C. § 1973b(c).

of the voting age population was registered to vote on November 1, 1964 or voted in the 1964 presidential election.[26] Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina and Virginia, plus 26 counties in North Carolina, three counties in Arizona, one county in Idaho and one county in Hawaii were covered by the 1965 Act.[27] Alaska, the Arizona counties, and the Idaho county successfully petitioned the District Court for the District of Columbia for termination of coverage almost immediately.[28]

In 1970, Section 5 was extended for five years and the coverage formula was amended to add jurisdictions that maintained a test or device on November 1, 1968 and where less than 50 percent of the voting age population were registered on November 1, 1968 or voted in the 1968 presidential election. This extension resulted in partial coverage of ten states: Alaska, Arizona, California, Connecticut, Idaho, Maine, Massachusetts, New Hampshire, New York and Wyoming.[29] Half of these states, Connecticut, Idaho, Maine, Massachusetts and Wyoming, filed successful termination suits.[30]

In 1975, Section 5 was extended for seven more years and the coverage formula was again extended to include jurisdictions that maintained a test or device on November 1, 1972 and where less than 50 percent of the citizen voting age population was registered on November 1, 1972 or voted in the 1972 presidential election. In addition, the provisions were broadened to address discrimination against members of "language minority groups." [31] The definition of "test or device" was amended to include the provision of election information, including ballots, only in the English language, in states or political subdivisions where more than five percent of voting age citizens are members of a single language minority.[32] This had the effect of covering Alaska, Arizona and Texas in their entirety, and parts of California, Florida, Michigan, New York, North Carolina and South Dakota.[33]

Finally, in 1982, Section 5 was extended for an additional 25 years. Congress conducted a thorough fact-finding process to evaluate whether covered jurisdictions had progressed sufficiently in the area of voting rights to warrant removal from Section 5 coverage, but no changes to the coverage date or formula were made.[34]

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[26] 42 U.S.C. § 1973b(b).
[27] U.S. Department of Justice, Civil Rights Division, Voting Section, *Section 4 of the Voting Rights Act*, http://www.usdoj.gov/crt/voting/misc/sec_4.htm (last visited Feb. 28, 2006) [hereinafter *Section 4 of the Voting Rights Act*]; *see* 30 Fed. Reg. 9897 (Aug. 7, 1965).
[28] Coverage could be terminated prior to the 1982 amendments by obtaining declaratory judgment that tests or devices had not been used during the proceeding five years to abridge the franchise on racial grounds.
[29] *Section 4 of the Voting Rights Act*, *supra* note 27; *see* 36 Fed. Reg. 5809 (Mar. 27, 1971).
[30] *Section 4 of the Voting Rights Act*, *supra* note 27.
[31] "Language minority groups" are defined as persons who are of American Indian, Asian American, Alaskan Natives, or Spanish heritage. 42 U.S.C. § 1973*l*(c)(3).
[32] 42 U.S.C. § 1973b(f)(3).
[33] *Section 4 of the Voting Rights Act*, *supra* note 27; *see* 40 Fed. Reg. 43,746 (Sept. 23, 1975).
[34] For a full list of currently covered jurisdictions, *see* U.S. Department of Justice, Civil Rights Division, Voting Section, *Section 5 Covered Jurisdictions*, http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited Feb. 28, 2006).

2. The Bailout Provisions

As part of the 1982 amendments and extension of the Act, Congress established a new "bailout" mechanism to allow covered jurisdictions to remove themselves from Section 5 coverage if they meet certain requirements. A state or political subdivision wishing to bail out must obtain a declaratory judgment from a three-judge panel of the United States District Court for the District of Columbia. In order to bail out, a jurisdiction must show that during the preceding ten years: (1) no test or device has been used for the purpose or with the effect of abridging or denying the right to vote on account of race or color or language minority status; (2) all changes affecting voting have been submitted for preclearance before implementation; (3) no submission has been the subject of an objection by the U.S. Attorney General or the denial of declaratory judgment from the United States District Court for the District of Columbia; (4) there have been no adverse judgments in lawsuits alleging voting discrimination; (5) there have been no consent decrees or agreements that resulted in the abandonment of a discriminatory voting practice; (6) there are no pending lawsuits that allege voting discrimination; and (7) federal examiners have not been assigned to the jurisdiction.[35]

In addition to these factors, the jurisdiction must demonstrate that it has "eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process" and that it has "engaged in constructive efforts to eliminate intimidation and harassment of persons exercising [protected voting] rights."[36] The jurisdiction must also present evidence of minority electoral participation.[37] Finally, it must show it has not engaged in any other discriminatory practices regarding voting that violate any laws, unless the jurisdiction can establish the violations were "trivial, were promptly corrected, and were not repeated."[38]

If the court finds these conditions have been met, the jurisdiction can bail out from Section 5 preclearance requirements. To make it easier for states and their subdivisions to obtain bailout, the U.S. Attorney General is authorized to consent to an entry of judgment granting bailout.[39] The court, however, retains jurisdiction over the action for ten years during which it may reopen the matter in response to an allegation of discriminatory conduct that would have barred bailout originally.[40] This "probation" period serves to ensure that released jurisdictions do not immediately turn back to discriminatory practices.

Unlike the bailout provision of the original Act, the amended procedure allows individual political subdivisions within a covered state to bail out independently. Currently, ten jurisdictions in Virginia have taken advantage of the bailout provisions, despite Virginia's continued coverage.[41]

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[35] 42 U.S.C. § 1973b(a)(1)(A)-(E).
[36] *Id.* § 1973b(a)(1)(F).
[37] *Id.* § 1973b(a)(2).
[38] *Id.* § 1973b(a)(3).
[39] *Id.* § 1973b(a)(5).
[40] *Id.* § 1973b(a)(9).
[41] Written Testimony of Bradley J. Schlozman, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, *Oversight Hearing on the Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 3 (Oct. 25, 2005), *available at* http://judiciary.house.gov/media/pdfs/schlozman102505.pdf; *see also* The NATIONAL COMMISSION ON THE VOTING

C. Section 203: Language Minority Assistance

It is crucial that every citizen in our democracy have the right to vote. Yet having that right is meaningless if certain groups of people are unable to accurately cast their ballot at the polls. Voters may be well informed about the issues and candidates, but to make sure their vote is accurately cast, language assistance is necessary in certain jurisdictions with concentrated populations of limited English proficient voters.

Section 203 requires certain jurisdictions to make language assistance available at polling locations for citizens with limited English proficiency.[42] When Congress amended the VRA in 1975 by adding Section 203, it found that through the use of various practices and procedures, such as English only ballots, "citizens of language minorities have been effectively excluded from participation in the electoral process. . . .The 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. . . ."[43] Specifically, Section 203 provides: "Whenever any State or political subdivision [covered by the section] provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language."[44] This provision was extended during the 1982 reauthorization and then again in 1992.

Section 203 applies to four language groups: Americans Indians, Asian Americans, Alaskan Natives, and those of Spanish heritage.[45] A community with one of these language groups will qualify for language assistance if: (1) more than 5% of the voting-age citizens in a jurisdiction belong to a single language minority community and have limited English proficiency (LEP); or (2) more than 10,000 voting-age citizens in a jurisdiction belong to a single language minority community and are LEP; and (3) the illiteracy rate of the citizens in the language minority is higher than the national illiteracy rate.[46] After the most recent Census Department determination on July 26, 2002, five states are covered in their entirety (Alaska for Alaskan Natives, and Arizona, California, New Mexico, and Texas for Spanish heritage) and 26 states are partially covered.[47]

Even though most new citizens are required to speak some basic English, they still may not be sufficiently fluent to participate fully in the voting process without this much-needed

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RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982-2005, at 29 (2006) [hereinafter PROTECTING MINORITY VOTERS].

[42] Registration and voting materials for all elections must be provided in the minority language as well as in English. Oral translation during all phases of the voting process, from voter registration clerks to poll workers, also is required. Jurisdictions are permitted to target their language assistance to specific voting precincts or areas. 42 U.S.C. § 1973aa-1a(c); *see* U.S. Department of Justice, Civil Rights Division, Voting Section, *Minority Language Citizens: Section 203 of the Voting Rights Act*, http://www.usdoj.gov/crt/voting/sec_203/203_brochure.htm (last visited Feb. 28, 2006) [hereinafter *Minority Language Citizens*].

[43] 42 U.S.C. § 1973aa-1a(a); *see also Minority Language Citizens*, *supra* note 42.

[44] 42 U.S.C. § 1973aa-1a(c); *see also Minority Language Citizens: supra* note 42.

[45] 42 U.S.C. § 1973*l*(c)(3).

[46] 42 U.S.C. § 1973aa-1a(b)(2)(A).

[47] *See* Voting Rights Act Amendments of 1992, Determinations Under 203, 67 Fed. Reg. 48,871 (July 26, 2002) (to be codified at 28 C.F.R. pt. 55).

assistance. In addition, there are many other citizens who were born in the United States but who still may not be English proficient. The failure of certain jurisdictions to provide adequate education to non-English speaking minorities is well documented in legal decisions and in quantitative studies of educational achievement. Ballots, particularly long ballot initiatives like those we have seen recently in states such as California and Washington, can be very complicated, even for those fluent in English. Language assistance helps certain citizens navigate through a plethora of issues on the ballot. It has also encouraged language minority groups to register and vote and participate more fully in the political process.

Moreover, language assistance is not costly. According to two Government Accountability Office studies, as well as independent research conducted by scholars, language assistance, when implemented properly, accounts only for a small fraction of total election costs.[48] The most recent studies show that compliance with Section 203 accounts for approximately 5% of total election costs.[49]

D. Federal Examiners and Observers Provisions

Other sections of the Act set to expire in August 2007 provide for the appointment of federal examiners and observers to monitor elections. Sections 6–9 enable the U.S. Attorney General to certify jurisdictions for examiner/observer coverage.[50] Where there is reason to suspect discrimination exists in a covered jurisdiction, the Attorney General may assign federal examiners to help register voters in covered jurisdictions, certified by him or court order, and assign federal observers to monitor election activities.

While registration examiners have not been used recently, most likely because of protections afforded by other legislation, polling place observers continue to play a vital role in DOJ's enforcement efforts. Since passage of the VRA, DOJ has regularly sent observers and monitors around the country to protect election-related civil rights. Since 1966, roughly 25,000 observers have been deployed in over 1,100 elections.[51] Since the last reauthorization, from July 1982 through December 2005, DOJ has used observers approximately 600 times in elections in jurisdictions covered by the Section 4 coverage formula and certified for examiners and observers by the Attorney General.[52] The importance of the observer program is further highlighted by DOJ's routine use of its own civil rights personnel to serve as civil rights monitors in jurisdictions not covered by the VRA. During the 2004 election, DOJ sent approximately 840 federal observers and more than 250 Civil Rights Division personnel to 86

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[48] *See* Written Testimony of Dr. James Thomas Tucker, Attorney, Ogletree Deakins, P.C., *Oversight Hearing on the Voting Rights Act: Section 203 – Bilingual Election Requirements, Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 4-6 (Nov. 9, 2005), *available at* http://judiciary.house.gov/media/pdfs/tucker110905.pdf.

[49] *Id.* at 6.

[50] 42 U.S.C. §§ 1973d–1973g.

[51] PROTECTING MINORITY VOTERS, *supra* note 41, at 32.

[52] *Id.* at 4, 61. Note that some of the 622 instances of DOJ's use of observers were pursuant to federal court orders.

jurisdictions in 25 states to monitor the general election to ensure voters were free from harassment, intimidation or other illegal activity.[53]

The presence of polling place observers deter election officials and others from engaging in discrimination and harassment and allow for the remedying of any discrimination that does occur. Observers are required to report any problems to the Civil Rights Division attorney who accompanies and supervises each observer team, and the attorney in turn can immediately discuss the problem with local officials. If not resolved on site, problems can be the subject of discussion between DOJ and local officials, and observers can also provide the factual foundation for litigation under the VRA if necessary. Accordingly, there is a strong case for extending the observer program and the vital protections it affords.

E. The Impact of Sunsetting The Expiring Provisions

As will be discussed more below, the expiring provisions continue to be particularly important in combating voting discrimination. Unfortunately, their full promise has not yet been achieved. In addition to providing a remedy for changes that deprive minority communities of the opportunity to elect representatives of their choice, these provisions act as a deterrent to state and local government officials from enacting voting changes with the potential to harm minority voters. During the recent hearings before the U.S. House of Representatives on the reauthorization of the VRA, the President of the Georgia Association of Black Elected Officials testified that "[h]ad there been no federal intervention in the voting and redistricting process, it is unlikely that most southern states would have ceased their practices of denying and diluting black vote."[54] He went on to state that "[t]he fact that Section 5 has been so successful is one of the arguments in favor of its extension, not its demise."[55]

Removal of federal oversight would doubtlessly result in significant erosion in minority voting rights. Even with the VRA as a deterrent, Georgia, for example, has received a total of 80 objections under Section 5 since the last extension of the preclearance requirement.[56] Moreover, Georgia has recently enacted a virtual poll tax, one of the most blatant measures adopted after Reconstruction to suppress the African American vote. Last year, the state enacted a photo ID requirement for voting in person, for which voters who did not already have a government photo ID such as a driver's license would need to pay $20 to obtain one.[57] This fee-for-voting would deter or prevent a disproportionate number of minorities, elderly, and the disabled from voting. A challenge to the photo ID law was filed by a coalition of groups, including the ACLU, and on October 18, 2005, the federal court enjoined its use on the grounds that it was in the nature of a

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[53] Press Release, U.S. Department of Justice, *Department of Justice Announces Federal Observers to Monitor General Election in States Across the Country* (Oct. 28, 2004), *available at* http://www.usdoj.gov/opa/pr/2004/October/04_crt_725.htm.

[54] Written Testimony of Representative Tyrone L. Brooks, Sr., Georgia House of Representatives, District 63, President, Georgia Association of Black Elected Officials, *Oversight Hearing on the Voting Rights Act: Section 5—Judicial Evolution of the Retrogression Standard Before the Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1 (Nov. 9, 2005) [hereinafter Brooks Testimony], *available at* http://judiciary.house.gov/media/pdfs/brooks110905.pdf.

[55] *Id.*

[56] *Id.* at 2.

[57] H.B. 244 , 2005 Ga. Gen. Assem., Reg. Sess., § 24 (Ga. 2005).

poll tax, as well as a likely violation of the Equal Protection clause.[58] Without voting protections (and even with them, as we see here), states covered by Section 5 could easily revert to their old, bad habits.

Certainly, preclearance must also continue in order to avoid ploys like the last-minute cancellation of a municipal election in Kilmichael, Mississippi, by the all-white town council. During the local elections of 2001, an unprecedented number of African Americans candidates were running for office. Three weeks before the election, however, the town's mayor and the all white five-member Board of Aldermen canceled the election.[59] In objecting to this change under Section 5, the Justice Department found that the cancellation occurred after Census data revealed that African Americans had become a majority in the town.[60] The town did not reschedule the election, and DOJ forced it to hold one in 2003 whereupon Kilmichael elected it first African American mayor, along with three African American aldermen.[61] The episode is a reminder that the VRA remains a hedge against discriminatory election practices and that protections are still needed to ensure racial equality in voting. These temporary provisions are just as necessary today as they have been in the past and should not be allowed to sunset.

III. THE VRA IS A MODEL OF REMEDIAL LEGISLATION

Each time the VRA has been renewed, Congress has assessed the extent of current, ongoing voting violations in those covered jurisdictions and reached the conclusion that the VRA should be extended. And although some continue to question the constitutionality of the VRA, it has been repeatedly upheld as within Congress' authority and as a model of remedial legislation. Because the testimony and reports submitted during the recent congressional hearings on the VRA demonstrate a continued pattern of voting discrimination by the covered jurisdictions between the 1982 extension and now, the preclearance provisions and the coverage formula meet the Supreme Court's requirements for congruent and proportional remedial legislation. In order to pass constitutional muster again, the provisions should be extended temporarily and narrowly tailored to address the harms they were designed to cure.

A. Affirming the Constitutionality of the Act

The core constitutional issue raised by the Voting Rights Act concerns the extent to which Congress is authorized by the Fourteenth and Fifteenth Amendments to circumscribe state action in an attempt to cure discrimination.[62] Not surprisingly, when the Act was first passed in 1965, it was immediately challenged as exceeding the powers of Congress and encroaching on an area traditionally reserved for the states. In *South Carolina v. Katzenbach*, South Carolina

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[58] *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1376-77 (N.D. Ga. 2005).
[59] Melanie Eversley, *For a Mississippi Town, Voting Rights Act Made a Change*, USA TODAY (Aug. 5, 2005) [hereinafter *For a Mississippi Town*].
[60] Stuart Comstock-Gay, Executive Director, National Voting Rights Institute, *Ballot Box Equality* (August 5, 2005), *available at* http://www.tompaine.com/articles/2005/08/05/ballot_box_equality.php [hereinafter *Ballot Box Equality*].
[61] *For a Mississippi Town*, *supra* note 59.
[62] *See generally* Rodriguez, *supra* note 6, at 784-92.

challenged provisions of the Voting Rights Act on "the fundamental ground that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution."[63] The Supreme Court, however, in an 8-1 decision, upheld the constitutionality of the statute, and of Section 5 in particular. The opinion, written by Chief Justice Warren, found that Congress was acting well within its authority because Congress "has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."[64] The scope of Congress' power under Section 5 of the Fourteenth Amendment, as reaffirmed by the Court in *South Carolina v. Katzenbach*, was considered broad:

> 'Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.'[65]

Noting that the "constitutional propriety of the [Act] must be judged with reference to the historical experience which it reflects," the Court seemed particularly persuaded by the "great care" with which Congress had explored the problem of voting discrimination.[66] The Court observed that Congress had determined that its earlier attempts to remedy the "insidious and pervasive evil" of racial discrimination in voting had failed because of "unremitting and ingenious defiance of the Constitution" in some parts of this country.[67] In response, Congress had acted properly under the reconstruction amendments to create a "complex scheme of stringent remedies aimed at areas where voting discrimination has been the most flagrant."[68]

Applying the broad test for appropriate remedial legislation to the specific provisions of the VRA, the Court found that Section 5 was a proper exercise of congressional power because Congress had found either substantial evidence of voting discrimination or "fragmentary evidence of recent voting discrimination" in the covered areas.[69] The covered jurisdictions all shared characteristics that indicated a history of discriminatory disfranchisement of voters: some sort of test or device and a voting rate well below the national average.[70] While preclearance was admittedly "an uncommon exercise of congressional power... the Court... recognized that exceptional conditions can justify legislative measures not otherwise appropriate."[71]

Since *South Carolina v. Katzenbach*, the Court has consistently ruled that a long history of racial discrimination in voting justifies a certain degree of intrusion into state and local affairs, and that Section 5 represents a valid means of combating discrimination. In *Katzenbach v.*

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[63] *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966).
[64] *Id.* at 326.
[65] *Id.* at 327 (quoting *Ex Parte Virginia*, 100 U.S. 339, 345-46 (1880)).
[66] *Id.* at 308.
[67] *Id.* at 309.
[68] *Id.* at 315.
[69] *Id.* at 329-330.
[70] *See id.* at 330.
[71] *Id.* at 334.

Morgan, another challenge to Congress' authority to pass such remedial legislation, Justice Brennan, writing for a unanimous court, upheld the constitutionality of the VRA, finding that Congress has a broad scope of authority in Fourteenth Amendment legislation.[72]

In 1980, the Supreme Court again upheld the constitutionality of Section 5 and sustained Congress' 1975 determination to extend Section 5 for an additional seven years as a "both unsurprising and unassailable" exercise of Congressional power.[73] In *City of Rome v. United States,* the City of Rome, Georgia argued that the VRA was unconstitutional because it exceeded Congress' power to enforce the Fifteenth Amendment by prohibiting both purposeful discrimination as well as practices with a discriminatory effect.[74]

The Court rejected this argument and upheld the Act's provisions as "an appropriate method of promoting the purposes of the Fifteenth Amendment."[75] Justice Marshall, writing the opinion of the Court, found that "Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent."[76]

The Court in *Rome* went on to reject the assertion that the VRA violates the principles of federalism. The Court cited *Fitzpatrick v. Bitzer* for the proposition that the "[p]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'"[77] Significantly, the Court noted that the Fourteenth and Fifteenth Amendments were "specifically designed as an expansion of federal power and an intrusion on state sovereignty."[78]

Finally, the appellants in *Rome* argued that the Voting Rights Act had outlived its usefulness. Justice Marshall declined "this invitation to overrule Congress' judgment that the 1975 extension was warranted."[79] Instead, the Court found that the considerable history of racism in the country, and the efficacy of the VRA, affirmed Congress' decision to extend the Act as "plainly a constitutional method of enforcing the Fifteenth Amendment."[80]

B. *City of Boerne v. Flores* and Congress' Remedial Power

As discussed, the Warren and Burger Courts interpreted Congress' Fourteenth Amendment enforcement power broadly. Since the last challenge to the Act, however, the Court has become increasingly responsive to objections to Congress' power under the Fourteenth Amendment. Beginning in the mid-1990s, the Rehnquist Court struck down a series of statutes aimed at combating discrimination as exceeding Congress' enforcement power, significantly limiting Congress' ability to act under Section 5 of the Fourteenth Amendment.[81] Even as it did

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[72] *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966) (quoting *Ex Parte Virginia*, 100 U.S. at 345-46).
[73] *City of Rome v. United States*, 446 U.S. 156, 182 (1980).
[74] *Id.* at 173.
[75] *Id.* at 177.
[76] *Id.*
[77] *Id.* at 179 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).
[78] *Id.*
[79] *Id.* at 180.
[80] *Id* at 182.
[81] Given their parallel language and history, the Court has "always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments as coextensive." *Lopez v. Monterey County*, 525 U.S. 266,

so, however, the Court has reemphasized that the remedies offered by the VRA are congruent and proportional to the harm of the voting discrimination at issue and a proper exercise of congressional power. The ACLU's recommendations for renewing the VRA remain well within Congress' authority to reauthorize.

The first in this series of cases was *City of Boerne v. Flores*, in which the Court struck down the Religious Freedom Restoration Act (RFRA) on the ground that it exceeded Congress' enforcement power under the Fourteenth Amendment.[82] RFRA was designed to prohibit the government from substantially burdening a person's exercise of religion unless the government could demonstrate the burden was narrowly tailored to further a compelling government interest.[83] The Court in *Boerne* acknowledged that the enforcement provision is a "positive grant of legislative power to Congress" and that the power should be understood in broad terms.[84] The Court, however, distinguished between Congress' "remedial" power to enforce the Amendment's provisions, and "the power to decree the substance of the Fourteenth Amendment's restrictions on the States."[85]

While the line between remedial action and substantive interpretation is admittedly not easy to discern, the Court proposed a test to be applied in determining whether Congress is acting appropriately under the Fourteenth Amendment: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."[86] Because the Court found that Congress had not compiled enough evidence of laws that discriminated on the basis of religion, RFRA was not a congruent or proportional response to constitutional violations by the states and, therefore, exceeded Congress' enforcement power.[87]

Significantly, the Court in *Boerne* explicitly pointed to the Voting Rights Act as an example of appropriate congruent and proportional remedial action by Congress. The Court, in distinguishing it from inappropriate acts, cited several features of the VRA. These included the finite term of the Act's duration, its limited geographical scope, the vast record of abuse between the original enactment and the 1982 reauthorization as reflected in the congressional record, and the bailout provisions, which all tended to ensure the VRA's reach is limited only to those cases in which constitutional violations are most likely.[88] While the Court was quick to say that "termination dates, geographic restrictions, or egregious predicates" are not required for Fourteenth Amendment legislation, they are highly relevant, for "limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5" of the Fourteenth Amendment.[89]

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294 n.6 (1999). Therefore, an analysis of the Court's jurisprudence related to § 5 of the Fourteenth Amendment is critical to analyzing the constitutionality of the Voting Rights Act, enacted under § 2 of the Fifteenth Amendment.

[82] *City of Boerne v. Flores*, 521 U.S. 507, 511, 532-36 (1997).

[83] *Id.* at 515-16.

[84] *Id.* at 517-18.

[85] *Id.* at 519.

[86] *Id.* at 520.

[87] *Id.* at 535.

[88] *Id.* at 533.

[89] *Id.* at 533.

C. Application of Section 5 is a Congruent and Proportional Remedy

The Supreme Court has found the Section 5 coverage formula to be "rational in both practice and theory" because it was based on evidence of recent, actual discrimination in those jurisdictions that employed tests and devices related to voting.[90] Based on the record that has been developed in advance of this reauthorization process, application of Section 5 and its coverage formula remain a congruent and proportional remedy.

Congruence requires an agreement "between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented."[91] Preclearance under Section 5 is a remedy clearly in agreement with preventing ongoing voting rights abuses. Considering numerous factors, including the Court's previous characterization of voting rights abuses as a "blight" that had "infected the electoral process in parts of our country for nearly a century," the availability of the bailout option, and the extensive record of continued voting rights discrimination developed in the congressional record to-date, a limited-duration extension of preclearance is in congruence with the ongoing danger of voting discrimination.[92]

The proportionality prong of the *Boerne* test looks at whether a relationship of comparative magnitude exists between the proposed remedy and the supposed remedial objective so that it can be "understood as responsive to, or designed to prevent, unconstitutional behavior."[93] Essentially, the proportionality inquiry looks to whether there is a tight fit between the injury and the remedy that serves to ensure Congress is truly acting in a remedial capacity, and not substantively determining what actions are unconstitutional.

The Court has pointed to several features of Section 5 that ensure a proportional relationship: Section 5 does not apply nationally, but only to limited jurisdictions with histories of voting discrimination; the bailout provisions allow jurisdictions to avoid preclearance by demonstrating they have been free of discriminatory voting practices; and Section 5 contains a sunset provision under which it lapses without reauthorization from Congress. Each of these features, and their effect on the constitutionality of a reauthorized Section 5 containing the same coverage formula, are discussed below, in turn.

1. The coverage formula limits the geographic scope of preclearance obligations.

The coverage formula was meant to reach jurisdictions with a long and pervasive history of voting discrimination against minorities – using objective factors to identify places where minority voter participation was low and where discriminatory tests or devices had been employed. It was not meant to take a snapshot of a particular date, but to protect against the risk of ongoing violations. The date in the formula itself was merely a starting point used to identify appropriate jurisdictions for the preclearance remedy. In 1982, Congress was concerned with evidence of continuing violations between 1975 and 1982, when determining whether preclearance was still an appropriate remedy. Congress' role in 1982, as it will be now, is to

[90] *South Carolina v. Katzenbach*, 383 U.S. at 330.
[91] *Boerne*, 521 U.S at 530.
[92] *Id.* at 525 (quoting *South Carolina v. Katzenbach*, 383 U.S. at 308).
[93] *Id.* at 532.

assess the situation in covered jurisdictions and determine whether evidence exists to support continuing coverage. As indicated in the report of the ACLU's Voting Rights Project summarizing its litigation docket of 300 voting rights cases filed since the 1982 reauthorization, substantial evidence exists to show that covered jurisdictions are still engaged in actions that bar full minority participation in elections.[94] Considering the magnitude of the harm, Section 5 and the coverage formula remain a necessary and proportional remedy. If certain jurisdictions, however, can demonstrate that they should no longer be covered, bailout remains the appropriate way to grant relief.

2. The bailout provision prevents overly broad application of the preclearance obligations

Congress designed the bailout formula to allow a jurisdiction that could sufficiently demonstrate it had taken steps to remove bars to minority enfranchisement, to be released from preclearance. The bailout formula ensures that the coverage formula is not overbroad or otherwise constitutionally flawed.

While few jurisdictions have bailed out, the mechanism may be operating just as Congress planned[95] – more jurisdictions are unable to utilize it simply because they do not qualify. If many of the covered jurisdictions cannot show they have complied with the Act and have been free of objections, discriminatory tests and devices, this is strong evidence that they remain the appropriate targets for federal oversight and that the coverage formula is adequately tailored towards remedying unconstitutional behavior. Similarly, if these jurisdictions are unable to demonstrate that they have eliminated the procedures that limited or diluted minority participation or that they have made constructive efforts to increase minority participation, the historical pattern of discrimination has not reached its end. According to J. Gerald Hebert, the legal counsel to *all* of the jurisdictions that have bailed out since the 1982 amendments to the VRA, the factors to be demonstrated are easily proven for those jurisdictions that do not discriminate in their voting practices.[96]

3. The sunset provision addresses a temporary problem.

The temporary nature of the preclearance provisions has helped to ensure the proportionality of the VRA.[97] The sunset provisions have required Congress to revisit the situation faced by minority voters in covered jurisdictions on four occasions since 1965. The continuing inclusion of expiration dates in Section 5 further emphasizes that Congress' intention was to assess continuing violations at the time of renewal, not to merely reassess the situation at the date of coverage.

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[94] *See generally* AMERICAN CIVIL LIBERTIES UNION, VOTING RIGHTS PROJECT, VOTE: THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT – VOTING RIGHTS LITIGATION, 1982-2006 (March 2006) [hereinafter ACLU VRP Report].

[95] S. REP. NO. 97-417, at 60 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 239.

[96] Written Testimony of J. Gerald Hebert, Former Acting Chief, Civil Rights Div., U.S. Dep't of Justice, *Oversight Hearing on the Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 3 (Oct. 20, 2005), *available at* http://judiciary.house.gov/media/pdfs/herbert102005.pdf.

[97] *See, e.g., Boerne*, 521 U.S. at 533.

Because of the bailout option, jurisdictions are really only covered as long as they need to be, after which they can take the necessary action to remove themselves from federal oversight. If Section 5 sunsets in 2007, however, the formerly covered jurisdictions will have escaped the need to make a showing of real progress. This was certainly not Congress' intent in 1982, and would defeat the goal of the preclearance provisions to bring about demonstrable reform in areas with a history of voting discrimination. Extending the VRA now, with another sunset date of 25 years, is necessary so that "recalcitrant" jurisdictions can make the changes they need to show that coverage should be discontinued.[98]

D. Congressional Record Necessary to Reauthorize the VRA

The Court's recent cases regarding Congress' evidentiary burden are crucial to understanding what lawmakers must do in order to enact an extension of the Act that will withstand constitutional scrutiny. While the Court has notably raised the evidentiary burden in recent years, there are indications that the burden may be lessened when Congress is dealing with legislation that either addresses a fundamental right or is subject to a heightened level of scrutiny.

In *Board of Trustees of University of Alabama v. Garrett*, the Supreme Court indicated that it will search for an adequate evidentiary record to support federal legislation that restricts state actions deemed unconstitutional.[99] The majority pointed to the VRA as an example of the ideal legislative record needed to support remedial legislation. The Court felt that in 1965 and again in 1982, "Congress documented a marked pattern of unconstitutional action by the States" that was sufficient to convince the Court that the VRA was a justified response to the states' actions.[100]

Notably though, the Court has indicated that it will require less of an evidentiary record when Congress is dealing with a fundamental right or a suspect class. In the two most recent Supreme Court cases on congressional power under the Fourteenth Amendment, *Nevada Department of Human Resources v. Hibbs* and *Tennessee v. Lane*, the Court appears to have backed away from the heightened evidentiary standard imposed in *Garrett*, and may be willing to accept a lower evidentiary showing to support remedial legislation.[101]

Hibbs involved a challenge to the Family and Medical Leave Act of 1993 (FMLA). The Court held that Congress' evidence of gender-based discrimination by the states was sufficient to justify imposing the FMLA's mandatory leave policy on the states.[102] The Court distinguished *Garrett* by noting that a higher level of scrutiny applies in assessing the constitutionality of legislation that addresses discrimination on the basis of gender, as is the case in *Hibbs*, compared to rational basis scrutiny that applied in *Garrett*.[103] Given this distinction, the Court felt that "it

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[98] S. REP. NO. 97-417, at 60 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 239 (stating that the sunset date was expected to affect only "those recalcitrant jurisdictions which have not bailed out by then.").
[99] 531 U.S. 356 (2001).
[100] *Id.* at 373-74.
[101] *Tennessee. v. Lane*, 541 U.S. 509 (2004); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).
[102] *Hibbs*, 538 U.S. at 735.
[103] *Id.* at 735.

was easier for Congress to show a pattern of state constitutional violations."[104] Because race discrimination is subject to strict scrutiny, an even higher level of scrutiny than applies to gender discrimination, it follows that the Court could find it even easier for Congress to show the requisite pattern of racial discrimination required to uphold Section 5.[105]

While an extensive evidentiary record for reauthorization in 2006 exists, the reasoning of the Court in *Tennessee v. Lane* also seems to indicate that an evidentiary burden to support Section 5 could be further lessened from *Garrett*. *Lane* concerned the question of whether a state could be subject to a suit for damages under Title II of the ADA for failing to make its courthouses reasonable accessible to the disabled. Because access to the courts was so fundamental, the Court upheld Congress' power to make the states liable in this context stating that "the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent."[106] Without explicitly acknowledging it was doing so, the Court upheld the statute with a significantly lower evidentiary showing than it had required in *Garrett*, allowing anecdotal evidence and evidence of non-state governmental actors to be considered.[107] Significantly, the Court allowed the use of older evidence of discrimination – most of the evidence was gathered in the 1980s and 1990s, while the decision was in 2004. What flows from the logic of *Lane* is that Congress may rely upon general evidence of racially discriminatory conduct in voting by state, county, and city officials in covered jurisdictions to support renewed preclearance, especially where Congress seeks to protect fundamental rights.

While multiple reports and testimony submitted as part of this reauthorization process abound with evidence of vote dilution, racial bloc voting, intimidation, and discrimination, in reauthorizing the VRA, the *Hibbs* and *Lane* approach makes logical sense. The greater the harm Congress seeks to address, the greater the power Congress has to remedy that harm. Interference with a fundamental right, such as voting, should impart Congress with significant leeway to determine how best to prevent and remedy the damage. Congress has access to a very detailed record of voting abuses since 1982 more than sufficient to meet the *Boerne* test, yet the *Lane* and *Hibbs* indicate the Court may be willing to relax the application of the *Boerne* test when a fundamental right is at stake. [108]

It is clear that Section 5 put us on the path to equality. We have started down a road of great promise, but have not gone far enough to abandon a protection that is responsible for that progress and a deterrent against jurisdictions backsliding. Much work remains.

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[104] *Id.* at 736.

[105] *Id.* (stating that in *South Carolina v. Katzenbach* the Court upheld the VRA, "[b]ecause racial classifications are presumptively invalid" and therefore "most of the States' acts of race discrimination violated the Fourteenth Amendment.").

[106] *Lane*, 541 U.S. at 523.

[107] *Id.* at 524-29.

[108] It should be noted, however, that since both *Hibbs* and *Lane*, the composition of the Court has changed. Justice O'Connor's vote may be the key to the "heightened scrutiny – lower evidentiary standard" theory, making the outcome uncertain in light of her recent replacement by Justice Alito.

IV. IMPACT OF THE VRA: CONTINUING PROBLEMS AND CONTINUING NEED

There are numerous and ongoing violations of the Act which hurt minority and limited English proficient communities. Recent violations of the expiring provisions of the VRA highlight their ongoing need. A vital and robust VRA, giving these communities the ability to elect candidates of choice, is critical in order for these communities to have fair and responsive representation.

A. Impact of Section 5 and Elected Officials' Responsiveness to Underserved Communities

Voting discrimination persists; Section 5 violations are not a thing of the past. For example, since 1968, when DOJ first began to interpose objections to voting changes, more than 1,000 objections have been lodged.[109] The majority of these objections, 56%, have been lodged since the last reauthorization in 1982.[110] Between January 1, 2000 and January 1, 2005, the U.S. Attorney General interposed 40 objections, 37 of which involved a change made by a local entity.[111] A single objection can protect thousands of voters from unlawful discrimination for many years. The ACLU alone has filed 300 voting rights cases over the past 25 years.

The facts behind these statistics attest to the ongoing problem of discrimination in voting and the central importance of retaining Section 5 preclearance. There is abundant, modern day evidence showing Section 5 is still needed to protect the equal right to vote of minorities in covered jurisdictions. Charleston County, South Carolina is a case in point. In 2003, South Carolina enacted legislation adopting the identical method of elections for the board of trustees of the Charleston County School District that had earlier, in a case involving the county council, been found to dilute minority voting strength in violation of Section 2.[112] Under the pre-existing system, school board elections were non-partisan, multi-seat contests decided by plurality vote, which allowed minority voters the opportunity to "bullet vote," or concentrate their votes on one or two candidates and elect them to office. That possibility would have been effectively eliminated under the proposed new partisan system.

In denying preclearance to the county's submission, DOJ concluded "[t]he 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."[113] DOJ noted further 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

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[109] PROTECTING MINORITY VOTERS, *supra* note 41, at 4.
[110] *Id.*
[111] Michael J. Pitts, *Let's Not Call the While Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605, 612 (2005).
[112] *United States v. Charleston County* and *Moultrie v. Charleston County Council*, 316 F. Supp. 2d 268 (D.S.C. 2003), *aff'd*, 365 F.3d 341 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 606 (2004).
[113] Letter from R. Alexander Acosta, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to C. Havird Jones, Jr., Senior Assistant Attorney Gen., South Carolina (Feb. 26, 2004), *available at* http://www.usdoj.gov/crt/voting/sec_5/ltr/l_022604.html.

> 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.[114]

Section 5 thus prevented the state from implementing a new and retrogressive voting practice – one that was understood to dilute black voting strength and ensure white control of the school board.

Another example of Section 5's ongoing importance can be found in Georgia. Following the 2000 Census, the City of Albany, Georgia, adopted a new redistricting plan for its mayor and commission to replace an existing malapportioned plan, but DOJ rejected it under Section 5. DOJ noted that while the black population had steadily increased in Ward 4 over the past two decades, subsequent redistrictings had decreased the black population "in order to forestall creation of a black district."[115] The letter of objection concluded it was "implicit" that "the proposed plan was designed with the purpose to limit and retrogress the increased black voting strength in Ward 4, as well as in the city as a whole."[116] A subsequent court ordered plan remedied the vote dilution in Ward 4.[117] In the absence of Section 5, elections would have gone forward under a plan in which purposeful discrimination was implicit. The plan could only have been challenged in time-consuming vote dilution litigation under Section 2, in which the minority plaintiffs would have borne the burden of proof and expense.

In another case in Georgia, after the state failed to enact remedial plans for the house and senate, the Georgia three-judge court appointed a special master to prepare court ordered plans. Under the special master's plan, nearly half of the black house members were paired, or placed in a house district with one or more other incumbents.[118] As a result of the pairing, a disproportionate number of African American house members would likely not have been returned to office following the next election. A number of the paired black incumbents were chairs or officers of house committees, and some were also senior members of the house.[119] Their loss would inevitably have adversely affected the representation of the black community in the state legislature.

The Georgia Legislative Black Caucus, represented by the ACLU, argued as *amicus curiae*, that the pairing of black incumbents caused a retrogression in minority voting strength within the meaning of Section 5, and created a discriminatory result within the meaning of Section 2.[120] The three-judge court agreed that court-ordered plans should "comply with the racial-fairness mandates of § 2 of the Act, as well as the purpose-or-effect standards of § 5," and

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[114] *Id.*

[115] Letter from J. Michael Wiggins, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Al Grieshaber, Jr., City Attorney, Albany, Ga. (Sept. 23, 2002), *available at* http://www.usdoj.gov/crt/voting/sec_5/ltr/l_092302.htm.

[116] *Id.*

[117] *Wright v. City of Albany, Georgia*, 306 F. Supp. 2d 1228 (M.D. Ga. 2003).

[118] ACLU VRP REPORT, *supra* note 94, Executive Summary at 24.

[119] *Id*; *see also* SENATE PUBLIC INFORMATION OFFICE & HOUSE PUBLIC INFORMATION OFFICE, MEMBERS OF THE GENERAL ASSEMBLY OF GEORGIA, SENATE AND HOUSE OF REPRESENTATIVES, FIRST SESSION OF 2003-2004 TERM (2003).

[120] ACLU VRP REPORT, *supra* note 94, Executive Summary at 24.

instructed the special master to draw another plan taking into account the unnecessary pairing of incumbents.[121] A new plan was drawn and it unpaired virtually all the black incumbents. As the court found in adopting the new plan, there was "no retrogression" from the pre-existing benchmark plans. Indeed, the number of majority black senate districts was the same at 13, while the number of majority black house districts was actually increased from 39 to 44.[122] The state appealed, but the Supreme Court affirmed the decision of the three-judge court.[123]

In the absence of Section 5, the kind of plan adopted by the legislature would almost certainly have been far different from the one it adopted under federal oversight. In addition, the plan drawn by the three-judge court would likely have been different in its treatment of majority black districts in the absence of the non-retrogression standard of Section 5.

In Louisiana, no state house of representatives redistricting plan has ever been precleared since the VRA passed forty years ago. But in 2003, the state wanted to move forward with redistricting plans anyway, and deleted those provisions in the state redistricting guidelines that set out Louisiana's obligations under the VRA.[124] The state also chose to spend taxpayer money to protect a redistricting plan that was designed to diminish the political opportunities of African-American voters.[125] After litigation challenged these practices, a federal court decision forced the state to withdraw its original plan and restore a district where African Americans had an opportunity to elect a candidate of choice.[126]

Latino voters have had similar trouble in Texas, where in 2003, a redistricting plan was drawn to purposefully limit Latino political representation.[127] The VRA was used to stop the plan, restore the districts, and make sure Latinos have a voice in the statehouse.

The need to renew the preclearance provisions is also especially critical to stop the ongoing abuses in Indian Country.[128] For example, in March 2005, the ACLU sought to enjoin South Dakota's implementation of House Bill 1265, an emergency measure which allows counties to redraw their county commission district lines more than once per decade.[129] The injunction was sought by the ACLU on behalf of four Native American plaintiffs on the grounds that HB 1265 violated the VRA, as well as a consent decree issued two-and-a-half years ago in *Quiver v. Nelson*, another voting case brought by the ACLU. In July 2005, a three-judge panel granted the injunction against the state, ruling unanimously that state officials must comply with Section 5 and obtain prior approval from DOJ before implementing the new law. The panel noted that the state's action "gives the appearance of a rushed attempt to circumvent the

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[121] *Larios v. Cox*, 314 F. Supp. 2d 1357, 1360 (N.D. Ga. 2004).
[122] *Id.* at 1366.
[123] *Cox v. Larios*, 542 U.S. 947 (2004).
[124] American Civil Liberties Union, *Voting Rights: About the VRA*, http://www.votingrights.org/more.php (last visited Feb. 28, 2006) [hereinafter *About the VRA*].
[125] *Id.*
[126] *Id.*; NAACP Legal Defense and Educational Fund, Inc., *Louisiana Redistricting* (2003), *available at* http://www.naacpldf.org/content.aspx?article=77.
[127] *About the VRA*, *supra* note 124.
[128] *See* Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, A Case Study*, 29 AM. INDIAN L. REV. 43 (2004-2005).
[129] *About the VRA*, *supra* note 124.

VRA."[130] The opinion noted that South Dakota officials have for decades avoided complying with the VRA by failing to seek prior approval from federal officials before implementing more than 700 changes in election law or voting procedures that effect residents of Shannon and Todd Counties, which are covered by Section 5.[131] Plaintiffs showed that for over 25 years defendants have intended to violate and have violated the preclearance requirements of the VRA.[132] The fact that Secretary of State Chris Nelson had been found to have violated the VRA in an earlier lawsuit in 2002 was another factor cited by the judges in issuing their injunction.[133]

Moreover in 2004, a federal court determined that South Dakota discriminated against Native American voters by packing them into a single district to remove their ability to elect a second representative of their choice to the state legislature.[134] This case was brought by Alfred Bone Shirt and three fellow Indians, represented by the ACLU, against the state for failing to submit a legislative redistricting plan for preclearance. In invalidating the plan, the court detailed the state's continuing discrimination in voting against Native Americans, including illegal denials of the right to vote, dilutive voting schemes, intimidation, non-compliance with the language assistance provisions, and lack of access to polling sites.[135]

Unfortunately, these examples are not anomalies; there are countless other instances of attempts to disfranchise minority voters and to dilute minority voting strength in Section 5 covered jurisdictions.[136]

The previous examples indicate that the VRA still has a vital role to play in preventing on-going discrimination. The VRA has been instrumental in giving minority communities fair and responsive representation they would not otherwise have. Decades of experience strongly suggest that in racially polarized environments – common in the jurisdictions covered by the VRA – minority communities that do not constitute a majority of the district can be disregarded by hostile or indifferent officeholders.[137] Recent reports indicate the sharp racial differences in policy preferences.[138] One report concluded that "'Southerners in general – and Deep Southerners in particular – are the least likely to endorse policies intended to ameliorate racial inequality.'"[139] Therefore, when minority communities are given the opportunity to elect candidates of their choice, those elected officials have been, and are more likely to be, responsive to their constituencies.

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[130] *Quiver v. Nelson*, No. 02 Civ. 5069, slip op. at 13 (D.S.D. July 13, 2005), *available at* http://www.aclu.org/FilesPDFs/district%20court%20ruling%20in%20quiver%20v.%20nelson.pdf.
[131] *Id.* at 13.
[132] *Id.* at 7.
[133] *Id.* at 13.
[134] *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004).
[135] *Id.* at 1018-34.
[136] *See generally* ACLU VRP REPORT, *supra* note 94.
[137] *See* Written Testimony of Theodore M. Shaw, President and Director-Counsel of the NAACP Legal Defense and Education Fund, Inc., *Oversight Hearing on the Voting Rights Act: Section 5—Judicial Evolution of the Retrogression Standard Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 15 (Nov. 9, 2005), *available at* http://judiciary.house.gov/media/pdfs/shaw110905.pdf.
[138] *See, e.g.*, PROTECTING MINORITY VOTERS, *supra* note 41, at 39.
[139] *Id.* at 40 (quoting Steven A. Tuch and Jack K. Martin, *Regional Differences in Whites' Racial Policy Attitudes, in* RACIAL ATTITUDES IN THE 1990S: CONTINUITY AND CHANGE 173 (Steven A. Tuch and Jack K. Martin eds., 1997)).

Indeed, evidence demonstrates that increased black representation has resulted in state legislatures giving greater priority to policy areas found to be important to black elected officials and their constituencies.[140] For example, the creation of the Black Legislative Caucus in South Carolina was a direct result of the civil rights movement and the VRA.[141] The Caucus has been responsible for significant tangible benefits for minority communities in the state. After the passage of the VRA, in the late 1960s a few African Americans won local offices in the state. But it was not until a 1974 lawsuit under the VRA, forcing the state to redraw district lines, that the number of districts that had high percentage of African American voters increased and the number of black legislators rose from 3 to 13.[142]

This small group became the Legislative Black Caucus in 1975, which for the first time in South Carolina's history enabled black legislators to focus on and be responsive to the needs of their black constituencies. This group convinced the white speaker of the house to appoint Caucus members to all permanent committees in the state house so that African Americans could provide input on all legislative matters.[143] They played an integral role in supporting the 1975 extension of the VRA, and in local matters, played a key part in expanding the state kindergarten system.[144]

By the mid 1980s, the Caucus, which had grown to 21 members in the state house and senate, was responsible for several additional measures including a procurement statute that ensured minority businesses a greater opportunity to pursue state contracts, a Governor's Office for Small and Minority Business, and the creation of a State Human Affairs Commission.[145]

By 1994 the Legislative Black Caucus had increased to 25 and began to push for more majority-minority districts – districts where a single minority constituency constitutes over 50% of the voting age population. Caucus members were concerned that non-minority officials, even within their own party, were not responsive to the minority constituencies and not sensitive to issues important to the Caucus, such as welfare reform, jobs, and economic development.[146] The Caucus continued to fight for and added to its list of accomplishments the election of African American judges, more money for traditionally black colleges, recruitment of more black teachers, and the building of rural health centers.[147] And in 1998, the Caucus had a significant achievement with the placing of a referendum measure on the November ballot that struck down the constitutional prohibition against inter-racial marriage.[148] All these tangible benefits were the direct result of the successes of the VRA. Prior to its passage, African Americans had been denied resources and opportunities; their needs were often ignored and discounted. Officials

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[140] *See* Chris T. Owens, *Black Substantive Representation in State Legislatures from 1971-1994*, 86 SOCIAL SCI. 779, 780 (Dec. 2005) (documenting increased funding for both healthcare and welfare spending where the percentage of black state legislators examined increased).

[141] Robert E. Botsch, Professor of Political Science, University of South Carolina Aiken, *Legislative Black Caucus* (August 1999), http://www.usca.edu/aasc/blackcaucus.htm.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.* Although the prohibition had long since been in conflict with federal law, its placement on the ballot and subsequent passage were of symbolic importance to members of the Caucus and their constituencies. *Id.*

elected because of the equal voting opportunities afforded minority citizens were more attuned to the needs of the minority communities in South Carolina.

The Georgia Legislative Black Caucus has a similar story. Over the past forty years African American legislators in Georgia have been responsive to their constituents and opened doors for increased African American leadership and economic opportunities.[149] Throughout the years, African American elected officials, who have been provided opportunities because of the VRA and other civil rights statutes, have consistently supported bills that have led to significant, positive ramifications for their constituencies and the state as a whole. For example, black members of the Georgia legislature helped enact the first fair housing act, sponsored legislation to help recipients of unemployment benefits, litigated over the appointment of more African American judges, and worked to limit the impact of predatory lending among minority, elderly, and low-income constituencies.[150] In order to provide needed legal protections for their constituencies, members of the Caucus have also authored anti-Ku Klux Klan legislation and introduced hate crime bills to protect victims of crimes based on race, religion, gender, ethnicity, national origin, and sexual preference.[151]

Similar tangible benefits have been documented in other states and jurisdictions because of the impact of the VRA and its deterrent effect. For example, in North Carolina in the mid-1990s, the predominately white neighborhoods to the west of Battleboro were being annexed by the city of Rocky Mount, but the city's leaders at first refused to annex the predominately black community of Battleboro.[152] Annexation would bring municipal services to the residents of Battleboro as well as give them a vote in local elections. At the time, Rocky Mount was a majority white city, although city planners projected that by the 2000 Census, Rocky Mount would be a majority black city; annexing Battleboro would increase this trend.[153] One of the key factors that led the city to finally agree to annex this community was the fact that community members were prepared to vigorously oppose any further annexation of white neighborhoods in the Section 5 preclearance process. This pressure ultimately led the city to back down and agree to annex Battleboro.[154] Today, the residents of Battleboro, the majority of whom are African American, enjoy municipal services, the right to vote in city elections, rising property values, and a higher standard of living because of Battleboro's incorporation into the City of Rocky Mount – results unattainable without the continuing reach of Section 5.[155]

B. Impact of Section 203 and Elected Officials' Responsiveness to Underserved Communities

As discussed, the language provisions of the VRA keep the franchise open to all citizens, who deserve the equal opportunity to exercise their constitutional right to vote. As Senator Orrin Hatch observed during the 1992 hearings, "[t]he right to vote is one of the most fundamental of

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[149] Georgia Legislative Black Caucus, Inc, *History*, http://www.galbc.org/history.htm (last visited Mar. 6, 2006).
[150] *Id.*
[151] *Id.*
[152] LCCR/LCCREF, *Protect Voting Rights: Renew the VRA, Learn More: Real Stories, Battleboro, North Carolina*, http://renewthevra.civilrights.org/resources/detail.cfm?id=186 (last visited Mar. 6, 2006).
[153] *Id.*
[154] *Id.*
[155] *Id.*

human rights. Unless government assures access to the ballot box, citizenship is just an empty promise. Section 203 of the Voting Rights Act, containing language assistance election requirements, is an integral part of our government's assurance that Americans do have such access."[156] The need for federal oversight on minority language assistance continues. Since 2001, DOJ has filed more minority language cases than in the entire previous 26 years in which these provisions have been applicable.[157]

The VRA has precipitated many of the achievements of Latinos in the United States. For instance, before the language assistance provisions were added to the VRA in 1975, many Spanish-speaking citizens did not register to vote because they could not read the election material and could not communicate with poll workers. When the VRA was enacted, about 2.5 million Latinos were registered to vote. Today, there are 9.3 million Latinos registered to vote, and in the past three decades, participation has tripled.[158] In the 1976 presidential election, Latinos cast about 2 million ballots and in 2004 that number climbed to 7.5 million.[159] In 1974, there were about 1,200 Latino elected officials and today there are 6,000.[160]

Section 203 has also removed barriers to voting and opened up the political process to thousands of Asian Americans, many of them first-time voters and new citizens. According to the Asian American Legal Defense and Education Fund's 2004 exit poll of 11,000 Asian American voters, almost 33% of all respondents needed some form of language assistance in order to vote, and 46% of respondents who needed language assistance were first time voters.[161]

Many communities still rely on the VRA to maintain full participation in local, state, and federal elections. Recent violations of Section 203, however, highlight its ongoing need. For example, in the late 1990s, DOJ sued Passaic County and city election officials in New Jersey for their failure to comply with the language assistance provisions. This resulted in a comprehensive consent decree that forced election officials to engage in recruitment of bilingual election workers, publish election notices and materials in Spanish, and provide voter assistance to Spanish speaking voters.[162]

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[156] H.R. REP. NO. 104-728, at 25-26 (1996) (quoting *Voting Rights Act Language Assistance Amendments of 1992: Hearings on S. 2236 Before the Subcomm. On the Constitution of the Senate Comm. On the Judiciary*, S. Hrg. 102-1066, 102d Cong., 2d Sess., at 134 (1992) (statement of Sen. Hatch)).

[157] Written Testimony of Bradley J. Schlozman, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, *Oversight Hearing on the Voting Rights Act: Section 203 – Bilingual Election Requirements Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 3 (Nov. 8, 2005) [hereinafter Schlozman 203 Testimony], *available at* http://judiciary.house.gov/media/pdfs/schlozman110805.pdf.

[158] *Linda Sánchez Speaks Out*, *supra* note 4.

[159] *Id.*

[160] *Id.*

[161] *See* Written Testimony of Margaret Fung, Executive Director, Asian American Legal Defense and Education Fund, *Oversight Hearing on the Voting Rights Act: Section 203 – Bilingual Election Requirements Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 3 (Nov. 8, 2005) [hereinafter Fung Testimony], *available at* http://judiciary.house.gov/media/pdfs/fung110805.pdf.

[162] Written Testimony of Juan Cartagena, General Counsel, Community Service Society, *Oversight Hearing on the Voting Rights Act: Section 203 – Bilingual Election Requirements Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 9 (Nov. 9, 2005), *available at* http://judiciary.house.gov/media/pdfs/cartagena110905.pdf.

Similarly, in 2003, in Harris County, Texas, officials did not provide language assistance for Vietnamese citizens. DOJ intervened and, as a result of the federal oversight, Vietnamese language assistance was required, voter turnout doubled, and the first Vietnamese American, Hubert Vo, was elected to the state legislature in 2004.[163] His impact on the daily lives of Vietnamese communities has already been felt. Recently, Vo was honored by the Vietnamese community of Louisiana for his ongoing efforts to find food, shelter, and relief for more than 20,000 Vietnamese Americans who were evacuated in the wake of Hurricanes Katrina and Rita.[164] Vo helped raise more than $500,000 in emergency funds to help evacuees in the Houston area and played a key role on Mayor Bill White's task force providing aid, housing, food, clothes, heath care, jobs and other assistance.[165]

Section 203 has also proven its effectiveness for Asian American communities in New York. The Asian American Legal Defense and Education Fund reports accounts of voters being told that they must learn English at home before they will be allowed to vote.[166] Yet because of Section 203, in 2001, first-generation citizens in New York City had the ability to vote independently. The city's implementation of language assistance has enabled more than 100,000 Asian Americans not fluent in English to vote.[167] As a direct result, in 2001, John Liu was elected to the New York City Council, becoming the first Asian American elected to a major legislative position in New York – the U.S. city with the nation's largest Asian American population.[168] In addition, Jimmy Meng became the first Asian American member of the New York State Assembly in 2004.[169] Both Liu and Meng were elected in Queens County, one of the three counties in New York City covered by Section 203.

Moreover, since DOJ brought suit against San Diego County, California in 2001 to enforce the language minority provisions of Section 203, voter registration among Vietnamese Americans is up over 37%, and Latino and Filipino American registration has risen by over 20%.[170] Similarly, in Yakima County, Washington, Latino voter registration is up over 24% because of a DOJ Section 203 lawsuit.[171]

According to a recent study, the VRA and its language provisions have also had a tremendous impact on the daily lives of Native American voters.[172] In Washington State and in South Dakota, Native Americans helped determine federal race winners.[173] Similarly, in

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[163] Fung Testimony, *supra* note 161, at 3.
[164] Hubert Vo, Texas House of Representatives District 149, *Vo Honored for Hurricane Relief Efforts* (Dec. 2, 2005), *available at* http://www.hubertvo.com/press12_02_05.htm.
[165] *Id.*
[166] *Ballot Box Equality, supra* note 60.
[167] Rep. John Lewis, Op-Ed., *Keeping the Polls Open*, N.Y. TIMES, Aug. 6, 2005, at A13.
[168] *Ballot Box Equality, supra* note 60
[169] Fung Testimony, *supra* note 161, at 3.
[170] Schlozman 203 Testimony, *supra* note 157, at 4.
[171] *Id.*
[172] FIRST AMERICAN EDUCATION PROJECT, NATIVEVOTE2004: A NATIONAL SURVEY AND ANALYSIS OF EFFORTS TO INCREASE THE NATIVE VOTE IN 2004 AND THE RESULTS ACHIEVED 4 (2005) [hereinafter NATIVEVOTE2004]. Currently there are 81 local jurisdictions across 18 states required to provide minority language assistance in voting pursuant to Section 203 because of their American Indian populations. Of these 81 jurisdictions, 31 are already covered under Section 5. *See* ACLU VRP REPORT, *supra* note 94, Appendix C at 865.
[173] NATIVEVOTE2004, *supra* note 172, at 4.

Arizona, Native American voters, participating in higher numbers, decided the fate of state office candidates and ballot measures.[174]

For the first time, candidates for statewide and federal offices have become aware of the importance of Native American constituencies, even though Native Americans were not always successful in electing their preferred candidates.[175] What is changing is that Native American voters only give overwhelming support to candidates with a record of support and responsiveness on Native American issues.[176] Moreover, the study indicated that where a candidate has a consistent record of hostility towards issues of importance to Native American voters, a strong showing of electoral opposition from Native American voters can almost be assured.[177] There is a long documented history of Native American populations suffering from problems resulting from indifferent or hostile treatment by non-Native American elected officials.[178] Without elected representatives who will advocate solutions to the particularized and unique needs of the Native American communities, it is unlikely that such problems will be addressed by general government policies.[179]

Section 203 had enabled increasing numbers of minority language citizens to register and cast ballots. It has also been instrumental in adding to the number of federal, state, and local elected officials of Latino, Asian American, and Native American descent. This has translated into tremendous gains for these communities. Still, more remains to be accomplished on the road to equal participation.

C. Impact of the Observers Provisions

Assistance provided by federal examiner and observers in the election process has played an instrumental role in preventing discrimination and increasing minority voter participation. Congress found federal oversight necessary to catch violations of the Act in covered jurisdictions, as well as to serve as a deterrent to such violations.

Post-1982 data reveals that several thousand observers were sent to 622 covered locations.[180] Prior to 1982, observers were sent to 520 covered jurisdictions.[181] In Mississippi alone after 1982 there were 250 sites involving 3,000 observers.[182] Five of six southern states accounted for 66% of all post-1982 locations needing observers.[183] During the 2004 election alone, observers were sent to locations in 25 states.[184] DOJ dispatched 898 federal observers and monitors to 85 jurisdictions.[185] The provisions remain an important tool in not only

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[174] *Id.* at 5.
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *See, e.g.,* PROTECTING MINORITY VOTERS, *supra* note 41, at 43.
[179] *Id.*
[180] *Id.* at 4.
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Ballot Box Equality, supra* note 60.
[185] PROTECTING MINORITY VOTERS, *supra* note 41, at 64.

protecting the right to vote generally, but also ensuring that Section 5 and Section 203 are properly obeyed and enforced.

According to Barry Weinberg, the former Deputy Chief and Acting Chief of the Voting Section of the Civil Rights Division at DOJ, the federal observer provisions have had a real impact on previously disfranchised voters and the need is still great.[186] He testified that federal observers have witnessed discriminatory treatment of racial and minority language voters in a variety of forms, including taunting and rudeness, ridiculing their need for assistance, and barring them from voting by failing to find their names on lists of registered voters, by refusing to allow them to vote on provisional ballots, or by misdirecting them to incorrect polling places.[187]

He also testified that minority language voters suffer additional discriminatory treatment when people who only speak English are assigned as polling place workers in areas populated by minority language voters. Observers have also witnessed polling place workers failing to communicate the voting rules and procedures to voters or failing to respond to voters' questions.[188] In some instances, qualified voters are turned away because poll workers erroneously believe the voters had not furnished all the necessary information, or are unable to understand what the voters are saying.[189] For example, DOJ recently sent observers to Boston to watch its elections. Because of that oversight and abuses they witnessed, DOJ has begun proceedings against the city for failing to meet the needs of language minorities under Section 203.[190]

Similarly, in the case *United States v. Berks County*, the court allowed DOJ to deploy observers to Reading, Pennsylvania because of evidence that Latino voters were treated unfairly.[191] The court found, based on the observers' work, substantial evidence of hostile and unequal treatment.[192] Because of this evidence, the court issued a permanent injunction that required the county to provide language assistance to Spanish-speaking citizens at all stages of the electoral process.[193]

And finally, as discussed in the previous section on the impact of Section 203, Passaic County, NJ was under a consent decree to comply with the language provisions of the VRA. On the basis of information gathered by the federal observers, DOJ took legal action to ensure the county's compliance with Section 203.[194] Voters thereafter elected the first Latino mayor.[195]

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[186] *See* Written Testimony of Barry Weinberg, former Deputy Chief and Acting Chief of the Voting Section of the Civil Rights Division, U.S. Dep't of Justice, *Oversight Hearing on the Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program* (Nov. 15, 2005), *available at* http://judiciary.house.gov/media/pdfs/weinberg111505.pdf.
[187] *Id.* at 5.
[188] *Id.*
[189] *Id.*
[190] *Ballot Box Equality, supra* note 60.
[191] 277 F. Supp. 2d 570, 574 (E.D. Pa. 2003).
[192] *Id.* at 575.
[193] *Id.* at 583.
[194] PROTECTING MINORITY VOTERS, *supra* note 41, at 65.
[195] *Id.*

Observers have played a major role since the last authorization in deterring and documenting racial discrimination in voting. Evidence collected by observers has served a useful role in covered jurisdictions and observers' continued availability is necessary to ensure fair and equal participation for all voters at the polling places.

V. RESTORING THE VITALITY AND ORIGINAL INTENT OF THE VRA

Since 1982, Supreme Court decisions have chipped away at the strength of the VRA. In addition to the need to reauthorize the expiring provisions of the VRA, the ACLU urges Congress to restore its original vitality.

Current law provides that in order to obtain preclearance under Section 5, a state must demonstrate that a change in a voting practice or procedure does not have a discriminatory purpose or effect.[196] The leading case interpreting this standard is *Beer v. United States*, in which the Supreme Court explained that discriminatory purpose or effect in the preclearance context means that a purpose or effect shall not have a "retrogressive" effect on minority voters.[197] In other words, any change cannot weaken the voting power of the minority electorate. Since *Beer*, there have been two very significant cases that have construed this retrogression concept in a manner that undermines the original intent of Congress.

As an initial inquiry, it is instructive to look at Congress' amendment of Section 2 during the 1982 reauthorization after a Supreme Court decision similarly diluted the provision's power. Prior to 1980, courts invalidated racially unfair election laws without regard to intent. In 1980, however, in *Mobile v. Bolden*, the Court declared that any challenge to an election procedure brought under the Fourteenth or Fifteenth Amendments must include proof that the measure was enacted with the intent to discriminate against voters on account of race or color. The Court went on to hold that Section 2 provided no more protection than the Fifteenth Amendment, that is, that intent was also required.[198] In 1982, Congress clarified the law, eliminating this intent requirement, as inconsistent with the congressional intent behind the VRA. In rejecting the Court's decision in *Bolden*, Congress explicitly provided in the reauthorization that a discriminatory "result" constituted a violation of Section 2.[199] The Court later accepted the amended Section 2 in *Thornburg v. Gingles*, in which the Court held that in order to prevail on a Section 2 claim, plaintiffs must prove only that a proposed election law or redistricting scheme impaired minority voters' ability to elect representatives of their choice.[200]

Like *Mobile v. Bolden*'s impact on Section 2, two Supreme Court cases since 1982 – *Reno v. Bossier Parish Sch. Bd* and *Georgia v. Ashcroft* – have severely undermined Section 5

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[196] 42 U.S.C. § 1973c.
[197] 425 U.S. 130 (1976).
[198] 446 U.S. 55, 61 (1980).
[199] 42 U.S.C. § 1973(a) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . .") (emphasis added); S. REP.NO. 97-417, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 179.
[200] 478 U.S. 30, 44 & n. 8 (1986).

by imposing more onerous requirements than imposed by statute. The ACLU urges Congress to address these limitations in reauthorization.

A. *Reno v. Bossier Parish School Board* ("*Bossier II*")

While the "discriminatory purpose or effect" language of Section 5 was long understood to prohibit jurisdictions from implementing both intentionally discriminatory voting changes, as well as those with a discriminatory or "retrogressive" effect, the Supreme Court issued a decision in 2000 that effectively eliminated the "purpose" prong of the Section 5 test. This decision, *Reno v. Bossier Parish Sch. Bd.*, was a significant setback to voting rights because it has dramatically reduced the power of Section 5.[201]

Bossier Parish is located in the northwest corner of Louisiana, near the border of Texas and Arkansas. In 1990, African Americans constituted approximately 20 percent of the parish's 86,000 residents, yet no African American had ever been elected to the 12-member school board.[202] After the 1990 Census, the school board refused to include any majority African American districts in the new plan, even though the school board later admitted in court that it was "'obvious that a reasonably compact black-majority district could be drawn within Bossier City.'"[203] According to undisputed testimony, two school board members specifically acknowledged that the school board's plan reflected opposition to "black representation" or a "black-majority district."[204]

Despite the plain language of Section 5 and the strong evidence that the school board was acting with an unconstitutional intent to discriminate against African American voters, the Supreme Court found no basis for an objection under Section 5.[205] Instead, the Court came up with a new interpretation of the statute. According to the Court, DOJ was powerless to block intentionally discriminatory voting changes unless it found that the jurisdiction acted with the retrogressive purpose of making things worse than they already were for minority voters.[206] Thus, because the school board in Bossier had no majority African American districts before 1990, its enactment of a plan preserving the all-white school board could not violate Section 5, no matter how blatant the evidence that the plan was motivated by racial discrimination. In other words, because African Americans already had no representation on the school board, there was no way to make them worse off, hence even an intentionally discriminatory voting change could not have a retrogressive effect. Therefore, the Court ruled, it was legal to maintain the all-white school board and ignore the fact that it was possible to increase African American representation by creating two majority-African American districts.[207]

It is critical to fix this loophole with legislation that restores the purpose prong to the Section 5 preclearance test. Section 5 should be clarified to provide that any proposed voting

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[201] 528 U.S. 320 (2000) ("*Bossier II*").
[202] *Bossier Parish Sch. Bd. v. Reno*, 907 F. Supp. 434, 437 (D.D.C. 1995), *aff'd in part, vacated & remanded in part sub nom. Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997) ("Bossier I").
[203] *Bossier II*, 528 U.S. at 350 (Souter, J., concurring in part, dissenting in part) (quoting Bossier Parish School Board member Barry Musgrove).
[204] *Bossier Parish Sch. Bd. v. Reno*, 907 F. Supp. 434, 438 n.4 (D.D.C. 1995).
[205] *Bossier II*, 528 U.S at 340.
[206] *Id.* at 335.
[207] *See id.*

change enacted with a discriminatory purpose, including a nonretrogressive discriminatory purpose, should be denied preclearance under Section 5. This language will restore the traditional purpose requirement that guided enforcement of the preclearance requirement for the quarter century preceding *Bossier II*.

B. *Georgia v. Ashcroft*

In 2003, the Supreme Court further weakened the *Beer* standard in the redistricting case, *Georgia v. Ashcroft*.[208] Following *Beer*, courts had held that the failure to preserve the ability of minority voters to elect candidates of their choice is retrogressive and that such voting changes are objectionable under Section 5. This standard was also ratified when Congress extended Section 5 in 1982. The Court in *Ashcroft*, however, created a new standard for retrogression that allows states to make minority voters into second-class voters, who can "influence" the election of white candidates, but who cannot amass the political power necessary to elect a candidate of their choice.[209]

Georgia v. Ashcroft was an action instituted by the state of Georgia seeking preclearance under Section 5 of its congressional, state senate, and state house redistricting plans. Following the 2000 Census, the Democratic-controlled Georgia legislature passed a redistricting plan that was backed by many African American leaders because it would have spread African American voters and influence across several districts rather than concentrating them in a select few. Georgia's Republican governor objected to the plan because he said it violated the VRA, which discourages the dilution of minority voting strength. The district court precleared the congressional and state house plans, but objected to three of the districts in the state senate plan because "the State has failed to demonstrate by a preponderance of the evidence that the reapportionment plan . . . will not have a retrogressive effect."[210] Although African Americans were a majority of the voting age population (VAP) in all three senate districts, the district court concluded that the state failed to carry its burden of proof that the reductions in the African American VAP from the benchmark plan would not "decrease minority voters' opportunities to elect candidates of choice."[211]

The Supreme Court, however, vacated the decision because, in its view, the district court "did not engage in the correct retrogression analysis because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts."[212] The Court held that while this factor "is an important one in the Section 5 retrogression inquiry," and "remains an integral feature in any Section 5 analysis," it "cannot be dispositive or exclusive."[213]

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[208] 539 U.S. 461 (2003).
[209] Written Testimony of Laughlin McDonald, Director, Voting Rights Project, American Civil Liberties Union, Found., *Oversight Hearing on the Voting Rights Act: Section 5—Judicial Evolution of the Retrogression Standard Before the Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1-2 (Nov. 9, 2005) [hereinafter McDonald Testimony], *available at* http://judiciary.house.gov/media/pdfs/mcdonald110905.pdf.
[210] *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 94 (D.D.C. 2002).
[211] *Id.* at 89.
[212] *Ashcroft*, 539 U.S. at 490.
[213] *Id.* at 480, 484.

The Court indicated that the district court should have considered other factors, including: "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."[214] The majority stated that Georgia "likely met its burden of showing non-retrogression," even if "minority voters will face a somewhat reduced opportunity to elect a candidate of their choice."[215] The Court reasoned that an elected Democrat was most likely to represent the interest of African American voters, regardless of the official's race or the demographics of his or her supporters, and therefore the new plan protected the interest of African American voters in Georgia.[216]

This new interpretation of the retrogression standard is a dramatic departure from *Beer* and other Section 5 cases, greatly weakening the enforcement provisions of Section 5.[217] Instead of looking at the effects of the newly devised plan, the new standard enunciated by the Court attempts to evaluate the intent of the state legislative drafters. Rather than relying on the federal government's assessment that a plan hurts minority voting strength as contemplated by the VRA, the new standard defers to the judgment of the jurisdiction – indeed, a jurisdiction covered by Section 5 preclearance requirement because of a history of discriminatory behavior towards minority voters. So even if the effect is an overall reduction in the election of candidates of choice by minority constituencies, the Court is unlikely to find retrogression if the jurisdiction can show that there is an increase in the "number of representatives [assumed] sympathetic to the interests of minority voters."[218] This is a particularly ambiguous and paternalistic standard, especially when the ability to elect candidates of choice has a great impact on minority communities and has been critical to these communities having fair and responsive representation.

Research indicates that majority-minority districts still play an important role in enabling minority communities to be fairly represented in our democracy.[219] Majority-minority districts were originally developed in response to racially polarized voting – where the "race of voters correlates with the selection of a certain candidate or candidates" – as a means of protecting and increasing the political power and representation of minority voters.[220] The purpose of these districts is to enable these historically disfranchised and geographically concentrated racial groups, where there is a history of racially polarized voting, to have the power to elect candidates of their choice, whether white or black. For example, in the 1990 redistricting efforts, "[t]he majority of Southern states did not elect a single Black state legislator from any majority-White district."[221] And in 2000, only 8% of black U.S. Representatives were elected from majority-

[214] *Id.* at 482.
[215] *Id.* at 487, 489-90.
[216] *Id.* at 469-71.
[217] *See, e.g., Bush v. Vera*, 517 U.S. 952, 955 (1996); *Reno v. Bossier Parish Sch. Bd,* 520 U.S. 471 (1997) ("*Bossier I*").
[218] *See Ashcroft*, 539 U.S. at 483 (citing *Thornburg*, 478 U.S. at 87-89, 99 (O'Connor, J., concurring in judgment).
[219] *See generally, e.g.*, QUIET REVOLUTION IN THE SOUTH (Bernard Grofman & Chandler Davidson eds., 1994); MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 134 (Bernard Grofman et al. eds., 1992); Lani Guinier, THE TYRANNY OF THE MAJORITY (1994); Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 35 (2004); Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 740 (1998).
[220] *See, e.g., Thornburg*, 478 U.S. at 62 .
[221] Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1368-69 (1995). This author also has noted:

white districts.[222] Similarly, when Latino candidates oppose white candidates, there is still a high degree of racial polarization in voting, and in white-majority districts the ability of Latino voters to elect their preferred candidate is decreased.[223] Indeed, in 2000, there were no Latino U.S. Representatives holding office who had been elected from majority white districts.[224] It is still nearly impossible for minority communities to elect candidates of their choice outside of districts where more than 50% of the voting age population is a combination of minority groups.[225]

In recent testimony before the House Subcommittee on the Constitution, Tyrone L. Brooks, Sr., a long time member of the Georgia legislature and current chair of the Georgia Association of Black Elected Officials testified that:

> I can confidently say that if we abolished the majority black districts for the state legislature, we would do away with most of the black legislators. The same would be true of black elected officials at the county and local levels. The argument that the state made in its Ashcroft brief failed to take into account how extensive racial bloc voting is, and that when a district is changed from majority black to majority white it depresses the level of black political activity. The enthusiasm, the spirit, the sense that blacks have a chance are all diminished. [226]

The inability of African Americans to exercise the franchise effectively in influence districts is apparent from the lack of electoral success of black candidates in majority-white districts.[227] As of 2002, of the 10 African Americans elected to the state senate in Georgia, all were elected from majority black districts (54% to 66% black population).[228] Of the 37 African

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> From 1972 to 1992, the probability of a majority-white congressional district electing a black representative remained at [a] negligible level regardless of a district's median family income, its percentage of high school graduates, the region of the country, or the proportion of residents who were urban, elderly, foreign born, or resident of the relevant state for more than five years. . . . [E]very majority black congressional district in the South (out of four) elected a black candidate to office; only one nonmajority black district in the South (out of 112) elected a black candidate.

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, 1525-26 (2002).

[222] PROTECTING MINORITY VOTERS, *supra* note 41, at 38-39.
[223] *Id.* at 42.
[224] *Id.* at 42-3.
[225] Pamela S. Karlan, *Reshaping Remedial Measures: The Importance of Political Deliberation and Race-Conscious Redistricting: Why Voting is Different*, 84 CAL. L. REV. 1201, 1231 (1996).
[226] Brooks Testimony, *supra* note 54, at 3. It was noted at the recent VRA hearings, that there is a "chilling" effect upon black political participation, and a "warming" effect on white political participation caused by the transformation of a majority black district into a majority white district. McDonald Testimony, *supra* note 209, at 7. Once a district is no longer perceived as majority black, black candidacies and black turnout are diminished, while white candidacies and white turnout are enhanced. *Id.*
[227] McDonald Testimony, *supra* note 209, at 6.
[228] *Id.*

Americans elected to the state house, 34 were elected from majority black districts.[229] Of the three who were elected from majority white districts, two were incumbents; the third was elected from a three-seat district.[230]

The fallacy of the notion that influence can be a substitute for the ability to elect is apparent from the *Shaw/Miller* cases, which were brought by whites who were resdistricted into majority black districts.[231] Rather than relishing the fact that they could "play a substantial, if not decisive, role in the electoral process," and perhaps could achieve "greater overall representation . . . by increasing the number of representatives sympathetic to the[ir] interests,"[232] they argued that placing them in white "influence," *i.e.* majority black districts, was unconstitutional. The Supreme Court has agreed.[233] If influence districts were as powerful as they have been held up to be, white voters would be eager to become a minority group in as many districts as possible.[234] White voters have not been eager for such an outcome, and therefore, the question remains why a different standard should apply to African American voters.

The ACLU urges Congress to support legislation restoring the protection lost under Section 5 as a result of *Georgia v. Ashcroft,* by making clear that the retrogression standard of Section 5 protects the ability of minority voters to elect representatives of their choice and takes into account the problem of racially polarized voting. Any efforts to address this issue should provide that any diminution of the ability of a minority group to elect a candidate of its choice would constitute retrogression under Section 5.

Therefore, it is recommended that Section 5 be clarified to provide that any voting change that would leave minority voters with less opportunity to elect preferred candidates than they had before the change would violate the effect standard of Section 5.

Congress has the power to restore the original intent of Section 5, which has been severely undermined by *Ashcroft v. Georgia* and *Bossier v. Parish.* It is vital that Congress not only renew the expiring provisions of the Act, but also create clear, meaningful protections against changes in election laws to ensure equal voting opportunities for all Americans.

C. Recovery of Expert Fees

The reach of another Supreme Court case has hurt the vitality of the VRA and should be addressed during the reauthorization process. In 1991, the Supreme Court ruled that prevailing parties in civil rights cases cannot recover expert witness fees as part of the attorneys' fees that they are entitled to receive. This decision, *West Virginia University Hospitals, Inc. v. Casey*, has had a chilling effect on private attorneys and public interest organizations considering voting rights litigation, because it requires lawyers to front thousands of dollars in expert witness fees

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[229] *Id.* at 6-7.
[230] *Id.* at 7.
[231] *Id.* at 10.
[232] *Ashcroft*, 539 U.S. at 482-83 (citing *Thornburg*, 478 U.S. at 98-100 (O'Connor, J., concurring in judgment)).
[233] *See, e.g., Miller v. Johnson*, 515 U.S. 900, 919-20 (1995).
[234] *See* McDonald Testimony, *supra* note 209, at 9.

that will never be recovered.[235] It also greatly undermined the purpose of fee awards in civil rights cases, which is to ensure that victims of discrimination can maintain access to the courts. In response to this case, and in order to alleviate these burdens, Congress passed the Civil Rights Act of 1991, which provided for the recovery of expert fees in employment discrimination cases.[236] For the same reasons, amending the VRA to provide for the recovery of expert fees is critical.

Litigating voting rights cases is particularly expensive because expert witnesses are often needed to document the extent of racial bloc voting, analyze and present statistical evidence, and testify about the "totality of circumstances" surrounding racial discrimination in the state or local jurisdiction directly impacted by the lawsuit. It is a tremendous cost borne by those least able to. Additionally, given the standards established by the Supreme Court, it is virtually impossible for plaintiffs to try a voting rights case without expert witness services. For all these reasons, the attorneys' fees provision must be amended so that winning parties in voting rights lawsuits are allowed to recover the cost of hiring the expert witnesses necessary to prove that voting discrimination exists.

CONCLUSION

The promise of equality is on the march, but the struggle continues. Discrimination in voting still exists and the protections of the VRA are still necessary to ensure fairness in our political process and equal opportunity for all citizens to participate in the political process. Because the expiring provisions of the VRA also help deter discrimination, the failure to renew these provisions will undoubtedly turn back the clock on the progress made so far.

The Voting Rights Act is one of the most effective civil rights statutes ever enacted to prevent discrimination. Since its passage, the VRA has guaranteed millions of minority voters a chance to have their voices heard. From New York to South Carolina to Texas and California, minority voters have gained greater influence in the creation of laws and polices that affect them because of the VRA.

We need the VRA today to ensure that progress continues and America, as a society, keeps its promise of democracy to all citizens. Indeed, at a time when America has staked so much of its international reputation on the need to spread democracy around the world, we must ensure its vitality here at home. By renewing the expiring provisions for another 25 years and strengthening them to address problems raised by recent U.S. Supreme Court decisions, we can ensure that the VRA remains current and effective in protecting the right to vote for all Americans. Therefore, the ACLU urges Congress to implement the following recommendations.

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[235] 499 U.S. 83, 102 (1991).
[236] Civil Rights Act of 1991, Pub. L. No 102-166, 105 Stat. 1071, § 113 (1991).

RECOMMENDATIONS

In 2007, three crucial sections of the Voting Rights Act will expire unless Congress votes to renew them. In light of the past and present discrimination that minorities have experienced when voting, and the proven effectiveness of the Voting Rights Act, Congress should renew and restore the original intent of the Act in the following manner:

1. Renew 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 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 U.S. District Court for the District of Columbia for pre-approval.

2. Renew Section 203 for 25 years so that new citizens and other Americans who are limited in their ability to speak English can continue to receive assistance when voting. These provisions currently impact some 466 local jurisdictions across 31 states.

3. Renew Sections 6–9, which authorize the U.S. Attorney General to appoint federal election observers.

4. Provide for the recovery of expert fees for prevailing parties in voting rights litigation.

5. Restore the original intent of Congress as expressed in the 1982 reauthorization and repair the damage done by two U.S. Supreme Court decisions that fundamentally weaken the administration of Section 5: *Reno v. Bossier Parish Sch. Bd.* (2000) and *Georgia v. Ashcroft* (2003).

VOTING RIGHTS IN ALASKA
1982-2006

A REPORT OF RENEWTHEVRA.ORG
PREPARED BY NATALIE LANDRETH AND MOIRA SMITH

MARCH 2006

VOTING RIGHTS IN ALASKA 1982-2006

NATALIE LANDRETH[1] AND MOIRA SMITH[2]

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EXECUTIVE SUMMARY

The 1965 Voting Rights Act (VRA) is arguably one of the most important pieces of legislation ever adopted by Congress. The state of Alaska, which has the single largest indigenous population in the United States, is covered by section 5 (the preclearance provision) and sections 4(f)4 and 203 (the language assistance provisions) of the VRA. Yet, little is known about the impact of the VRA in Alaska over the past 40 years, including whether state voting practices or procedures discriminate against minority voters, or how well the state is complying with the minority language assistance provisions. This report is a beginning point to a better understanding of the status of the VRA in Alaska. Its primary focus is the study, documentation, and analysis of the experiences of Alaska Native voters through the lens of the VRA.

Rural Alaska and the Status of Alaska Natives

"Rural" Alaska is a term of art, qualitatively distinct from rural Nebraska or rural Montana. As the state with the largest land area and with the lowest population density of any state in the United States, rural Alaska includes nearly 200 Native villages and communities that are not accessible by road. They are only accessible by small propeller plane. The fewer than 300 Alaska Natives who reside in each of these villages still practice their traditional way of life – living off the land through subsistence fishing, hunting and gathering. Alaska Natives are by far the largest minority population in Alaska, currently making up 19 percent of the total state population, with numbers growing in both urban and rural Alaska. Despite certain gains, Alaska Natives are still the largest group of the total Alaskan population to live in poverty, with the highest unemployment and the lowest level of education.

Voting in rural Alaska can be a very different experience than voting elsewhere in the country. Voting can involve crossing a river, or asking your grandchildren to translate for you and explain what is on the ballot. One example is Kasigluk, a Yup'ik village fifteen minutes from Bethel by air. There, the local election official announces through a borrowed marine radio that anyone who wants to vote has to come down to the community center by 11:30 a.m. At 11:30, she promptly collects the election materials, packs up the single ballot machine, drives it down to the river by four-wheeler and loads it onto a boat (there is no bridge) to cross over to the other side of the river to the old village site where she sets up the ballot machine again at the school. The principal then announces on the radio that the poll is open. The State Division of Elections says there are about 150 communities like Kasigluk. It is also important to note that 24 Native villages did not even have polling places in 2004.

Alaska Natives not only inhabit a unique geographical place, they also possess a unique political status in the landscape of Alaska. Following the adoption of the 1971 Alaska Natives Claims Settlement Act (ANSCA) terminating aboriginal title to lands in Alaska, three different types of Native groups or organizations emerged in co-existence: (1) 231 federally recognized Indian tribes; (2) 13 for-profit Native corporations; and (3) 12 regional non-profit corporations. These Native groups intersect with the internal political structure of Alaska, which is divided into 16 boroughs and one large area referred to as the unorganized borough (an area encompassing most of the rural Native villages). Those who reside in the 16 boroughs generally receive their services through their organized and state-funded regional governments, while those who reside

in the unorganized borough must generally rely on the local Native village tribal government for services.

A History of Discrimination and Section 5 Preclearance

In the early years of the twentieth century, the burgeoning Alaska Territory passed laws limiting the ability of Alaska Natives to be citizens, to participate in the political process, and to enter certain public establishments. In 1924, when the U.S. Congress conferred citizenship on "all noncitizen Indians born within the territorial limits of the United States," the Territorial Legislature responded by enacting a literacy law the next year requiring that "voters in territorial elections be able to read and write the English language." Alaska's Constitution, which became operative with the Formal Declaration of Statehood on January 3, 1959, also included an English literacy requirement as a qualification for voting which was not repealed until 1970.

During World War II, the Aleuts were forcibly relocated from their island homelands and interned in overcrowded "duration villages" with no electricity, plumbing, clean water or medical care. After the war, there were still signs in stores and restaurants that read "No Natives Allowed" and "No Dogs or Indians." This history of discrimination is indicative of why Alaska is a covered jurisdiction under Section 5 of the VRA.

But continuing attempts by the state to dilute the Alaska Native vote speak to the need for reauthorization of Section 5 of the VRA. Following the 1990 census, the state adopted a legislative redistricting plan that was harshly criticized on the grounds that it diluted Native votes, disregarded the differences between Alaska Native groups, and was prepared in secret under the influence of some questionable dealings. A coalition of Native interests appealed to the U.S. Department of Justice (DOJ) imploring DOJ not to preclear the plan under Section 5 of the VRA and identified some of the discriminatory components of the proposed "anti-Native" plan. DOJ requested more information and ultimately declared the plan legally unenforceable because of its negative effects on Alaska Native voters. Thus, throughout the redistricting process and litigation, the VRA and DOJ stood as the last lines of defense. Without Section 5 preclearance, retrogressive practices would have been implemented with the approval of the Alaska courts.

As a general matter, the 2000 redistricting proceeded without significant problems. However, three aspects of the 2000 redistricting are relevant to our inquiry regarding the need for reauthorization: (1) compliance with the VRA was clearly the driving force behind several of the State's new districts; (2) the redistricting board hired a national voting rights expert whose report revealed that certain areas in Alaska still have racially polarized voting; and (3) in the litigation following the 2000 redistricting, the Alaska Supreme Court set forth a new standard of deviation that will require future monitoring by the DOJ.

Finally, in both the 2000 and 2004 elections, the state made significant changes to its elections laws shortly before the election, including changing absentee ballot requirements, acceptable forms of identification and polling places. None of these changes were "precleared" prior to the election and the state later withdrew some of these changes. While the change of a polling place may not raise a red flag in most jurisdictions, in rural Alaska it can have a significant impact on

the ability of Native voters to get to the right poll. In short, the Section 5 preclearance provision has resulted in some important changes in Alaska's districts and election laws.

Native Languages and Sections 4(f)(4) and 203 Language Assistance

There are 20 different languages still spoken in Alaska. The largest groups of language speakers are Iñupiaq (more than 3,000 speakers), Siberian Yup'ik (about 1,100 speakers), and Central Yup'ik (about 10,000 speakers). Siberian Yup'ik and Central Yup'ik are particularly important here because they are still the primary language of many of the villages and the first language that children learn at home. Maintaining and preserving these languages is critically important to the Native population because language expresses a culture's worldview, and is, according to the Alaska Native Languages Center, "the glue that sticks everything together."

There is and has always been a significant disparity in educational opportunities for Alaska Natives, resulting in many Native language speakers having limited English proficiency ("LEP"). Beginning in the early territorial days, official government policy established a segregated school system, ultimately leading to a boarding school policy that resulted in the State of Alaska not building high schools in rural villages. Native students had to travel hundreds of miles, sometimes out of state, to obtain a high school education. At the time the VRA was extended in 1975, only a total of 2,400 Alaska Natives had graduated from high school. As a result of litigation, educational opportunities and graduation rates have improved for Alaska Native students. But further litigation has revealed that the state still discriminates, providing inadequate funding to rural Alaska schools.

Although Congress amended the VRA in 1975 to remedy the discrimination faced by language minorities in voting, there is little evidence of compliance with sections 4(f)(4) and 203 by the State of Alaska in the past 30 years. While voter registration and turnout appear to be relatively high in Alaska, Alaska Native turnout is difficult to discern because the State chooses not to collect racial data.

Although there are no formal barriers to registration such as literacy tests, there are still barriers. Alaska continues its practice of English-only elections, adversely impacting the ability of Alaska Natives to exercise their right to vote. Alaska only provides registration materials printed in English and many Alaska Natives find the English-only ballot language confusing. Further, Alaska has a re-registration requirement that disproportionately affects Alaska Natives, who are the most mobile segment of the population.
In short, Alaska appears to have not complied with its obligations to provide minority language assistance to Alaska Native voters. The state offers intermittent oral language assistance and no written assistance for Alaska Natives. While Alaska seems to provide translators upon request in many places, this reflects a commitment to fulfill its obligations under state law to assist qualified voters needing assistance in voting. By contrast, Alaska does provide written election materials for the 2 percent of the Alaska population that is Filipino.

Thus, Alaska is arguably out of compliance with the VRA and has been since the mandate was imposed on the state 30 years ago. As Congress contemplates reauthorization of the language provisions, it should take into account this non-compliance and the ongoing need for some

assistance demonstrated in this report. Alaska Native voters still experience what the VRA was meant to eradicate 30 years ago.

INTRODUCTION TO THE VOTING RIGHTS ACT

As the expiration date of the Voting Rights Act's minority language assistance provisions – Sections 203[3] and 4(f)(4) – and preclearance provision- Section 5[4]- approaches, Congress will consider the current state of discrimination in voting and will determine whether these provisions are still needed.[5] The Voting Rights Act (VRA) was passed in 1975 with a ten-year sunset provision; it was renewed in 1982. Section 203 was renewed in 1992 for fifteen years in the Voting Rights Language Assistance Act of 1992. The Act's temporary provisions are set to expire on August 6, 2007, unless reauthorized by Congress. This report will address Alaska's experience under the minority language and preclearance provisions.

Alaska is covered in its entirety by Sections 5, and 4(f)(4) and is partially covered by Section 203 of the VRA. Alaska has the single largest indigenous population in the United States, yet its compliance with the VRA has never been thoroughly studied. More broadly, the minority voting experience in Alaska has not been comprehensively reviewed. While this report does not answer all questions or provide complete information about Alaska's experience under the VRA, it does fill some longstanding gaps and lay some groundwork for further study. In addition, this report details the sometimes awkward "fit" between the VRA and rural Alaska and suggests some changes that may increase the effectiveness of the VRA in Alaska.

The methodology used in this report is fairly simple. The authors collected a broad range of information from numerous sources such as the State Department of Elections (DOE), the Federal Election Commission, the Census Bureau, the United States Department of Justice (DOJ), the Native Vote 2004 project, the Institute for Social and Economic Research (ISER) at the University of Alaska, the Native corporations, the Alaska Native Languages Center, and the Lawyers' Committee for Civil Rights, among others. In addition, this primary and secondary research was supplemented by interviews with elders at the 2005 Convention of the Alaska Federation of Natives, surveys completed by tribes detailing their voting experiences in remote areas, as well as interviews with the State Director of the DOE, the election directors in the covered jurisdictions in the State, and the attorneys involved in the most recent redistricting litigation.[6]

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[3] Voting Rights Act: Bilingual election requirements, 42 U.S.C. § 1973aa-1a (2005).
[4] 42 U.S.C. § 1973c
[5] The House Judiciary Committee's Subcommittee on the Constitution held hearings on October 18, 20, and 25 and November 1, 8, 9, and 15, 2005; more are anticipated in early 2006.
[6] There were several challenges to preparing this report. First, there are no previous reports on the impact of the VRA in Alaska and therefore no baseline data against which to compare, and no guiding methodology. In addition, there remain gaps in the available information. First, the state of Alaska, Department of Elections (DOE) does not collect racially identifying data on its voters. Letter to Natalie Landreth from Whitney Brewster, Director of the DOE, January 5, 2006, on file with the authors. (It should be pointed out that only seven states do collect racial data, and only one – South Carolina – requires that it be included on the voter registration form. In order to measure actual compliance with the VRA, covered states might be directed to collect such data. In fact, the Federal Election Commission website states that some states do collect such data for the specific purpose of administering the VRA,

This report is organized to contextualize the Alaska Native and general minority voting experience in Alaska under the Voting Rights Act. The second section provides some background on Alaska, explains its unique demography, and illustrates some of the difficulties faced by Alaska Natives, not only in voting but in everyday life. The third section outlines the history of racial discrimination against Alaska Natives in Alaska. The fourth section describes the 1975 extension of the VRA to language minorities and how Alaska came to be covered by the Act. The fifth section discusses how preclearance has made a difference in Alaska but finds that, as a result of the state's non-compliance, the language minority provisions have had little impact. Finally, the sixth section summarizes the conclusions of this report.

This report concludes and recommends that Alaska should remain covered by both the minority language provisions in Sections 203 and 4(f)(4) and the preclearance provisions of Section 5. The language assistance provisions have had no chance to improve the situation of language minorities in Alaska because the state has apparently not complied with them. This may be the result of lack of clarity in the statute or lack of guidance from Congress or the Justice Department. For whatever reason, the state has not increased assistance to minority voters as a result of the VRA. The only language assistance provided is help upon request, which Alaska has supplied for more than 30 years. It provides no written assistance and inconsistent oral guidance for the significant Alaska Native population. Yet Alaska Natives continue to require language assistance, continue to receive a lesser education than non-Natives in Alaska, and continue to suffer under "English-only" policies and services. Moreover, Alaska Natives are poorer and have lower rates of literacy and English proficiency. Thus, this report recommends that Alaska continue as a covered jurisdiction under Sections 203 and 4(f)(4). The report also details Alaska's experience under the preclearance procedures and notes that it has resulted in some important changes in Alaska's voting districts. Accordingly, the report also recommends that Alaska continue to be subject to preclearance.

I. Alaska Demography

Alaska Natives are the only group of sufficient size and geographic concentration to be relevant to the VRA in Alaska.[7] This section provides an overview of the demography of Alaska and the place of Alaska Natives within that framework.

Before detailing the changing demography, it is critical to explain Alaska's geography and what exactly is meant by "rural" in Alaska throughout this report.

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http://www.fec.gov/votregis/vr.shtml.) Thus, it was difficult to measure Alaska Native participation in the electoral process. This is further complicated by the fact that not all Alaska Natives are shareholders in a Native corporation or enrolled tribal members and thus there is no one clear place from which to draw data. Second, Alaska is one of the states that have more registered voters than the actual voting age population (VAP). This makes statistical precision difficult. Third – and this may be true of many states – DOE districts, Native regional corporations, and census districts all have different boundaries, making it difficult to compare data sets.

[7] Although Alaska Natives are the only group of concern statewide, the Filipino population is apparently of sufficient size and concentration to be covered under the VRA on Kodiak Island only. 67 Fed. Reg. 48871, *Voting Rights Act Amendments of 1992, Determinations Under Section 203.*

A. "Rural" has a unique meaning in Alaska

What is now known as Alaska was purchased by the United States from Russia in 1867, but it did not become a state until 1959. At the time of statehood, its population was 226,167. Alaska has the largest land area of any state in the United States and if it were its own country, it would be the 19th largest nation in the world. Alaska also has the distinction of having the lowest population density in the United States at 1.1 people per square mile.[8] Rural Alaska is an entirely different animal than, for example, rural Nebraska or rural Montana. In Alaska, there are almost 200 Native villages and communities that are not accessible by road. They are accessible only by small propeller planes that also bring the mail and supplies. Most villages consist only of houses, a school, a church, and an office for the tribal council or municipality if there is one. There are no hotels or services of any kind, except for maybe a small store in someone's home. The populations are generally small, fewer than 300, and they still practice an ancient way of life in that they literally live off the land – fishing, hunting, and berry picking. Thus, "rural" in Alaska carries a unique meaning that provides important context for the voting issues detailed here.

Naturally, voting can be a very different experience in this kind of environment. In 2004, the local NBC affiliate KTUU aired a series of stories about voting in rural Alaska. One of these stories described an election in Kasigluk, a Yup'ik village fifteen minutes from Bethel by air. Kasigluk still does not have running water, so people pull what they need from the wells. The local election officer makes an announcement through a borrowed marine radio that anyone who wants to vote has to come down to the community center by 11:30 a.m. because that is when she is taking the single polling machine to the other side of the river. At 11:30, the local election official collects the materials, packs up the ballot machine, and drives it by four-wheeler down to the river. The old village site, where some tribe members still reside, is on the other side of the river but there is no bridge, so the election officer loads the ballot machine and materials onto a boat and crosses over. When the weather is bad, this is no mean feat. The ballot machine is set up again at the school on the other side where the children recite the pledge of allegiance in Yup'ik. The principal makes an announcement on the radio that the ballot machine has arrived and the poll in Kasigluk is open. The DOE says there are about 150 communities like this one.[9]

B. The unusual settlement of Natives' land claims in 1971 impacts the political landscape

Not only do many Alaska Natives inhabit a unique geographic place in Alaska, they also have a unique place in the political landscape. In 1971, the Alaska Native Claims Settlement Act (ANCSA) terminated aboriginal title to lands throughout Alaska in exchange for a lump sum settlement of $1 billion and forty-four million acres of land.[10] That sum went mostly to thirteen newly established Native corporations – one for each of twelve regions in Alaska, and a

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[8] United States Census Bureau 2000.
[9] State of Alaska, *Help America Vote Act (HAVA) Plan*, 2005 Updated at 3.
[10] 43 U.S.C. § 1601 *et seq.*

thirteenth corporation for Native Alaskans who reside outside the state.[11] The entire State is divided into these twelve regional corporations, which correspond roughly to the different language and culture groups of Alaska Natives.[12] These Native corporations are state-chartered corporations whose shareholders are Alaska Natives who resided within that corporation's region as of the date of passage of ANCSA in 1971.[13] Because shareholders were limited to those alive at the time of ANCSA's passage, most Alaskans born after that date are not shareholders and have little relationship to their regional corporations.

The Native Tribes also continued to exist. Thus, ANCSA did not shift Alaska Natives into a corporate structure wholesale, but merely separated the Tribes from their land base (and the resulting settlement). Today, there are three different types of Native groups or organizations: (1) the 231 federally recognized Tribes; (2) the thirteen for-profit Native corporations created under ANCSA; and (3) twelve regional non-profit corporations created under ANCSA.

The boundaries of the twelve regional ANCSA corporations are not formal political boundaries, but serve more as boundaries for the provision of services and dividends from one's Native corporation. Alaska's internal political boundaries and regional governments are boroughs. Unlike most states, Alaska does not have counties. This resulted from Alaska's constitutional drafters' perception that the county system prevalent in "lower 48" states was flawed.[14] Thus, Alaska is divided into sixteen boroughs and a large area referred to as the unorganized borough.[15] Most of those who reside in boroughs receive services through the borough or

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[11] Scholars and Native leaders still debate the policy and economic effects and rationale of ANCSA. *See, e.g.*, Shannon D. Work, *The Alaska Native Claims Settlement Act: An Illusion in the Quest for Native Self-Determination*, 66 Or. L. Rev. 195 ("the act has the potential to destroy the remaining vestiges of an entire culture"); *Holding Our Ground*, a radio documentary series featuring Alaska Natives (Perry Eaton of Kodiak: "I think that the passage of the land claims settlement act was a hallmark in American History. The uniqueness of the act perhaps is its own worst problem. And that, being the imposition of the corporate structure on a culturally different people." ALASKA NATIVE MAGAZINE, Nov/Dec 1985, *See* Steve Colt, *Alaska Natives and the "New Harpoon": Economic Performance of the ANCSA Regional Corporations*, INST. OF SOC. AND ECON. RESEARCH, 2001, at http://www.iser.uaa.alaska.edu/Publications/colt_newharpoon2.pdf (last visited December 12, 2005). (Colt concludes there was a "large variation in economic performance among Alaska Native corporations. [...] The average performance of the group was poor, but several relative success stories stand out against the backdrop of several hundred million dollars in business losses.") Colt's study concentrates on the twenty years following establishment of the Native corporations. (http://www.ankn.uaf.edu/curriculum/ANCSA/HoldingOurGround/ (last visited Jan. 2, 2006)).

[12] A map of the state as divided into the twelve regional corporations is attached as Exhibit 1.

[13] The fact that those born after 1971 are mostly non-shareholders (unless they received shares by inheritance) has resulted in a youth population of non-shareholder Natives who receive no dividends and have little loyalty to the corporation from their region. Some estimates suggest that the number of non-shareholder Natives will surpass the shareholders within the next ten years.

[14] *See* L. Cotton, *Regional Government Options Study Delta-Ft. Greely Regional Education Attendance Area* at http://www.ci.delta-junction.ak.us/pdf_documents/11.2003 percent20burough percent20study.pdf (last visited December 12, 2005) ("A major drawback of other sub-state systems was the proliferation of government units with overlapping jurisdiction which too often resulted in confusion, inefficiency, and duplication of services. To avoid this problem, the writers of the state constitution hoped to devise a sub-state level of government which would '...provide for maximum local self-government with a minimum of local government units and to prevent duplication of tax-levying jurisdictions...' (Alaska State Constitution, Article X, Section One). The system was to have only two local governing bodies, cities and boroughs.")

[15] http://en.wikipedia.org/wiki/List_of_Alaska_boroughs_and_census_areas (visited Feb. 18, 2006).

municipal government or the regional non-profit corporations. Those who reside in the unorganized borough, which encompasses most of the Native areas, receive their services from their tribes or non-profit corporations. Because the State has withdrawn a lot of funding that used to be allocated to rural municipalities, an increasing number of municipalities have simply collapsed into the tribal governments; thus, the only government for hundreds of miles is sometimes the local Indian tribe.

C. Census data since 1980 show a growing but still disproportionately poor and undereducated alaska native population

The Census data reveals that Alaska's population, including the Alaska Native population, is increasing, but that Alaska Natives still lag behind non-Natives in many ways.

	1980	1990	2000
Total population	401,851[16]	550,043[17]	626,932.[18]
percent male / female	54 / 46	53 / 47	52 / 48
percent over 55	8	9	12.9
percent Alaska Native	16	15.6	19
percent who speak a language other than English	unavailable	17	14.3
percent that had lived in Alaska for at least 5 years	69	75	81

The 1990 Census also revealed that, although Alaska Natives resided in all areas of the State, they were fairly concentrated and comprised over half the population in eight areas: Bethel census area (84 percent), Dillingham census area (73 percent), Lake and Peninsula Borough (76 percent), Nome census area (74 percent), North Slope Borough (73 percent), Northwest Arctic Borough (85 percent), Wade Hampton census area (93 percent), and the Yukon-Koyukuk census area (56 percent).[19] Alaska Natives also continued to earn a lower annual income than all other groups, and less than half of what Whites earned in 1990.[20] Thus, in 1990, Alaska Natives had the lowest per-capita income of any group and constituted "the largest group of the total Alaskan population to live in poverty"; 21 percent of Alaska Natives lived in poverty.[21] Alaska Natives in the eight census areas listed above also had the highest unemployment rate in the state and the

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[16] Thomas A. Morehouse, *Alaska's Elections 1958-1984*, ISER Occasional Paper No. 17 (Anchorage 1985) p. 6.
[17] *Alaska Natives Commission Report Volume I*, available at http://www.alaskool.org/resources/anc/anc07.htm#top (visited January 18, 2006).
[18] The Census estimates that the 2004 population is 655,435.
[19] *Id.* at Demographic and Geographic Sketches of Alaska Natives; a map of the current Native concentrations is attached as Exhibit 7.
[20] *Id.*
[21] *Id.*

lowest level of education.[22] In the Wade Hampton census area for example, only 58 percent of the Native population had graduated from high school. At the time, 61 percent of Alaska Natives lived in "village Alaska," and only 32 percent lived in the major urban areas.[23]

The 2000 Census revealed that little had changed in the Alaska Native population. The Alaska Native population is now 19 percent, making it by far the largest minority population in the State, followed by African-Americans at 4.3 percent and Filipinos at 2 percent. Still a young population, Alaska's median age is 32.4 years.

The ISER recently concluded a very important study called "Status of Alaska Natives 2004." Based on Census 2000 data, it makes several important observations that show improvement in the status of Alaska Natives, but it also concludes that Alaska Natives still lag far behind the non-Natives in many areas. The report noted first that the Alaska Native population is growing. In 1990, there were approximately 95,000 Alaska Natives, but by 2000, that number had reached 120,000.[24] Although the Native population grew in both urban and rural areas, it grew faster in urban areas as the population seems to shift toward the cities.[25] At the time of statehood, in 1959, 70percent of the indigenous population resided in approximately 178 rural Native villages and towns.[26] Now, however, 43percent of Alaska Natives live in urban areas such as Anchorage, Fairbanks, or Juneau.[27] However, the populations of rural villages are also continuing to grow. Alaska Natives are also a very young people, as 44 percent are age 19 and under.

The statistics show improvements in some areas and stagnation in others. The number of unemployed Natives increased by 35 percent since the 1990 Census (less than half now have jobs) and their incomes remain at just 50–60 percent those of non-Natives. As a result, Alaska Natives are three times as likely as other Alaskans to be poor. Although the situation was much worse in 1990, still only 75 percent of rural homes have sanitation systems. Thirty-two communities in interior and western Alaska still do not have public sanitation systems at all, and a further twenty-three communities have sanitation that serves only 70 percent or less of that community. The good news in rural Alaska was the dramatic improvement in access to health care and the significant increase in the availability of quality housing. On the other hand, Alaska Natives' rate of Fetal Alcohol Spectrum Disorder doubled in the 1990s and the number of Alaska Native prisoners jumped by 50 percent; Alaska Natives now make up more than one-third of the prisoners but only one-fifth of the population.

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[22] *Id.*
[23] *Id.*
[24] Scott Goldsmith, Jane Angvik, Lance Howe, Alexandra Hill, and Linda Leask, *The Status of Alaska Natives Report 2004*, Volume I, ISER (Anchorage 2004) at 2.
[25] *Id.*
[26] Gordon Scott Harrison, *Electoral Behavior of Alaska Native Villages*, ISER Research Note G1 (Fairbanks 1970) at 2, n.3
[27] *Status of Alaska Natives, supra* note 24, at 2.

D. A significant number of Alaska Natives still speak their Native language and many have limited proficiency in English

There are 20 different languages still spoken in Alaska: Aleut, Alutiiq, Iñupiaq, Central Yup'ik, Siberian Yup'ik, Tsimshian, Haida, Tlingit, Eyak, Ahtna, Dena'ina, Deg Hit'an, Holikachuk, Upper Kuskokwim, Koyukon, Tanana, Tanacross, Upper Tanana, Gwich'in, and Han.[28] Some of these also have regional dialects. The largest groups of language speakers are Iñupiaq (more than 3,000 speakers), Siberian Yup'ik (about 1,100 speakers), and Central Yup'ik (about 10,000 speakers). Siberian Yup'ik and Central Yup'ik are particularly important here because they are still the primary language of many of the villages and the first language that children learn at home.[29] There are also Yup'ik and Iñupiaq immersion schools in Bethel, Barrow and Kotzebue.[30] In addition, at least three state school districts have bilingual or immersion programs.[31] Thus, there are many children and adults who still speak their native languages and even use them as their primary language. Moreover, maintaining and preserving these languages is critically important to the Native population because language expresses a culture's worldview, and is, according to the Alaska Native Languages Center, "the glue that sticks everything together."[32] The Lower Kuskokwim School District perhaps sums it up best in the title of its Yup'ik First Language Program: "Our language, our souls."[33]

Many of these Native language speakers also have limited English proficiency ("LEP"). For example, in the Bethel census area, which is a Yup'ik speaking area, the percentage of the Alaska Native VAP who are LEP is 21 percent. In the Wade Hampton census area, 12 percent of the Alaska Native VAP is LEP. In the North Slope Borough, an Inupiaq speaking area, 13 percent of the Alaska Native VAP is LEP.

II. History of Discrimination in Alaska

While the Alaska Native experience with the U.S. government, its agents, and its westward-migrating citizens differs in several respects from the experiences of Native Americans in the lower forty-eight United States, the effects of these interactions on Alaska Natives are uncannily similar. From the time of European and Euro-Americans' first exploration of Alaska, Alaska Natives suffered from epidemics brought in by fur traders, and one ethnic group, the Aleuts, was reduced to one-tenth its previous size over the course of sixty years[34] due to smallpox and other infections brought by the explorers. The discovery of gold in the 1880s hastened non-Native

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[28] http://www.uaf.edu/anlc/ (visited Jan.25, 2006). A map of the areas where these languages are spoken is attached as Exhibit 2.

[29] http://www.uaf.edu/anlc/langs/cy.html (visited Jan. 25, 2006).

[30] The Iñupiaq immersion school in Kotzebue is called Nikaitchuat Ilsagviat, and the Yup'ik immersion school in Bethel is called Ayaprun Elitnaurvik (www.yupik.org).

[31] Lower Kuskokwim School District (Yup'ik), Northwest Arctic Borough School District (Iñupiaq) and the North Slope Borough District (Iñupiaq).

[32] Interview with Larry Kaplan, Alaska Native Languages Center (Jan. 24, 2006).

[33] http://www.ankn.uaf.edu/Curriculum/Yupiaq/DelenaNorrisTull/ (visited Jan. 25, 2006).

[34] Aleutian Pribilof Islands Ass'n, *History & Culture – History* at http://www.apiai.com/history.asp?page=history (last visited December 11, 2005). Researchers estimate the population of Aleuts to have been 12,000-15,000 when Vitus Bering (employed by Russia) first sighted the Aleutian Islands in 1741. In 1800, the Aleut population was estimated to be 1,200.

settlement and accordingly increased conflict between Natives and the newcomers. In the early years of the twentieth century, the burgeoning territory passed laws limiting the ability of Alaska Natives to be citizens, participate in the political process, and even enter certain public establishments. During World War II, the Aleuts were forcibly relocated from their island homelands on Attu to Southeast Alaska where they were held in overcrowded "duration villages" with no electricity, plumbing, clean water or medical care.[35] Even after the war, they were never allowed to return, and the government permanently relocated them to the villages of Unalaska, Atka, and Nikolski.[36] Even post-war, there were still signs in stores and restaurants that read "No Natives Allowed" and "No Dogs or Indians."

In the early 1940s, a husband and wife pair, Roy and Elizabeth Peratrovich,[37] protested persistent discrimination in public places like restaurants, movie theaters, playgrounds, and swimming pools.[38] As a result of three years of lobbying, a trying day of testimony,[39] and a powerful speech by Elizabeth Peratrovich,[40] the Alaska Territorial Legislature considered and passed the Alaska Equal Rights Act of 1945. This was a first step to reverse the attitude characterized by territorial governor John G. Brady, who lamented that "for too many whites *Indian* was synonymous with *nigger*."[41]

The discrimination experienced by Alaska Natives extended into voting. The earliest voting laws applicable to Alaska Natives in Alaska imposed a burdensome and discriminatory pre-registration process on Natives seeking citizenship. Under the 1915 Act, "to define and establish the political status of certain Native Indians within the Territory of Alaska," Alaska Natives were rewarded with citizenship (and thus the right to vote) only after: (1) submitting an application to a U.S. government, territorial, or municipal school; (2) enduring an examination by a majority of the teachers of the school about the qualifications of the applicant "as to an intelligent exercise of

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[35] http://www.nps.gov/aleu/AleutInternmentAndRestitution.htm.
[36] *Id.*
[37] Grand President of the Alaska Native Brotherhood and Grand Vice President of the Alaska Native Sisterhood, respectively. The Alaska Native Brotherhood, established in 1912, was "an association that evolved into the first significant Native political organization in Alaska." Terence Cole, *Jim Crow in Alaska: the Passage of the Alaska Equal Rights Act of 1965,* Western Historical Quarterly 23 (November 1992) at 429-449.
[38] The discrimination included, *inter alia*, being barred from the Douglas Inn, a restaurant in Juneau, Alaska. In response to this discrimination, on December 30, 1941, Roy Peratrovich wrote then-territorial Governor of Alaska, Ernest Gruening, alluding to World War II and asking "in view of the present emergency, when unity is being stressed don't you think that it is very Un-American?" He continued by stressing that "all freedom loving people in our country were horrified" by German discrimination against Jews. Peratrovich also referred to Alaska Native servicemen: "In the present emergency our Native boys are being called upon to defend our beloved country, just as the White boys. There is no distinction being made there but yet when we try to patronize [some restaurants] we are told in most cases that Natives are not allowed." Central Council of Tlingit and Haida Indian Tribes of Alaska (CCTHITA), *A Recollection of Civil Rights Leader Elizabeth Peratrovich, 1911-1958*, August 1991, at 16.
[39] Senator Allen Shattuck vehemently opposed passage of the bill, claiming "who are these people, barely out of savagery, who want to associate with us whites with 5,000 years of recorded civilization behind us?"
[40] After a series of comments similar in tone to Sen. Shattuck's, thirty-four-year-old Elizabeth Peratrovich stood and gave a short but poignant and ultimately effective speech. As a result of her speech, the Senate passed the bill 11-5. Governor Gruening recalled "Had it not been for that beautiful Tlingit woman, Elizabeth Peratrovich, being on hand every day in the hallways, it (the anti-discrimination bill) would never have passed." CCTHITA, *A Recollection of Civil Rights Leader Elizabeth Peratrovich, supra* note 38, at 23.
[41] T. Hinckley, *Alaskan John G. Brady: Missionary, Businessman, Judge, and Governor, 1878-1918* (Columbus, 1982) at 136.

the obligations of suffrage, a total abandonment of any tribal customs or relationship, and the facts regarding the applicant's adoption of the habits of a civilized life"; (3) obtaining an endorsement by at least five white U.S. citizens "to the effect that such citizens have been personally acquainted with the life and habits of such Indian for a period of at least one year and that in their best judgement [*sic*] such Indian has abandoned all tribal customs and relationship, has adopted the ways and habits of a civilized life, and is duly qualified to exercise the rights, privileges, and obligations of citizenship"; (4) applying to the U.S. District Court for a certification that "such applicant forever renounces all tribal customs and relationships"; (5) receiving a notice of hearing issued by the district court judge; (6) posting the hearing notice and application in the post office nearest to his or her residence; and (7) obtaining a certificate of citizenship from the district court judge.

This law was ostensibly rendered obsolete nine years later, in 1924, when Congress conferred citizenship on "all noncitizen Indians born within the territorial limits of the United States."[42] However, the Territorial Legislature responded by enacting a literacy law the next year.[43] The measure required that "voters in territorial elections be able to read and write the English language."[44] This literacy test and its intended restriction of Native suffrage likely reflected the opinion of many whites at the time. The *Fairbanks Daily News-Miner*, a daily paper, published an editorial in 1926 entitled "Alaska–A White Man's Country" in which the editors insisted "notwithstanding the fact that the Indians outnumber us, this is a white man's country, and it must remain such."[45]

Alaska's constitution, which became operative with the Formal Declaration of Statehood on January 3, 1959, also included an English literacy requirement as a qualification for voting.[46] Alaska finally voted to repeal this provision of the constitution in 1970, five years prior to the enactment of Sections 203 and 4(f)(4). State Senator Gravel linked the repeal of the literacy requirement to the federal pressure associated with the enactment of the VRA of 1965: "We have seen that a measure of national leadership was required to guarantee the Constitutional right to vote of individuals who happened to be members of ethnic or racial groups traditionally

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[42] Indian Citizenship Act of June 2, 1924, 68 Cong. Ch. 233, 43 Stat. 253.
[43] One commentator described this law as "designed to limit Native voting." Cole, *Jim Crow in Alaska, supra* note 37 at 429-49.
[44] Stephen Haycox, *William Paul, Sr. and the Alaska Voters' Literacy Act of 1925*, Alaska History, Vol. 2, No. 1 (Winter 1986/87): 17-38 at http://www.alaskool.org/native_ed/articles/literacy_act/LiteracyTxt.html (last visited Dec. 12, 2005).
[45] Cole, *Jim Crow in Alaska,* note 37 at 429-49.
[46] AK. CONST. art V, § 1 currently reads: "Every citizen of the United States who is at least eighteen years of age, who meets registration residency requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state or local election. A voter shall have been, immediately preceding the election, a thirty day resident of the election district in which he seeks to vote, except that for purposes of voting for President and Vice President of the United States other residency requirements may be prescribed by law. Additional voting qualifications may be prescribed by law for bond issue elections of political subdivisions. (Amended 1966, 1970 & 1972)." The original version included a provision requiring that "a person otherwise qualified to vote in state or local elections be able to read or speak the English language as a prerequisite for voting." This measure was repealed with a vote of 34,079 to 32, 578 on August 25, 1970, after HJR 51, introduced by Rep. Chancy Croft, placed Constitutional Amendment 2 on the 1970 ballot.

powerless within the state and federal political processes."[47] The repeal of the literacy requirement removed the final formal barrier to registration faced by Alaska Natives.

Alaska Natives also experienced discrimination in education. From the beginning of Alaska's history as a U.S. territory, the education of Alaska Natives was unequal. Steeped in the Social Darwinism of the turn of the twentieth century, the Bureau of Education of the Department of the Interior (DOI) established a segregated school system[48] that was later codified by Congress in the Nelson Act[49] of 1905. The Act divided responsibility for provision of public education between the territorial government, responsible for white children and children of "mixed blood who live a civilized life," and the federal government, which retained responsibility for educating Indian and Eskimo children. In schools for Alaska Native students, the Bureau advocated "English as the language of instruction, since it can [...] advance national solidarity and provide the best conditions for individual and national progress."[50]

The state's first legal challenge to segregated public education took place in 1929, after two Native girls were expelled from the white public school in Ketchikan and ordered to attend the Native school in Saxman, a Native village four miles south of Ketchikan. The court reaffirmed the right of mixed-blood children to attend the school of their choice.[51] The segregation continued, however, with various reports throughout the 1930s and 1940s that Native students were denied access to public schools.

In the early twentieth century, a boarding school policy was instituted in Alaska. The DOI's Bureau of Education hoped to concentrate Alaska Natives into larger villages so that Natives' school-aged children could attend larger schools.[52] As a result of the official boarding school policy,[53] the state of Alaska did not build high schools in rural villages, which meant that Alaska

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[47] *Hearings* at 529.

[48] Stephen E. Cotton, *Alaska's "Molly Hootch Case": High Schools and the Village Voice*, Educational Research Quarterly, Volume 8 1984 number 4, p. 30 at http://www.alaskool.org/native_ed/law/mhootch_erq.html (last visited Jan. 2, 2006).

[49] Nelson Act: Alaska Roads, Schools, and Insane, Jan. 27, 1905, ch. 277, 33 Stat. 616. The full text of the Act is at http://www.alaskool.org/native_ed/law/nelson.html (last visited Dec. 12, 2005).

[50] Department of the Interior, Bureau of Education, *Education in the territories and dependencies* "What the Bureau of Education Stands For," Bulletin No. 12, 1919, at 53. An English-only policy was instituted by the Commissioner of Indian Affairs for all schools on Indian reservations (whether Government or mission schools) as of 1887. R. Spack, *America's Second Tongue: American Indian Education and the Ownership of English, 1860-1900*, University of Nebraska Press, Lincoln and London, 2002, at 33.

[51] Cole, *Jim Crow in Alaska*, *supra* note 37 at 429-449.

[52] "The concentration of the bureau's work on large villages [...] will hasten the arrival of the day when the native of Alaska will take his place along with his white brother in the affairs of the Territory." DOI Bureau of Education, *Education in the territories and dependencies* "What the Bureau of Education Stands For," Bulletin No. 12, 1919, at 55. The explicit goal of destroying smaller Alaska Native villages was affirmed forty-seven years later in a report commissioned by the State of Alaska on Native Education. The Virginia-based consultant "concluded that 'movement to the larger centers of population is one essential ingredient in the adjustment and acculturization of the Alaskan native. Residence in urban areas appears to accelerate the breakdown of old village patterns, patterns which may retard the development of rural folk into a disciplined and reliable workforce'." Cited in Cotton, *Alaska's "Molly Hootch Case," supra* note 48 at 30.

[53] The policy was abandoned in 1970, when "officials in the Department of Education concluded that the regional secondary school program was failing to provide all the benefits originally envisaged, and had detrimental effects upon some of the students which outweighed the benefits they were deriving from the program." Agreement of

Native students had to travel hundreds of miles from home, sometimes out of state, to obtain a high school education.

In 1971, the Alaska Legal Services Corporation filed a class-action lawsuit, commonly known as "the Molly Hootch lawsuit" (Molly Hootch, the lead plaintiff, was a Yup'ik schoolgirl), which radically changed the face of educational opportunities for Alaska Natives. The plaintiffs claimed that by failing to build high schools in rural villages, the state of Alaska unconstitutionally discriminated against Alaska Native students in public education.[54] The state settled in 1976 and, per the consent decree, spent $136 million constructing schools in all rural villages with more than ten school-aged students.[55]

At the time the VRA was extended to Alaska in 1975, Alaska had abolished its literacy test but continued to conduct English-only elections. Alaska had made significant progress in reversing the practice and effect of discrimination against Alaska Natives with the passage of the Alaska Equal Rights Act in 1945, by repealing the literacy requirement in the Alaska Constitution, and as a result of passage of ANCSA in 1971. However, in 1975, Alaska Natives still lagged far behind non-Natives in almost all aspects including education, earnings, healthcare, and quality of life.

III. The 1975 Extension of the Voting Rights Act to Language Minorities

In 1975, Congress amended the VRA to remedy the discrimination faced by language minorities in voting. Congress determined whether a test or device had been used that effectively prevented language minorities from voting. The jurisdictions that had used such a test, including Alaska, became subject to new language minority provisions under Section 4(f)(4) of the VRA, as well as preclearance and observer provisions. In addition, Congress developed a second formula based on minority population size or percentage, Section 203, to provide for minority language assistance. Although the coverage formulas of 4(f)(4) and 203 are different, the types of language assistance they require are identical.

While only certain areas are covered by Section 203, *all* of Alaska is covered by Sections 4(f)(4) and 5.[56] The State, on the other hand, may be operating under the assumption that it is only covered by Sections 203 and 5.[57]

Settlement, *Tobeluk v. Lind* No. 72-2450, Superior Court of Alaska, at http://www.alaskool.org/native_ed/law/tobeluk.html (last visited Dec. 11, 2005).

[54] The plaintiffs alleged: (1) a pattern and practice of racial discrimination against Alaska Natives in violation of the Fourteenth Amendment of the U.S. Constitution, 42 U.S.C. §§1981, 3.983, 2000d, and the equal protection clause of the Alaska Constitution; and (2) violation of the plaintiffs' right to a public education, which is not justified by either a rational basis or a compelling state interest. In the consent decree, the parties stipulated that "members of the plaintiff class enrolled in the boarding program have experienced accelerated drop-out rates, psychological and social problems, including disruption of family life and loss of sense of identity, and failure to live up to educational potential." S. REP. NO. 94-295, at 29.

[55] $466,900,000 in 2005 dollars.

[56] The current coverage list can be found at: http://www.usdoj.gov/crt/voting/28cfr/55/28cfr55.htm#anchor55_4f4 (visited Jan. 31, 2006).

[57] Correspondence to Natalie Landreth from Whitney Brewster, Director of the Alaska DOE, dated January 5, 2006, outlined only areas covered by Section 203. Correspondence on file with the author.

Despite total 4(f)(4) coverage and partial 203 coverage , there has been little formal activity under these provisions in Alaska. There have been no reported cases on the minority language provisions. As set forth below, there seems to be little DOJ involvement in general, although it has stepped in at very important times to prevent some potentially unlawful redistricting plans. These are discussed in detail. No federal observers have been deployed to Alaska under Sections 6 or 9.[58] Alaska has suffered from this inattention.

This section explains the findings that prompted Congress to enact the language minority provisions. It then describes the remedy Congress fashioned and what the VRA mandates in covered jurisdictions like Alaska. Finally, this section outlines why Alaska specifically is covered under the language minority provisions.

A. Congress found that language minorities faced significant disadvantages at the polls

Ten years after enacting the VRA, Congress responded to the "systematic pattern of voting discrimination and exclusion against minority group citizens [whose] dominant language is other than English"[59] by amending the VRA to require covered jurisdictions to provide bilingual voting assistance. Congress found that "through the use of various practices and procedures, citizens of language minorities ha[d] been effectively excluded from participation in the electoral process."[60] For Congress, "printing or providing information only in English is *effective as a literacy test* in keeping [language minorities] from registering to vote or casting an effective ballot."[61] Congress concluded that remedial action was necessary to address language minorities' exclusion and alienation from the voting and political processes.

In coming to the conclusion that remedial action was necessary, the Subcommittee on Constitutional Rights of the Senate Judiciary Committee examined four distinct categories of evidence.[62] First, Congress considered evidence of barriers to registration faced by language minority citizens. Second, the Subcommittee examined past "outright exclusion and intimidation at the polls."[63] The U.S. Commission on Civil Rights (UCCR) had documented several instances of such exclusion at the polls: among other discriminatory practices, the Commission highlighted election officials' "failing to locate voters' names on precinct lists, location of polls

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[58] There has, however, been informal USDOJ "attorney coverage" in the 2004 primary, municipal/borough and general elections. This monitoring focused on compliance with Section 203 for the benefit of the Filipino population in Kodiak, Alaska.

[59] S. REP. NO. 94-295, at 24 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 790.

[60] 42 U.S.C. § 1973aa-1a(a).

[61] B. Weinberg, L. Utrecht, *Problems in America's Polling Places: How They Can Be Stopped*, 11 TEMP. POL & CIV. RTS. L. Rev. 401, 411 (emphasis added).

[62] The U.S. Commission on Civil Rights' report, *The Voting Rights Act: Ten Years After* (1975), which preceded hearings on the reauthorization of Section 203 and largely guided Congress' work on bilingual voting assistance provisions, was organized into six substantive chapters, which reflect the same general themes as those used by Congress: (1) barriers to registration; (2) barriers to voting (which included the lack of bilingual ballots and other voting materials); (3) barriers to candidacy; (4) physical and economic subordination; (5) fair representation in state legislatures and Congress; and (6) fair representation in local governments.

[63] S. REP. NO. 94-295, at 26.

at places where minority voters feel unwelcome or uncomfortable, [...] and the inadequacy of voting facilities."[64] Congress also found that language minority citizens face[d] "acts of physical, economic, and political intimidation"[65] when attempting to exercise their right to vote. The Subcommittee highlighted acts of economic intimidation (fear of job loss, threatened loss of loans, fear of interference with welfare check disbursement) against Mexican Americans, and deduced that "people whose jobs, credit, or housing depend on someone who wishes to keep them politically powerless are not likely to risk retaliation for asserting or acting on their own views."[66]

Third, the Subcommittee evaluated whether past discrimination had produced process failure and whether majority voters had changed election laws to dilute minority voting power. Congress concluded that "because of discrimination and economic dependence, and the fear that these have created, language minority citizens [...] have not successfully challenged white political domination."[67] Congress highlighted the disparity in political representation in Texas, where Mexican-Americans comprised 16.4 percent of the population, but held only 2.5 percent of the elective positions.[68] Even if elected, Congress noted, minority representatives often faced changes to election laws intended to dilute minority political power. According to Congress, such changes were "widespread" in Texas "in the wake of recent emergence of minority attempts to exercise the right to vote."[69] After citing other examples, Congress concluded that "if a language minority person is not permitted to register, or if registered not allowed to vote, that person is obviously denied full participation in the political process."[70]

These first three categories of evidence largely mirrored the discriminatory practices against African-Americans that motivated Congress to enact the VRA in 1965. Indeed, in January 1975, the UCCR published "The Voting Rights Act: Ten Years After," a study of "the current status of minority voting rights in jurisdictions covered under the Voting Rights Act of 1965, as amended in 1970."[71] The UCCR concluded that "the problems encountered by Spanish speaking persons and Native Americans in covered jurisdictions are not dissimilar from those encountered by Southern blacks."[72] Given the UCCR's documentation of discriminatory practices against Hispanics and pressure from Texan and Californian representatives in Congress, the pressure to extend the protections of the VRA to Hispanics was significant.

Congress chose to do more than simply extend the VRA protections to Hispanic Americans; the Subcommittee on Constitutional Rights spent considerable time and effort amassing evidence for the fourth category of evidence: that *elections held only in English in itself constituted voting discrimination.* In order to establish that monolingual elections were discriminatory, the

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[64] *Id. See also* UCCR, *The VRA Ten Years After*, *supra* note 62, at 97.
[65] S. REP. NO. 94-295, at 26.
[66] *Id.*
[67] *Id.*
[68] *Id.* at 27.
[69] *Id.*
[70] *Id.*
[71] UCCR, *The VRA Ten Years After*, *supra* note 62 at i, "Letter of Transmittal." The UCCR's staff "visited 54 jurisdictions in 10 States (Alabama, Arizona, California, Georgia, Louisiana, Mississippi, New York, North Carolina, South Carolina, and Virginia) between July and November 1974." *Id.* at v.
[72] *Id.* at 15-16.

Subcommittee focused its inquiry on three contributing factors: (a) the disparity in educational opportunities for language minorities that had created (or contributed to) a disparate mastery of the English language; (b) discrimination faced by language minority citizens as a result of their disparate language skills; and (c) state and local governments' failure to intervene to protect the rights of language minorities.

The Subcommittee found that the widespread *de jure* public school segregation permitted prior to the Supreme Court's ruling in *Brown v. Board of Education*[73] severely hindered language minorities' ability to learn English.[74] According to Congress, the low elementary and high school graduation rates of language minorities[75] and consequent high illiteracy rates were "the product of the failure of state and local officials to afford equal educational opportunities to members of language minority groups."[76] This conclusion mirrored the conclusion of an earlier UCCR report on educational inequality: "the basic finding of this report is that minority students in the Southwest – Mexican Americans, blacks, American Indians – do not obtain the benefits of public education at a rate equal to that of their Anglo classmates."[77] Furthermore, not only had minority language citizens suffered disparate treatment in education and voting, the Subcommittee heard evidence that they had been "the target of discrimination in almost every facet of life."[78]

Finally, Congress found that state and local jurisdictions' recalcitrance in protecting language minorities against discrimination necessitated federal intervention. At the time of the 1975 hearings, state and local governments had been sued in ninety-seven civil and fourteen criminal suits initiated by the U.S. Department of Justice "involving the rights of Spanish-speaking citizens, Asian Americans, and American Indians."[79] Congress found that absent congressional intervention, state and local jurisdictions would "continue to adhere to a uniform language system"[80] and that their failures to accommodate languages other than English in the voting process "undermine[d] the voting rights of non-English speaking citizens and effectively

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[73] 347 U.S. 483 (1954).
[74] S. REP. NO. 94-295, at 28.
[75] The Subcommittee found that in Texas, more than 33 percent of the Mexican-American population had not completed the fifth grade.
[76] The Senate Report cites several examples of *de jure* segregation and/or the disparate treatment of language minority pupils and the court opinions striking them down. *See, e.g., Guey Heung Lee v. Johnson*, 404 U.S. 1215 (1971) (upholding California desegregation plan and citing repealed California statute establishing separate schools for minority students); *Lau v. Nichols*, 414 U.S. 563 (1974) (failure to provide English language assistance to Chinese-American non-English students denies them an opportunity to participate in the public school program); *Natonabah v. Board of Education*, 355 F.Supp. 716 (D.N. Mex. 1973) (Navajo pupils denied equal educational opportunities); *Hootch v. State Operated School System,* 536 P.2d 793 (Alaska 1975) (remanding claim that Alaska school system unconstitutionally discriminated against Alaska Native students; the state of Alaska settled the lawsuit by committing to construct high schools in 126 rural communities.)
[77] S. REP. NO. 94-295, at 29.
[78] *Id.*
[79] *Id.* at 30. These suits, listed by Assistant Attorney General for Civil Rights, J. Stanley Pottinger, during his testimony before Congress, generally sought to "enjoin discrimination against language minorities in public schools, employment, voting rights, and penal institutions." *Hearings on the Extension of the Voting Rights Act of 1965*, 94th Cong. 588-592 (1975) (hereinafter *Hearings*).
[80] S. REP. NO. 94-295, at 30.

exclude[d] otherwise qualified voters from participating in elections."[81] Congress concluded that this evidence of discrimination against language minorities warranted federal intervention; and enacted Sections 203 and 4(f)(4) on August 6, 1975.

B. As a result of this discrimination, Congress enacted the language minority provisions

There are two different provisions that require assistance for language minorities: Sections 4(f)(4) and 203. Both mandate that the jurisdiction covered provide bilingual language assistance. Section 4(f)(4) also triggers coverage under the preclearance provisions described below.

Coverage under Section 4(f)(4) is based on whether the state or political subdivision maintained any "test or device"[82] in the 1964 election, the 1968 election, or the 1972 election, and the director of the Census determines that less than 50 percent of the VAP were registered to vote or that less than 50 percent of such persons did vote.[83] If this threshold is met, the state or political subdivision must provide all voting materials, defined broadly, in the language of the applicable minority group. Furthermore, jurisdictions covered by Section 4(f)(4) must also submit all proposed election law changes to the DOJ for preclearance under Section 5.

Section 203 has a different coverage formula, but the same effect. Jurisdictions are covered by Section 203 if the U.S. Census determines that: (1) more than 5 percent of the citizens of voting age of a given jurisdiction are members of a single language minority and are limited-English proficient (LEP);[84] (2) more than 10,000 of the citizens of voting age of such political subdivision are members of a single language minority and are LEP;[85] *or* (3) in jurisdictions containing all or any part of an Indian reservation, more than 5 percent of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are LEP;[86] *and* (4) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.[87]

The language minority provisions prohibit covered jurisdictions from "providing voting materials only in the English language"[88] and mandate that voting materials be provided "in the language of the applicable minority group."[89] However, they include a curious provision for

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[81] *Id.*
[82] "Test or device" is defined as any requirement that a person (1) demonstrate the ability to read or understand, (2) demonstrate educational achievement or knowledge, (3) have good moral character, or (4) prove qualifications "by the voucher of registered voters or members of any other class." 42 U.S.C. § 1973b – (c). The statute also defines English-only elections as a test or device where more than 5 percent of the population is a member of a single language minority. 42 U.S.C. § 1973b – (f)(3).
[83] 42 U.S.C. § 1973b - (b)
[84] 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(I).
[85] 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(II).
[86] 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(III).
[87] 42 U.S.C. § 1973aa-1a(b)(2)(A)(ii). Per 42 U.S.C. § 1973aa-1a(b)(3)(E), "illiteracy means the failure to complete the 5th primary grade."
[88] 42 U.S.C. § 1973aa-1a(b)(1).
[89] 42 U.S.C. § 1973aa-1a(c).

unwritten languages: "*Provided,* That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives [sic] and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting." This clause becomes very important because, as explained below, Alaska claims it does not have to provide written materials because the Native languages are not written. Voting materials that have to be translated are broadly defined as "registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots."[90]

C. Why Alaska was included in the language minority provisions

The congressional record reflects remarkably little debate on whether or why to include Alaska under the language minority provisions. Indeed, the more than 1000 pages of Senate hearings on the extension of the VRA include fewer than eleven pages on the voting rights of Alaska Natives.[91] This consisted of testimony by Alaska's two U.S. senators and its lieutenant governor, all of whom advocated against a federal bilingual voting assistance mandate. While Alaska's senior Senator Mike Gravel generally supported extension of the VRA, he declared a mandate to provide bilingual voting materials "a very specious attack on human nature."[92] Senator Gravel recognized the extent to which Alaska Native languages were spoken in Alaska, commenting that he "probably ha[d] to use an interpreter more than probably anybody else in the Congress"; however, he argued that "language is not a barrier for [Alaska Natives'] recognizing what is in their interest in voting"[93] and questioned Alaska's ability to comply with a bilingual voting assistance requirement because "there are some Native languages which are not written languages."[94] Alaska's then-junior senator, Ted Stevens, similarly protested the inclusion of Alaska Native languages in the extension of the VRA. In a personal letter to Senator Tunney, Chair of the Judiciary Subcommittee on Constitutional Rights, Senator Stevens wrote:

> John, there are twenty different Eskimo and Aleut dialects in the State of Alaska. A knowledge of one dialect is no assurance of an understanding of any one of the other 19. [...] Writing systems for only a few of these languages have ever been developed, and those only recently. In some of the languages, there is no word for "Vote" and "Ballot." Most Natives are unable to read their language if it is written.
>
> Inclusion of Alaska under this legislation would be extremely burdensome. More importantly, there is no justification for such inclusion. No "test" or "device" is applied in Alaska as a prerequisite for voting. By Alaskan statute, assistance is provided to any voter with either a language or a physical disability. Plain and simple, Alaska does not discriminate against Alaska Natives in voting.[95]

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[90] 42 U.S.C. § 1973aa-1a(b)(3)(A).
[91] *Hearings* at 525-34; 942-43. There is a similar dearth of commentary on the language minority rights of Native Americans.
[92] *Id.* at 526.
[93] *Id.*
[94] *Id.* at 530.
[95] *Id.* at 942-43.

Finally, the Subcommittee heard from Lieutenant Governor Lowell Thomas, Jr., who requested that Alaska be exempted from inclusion in the prospective language assistance mandate because, per Alaska Statute 15.15.240, "Alaska provides assistance to any voter who desires help in reading or marking the ballot."[96] According to Lieutenant Governor Thomas, "many voters do ask for and receive assistance as provided in this section of the Alaska Statutes."[97]

Although the State's representatives denied that discrimination existed in voting in Alaska, in fact, Alaska Natives had experienced significant discrimination in almost every facet of life.

First, a voting test or device was administered in Alaska because it did have a provision in the state constitution that speaking English was a prerequisite to voting until 1970, and it had conducted English-only elections despite its diverse population.[98] Second, there was significant disparity in educational opportunities for language minorities that had created (or contributed to) a disparate mastery of the English language. At the time the VRA was extended in 1975, only 2,400 Alaska Natives total had graduated from high school.[99] Furthermore, Alaska operated a segregated boarding school system for Alaska Natives, who had to choose between staying with their families and forgoing an education or leaving their families behind in order to get a diploma. The Senate Report on the VRA even noted these enormous educational disparities.[100] More broadly, as detailed above in section III, Alaska Natives had endured a long history of discrimination in their everyday lives. Alaska thus has a significant history of discrimination that made it very difficult for Alaska Natives to participate in the electoral process for many years.

IV. The Impact of the Voting Rights Act in Alaska

A. Alaska Natives continue to face discrimination in voting and in other areas

As a result of Alaska's non-compliance, very little has changed for Alaska Natives since the extension of the VRA in 1975. While the actual English language requirement has disappeared from the state constitution, Alaska still conducts English-only elections despite its large Alaska Native population. Further, the large minority language-speaking Alaska Native population also has much higher poverty rates and much less education than their non-Native counterparts. Thus, many of the concerns present in 1975 remain just as salient today.

Because of the ongoing discrimination in many areas, Alaska still meets the criteria for coverage under both formulas in the language minority provisions. With respect to Section 4(f)(4), coverage under 4(f)(4) is based on whether: (1) the state or political subdivision maintained any "test or device"[101] in the 1964 election, the 1968 election or the 1972 election, and (2) the

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[96] *Id.* at 532. *See also* AK. STAT. 15.15.240 (2005).
[97] *Hearings* at 532.
[98] See Section III above.
[99] Goldsmith, *Status of Alaska Natives*, *supra* note 25, at 14.
[100] S. REP. NO. 94-295, at 29.
[101] "Test or device" is defined as any requirement that a person (1) demonstrate the ability to read or understand, (2) demonstrate educational achievement or knowledge, (3) have good moral character, or (4) prove qualifications "by the voucher of registered voters or members of any other class." 42 U.S.C. § 1973b – (c). The statute also defines

director of the Census determines that less than 50 percent of the VAP were registered to vote or that less than 50 percent of such persons did vote.[102] As the three benchmark elections in the statute have not changed, Alaska was and remains covered under these criteria. However, if the formula were based instead on more recent elections, the evidence shows that Alaska would still be covered. That is, Alaska still employs a test or device in the form of English-only elections, and only about 50 percent of the VAP were registered to vote or did vote in more recent elections.

With respect to Section 203, the VRA designates jurisdictions as "covered" if the U.S. Census determines that: (1) more than 5 percent of the citizens of voting age of a given jurisdiction are members of a single language minority and are LEP;[103] (2) more than 10,000 of the citizens of voting age of such political subdivision are members of a single language minority and are LEP;[104] *or* (3) in jurisdictions containing all or any part of an Indian reservation, more than 5 percent of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are LEP,[105] *and* (4) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.[106]

The Census Bureau has already made these determinations as set forth in the chart above, and those (unreviewable) determinations appear to be correct. However, some examples derived on that census data will help illustrate the extent of the problem.

In the Bethel Census area, which is a Yup'ik speaking area, the percentage of the Alaska Native VAP who are limited-English proficient, or LEP, is 21 percent and the illiteracy rate of Alaska Natives is more than 10 percent. In the Wade Hampton Census Area, 12 percent of the Alaska Native VAP is LEP and the illiteracy rate among Alaska Natives is 14 percent. In the North Slope Borough, and Inupiaq speaking area, 13 percent of the Alaska Native VAP is LEP and 7 percent is illiterate. Therefore, Alaska still meets, and indeed far exceeds in most places, the requirements of the coverage formula for Section 203.

1. Voter registration and turnout are relatively high in Alaska, but determining turnout specifically among Alaska Natives is difficult

Alaska has a large number of registered voters, and in fact, is one of a few states to have a larger number of registered voters (475,000) than the actual VAP (436,215).[107] The State attributes this to Alaska Statute Title 15 allowing people who are "temporarily out of state" to remain registered to vote if they intend to return.[108] The high registration is also due in part to the fact

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English-only elections as a test or device where more than 5 percent of the population is a member of a single language minority. 42 U.S.C. § 1973b – (f)(3).

[102] 42 U.S.C. § 1973b - (b)

[103] 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(I).

[104] 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(II).

[105] 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(III).

[106] 42 U.S.C. § 1973aa-1a(b)(2)(A)(ii). Per 42 U.S.C. § 1973aa-1a(b)(3)(E), "illiteracy means the failure to complete the 5th primary grade."

[107] State of Alaska, *HAVA State Plan*, 2005 Updated at 1.

[108] State of Alaska, *HAVA State Plan*, 2005 Updated at 1.

that voter registration is one way to establish residency for the purposes of receiving the Alaska Permanent Fund Dividend.[109] Alaska requires that voters register thirty days before an election, with the exception that a voter may register on Election Day and cast a vote only for President. Accordingly, Alaska seems to have always maintained a respectable level of turnout of its VAP. It has fluctuated over the years, but hovers from 50 to 60 percent.[110] Statewide voter turnout was approximately 69 percent of the VAP in the 2004 presidential election, 66 percent in the 2000 election, and 52 percent in 1990.[111] Turnout in the largest urban area of Anchorage averages 54 percent.[112]

Alaska Native turnout is more difficult to discern. Some sources have contended that turnout in rural (Native) Alaska tends to be fairly high, between 9 and 15 percent higher than in Anchorage.[113] Because the State does not collect racial data that would reveal turnout among Native voters both in urban and rural areas, Native turnout instead has been measured by the corporations themselves who have detailed, updated shareholder lists and can crosscheck them against the voter rolls to determine exactly how many shareholders voted. However, because only about half of Natives are shareholders and they also tend to be older (thus more likely to vote), this data may overstate turnout. Nevertheless, the information compiled by the Native corporations reveals that Native turnout in rural areas tends to be about 61 percent, while Native turnout in parts of Anchorage is as low as 36 percent.[114] Although the 61 percent is an average, some areas such as Koyuk and Brevig Mission have voter turnout of above 70 percent, while others such as Napaskiak have a voter turnout of only 37 percent.[115]

Because the turnout compiled by Native corporations only includes about half of the Native population and does not include the young Native population (who are not generally shareholders), there was a concern that this turnout data might be overstated. To get an estimate (a second opinion) of the percentage turnout among Alaska Natives, the authors compared two sets of data. First, they compiled the list of communities in Alaska with $\geq$ 80 percent all-or part-Native population per the 2000 Census.[116] Second, they calculated the percentage turnout in the

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[109] Alaska distributes a share of its Permanent Fund investment earnings to every qualified Alaska resident each year. The Permanent Fund was created because "[d]uring construction of the Trans-Alaska Pipeline in the 1970's, oil companies flooded state coffers with money paid for leases to explore and secure drilling rights. The Legislature spent all $900 million of that initial lease money within a few years. Alaskans [...] voted in 1976 to amend the constitution to put at least 25 percent of the oil money into a dedicated fund: the Permanent Fund. This would save money for future generations, which would no longer have oil as a source of income. The 9th Alaska Legislature [...] placed [the Permanent Fund] as a ballot proposition in the 1976 General Election. It passed by a margin of two to one." From the Alaska Permanent Fund Corporation *Frequently Asked Questions* at http://www.apfc.org/theapfc/faq.cfm (last visited Dec. 29, 2005).

[110] Morehouse, *supra* note 16, at 13 (derived from DOE data).

[111] First American Education Project, *Native Vote 2004: A National Survey and Analysis of Efforts to Increase the Native Vote in 2004 and the Results Achieved,* at 11.

[112] *Id.*

[113] *Id.* at 10.

[114] *Id.* at 10.

[115] *Id.* at 12.

[116] This information is based on data obtained from the Alaska Community Database maintained by the Department of Commerce, Community and Economic Development's Division of Community Advocacy. The disclaimer accompanying the database is as follows: "This department does not intend that the communities listed in the Commerce Alaska Community Database should be construed as a definitive listing of Alaska communities. There is

1992, 1996, 2000, and 2004 elections for those villages with both a ≥ 80 percent all or part Native population and a polling place.[117] (For villages with no polling place, no data is available.) The resulting turnout percentages are somewhat different. Native villages with polling places had a great variation of turnout, but averaged only 50 percent, compared to the statewide average of 66.6 percent. Although the 2004 election featured a hotly contested Senate race, some Native villages had turnout as low as 12 percent. As noted above, however, some Native villages had very high turnout of 70 percent or more. In the 2002 election, which featured a highly charged gubernatorial race, the average turnout among Native villages was 43.39 percent. Thus, it seems that even in 2000, only about 50 percent (or slightly more) of Alaska Natives actually voted.

It is very important to note that twenty-four Native villages did not even have polling places in 2004. The combined VAP of these villages is approximately 1,500; thus, more than 1,500 Alaska Native voters did not even have the opportunity to vote in person. Moreover, Alaska's elections are notoriously close; the Governor's race in 1996, for example, was decided by only 536 votes.

2. Barriers to voting, particularly English-only elections, still exist for Alaska Natives

In addition to the fact that Alaska still falls under the coverage formulas for both language minority provisions, there is strong evidence that many of the concerns that existed in 1975 are still present. When Congress was considering the extension of the VRA to language minorities in 1975, it identified four categories of evidence relevant to its findings that language minorities deserved the protection afforded by Section 203: (1) barriers to registration; (2) "outright exclusion and intimidation at the polls;"[118] (3) process failure and measures designed to dilute the minority vote; and (4) evidence that monolingual elections in themselves constituted discrimination because of: (a) the disparity in educational opportunities for language minorities that had created (or contributed to) a disparate mastery of the English language; (b) discrimination faced by language minority citizens as a result of their disparate language skills, and (c) state and local governments' failure to intervene to protect the rights of language minorities. The first, third, and fourth categories are still highly relevant.

First, although there are no longer formal or direct barriers to registration such as the literacy tests of old, there are still barriers. One obvious issue is that registration materials are still printed only in English, thus placing at a disadvantage all of the Alaska Natives who have limited or no knowledge of English. As noted above, this is a large number of people, especially

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no official definition of the term "community" in Alaska, and this department does not generally make formal determinations regarding whether or not a specific group of persons comprises a community. Communities currently listed in our database include all legally incorporated municipalities (cities and boroughs), all federally-recognized Native villages and all "Census-Designated Places" (recognized by the 2000 U.S. Census). Our list also includes a number of other "communities" that do not come under these preceding classifications. There are numerous "place name" locations, named municipal neighborhoods and historical locales that are not included in the current community list."

[117] This information is available on the lieutenant governor's website, http://ltgov.state.ak.us/elections/returns.php.

[118] S. REP. NO. 94-295, at 26.

Central and Siberian Yup'ik and Inupiaq speakers.[119] Congress noted during the hearings that English-only elections are as effective as a literacy test, and in this regard, Alaska maintains a barrier to registration.

In addition, there is a re-registration requirement that disproportionately affects Alaska Natives. All Alaskans who relocate to a new election district must re-register in their new district at least thirty days prior to a state-run election.[120] While this may not be uncommon, Alaska is unique in that the in-state population moves from the villages (Native) to the urban (non-Native) areas, not the other way around. According to the ISER's "Status of Alaska Natives" report, "[t]he number of 'recent arrivals' in urban areas in 2000 indicates a very mobile Native population in those areas. For example, of the 24,812 Alaska Natives living in Anchorage in 2000, 25 percent reported living elsewhere five years earlier." Thus, while the re-registration requirement does not apply only to Alaska Natives, it disproportionately affects them because they are the most mobile population. On Election Day, individuals who thought they were registered because they had done so in their own village would be surprised to go to their new polling place in Anchorage and discover they could not vote.

With respect to the third category—process failure and dilution of the minority vote—there is less evidence of discrimination. While no Alaska Native has ever held statewide office,[121] the number of Alaska Natives in the Alaska State Legislature appears to be almost proportional to the Alaska Native VAP.[122] The Native population is 19 percent statewide and 12.5 percent of the State House is Alaska Native, as is 15 percent of the State Senate.[123] On the other hand, there have been some attempts to dilute the Native vote since 1982. Fortunately, these measures were discovered by DOJ during the preclearance procedure and, thus, did not take effect or were adjusted to assuage DOJ's concerns. These are discussed more fully below.

Most of the evidence gathered applies to the fourth category, English-only elections. The largely monolingual elections in Alaska clearly have impacted Alaska Natives' ability to exercise their right to vote. In addition to the tribal surveys, evidence of continued use of languages other than English, and self-help measures Alaska Natives resorted to described below, several Alaska

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[119] See Exhibit 2 for a map of these language areas.

[120] AK. STAT. 15.05.020(8): "The address of a voter as it appears on the official voter registration record is presumptive evidence of the person's voting residence. This presumption is negated only if the voter notifies the director in writing of a change of voting residence." A voter who was originally registered outside the district who later moved within the district and never updated his official voter residence address may not vote within the district. *Fischer v. Stout* (Alaska 1987) 741 P.2d 217.

[121] Perhaps the closest an Alaska Native has come to holding statewide office was Emil Notti, a pioneer of the Alaska Native land claims movement, who ran for U.S. House in 1973. In addition, the current Lieutenant Governor, Loren Leman, is of Native ancestry.

[122] The 24th Alaska Legislature includes five Alaska Native representatives (out of forty total, for a representation of 12.5 percent) and three Alaska Native senators (out of twenty total, for a representation of 15 percent). The total Alaska Native population in the 2000 U.S. Census was 119,241 (98,043 of whom self-identified as Alaska Native only, and 21,198 of whom self-identified as Alaska Native and Other Race.) The total estimated population of Alaska in 2000 was 626,932; Alaska Natives make up 19 percent of the total population.

[123] There are three Alaska Native Senators: Al Kookesh (District C); Lyman Hoffman (District S); and Donald Olson (District T). There are five Alaska Native Representatives: Bill Thomas (District 5); Woodie Salmon (District 6); Carl Moses (District 37); Mary Kapsner (District 38); and Reggie Joule (District 40). All of the representatives are in districts where an Alaska Native also holds the Senate seat.

Natives interviewed for this report indicated that they had been confused by initiatives on the ballot over the years.

Nick Jackson, an Elder from Gulkana, and Elmer Marshall from the Native Village of Tazlina, both of which are in the Valdez-Cordova census area, said that the ballot language was confusing. They "make it sound like you vote for it when you're voting against it." Furthermore, Marshall indicated that "Elders vote it wrong because it's confusing." Several other Elders complained that it was hard to understand what they were voting for on ballot initiatives. Many Alaska Natives are clearly at a disadvantage in the English-only elections.

3. English-only elections are discriminatory as long as disparities in educational opportunities for Alaska Natives and non-Natives persist

In considering English-only elections, Congress was interested in evidence that monolingual elections in themselves constituted discrimination because the disparity in educational opportunities for language minorities had created (or contributed to) a disparate mastery of the English language. The educational opportunities afforded to Alaska Natives have dramatically improved since 1975, but there is evidence that there remain disparities in educational opportunities for Alaska Natives and that Alaska Natives still lag behind non-Natives.

Recent research shows significant discrepancies in educational performance on standardized tests between Alaska Natives and non-Natives still remain. In evaluating Alaska Native students' performance on the Alaska Benchmark Examinations,[124] the Alaska Native Policy Center concluded "statewide, significantly lower percentages of Alaska Native students were proficient in each of the three subjects and at each of the three grade levels, when compared to all other students."[125] Only 40–60 percent of Alaska Native students pass the standardized tests in reading, writing and math, compared to 70–80 percent of non-Native students. More specifically, the results of the Statewide Spring 2005 High School Graduation Qualifying Exam (HSGQE) show that only 19.5 percent of Alaska Native graduating seniors were proficient in reading comprehension.[126] *That means 80.5 percent of the new Alaska Native voters may not be able to read and understand the ballot.*

Similarly, although Alaska Natives believe that graduation from high school is "highly important,"[127] graduation rates for Alaska Natives are persistently far lower than for non-Natives. In the early 1970s, only 2,200 Alaska Natives had graduated from high school. This is incredibly important because these people are now the elder citizens in the remotest villages.

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[124] "The Alaska Benchmark Examinations measure whether students are achieving statewide academic standards in reading, writing, and math. Students take the Alaska Benchmark Examinations in three different grades (Grade 3, 6, and 8) during their public school careers." Alaska Native Policy Center, *Alaska K-12 Education Indicators 2004*, Executive Summary, p. 5, at http://www.firstalaskans.org/545.cfm (last visited Jan. 2, 2006).

[125] *Id.*

[126] The full statewide spring 2005 HSGQE results are attached as Exhibit 3.

[127] McDowell Group, *Alaska Native Education Study: A Statewide Survey of Alaska Native Values and Opinions Regarding Education in Alaska*, Section 4 p. 1, at http://www.firstalaskans.org/460.cfm (last visited Jan. 2, 2006) "Virtually all Alaska Natives believe graduation from high school, college, and vocational/technical school is highly important."

This population is still a significant component of the Alaska Native VAP, yet the vast majority did not graduate high school, and they are the most likely to have limited English proficiency. They are at a significant disadvantage voting in English-only elections.

Fortunately, graduation rates have risen dramatically. After the Molly Hootch case, schools were constructed in every rural community with more than ten students, finally giving everyone access to a high school education. According to the 2000 Census, more than 53,000 Alaska Natives have now graduated high school. This amounts to nearly 75 percent of all Alaska Natives over 18, but it is still short of the 90 percent high school graduation rate of other Alaskans. According to the Alaska Native Policy Center:

> In the 2003–2004 school year, the statewide graduation rate for all students was 62.9 percent. Alaska Native students graduated at a rate of 47.5 percent. Across all regions, Alaska Natives consistently have lower graduation rates than all other ethnicities combined.[128]

Drop-out rates among Native students unfortunately increased in the 1990s, and they are double the drop-out rates of other Alaskans. Quite simply, less than half of Alaska Native students meant to graduate in 2004 actually made it to graduation.

In addition to the fact that Alaska Natives exhibit lower academic achievement and have a lower mastery of the English language, a judge recently held that the state still discriminates in its funding of rural schools. In *Kasayulie v. State of Alaska*, Superior Court Judge John Reese held that the Education Clause of the Alaska Constitution[129] "places an affirmative duty on the state to provide public education"[130] and that the discrepancy in funding for school construction in urban and rural Alaska unconstitutionally discriminated against Alaska Natives. While a remedial order has not yet been issued in the *Kasayulie* case, the Alaska State Legislature responded by increasing spending on rural school construction. Furthermore, education advocates have filed a subsequent suit challenging the adequacy and fairness of the state's public school funding. The plaintiffs in *Moore v. State of Alaska* allege that "every Alaskan child receives an inadequate education because the funding of that education is grossly inadequate."[131] *Moore* was filed on August 9, 2004, and is currently pending trial.

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[128] Alaska Native Policy Center, *supra* note 124, at 9.

[129] "The legislature shall by general law establish and maintain a system of public schools open to all children of the state." AK. CONST. art. VII sec. I (1998).

[130] *Kasayulie v. State Of Alaska*, No. 3AN-97-3782 CIV, Order Granting Plaintiffs' Motions for Partial Summary Judgment on Facilities Funding, Sept. 1, 1999, at http://www.alaskabar.org/opinions/124.html (last visited Jan. 1, 2006).

[131] *Moore v. State of Alaska*, Case No. 3AN-04-9756 Civ., First Amended Complaint for Declaratory and Injunctive Relief, p. 2, at http://www.neaalaska.org/funding/First percent20amended percent20complaintsep04.pdf (last visited Jan. 1, 2006).

4. Alaska Natives fare worse economically than non-Natives

The signs preventing "Indians and dogs" from entering businesses in Alaska have come down. However, Alaska Natives' economic well-being still "lag[s] behind non-Natives'."[132] According to the ISER, "[t]he share of the Native population working is smaller, they work on average fewer hours and weeks, and their average wages are lower. Those differences are reflected in lower cash incomes and higher poverty rates among Natives than non-Natives."[133] Thus, not only do Alaska Natives have a lower quality education due in part to funding disparities, perform far more poorly than other ethnicities on standardized tests, and graduate far less often than other ethnicities, they also have lower incomes and higher poverty rates. Thus, Congress' concerns about educational opportunity and performance remain highly relevant in the case of Alaska Natives.

Finally, the state seems to have failed to intervene to protect the rights of language minorities. The most compelling illustration of this is the failure to comply fully with the oral and written language assistance mandates in Sections 203 and 4(f)(4) of the VRA, as discussed below.

In addition, the Alaskan electorate has shown itself to be unsympathetic to language minority rights: in 1998, a constitutional amendment passed two to one to require the government to conduct official business in English. Although this initiative was ruled unconstitutional in 2002 because it violated the free speech guarantees of the Alaska Constitution,[134] the state then moved to sever the policy portion of the law from the implementing provisions. In other words, the state asked the court to preserve the policy that English is the official language of the state of Alaska. The Alaska Supreme Court is considering whether the policy alone can be severed and preserved.[135] Such a policy could of course interfere with the State's obligation to provide minority language assistance under the VRA. Indeed, the proponents of the English-only measure specifically opposed printing forms and materials in multiple languages, arguing "millions of taxpayer dollars are wasted on such programs."[136]

B. Alaska has failed to comply with the minority language provisions

Since its inclusion in the VRA in 1975, Alaska appears to have not complied with its obligation to provide voting assistance in Alaska Native languages. While it provides intermittent oral assistance, it does not provide any written materials for the thousands of Alaska Natives. At least part of this failure can be attributed to an unclear mandate in the current laws and regulations.

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[132] Goldsmith, *Status of Alaska Natives, supra* note 25, Chapter 4 at 1.
[133] *Id.*
[134] *Kritz v. State of Alaska*, No. 3DI99-12 CI, (3d Dist. Mar. 22, 2002).
[135] *Alakayak v. State,* Case No. 3AN-99-4488 CI (awaiting a decision).
[136] Susan Fischetti, *Alaskans for a Common Language*, Statement, *POINT COUNTERPOINT, Make English Alaska's Official Language?, Official language practical reins in bureaucracy,* Anchorage Daily News, April 4, 2004.

The decision about which of these languages to include for purposes of the language provisions in the VRA is made by the director of the Census.[137] The last determination was issued on July 26, 2002[138] and listed the jurisdictions in Alaska covered by Section 203. In 2002, the director of the Census designated fourteen census areas, some of which match borough boundaries, as covered areas for the purposes of Section 203.[139] These are listed below:

COVERAGE OF LANGUAGE MINORITIES IN ALASKA UNDER SECTION 203[140]

Census Area	Total Population	Native Population	Percent Native	Group
Aleutian West	5,465	1,232	22.5 percent	Aleut
Bethel	16,006	13,680	85.5 percent	Eskimo, American Indian (tribe not specified), American Indian (Other Tribe specified)
Denali Borough	1,893	162	8.6 percent	Athabascan
Dillingham	4,922	3,753	76.2 percent	Eskimo, American Indian (other tribe specified), Native (other group specified)
Kenai Peninsula Borough	49,691	5,065	10.2 percent	American Indian (tribe not specified), Aleut
Kodiak Island Borough	13,913	2,452	17.6 percent	Filipino[141]
Lake and Peninsula Borough	1,823	1,453	79.7 percent	Athabascan, Aleut, Eskimo
Nome	9,169	7,274	79.1 percent	Eskimo
North Slope Borough	7,385	5,453	73.8 percent	American Indian (tribe not specified), Eskimo
Northwest Arctic Borough	7,208	6,181	85.8 percent	Eskimo, Alaska Native (Other group specified)
Southeast Fairbanks	6,174	980	15.9	Athabascan, Native (Other

[137] 42 U.S.C. § 1973aa-1a(b)(2)(A).
[138] 67 Fed. Reg. 48871, *Voting Rights Act Amendments of 1992, Determinations Under Section 203.*
[139] 67 Fed. Reg. 48872.
[140] The covered jurisdictions and "group" designation is taken from 67 Fed. Reg. at 48872; the data on total population, Native population, and percent Native population is taking from the Institute of Social and Economic Research (ISER), *The Status of Alaska Natives Report 2004* p. 2-33, at http://www.iser.uaa.alaska.edu/Publications/aknativestatusch2.pdf (last visited Dec. 12, 2005).
[141] Kodiak has a disproportionately large Filipino population compared with the rest of Alaska (the population of Kodiak is 16 percent Asian, according to the 2000 Census, as compared with 4 percent in Alaska as a whole.) Filipinos immigrated to Alaska in the first half of the twentieth century to work in the fishing industry; most Filipinos in Kodiak are still employed in this industry. For a history of Filipino-Americans in Alaska, see T. Buchholdt, *Filipinos in Alaska: 1788-1958*, 1996.

			percent	group specified)
Valdez-Cordova	10,195	1,767	17.3 percent	Athabascan
Wade Hampton	7,028	6,673	94.9 percent	Eskimo, American Indian (Chickasaw), American Indian (tribe not specified)
Yukon-Koyukuk	6,551	4,877	74.4 percent	Athabascan, Eskimo, American Indian (Other Tribe specified.)
Total/average	**147,423**	**61,002**	**Average: 52.9 percent**	

1. The Native groups identified by the Census Bureau for purposes of Alaska's compliance with Section 203 do not correspond to Alaska's twenty language groups

The determination specifies that as of July 2002, "those jurisdictions that are listed as covered by Section 203 have a legal obligation to provide the minority language assistance prescribed by Section 203 of the Act."[142] Although this mandate may seem clear to those not familiar with Alaska Natives and their languages, the "group" identifier is somewhat vague. For example, if one compares the above chart to the list of 20 languages spoken in Alaska (see Exhibit 2), "Eskimo" and "Athabascan" are nowhere to be found. Each arguably refers to or includes more than one language, although the DOE could with effort ascertain that the "Eskimo" group included in Section 203 coverage refers to the predominant ethnic group in the region, Central Yup'ik.[143] For the Wade Hampton census area, the bureau lists three "Groups": "Eskimo," "American Indian (Chickasaw)," and "American Indian (Other Tribe specified)." The inclusion of Chickasaw is perplexing as there are next to no Chickasaw in this region; according to the state legislator from that region, the only Chickasaw is the school superintendent and his family.[144] Assuming the number of people self-identifying as Chickasaw did not equal 5 percent of the population of the census area, the bureau may have misapplied the Section 203 formula.

However, it is the state's burden to determine what the census language determinations refer to, and this can be done with little difficulty. The state can, for example, call upon the expertise of the Alaska Native Language Center,[145] as was done for this report, to ascertain what the census determinations refer to and where language assistance would be most helpful. The census data itself also shows where rates of LEP and illiteracy are highest and the State can also rely on this to determine where assistance is needed and in what languages.

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[142] 67 Fed. Reg. 48872.
[143] The term "Eskimo" could refer to Inupiaq or Yup'ik Eskimos, among others.
[144] Personal interview with Rep. Mary Kapsner (Dec. 30, 2005).
[145] http://www.uaf.edu/anlc (visited Jan. 25, 2006)

2. Interviews with Native voters and surveys reveal that even oral assistance is not always available

The State has been continuously covered by the minority language provisions since 1975, yet many residents of rural Alaska indicate that there is no or only intermittent language assistance. In interviews conducted with Alaska Natives in October 2005, several residents located within one of the fourteen 203-covered jurisdictions in Alaska indicated that assistance was not available in their Native language.[146] According to a ninety-one-year-old Elder[147] from Beaver, Alaska,[148] who was raised speaking Gwich'in, "Everybody when I was a child growing up [...] talk Gwich'in, nobody talk English." Now, however, the Elder says the poll workers in Beaver speak only English. Similarly, Lillie Tritt, a seventy-four year-old from Venetie, said that no poll workers in her nearby village of Venetie[149] speak Gwich'in. Sidney Huntington, a ninety year-old from Galena,[150] indicated that the poll workers in Galena do not speak the Native language. Nick Jackson and Elmer Marshall indicated that there was no one in Gakona, Glennallen, or Copper Center (the three nearest polling places to their villages) who spoke their Native language. Susanna Horn of St. Michael[151] said the election supervisor in her polling place "doesn't know any Eskimo words" even though he is a Yup'ik Eskimo.

Surveys distributed to tribes throughout Alaska also showed that there is only intermittent language assistance readily available.[152] Nulato reported that none of the poll workers spoke the Native language, Koyukon.[153] Chevak, a Yup'ik community, also reported there were no Native language speakers at their polls. Kotzebue reported that at least one poll worker spoke Iñupiaq, as did Akiak, a Central Yup'ik community, and Hughes and Allakaket, both Koyukon speaking villages. As a result of the inconsistent language assistance, many Alaska Natives resort to self-help. Some local speakers of the Native language provide assistance to friends and family

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[146] Unless otherwise indicated, all quotations of individuals in this report are based on personal interviews conducted October 17-19, 2005, in Fairbanks, Alaska during the Alaska Federation of Natives' (AFNs') Youth and Elder Conference.

[147] The term "Elder" is commonly used in Alaska to refer to Elderly Alaska Natives who, in most Alaska Native cultures, are held in high respect. As the Alaska Native Heritage Center explains, "Within Native culture, children were taught to give their 'first' bird or animal kill, a bucket of berries or something that they made to an Elder. Today in many villages, the first salmon or animal killed is still given to the Elders of the community. [...] Elders have shared their values, traditional knowledge and have cared for us." Elders were interviewed for this paper because they are generally more likely to speak Alaska Native languages and, thus, have a greater need for bilingual language assistance.

[148] In the Yukon-Koyukuk Census Area, a covered jurisdiction.

[149] *Id.*

[150] *Id.*

[151] In the Nome Census Area, a covered jurisdiction.

[152] On file with the authors.

[153] Nulato also indicated they did not see a need for a Koyukon-Athabascan speaker at their poll.

members who need help understanding the ballot,[154] and some non-governmental organizations also provide assistance in Native languages.[155]

3. Availability of oral assistance is not advertised; phone hotline is in English only

The state, on the other hand, asserts that it does have oral assistance available at each polling place. In an interview in October 2005, Shelly Growden, the Fairbanks Regional Office Election Supervisor,[156] said that people in Region III generally speak English and that if they need assistance, "they ask for it." Region IV, which covers ninety-eight mostly Native communities from Kaktovik to the end of the Aleutian Chain, reported that at least one person at each polling station spoke the Native language. The Bethel City Clerk also reported there was at least one Yup'ik speaker at each polling station, and if that person was not present, he or she left their phone number where they could be reached in the event someone needed a translator. Dillingham similarly reported that there is a translator at their polls every election. No jurisdiction reported posting any information at polling stations notifying the public that language assistance was available. Rather, they claim everyone just knows it is available.

Alaska also provides an interactive toll-free hotline for voters that tells voters their polling location, and in order to comply with the Help America Vote Act (HAVA), this service will be expanded to provide broader registration and election information.[157] While this service is only available in English, in order to comply with the language provisions, it should, of course, include all the same information in all of the pertinent Alaska Native languages.

4. Alaska provides no written voting materials in any native languages

Oral assistance at the poll may not always be readily available, but the situation for written materials is even more troubling. While Alaska does provide sample ballots and other written materials in Tagalog for the Filipino population in Kodiak,[158] it does not provide written

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[154] Fiona Sawden, an Elder from Port Graham, is a fluent Alutiiq speaker who says she helps others to understand what's on the ballot. "If they have problems I help them translate what the voting was for." When asked how she knew what was on the ballot, Mrs. Sawden said she reads the Official Election Pamphlet, the Division of Elections-issued booklet describing the candidates and issues on the ballot, and tells people based on what she learns from reading the OEP.

[155] For example, the Northwest Arctic Native Association provides assistance in Inupiaq. According to Minnie Gray, an eighty-one year old Elder from Ambler who speaks Inupiaq, the young people who work at the polls in Ambler "speak a little bit Inupiaq"; but she and her eighty-two year old sister Clara Lee receive significant assistance from the NANA employee who, since 2002, "provides a little bit Inupiaq translation" to Elders.

[156] Alaska is split into four regions for elections purposes: Region I includes Southeast Alaska, Region II includes Southcentral Alaska, Region III covers Central Alaska, and Region IV covers Northern and Western Alaska. Regions III and IV include the majority of Alaska's Section 203-covered jurisdictions.

[157] State of Alaska, *HAVA State Plan*, 2005 Updated at 17.

[158] The Division of Elections provides voter registration forms and the Official Election Pamphlet (a voter pamphlet with candidate-related information which is distributed statewide) into Tagalog for voters in Kodiak, Alaska; Filipinos comprise 2 percent of the population of Alaska. The State specifically stated that it provided this translation in order to comply with Section 5 of the VRA. *See HAVA State Plan* at 16. The State also has voting information in Tagalog on its website.

materials for *any* of the 20 Native languages in Alaska.[159] Region IV, and many respondents from the Boroughs and city clerk offices, explained that this was because the Native languages are not written languages and thus, written assistance is not required.

Alaska's position is based on the single clause found in both language provisions that "where the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives [sic] and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting."[160] DOJ regulations provide that a language is "unwritten" for purposes of the minority language provisions "if it is not commonly used in written form."[161] However, Alaska's interpretation is incorrect and the facts indicate that it is not well-founded.

Almost all American Indian and Alaska Native languages were at one time historically unwritten and, therefore, the exception would essentially swallow the rule. Moreover, such an interpretation would require translation for all languages other than English spoken in the United States *except* Indian and Native Languages; this would not be permissible under the Equal Protection Clause of the U.S. Constitution. Yet this is currently how Alaska administers the rule. Or, if a line were drawn that, for example, a language had to be written for at least fifty years prior to being entitled to translated election materials, this too would likely violate the Equal Protection Clause.

The clause must therefore refer only to languages currently unwritten, or as the Code of Federal Regulations strongly suggests, languages which have so recently been transcribed by academics or others that its Native speakers would actually not understand the written version. There can be no other reasonable interpretation of this clause. Alaska's position must therefore be incorrect.

Alaska's failure to provide written election materials resulted in one of the few VRA cases brought in Alaska. In 1995, the Native Village of Barrow and 18 individual non-English speaking Alaska Natives sued the City of Barrow for failure to comply with the language minority provisions of the VRA.[162] Specifically, the plaintiffs claimed that the city failed to provide written election materials in Inupiaq in the October 1995 election, and this resulted in poll workers offering incorrect personal explanations, advice and interpretations. The plaintiffs asserted that the personal translations mistakenly led them to vote "yes" to lifting Barrow's ban on the sale of alcohol when they intended to vote "no."[163] The ban was lifted by a slim margin of 76 votes; thus, the plaintiffs claimed if they had received a correct, uniform translation of the ballot measure in Inupiaq as required under the VRA, they would have voted differently and

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[159] In 1995, the Native Village of Barrow had sued the city of Barrow over the repeal of the alcohol importation ban, and one of the issues raised by the village was that the City was in violation of the VRA because ballots and other election materials had not been provided in the Native language, Inupiaq. As part of the settlement, the city agreed to provide ballots in Inupiaq, but it is unclear whether Barrow still does this. Personal communication with Scott Taylor, attorney for city of Barrow, January 30, 2006.
[160] 42 U.S.C. § 1973b (4)(f)(4) and 42 U.S.C § 1973aa – 1a(c).
[161] 28 CFR § 55.12 (c).
[162] *Native Village of Barrow et al. v. City of Barrow et al.,* Case No. 2BA-95-117 CI (Second Judicial District).
[163] First Amended Complaint at 3-4.

defeated this proposal.[164] The case was settled; therefore, the court did not reach a decision and there was no remedial order issued in the case. It remains a powerful example of how important written election materials may be in some communities.

5. Native languages are written languages, and Native speakers would benefit from voting materials in their language

Under the most likely interpretation of the "historically unwritten" clause, Alaska's 20 Native languages are written languages.[165] The facts demonstrate that almost all of Alaska's twenty Native languages are not only written, but well-established and even taught in schools. The two largest language groups, Iñupiaq and Yup'ik, clearly meet this criteria. Yup'ik was written more than 100 years ago by Russian missionaries and it has been taught in the public schools for more than thirty years.[166] The modern orthography for Siberian Yup'ik has been available for more than forty years.[167] Gwich'in has an older orthography, as it has had written literature since at least 1870.[168] The Gwich'in people have even translated most of the Bible into Gwich'in for the church in Arctic Village. The Koyukon writing system developed around 1900, and many of the other fifteen languages have had developed writing systems for at least forty years.[169] As described above in section II. D., there are tens of thousands of speakers of Native languages in Alaska, and there are still villages and communities, particularly Yup'ik, where English is not the primary language at home. This is sufficient basis to conclude that Alaska's Native languages are indeed written languages for the purposes of translating written election materials.

Not only do Alaska's Native languages qualify as written, but there is significant evidence that many Alaska Natives want and need written assistance.[170] As when oral assistance is not available, Alaska Natives resort to self-help. Lillie Tritt indicated that since "we don't know how to vote" on initiatives, she asks her high school-aged relatives to inform her about the ballot measures. She assumes they learn about the elections at school. Tritt also said "some people don't know how to vote and they vote for just anybody because they don't know how to vote. They don't know who's good." Fiona Sawden, an Alutiiq-speaking Elder from Port Graham, indicated that there is no Alutiiq-language information on radio or television about the elections. Susanna Horn indicated that she does obtain information about the elections in her Central Yup'ik language because there is a radio host from Emmonak who "will explain everything in English and in Yup'ik and tell where to go vote, times of voting, and who can help you." Lydia Bergman said she receives no official information in Koyukon and, therefore, asks her husband and his friends how to vote. Myron and Martha Kingeekuk, both from Savoonga, Alaska, say that they receive no information on elections in the Siberian Yup'ik language. When particularly important measures that will affect the lives of Alaska Natives are on the ballot, such as the

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[164] First Amended Complaint at 2-4.
[165] Many Alaska Native languages even have online dictionaries, www.alaskool.org/language/dictionaries (visited Jan. 31, 2006).
[166] http://www.uaf.edu/anlc/langs/cy.html (visited Jan. 25, 2006)
[167] http://www.uaf.edu/anlc/langs/sy.html (visited Jan. 25, 2006).
[168] http://www.uaf.edu/anlc/langs/ga.html (visited Jan. 25, 2006).
[169] http://www.uaf.edu/anlc/languages.html (visited Jan. 25, 2006).
[170] Larry Kaplan of the ANLC indicated that there are at least three languages where voting assistance would be essential: Siberian Yup'ik, Central Yup'ik, and Inupiaq.

English-only constitutional amendment in 1998, local leaders such as AFN have resorted to translating the election materials into Alutiiq, Yup'ik, and Tlingit themselves.[171]

The surveys returned by tribes affirmed that there are indeed places where written assistance would be very helpful. When asked "what percentage of people in your village speak English but would benefit from Native language assistance in voting such as instructions for casting ballots or translations of constitutional amendments," the village of Chevak responded "90 percent." Akiak answered the same question also with 90 percent. Both are Yup'ik villages. The Koyukon-speaking village of Hughes responded to the same question with 25 percent. Nulato responded with 0 percent.

6. Conclusion

The state of Alaska offers intermittent oral language assistance and no written assistance for Alaska Natives under the language provisions of the VRA. It does, however, provide written election materials for the two percent of the Alaska population that is Filipino. Alaska's efforts to provide assistance to voters under the minority language provisions fall short of full compliance with the intent of those provisions. While Alaska seems to provide translators upon request in many places, this reflects a commitment to fulfill its obligations under Alaska Statute 15.15.240 to assist qualified voters needing assistance in voting, but does not amount to full compliance with the VRA.

In fact, Alaska has arguably been out of compliance with the VRA since the language provisions were enacted thirty years ago. As Congress contemplates reauthorization of the language provisions, it should take this non-compliance and the ongoing need for some assistance demonstrated here into account. It can be summed up this way: 80.5 percent of high school seniors, the new Alaska Native voters, may have difficulty comprehending the English ballot, yet they will be subject to an English-only election. Therefore, the language provisions should be renewed and Alaska should remain a covered jurisdiction.

C. The preclearance requirement of Section 5 has made a difference in Alaska

Section 5 of the VRA contains the "preclearance" requirement. It requires covered jurisdictions to secure approval from the U.S. Attorney General before implementing any changes in their voting laws. The covered jurisdiction must show that the proposed change in the law is not intended to and would not have the effect of "denying or abridging the right to vote on account of race or color or membership in a language minority."[172]

There has not been an in-depth study into whether Alaska has strictly complied with preclearance requirements. However, there have been a few cases concerning election law changes that

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[171] According to State Senator Albert Kookesh, a Tlingit Indian from the village of Angoon who is co-chair of AFN, the largest Alaska Native advocacy organization, AFN provided voter information in Alutiiq, Yup'ik, and Tlingit in 1998 at the time of the passage of the English-only constitutional amendment.
[172] 42 U.S.C. §1973 (c).

bypassed this process.[173] With respect to objections under preclearance, Alaska's proposed changes have met with only one objection from the DOJ in more than 20 years. However, this should not suggest that Alaska should not be subject to preclearance. As set forth below, the preclearance process has prevented some measures that if enacted would have disfranchised or diluted the voting strength of Alaska Native voters.

The Alaska Redistricting Board and Alaska courts face a complex challenge in meeting all of the separate standards under federal and state law. First, Alaska is unusual in that the governor has authority over redistricting. Second, Article VI, Section 6 of the Alaska Constitution, requires first and foremost that districts be contiguous and compact:

> The governor may redistrict by changing the size and area of election districts, subject to the limitations of this article. Each new district so created shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each area shall contain a population at least equal to the quotient obtained by dividing the total civilian population by forty. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

The redistricting board must also comply with the equal protection clauses of the federal[174] and state[175] constitutions. Finally, the board and courts must follow the requirements of the VRA to avoid retrogression or dilution of the minority vote. It can be very difficult to satisfy all of these requirements.[176]

There have not been many lawsuits filed under the VRA in Alaska.[177] Almost all of the litigation has focused on state legislative redistricting and the threat of retrogression or dilution of the Alaska Native vote.

The first of these was *Kenai Peninsula Borough et al. v. State,*[178] where the Alaska Supreme Court considered enhancing "the voting strength of minorities in order to facilitate compliance with the Voting Rights Act."[179] The reapportionment plan created after the 1980 census had been struck down by the Alaska Supreme Court on the grounds that a House District violated Article VI, Section 6 of the Alaska Constitution because of the "lack of any evidence of significant social and economic interaction between Cordova and the rest of the communities

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[173] In *Harrison v. State*, 687 P.2d 332, 345 (Alaska App. 1984), a man was convicted of importing alcohol into the village of St. Mary's in violation of the local option law and the village's prohibition against the sale and importation of alcohol. The defendant argues that his conviction could not stand because the ban had not been precleared by the DOJ as required under the VRA. The court rejected this argument on the grounds that preclearance was "a formality" and that the law was eventually approved anyway.
[174] U.S. Constitution, Amend XIV, Section 1.
[175] Article I, Section 1.
[176] *Hickel v. Southeast Conference*, 846 P.2d 38, 50 (Alaska 1993).
[177] *But see Native Village of Barrow v. City of Barrow, supra* note 162.
[178] 743 P.2d 1352 (Alaska 1987); there may have been earlier VRA cases filed but they did not result in published opinions.
[179] *Id.* at 1361.

comprising the district."[180] The reapportionment board then redrew the district with both that section of the Alaska Constitution and the VRA in mind. The new plan resulted in a District 2 with a 14.8 percent deviation from the ideal district size.[181] Furthermore, it had increased the Native population in the District from 27.5 percent to 41.9 percent.[182] The state argued that the district was created, and the Native population was increased, specifically to facilitate approval under the VRA.[183] The court recognized that this was a legitimate aim under the VRA, but it held that since the state had not shown that retrogression would occur without the increase to 41.9 percent, it had not carried its burden of showing that the district was necessary to comply with the VRA.[184] Despite this failure, the court upheld the district with a deviation of 14.8 percent because it "effectuated other rational and consistent state policies under Article VI, Section 6 of the Alaska Constitution."[185]

There has only been one objection to a proposed change in the law in Alaska and it occurred in relation to the redistricting after the 1990 Census. This lone objection, described below, played a very significant role in shaping Alaska's political landscape, and underscores the need for continued coverage by the preclearance process.

Immediately after the 1990 Census, the parties staked out their various positions. Most prominent among these were the Yup'ik, who claimed they had been "gerrymandered into political oblivion" after the 1970 census.[186] The Yup'ik community consisted of 26,000 people living in almost 75 villages, united by language and culture. They argued that they were entitled to their own district(s) under the VRA.[187] The Yup'ik community, the largest single indigenous group in Alaska, argued that this population justified two House districts and one united Senate district. They got what they wanted, but the proposed redistricting plan would not survive.

Under the redistricting plan, Southeast lost a seat, Fairbanks gained a seat, Matanuska-Susitna Borough was splintered into five pieces, and Yup'iks gained but Inupiats of the North Slope Borough lost.[188] The plan was harshly criticized on the grounds that it diluted Native votes (except the Yup'iks), disregarded the differences between Alaska Native groups, and had allegedly been prepared in secret and under the influence of suspicious dealings.[189] More pointedly, a coalition of Native interests accused the Governor of being "anti-Native."[190] The coalition of Native groups had appealed to the DOJ, imploring them not to preclear the plan and identifying some of the retrogressive components of the proposed plan.

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[180] *Id.* at 1355.
[181] *Id.* at 1361.
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] George Frost, *Yup'ik Call for United Village Vote; Bush Election District Plan Chaotic, Foes Say*, ANCHORAGE DAILY NEWS, March 30, 1991, at p. B1.
[187] *Id.*
[188] George Frost, *Plan Would Cause Changes Statewide*, ANCHORAGE DAILY NEWS, July 14, 1991, at p. A9.
[189] Ralph Thomas, *Verdict on Election Maps Waits; State Must Answer Critics First*, ANCHORAGE DAILY NEWS, January 4, 1992, at p. A1.
[190] *Id.*

DOJ immediately stepped in and sent a letter to the state requesting more information.[191] DOJ asked the state to respond to several specific concerns: (1) the proposed plan reduced the number of Alaska Native majority districts from four to three; (2) Interior Athabascan Indians had been combined unnecessarily with Inupiat Eskimos of the North Slope, diminishing the voting strength of both; (3) one district was retrogressive in that it combined an urban and a rural Native area, decreasing the Native voting strength; (4) the proposed plan had been prepared with "extraordinary treatment" toward incumbent legislators, except that incumbent Native legislators' districts were to be combined; and (5) the redistricting board had prepared the plan in meetings that were not publicized or that were publicized with inaccurate dates and/or locations. This letter alerted the state that its plan was in trouble.

The trial court ultimately rejected the plan as unconstitutional. The trial contained even more details about the development of the proposed plan, one of the most disturbing of which was the testimony of then Representative Georgianna Lincoln, who said that she had been "offered the chance to draw her own House district if she joined a political plot against the House leadership during the last legislative session."[192] Similarly, some of the reapportionment participants and redistricting board members coincidentally found themselves in "open" districts without incumbents that would be easier to run in.[193] Judge Weeks noted that it was indeed possible that these were coincidences.[194] After the proposed plan was declared unconstitutional, the state blamed the VRA, stating that the judge did not understand how hard it was to follow the state constitution and the VRA at the same time.[195]

In May 1992, the Alaska Supreme Court affirmed the trial court's holding that the proposed plan violated the Alaska Constitution, and remanded to the trial court to formulate an interim plan so that the 1992 state elections might proceed. The court then appointed three masters to aid in the development of an interim plan, which was presented to the trial court on June 14. The interim plan was precleared by the DOJ on July 8, 1992.

The interim plan was then challenged, in *Hickel v. Southeast Conference*,[196] under Article VI, Section 6 of the Alaska Constitution, and Section 2 of the VRA.[197] Although the court noted that the board claimed to have created District 3 in order to comply with the VRA,[198] the court only referred to the relevance of the VRA in passing in footnote 22:

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[191] Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division of the USDOJ, to Virginia B. Ragle, Assistant Attorney General of the State of Alaska, of 12/31/91.
[192] George Frost, *Election Districts Rejected; State to Appeal Court's Decision,* ANCHORAGE DAILY NEWS, May 12, 1992, at p. A1.
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] 846 P.2d 38
[197] This time the Yup'ik sued claiming that their voting strength had been diluted by being split into four House districts. Sheila Toomey, *Yup'iks Sue State Over New Voting Map*, ANCHORAGE DAILY NEWS, July 22, 1992, at p. B1.
[198] This district would have increased the Native VAP by 2 percent, but it split the Southeast population in unusual ways.

> The Board must first design a reapportionment plan based on the requirements of the Alaska Constitution. That plan must then be tested against the Voting Rights Act. A reapportionment plan may minimize article VI, section 6 requirements when minimization is the only means available to satisfy Voting Rights Act requirements.[199]

The court then reiterated a curious directive from its order for the interim plan: "The [Redistricting] Board shall ensure that the requirements of Article VI, Section 6 are not *unnecessarily compromised* by the Voting Rights Act."[200] The court thus declared that 11 districts in the interim plan violated the compact and contiguous requirement of Article VI, Section 6 of the Alaska Constitution.[201] It did not discuss any of the rather unsavory activities that were alleged to have occurred with respect to the "open" seats and the not-so-open meetings.

Hickel struck down 11 districts, but apparently did not consider the one district DOJ was really interested in, which was District 36. It appears that the court did not approve of districts 1, 2 and 3 in the Southeast; the splitting of the Matanuska-Susitna Borough into five districts (6, 26, 27, 28 and 34); the combining of the North Slope Inupiat and the Interior Athabascan Indians in district 35; and the splitting of the Aleutian Islands into two different districts (37 and 39). However, on September 28, 1993, DOJ objected to the state's plan on the grounds that district 36, and its companion Senate District R, showed evidence of racially polarized voting and that the proposed plan reduced the Alaska Native share of the VAP from 55.7 percent to 50 percent.[202] DOJ acknowledged the state's argument that preservation of the Lake and Peninsula borough boundaries in district 36 was required under state law, but DOJ also noted that the borough did not have to be divided to comply with both the state constitution and the VRA. DOJ thus declared the plan legally unenforceable. The state requested that the DOJ reconsider its decision, but the DOJ declined on February 11, 1994. Thus, it would appear that on this occasion, what was permitted by Alaska state law was not permitted under the VRA, but it took the intervention of DOJ to prevent its implementation. DOJ served as the last line of defense as it were, and without preclearance, what the DOJ considered to be retrogressive practices would have gone into effect in Alaska in 1993.

The redistricting after the 2000 Census did not contain the level of drama and intrigue, nor the DOJ objection, seen in the 1990s redistricting. However, there are several interesting facets of this redistricting, beginning with the state's attempt to make some significant changes to election law before the 2000 census results were even released. The most important proposed change in the law was a requirement that only official census data be used in all plans drawn by the redistricting board.[203] DOJ aptly pointed out that since census data was often criticized on the basis that it tended to undercount racial and language minorities, the state's proposed rule would reduce the "opportunities for minority citizens to elect candidates of their choice."[204] Again, the

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[199] *Hickel*, 846 P.2d at 52 n.22.
[200] *Id.* (emphasis added).
[201] *Id.* at 57.
[202] Letter from James P. Turner, Acting Assistant Attorney General, Civil Rights Division, USDOJ, to Virginia Ragle, Assistant Attorney General, State of Alaska of 9/29/93.
[203] Senate Bill 99 (1999)
[204] Letter from Joseph D. Rich, Acting Chief, Voting Section, USDOJ, to James L. Baldwin, Assistant Attorney General, State of Alaska of 11/19/99.

preclearance process had singled out an issue that could have caused significant problems, especially since here it could have undercut the validity of all the 2000 redistricting.

The 2000 redistricting then proceeded without significant problems and did not prompt the involvement of DOJ. Three aspects of the 2000 redistricting are relevant here, however: (1) the VRA was clearly the driving force behind several of the state's new districts; (2) the expert reports revealed that there are indeed places in Alaska where voting remains polarized; and (3) in the litigation that follows every redistricting plan, the Alaska Supreme Court set forth a new standard for deviation that is unlike any other in the United States.

First, the redistricting board[205] clearly paid careful attention to the requirements of the VRA. The board hired a national voting rights expert to measure the amount of racial bloc voting in Alaska and then evaluate whether the proposed redistricting plans would have any retrogressive effects or dilute the Native vote in any way. The proposed plan maintained six House districts and three Senate districts where Alaska Natives would be effective electing a candidate of their choice.[206] Indeed, the VRA is responsible for House District 5 (the Southeast Islands to Cordova) and Senate District C (Southeast Islands and Interior Rivers House Districts), in that these districts likely would not have withstood scrutiny under the Alaska Constitution but were upheld specifically because they were necessary to preserve Native voting strength under the VRA.[207] The VRA thus had the effect of preserving Alaska Native voting rights where the state constitution would have failed them.

It is worth noting that the expert employed a formula to determine whether a district was an effective minority district, that is, whether Alaska Natives could elect a candidate of their choice, based on the percentage of minority population plus the percentage of the "crossover" votes that could be expected from the non-Native population. She did not base her determination on simple Native majority districts. This formula, which is not without controversy, resulted in a determination that districts with at least 30-35 percent Alaska Native population were effective minority districts and could consistently elect Alaska Natives.[208] Thus, while the State Redistricting Board argued that it maintained six House districts and three Senate districts, some

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[205] The 2000 Redistricting Board consisted of five persons, including two Alaska Natives.

[206] Letter from Philip R. Volland, counsel to the Alaska Redistricting Board, to Chief, Voting Section, Civil Rights Division, USDOJ of 4/25/02. *See also* note 122, *supra,* for a description of the number of Alaska Native legislators. At 15 percent of the legislature but 19 percent of the population, Alaska Natives appear to be slightly underrepresented.

[207] *In Re 2001 Redistricting Cases*, 44 P.3d 141, 2002 WL 437164 (Alaska 2002) at paragraph 6.

[208] Dr. Lisa Handley, *A Voting Rights Act Evaluation of the Proposed Alaska State Legislative Plans: Measuring the Degree of Racial Bloc Voting and Determining the Effectiveness of Proposed Minority Districts*, submitted to the USDOJ with the preclearance submission dated April 25, 2002, at 20 (Unpublished). Compare to 1968, when the rural Native vote dominated seven districts by large percentages: district 12, Aleutian Islands (77 percent); district 13, Bristol Bay (100 percent); district 14, Bethel (100 percent); district 15, Yukon-Kuskokwim (68 percent); district 17, Barrow-Kobuk (100 percent); district 18, Nome (100 percent); and district 19, Wade-Hampton (100 percent). The rural Native vote was similarly concentrated in senate districts: district H, Bristol Bay and Yukon-Kuskokwim (89 percent); district J, Barrow-Kobuk and Nome (100 percent); and district K, Bethel and Wade-Hampton (100 percent). The Native population was at the time highly concentrated in rural areas and the districts appear to have been drawn accordingly, so that the rural Native vote dominated seven representative districts and three senate districts, but was marginal (no more than 25 percent) in all other districts. Harrison, *supra* note 26 at 6-7.

of these contained percentages of Alaska Natives that were only 30-35 percent Native. DOJ did not object to this.

On a related note, the second important aspect of the 2000 redistricting was its revelation that certain areas of Alaska still have polarized voting. The expert stated that overall Alaska did not seem to be particularly polarized, but she then identified certain districts that still seem to experience polarization. In the 2000 primaries, she found that voting may have been polarized in House District 38 and Senate Districts C and S.[209] In the 2000 general election, she found that not only was voting polarized in District 36 (now District 6), but also the minority-preferred candidate lost the election.[210] In the 1998 primaries, she again found that voting may have been polarized in House Districts 36 and 40, and Senate District R.[211] Voting was again polarized in House District 36 and Senate District R in the 1998 general election, and as in 2000, the minority-preferred candidate lost in District 36.[212] In the 1996 general election, voting was again polarized in District 36, but the minority-preferred candidate won that year.[213] Lastly, in the 1994 general election, voting was polarized in District 36 and Senate District T, but the minority-preferred candidates won both contests.[214] In sum, the former House District 36, and the Senate Districts R, S, and T all experienced some polarized voting patterns and in some of these contests the minority candidate did lose. (All of these districts currently have Alaska Native representatives.) House District 36 in particular, which is now District 6, repeatedly experienced polarized voting. This is a rural Native area – in fact, it encompasses about half the land mass of rural Alaska – and, thus, this district in particular should be carefully monitored during the next redistricting after the 2010 census. The pattern of polarized voting and the fragility of this minority district in particular warrant continued preclearance. Maps of the former House and Senate districts are attached as Exhibit 3. The current districts are attached as Exhibit 4. What was District 36 is now District 6. A detailed map of this district is attached as Exhibit 5.

The final aspect of the 2000 census redistricting that is of importance for this report is that the Alaska Supreme Court set forth a very unusual standard for deviation. Courts had drawn a bright-line rule that population deviations of less than 10 percent were not major and thus required no justification to demonstrate they were not discriminatory. However, the Alaska Supreme Court opined that because the Alaska Constitution had been amended in 1998 to require that districts be "formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area," this 10 percent line no longer applied. The court interpreted the phrase "as nearly as practicable" to mean that basically any deviations required justification.[215] Furthermore, the court noted that technology made lower deviations possible and since places like Anchorage were de facto sufficiently socio-economically integrated, then deviations must be minimized or justified.[216]

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[209] Handley, *supra* note 208, at 5.
[210] *Id.* at 7
[211] *Id.* at 8.
[212] *Id.* at 11.
[213] *Id.* at 14.
[214] *Id.* at 17.
[215] *In Re 2001 Redistricting Cases*, 44 P.3d 141, 2002 WL 437164 (Alaska) at paragraph 11 at page 8.
[216] *Id.* at 8-9.

This is apparently the only court in the nation to have such a rule. Thus, future redistricting submissions to the DOJ may draw unusual lines within single communities to reduce the deviation as closely to zero as possible, and DOJ should carefully monitor these to assure this does not have the effect of interfering with the aims of the VRA.

The final issue to be noted with respect to preclearance is that in both 2000 and 2004, the governing state administrations significantly overhauled election laws right before these important elections. In September 2004, the state submitted many significant changes, including changes to absentee and questioned ballots and acceptable forms of ID, which were implemented in the election just two months later. The state apparently did not obtain preclearance in time, as the DOJ STAPS[217] report shows that these changes were "precleared" on November 9, 2004 – one week after the election. The state had made a similar overhaul of its election laws before the 2000 election, and submitted these changes for preclearance on August 7, 2000; final "preclearance" was obtained on most of these changes on April 2, 2001 – five months after the election. About ten of these changes were withdrawn after the election; thus, with respect to these changes, Section 5 had an impact.

Also in 2000, polling places were changed just one month before the election and not "precleared" until November 29. While the change of a polling place may not raise a flag in most jurisdictions, in rural Alaska, it can have a significant impact on the ability of voters to get to the polls and it should therefore receive a close look.[218] In any event, the preclearance process may not have functioned as intended in the last two elections because the State did not actually get preclearance before the election, but after.

CONCLUSION

Despite the continued language assistance needs of Alaska Natives, the language provisions of the VRA have had little impact in Alaska. This is because Alaska provides only what it was required to provide under state law more than 30 years ago, namely help upon request. Alaska does not uniformly provide oral assistance, nor does it provide any written language assistance to the indigenous population of Alaska, which comprises about 19 percent of the total state population. Yet the 2 percent Filipino population receives the full spectrum of assistance. This is because the state interprets the language provisions not to require written language assistance for Alaska Natives because their languages were historically unwritten. This appears to be an incorrect interpretation and should change.

The preclearance provisions have resulted in some important changes in Alaska's districts and election laws. In addition, there are some fragile minority districts which have consistently experienced polarized voting and these should continue to be monitored to ensure the voting rights of Alaska Natives are protected.

The Alaska Native population is unique even among indigenous people. They retain many important aspects of their ancient way of life, including their languages. More than half live in

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[217] Submission Tracking and Processing System Report

[218] See section II. A. above for a description of conditions and lifeways in rural Alaska.

an environment where voting can involve crossing a river or asking your grandchildren to translate for you and explain what is on the ballot. The Alaska Native population still faces barriers to voting that the VRA was meant to eradicate 30 years ago.

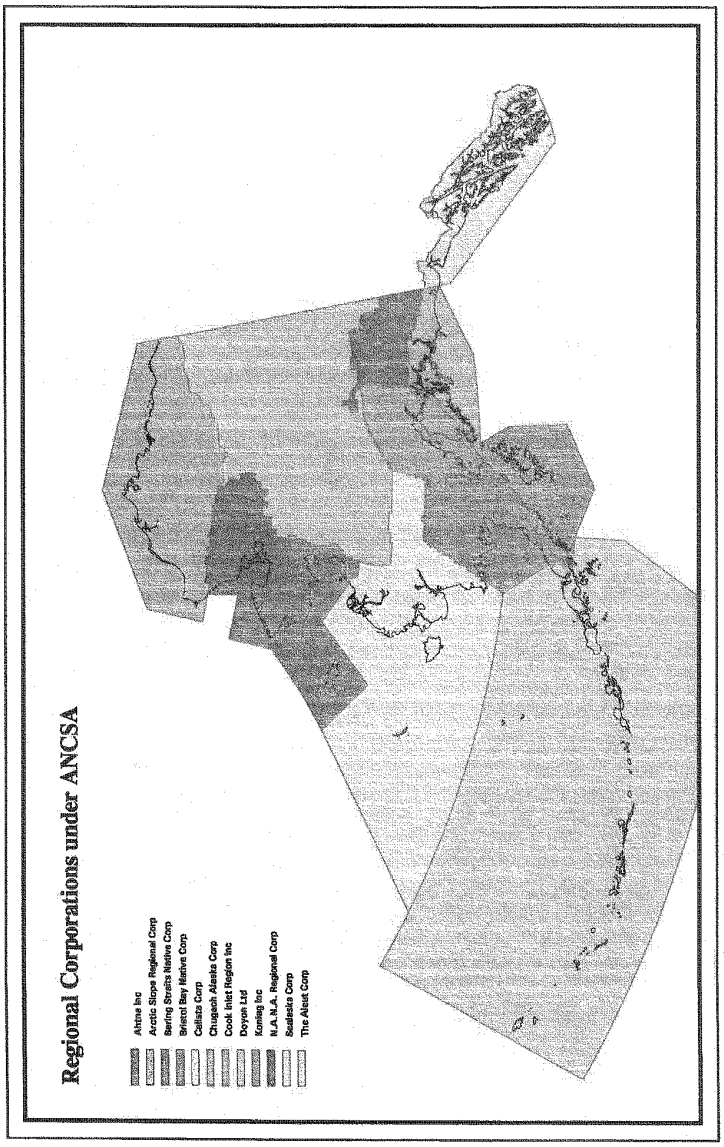
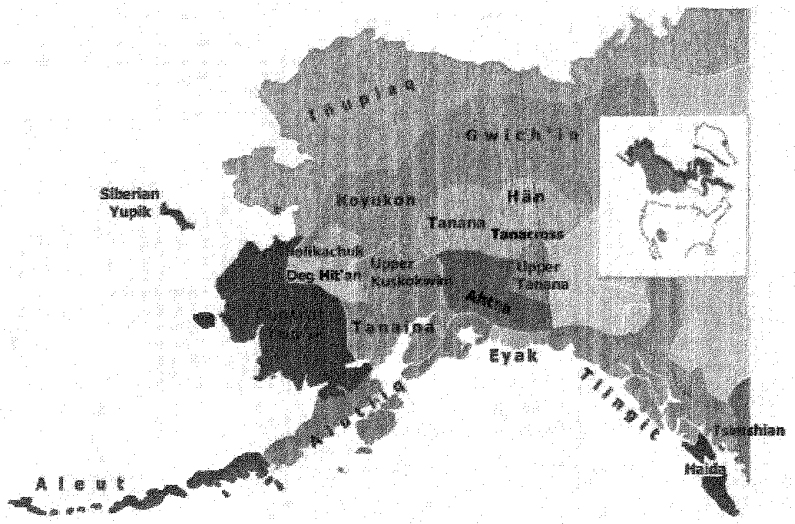

Regional Corporations under ANCSA
Ahtna Inc
Arctic Slope Regional Corp
Bering Straits Native Corp
Bristol Bay Native Corp
Calista Corp
Chugach Alaska Corp
Cook Inlet Region Inc
Doyon Ltd
Koniag Inc
N.A.N.A. Regional Corp
Sealaska Corp
The Aleut Corp

EXHIBIT 1

Alaska Native Languages



Map Created by Alaska Native Language Center at the University of Alaska at Fairbanks

EXHIBIT 2

STATEWIDE SPRING 2005 HSGQE

GRADE 12

Statewide Results by Ethnicity, Gender and Groups

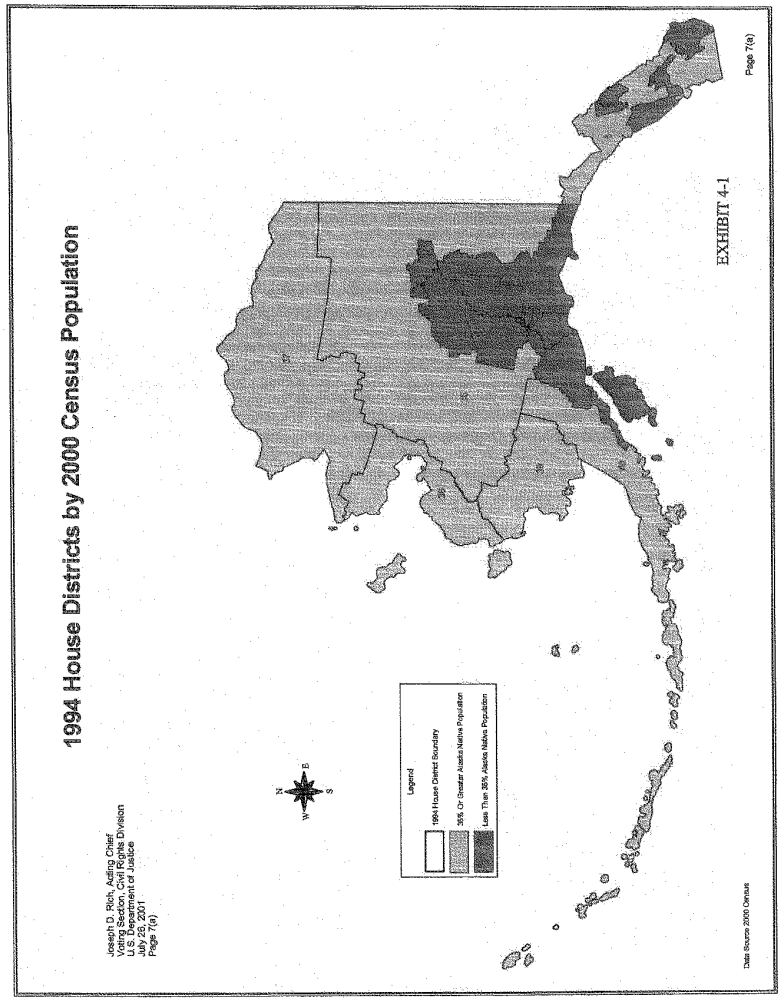
READING	Proficient Count	Proficient Percentage	Not Proficient Count	Not Proficient Percentage
African American	9	17.0%	44	83.0%
Alaska Native	71	19.5%	294	80.5%
American Indian	*	40% or fewer	*	60% or more
Asian/Pacific Islander	16	20.5%	62	79.5%
Caucasian	93	44.7%	115	55.3%
Hispanic	11	34.4%	21	65.6%
Female	95	29.7%	225	70.3%
Male	107	25.3%	316	74.7%
Disabled	42	18.7%	183	81.3%
Non Disabled	160	30.9%	358	69.1%
Limited English Proficient	~	~	~	~
Low Income	~	~	~	~
Migrant	~	~	~	~
WRITING	Proficient Count	Proficient Percentage	Not Proficient Count	Not Proficient Percentage
African American	7	29.2%	17	70.8%
Alaska Native	46	27.2%	123	72.8%
American Indian	*	*	*	*
Asian/Pacific Islander	9	25.0%	27	75.0%
Caucasian	78	60.5%	51	39.5%
Hispanic	8	42.1%	11	57.9%
Female	65	47.8%	71	52.2%
Male	84	34.6%	159	65.4%
Disabled	34	22.4%	118	77.6%
Non Disabled	115	50.7%	112	49.3%
Limited English Proficient	~	~	~	~
Low Income	~	~	~	~
Migrant	~	~	~	~
MATHEMATICS	Proficient Count	Proficient Percentage	Not Proficient Count	Not Proficient Percentage
African American	45	47.9%	49	52.1%
Alaska Native	138	35.7%	249	64.3%
American Indian	9	52.9%	8	47.1%
Asian/Pacific Islander	54	52.4%	49	47.6%
Caucasian	226	63.8%	128	36.2%
Hispanic	28	57.1%	21	42.9%
Female	276	53.3%	242	46.7%
Male	224	46.1%	262	53.9%
Disabled	101	39.9%	152	60.1%
Non Disabled	399	53.2%	351	46.8%
Limited English Proficient	~	~	~	~
Low Income	~	~	~	~
Migrant	~	~	~	~

1 Percent Proficient and Percent Not Proficient rates only include students that participated in the exams.

~ No method of data collection for this information for 2005 school year, data will be collected in 2006 year.

Rev. 08/30/05

EXHIBIT 3


1994 House Districts by 2000 Census Population
Joseph D. Rich, Acting Chief
Voting Section - Civil Rights Division
U.S. Department of Justice
July 23, 2001
Page 7(a)
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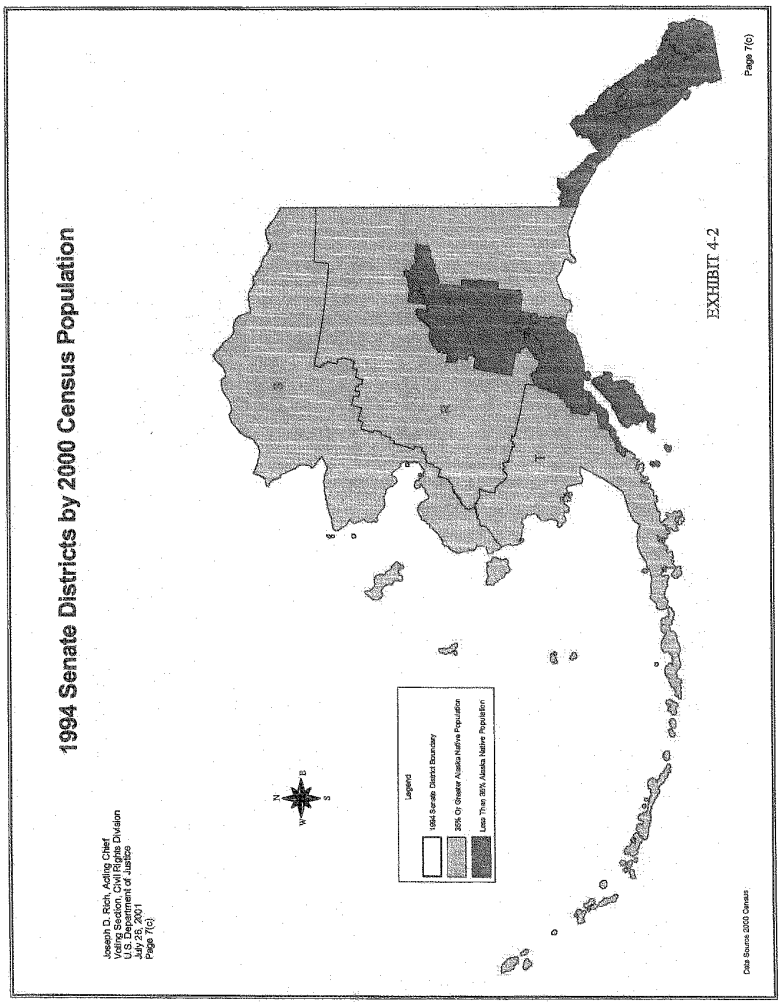
1994 House District Boundary
35% Or Greater Alaska Native Population
Less Than 35% Alaska Native Population
Data Source 2000 Census
Page 7(a)

EXHIBIT 4-1


1994 Senate Districts by 2000 Census Population
Joseph D. Rich, Acting Chief
Voting Section, Civil Rights Division
U.S. Department of Justice
July 26, 2001
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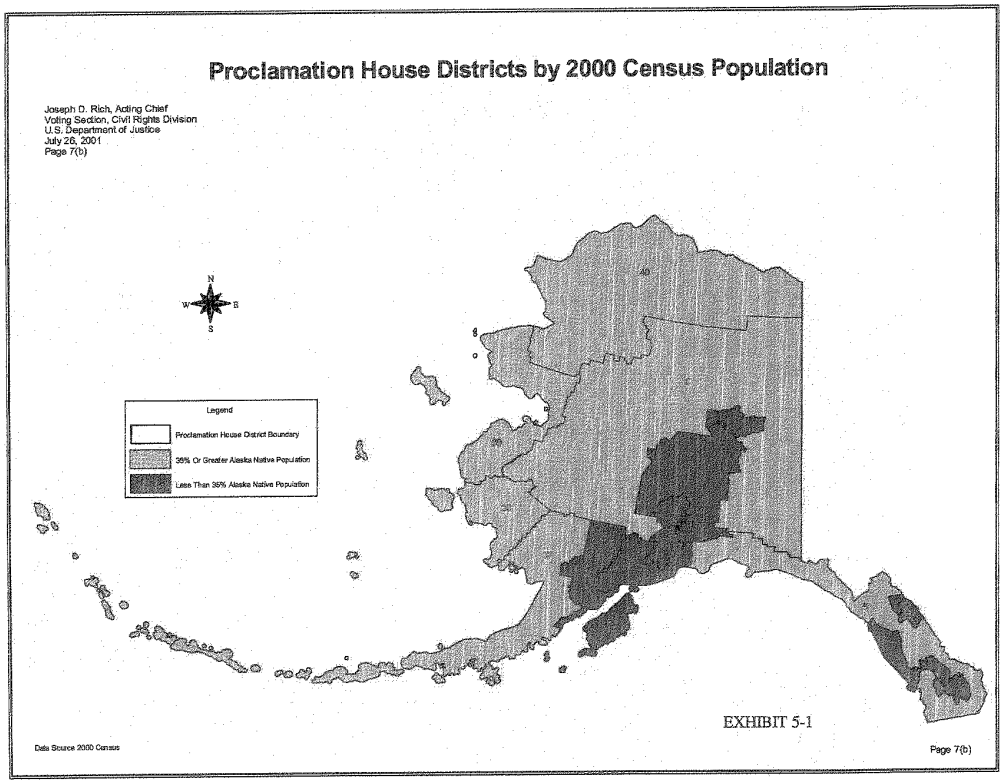
1994 Senate District Boundary
35% Or Greater Alaska Native Population
Less Than 35% Alaska Native Population
Data Source 2000 Census
Page 7(c)

EXHIBIT 4-2


Proclamation House Districts by 2000 Census Population
Joseph D. Rich, Acting Chief
Voting Section, Civil Rights Division
U.S. Department of Justice
July 26, 2001
Page 7(b)
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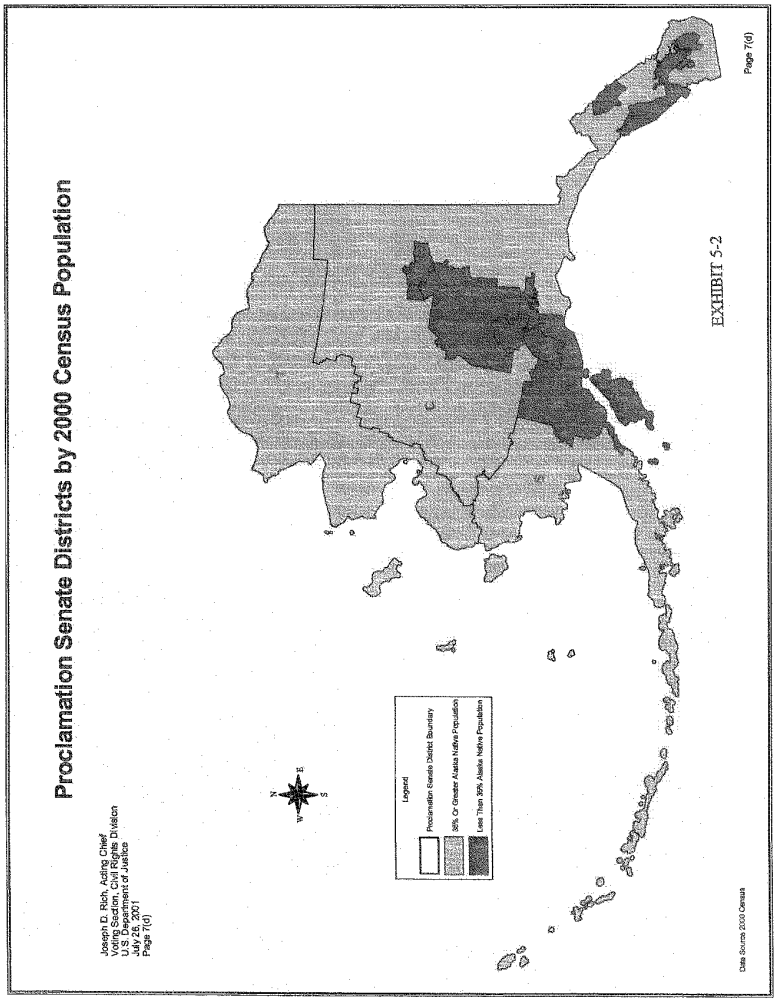
Proclamation House District Boundary
35% Or Greater Alaska Native Population
Less Than 35% Alaska Native Population
EXHIBIT 5-1
Data Source 2000 Census
Page 7(b)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Joseph D. Rich, Acting Chief
Voting Section, Civil Rights Division
U.S. Department of Justice
July 26, 2001
Page 7(d)
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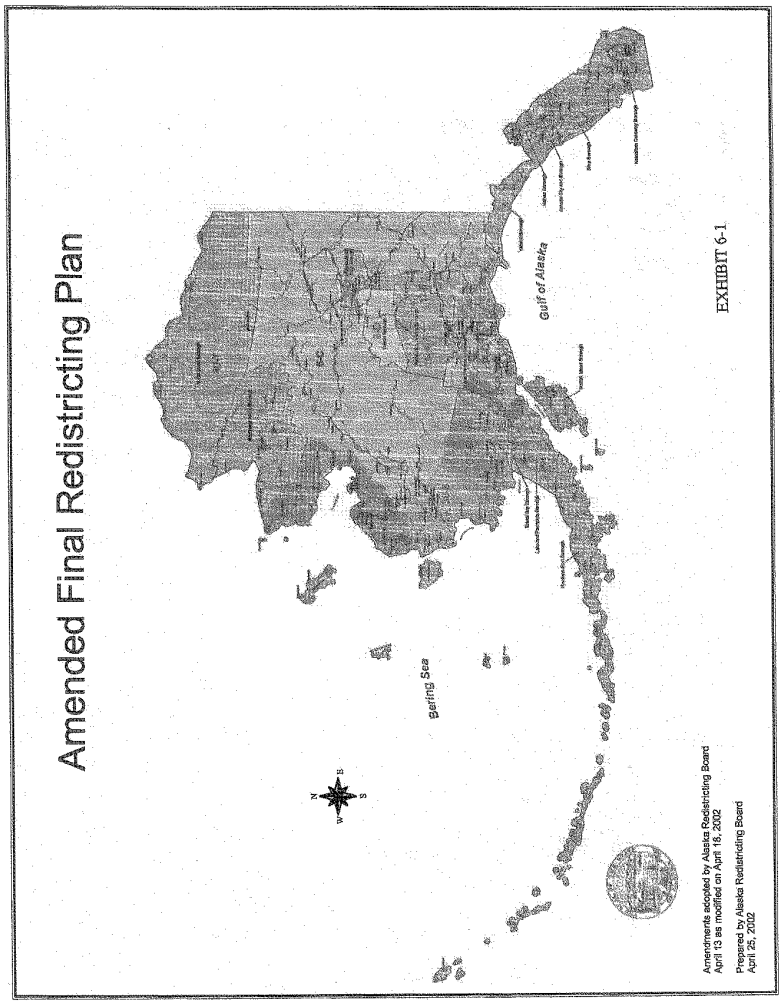
Proclamation Senate District Boundary
35% Or Greater Alaska Native Population
Less Than 35% Alaska Native Population
Data Source 2000 Census
Page 7(d)

EXHIBIT 5-2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Bering Sea
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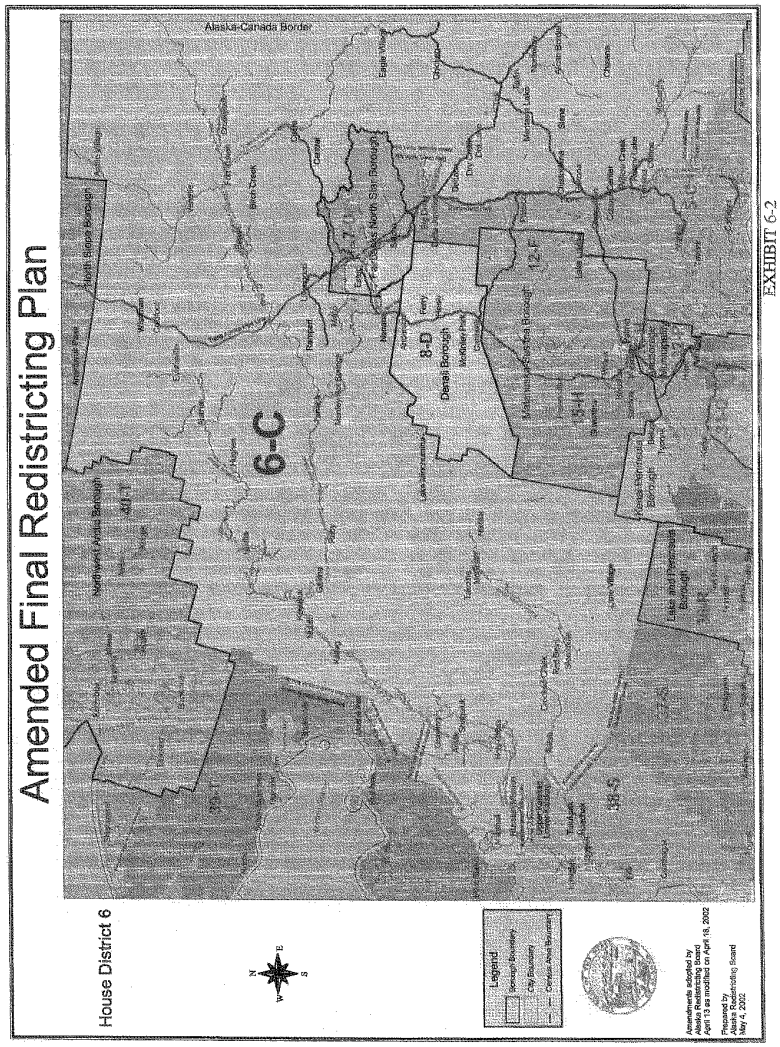
April 13 as modified on April 16, 2002
Prepared by Alaska Redistricting Board
April 25, 2002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House District 6
Alaska-Canada Border
6-C
8-D
Denali Borough
Legend
Borough Boundary
City Boundary
Census Area Boundary
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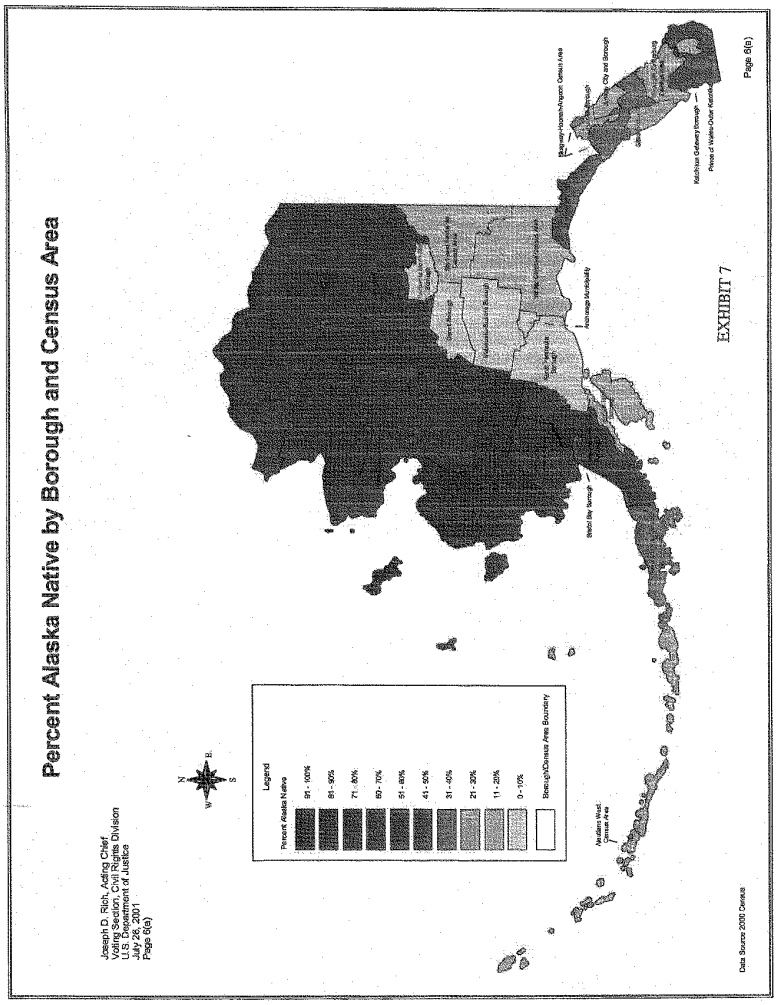
Alaska Redistricting Board
April 10 as modified on April 18, 2002
Prepared by
Alaska Redistricting Board
May 4, 2002

EXHIBIT 6-2


Percent Alaska Native by Borough and Census Area
Joseph D. Rich, Acting Chief
Voting Section, Civil Rights Division
U.S. Department of Justice
July 26, 2001
Page 6(b)
N
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Legend
Percent Alaska Native
91 - 100%
81 - 90%
71 - 80%
61 - 70%
51 - 60%
41 - 50%
31 - 40%
21 - 30%
11 - 20%
0 - 10%
Borough/Census Area Boundary
Aleutian West Census Area
Bristol Bay Borough
Dillingham Census Area
Wade Hampton Census Area
Kusilvak Census Area
Bethel Census Area
Yukon-Koyukuk Census Area
Nome Census Area
Northwest Arctic Borough
North Slope Borough
Anchorage Municipality
Kenai Peninsula Borough
Matanuska-Susitna Borough
Valdez-Cordova Census Area
Yakutat City and Borough
Skagway-Hoonah-Angoon Census Area
Haines Borough
Prince of Wales-Outer Ketchikan Census Area
Ketchikan Gateway Borough
Data Source 2000 Census
EXHIBIT 7
Page 6(b)

APPENDIX TO THE STATEMENT OF WADE HENDERSON, "VOTING RIGHTS IN ARIZONA, 1982–2006," A REPORT OF RENEWTHEVRA.ORG

VOTING RIGHTS IN ARIZONA 1982-2006

DR. JAMES THOMAS TUCKER,[1] DR. RODOLFO ESPINO,[2] TARA BRITE, SHANNON CONLEY, BEN HOROWITZ, ZAK WALTER, SHON ZELMAN[3]

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[3] Student Researchers, Barrett Honors College, Arizona State University

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EXECUTIVE SUMMARY

Since 1965, the temporary provisions of the Voting Rights Act have applied to portions of Arizona. During that time, Arizona has made great progress toward providing Latino and American Indian voting-age citizens with equal access to the political process. Arizona has discontinued the use of its English-only literacy test. Latino and American Indian voting-age citizens are registering and turning out in record numbers and are increasingly making a difference in state and local elections. Nevertheless, Arizona's record since 1982, when the temporary provisions were last reauthorized, shows that the state still has a long way to go.

Recent examples of measures with a discriminatory effect on language minority voting-age citizens illustrate the continuing need for the Voting Rights Act in Arizona:

- In November 1988, Arizona voters approved an "English as the Official Language" amendment that was struck down by the Arizona Supreme Court under the First and Fourteenth Amendments because of the barriers it created for Spanish and American-Indian speaking citizens and their representatives.
- In 2000, Arizona voters adopted Proposition 203, banning bilingual education in public schools to the detriment of tens of thousands of English Language Learner (ELL) students.
- In 2004, Arizona voters adopted Proposition 200, which has made it increasingly difficult for voting-age citizens, particularly elderly American Indian voters, to register or vote because of lack of requisite documentation including birth certificates and other federal or state forms of identification.

Although Arizona's English literacy test was repealed in 1972 after being suspended by the 1970 amendments to the Voting Rights Act, these and other similar measures reinstitute de facto English literacy tests that effectively deny political access to tens of thousands of Arizonans.

Several discriminatory measures adopted since 1982 demonstrate the need for continued Section 5 coverage of Arizona:

- The Justice Department has objected to four statewide redistricting plans because of their discriminatory impact on language minority voting-age citizens, including one in the 1980's, two in the 1990's, and one in 2002.
- Over 80 percent of all Section 5 objections in Arizona have occurred since 1982.
- The Justice Department has interposed Section 5 objections to discriminatory voting changes in seven of Arizona's 15 counties since 1982.
- Several of the post-1982 Section 5 objections have been directed at discriminatory practices with the purpose or effect of denying language assistance and other basic election access to limited-English proficient (LEP)

American Indian voting-age citizens, such as discriminatory practices remedied in 1989 and 1994 cases brought by the Department of Justice.

There also continues to be a need for language assistance under Section 203 of the Act, with recent evidence of persistent and ongoing discrimination in education, high illiteracy rates, and non-compliance with the Act showing the importance of these provisions:

- According to the 2000 Census, 20.6 percent of all Hispanic voting-age citizens are LEP and 21.7 percent of all American Indian voting-age citizens are LEP. The need is most acute among elderly American Indian citizens, with 46.5 percent of all American Indian citizens over 65 requiring language assistance.
- The need for language assistance among Navajo voting-age citizens in Apache, Coconino, and Navajo Counties is extreme, with approximately one-third of those citizens LEP, among whom the illiteracy rate is over 25 percent, roughly nineteen times the national illiteracy rate.
- In the December 2005 decision of *Flores v. State*, a federal court cited Arizona for contempt for under-funding its English Language Learner (ELL) programs by as much as 90 percent. Arizona's failure has denied equal educational opportunities to 175,000 ELL Latino and American Indian students, in violation of *Lau v. Nichols* and Title VI of the Civil Rights Act. The state has taken no action to correct the problem since originally being found liable six years ago, resulting in fines of at least $500,000 per day.
- Denial of equal educational opportunities has resulted in high failure rates among Latino and American Indian students on state-mandated graduation tests. On national testing, more than 60 percent of all Latino and American Indian students score below grade level.
- Arizona has inadequate English as a Second Language (ESL) and adult ELL courses to help bridge the language gap.
- As recently as 2002, the Department of Justice identified substantial non-compliance with Section 203 by Apache County, denying thousands of American Indian voting-age citizens equal access to the election process.

Sections 6 through 9 of the Act also have made a difference in Arizona since 1982:

- Since 1982, there have been more than 1200 federal observers deployed to Apache, Navajo, and Yuma Counties, identifying substantial non-compliance in the availability and quality of language assistance to American Indian and Latino voting-age citizens.
- Since 2004, the use of monitors in six Arizona counties not designated for federal observers highlights the need to increase the attorney general's power to designate jurisdictions to ensure compliance with the Voting Rights Act.

The record in Arizona demonstrates the continuing need for coverage under Section 4(f)(4), and reauthorization of the expiring provisions of the VRA for an additional twenty-five years.

I. Introduction to the Voting Rights Act

A. History of Discrimination in Voting and Other Areas

Prior to passage of the Voting Rights Act of 1965 ("VRA"), Arizonans of Hispanic, American Indian, African-American, and Asian heritage were the victims of discrimination in virtually every other area of their social and political life.

For example, the town of Winslow adopted a policy segregating public swimming pools that allowed only Anglos to use the pool on days it was cleaned and Mexican Americans, American Indians and blacks on other days.[4] Similarly, Arizona adopted an anti-miscegenation law banning marriages between persons of "Caucasian blood" and those of "Negro, Mongolian, Malay, or Hindu" blood.[5] American Indians were included in an earlier version of the anti-miscegenation statute, but were removed as a result of a 1942 amendment.[6] African Americans were not removed from the statute until 1962, just five years before the landmark Supreme Court case of *Loving v. Virginia*.[7]

Segregated schooling was widespread after it was sanctioned by the state Supreme Court[8] and state legislature, which passed a statute permitting school districts "to make such segregation of pupils as they may deem advisable."[9] Spanish-speaking Latino students were specifically targeted for segregation on the basis of their language.[10] It was not until the 1950s, after *Brown v. Board of Education*, that Latino students were integrated into Arizona's public schools.[11] American Indian students remained largely segregated from non-Indians because they attended Bureau of Indian Affairs (BIA) schools on reservations.

---

[4] The policy ended as a result of a consent agreement in *Baca v. Winslow*, No. Civ-394-Pct (D. Ariz. 1955).

[5] Ariz. Rev. Stat. § 25-101(A) (1956). The statute was struck down in 1959 in *Oyama v. O'Neill*, No. 61269 (Ariz. Super. Ct. Dec. 23, 1959).

[6] Arizona's anti-miscegenation statute was originally enacted by the Territorial legislature in 1865.

[7] 388 U.S. 1 (1967).

[8] *See Dameron v. Bayless*, 14 Ariz. 180, 126 P. 273 (Ariz. 1912) (upholding segregated schools under *Plessy v. Ferguson*).

[9] Ariz. Rev. Stat. § 2750 (1913).

[10] Laura K. Muñoz, "Separate But Equal? A Case Study of *Romo v. Laird* and Mexican American Education," at 1 (Organization of American Historians).

[11] In *Ortiz v. Jack*, No. Civ-1723 (D. Ariz. 1955), the Glendale Board of Education agreed to discontinue the segregation and discrimination of Mexican school children. Similarly, in *Gonzalez v. Sheeley*, the Court enjoined the segregation of Mexican school children in public schools. The Court reasoned, "a paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association, regardless of lineage." 96 F. Supp. 1004, 1008-09 (D. Ariz. 1951).

Even after the public schools were desegregated, Latinos continued to be subjected to Arizona's sweeping limitations on bilingual education. Arizona has had a longstanding tradition of English-only education in public schools, with English-only courses (known as "1C classes") mandated by Arizona law in 1919. In districts, with large numbers of English as a Second Language (ESL) and English Language Learner (ELL) students, students received English lessons at a low-level, simplified curriculum. Many of the students in the 1C classes remained behind for several years before dropping out of school, never receiving the opportunity to learn age-appropriate material. The 1C courses remained the only option until 1965, when some bilingual programs were introduced. However, a limit was placed on the number of programs that were permitted, and English-only flourished.[12] Limitations on bilingual education had the effect of denying Latinos access to voting once they were eligible, particularly due to Arizona's English literacy test, which is discussed below.

Similarly, for much of Arizona's history, American Indians were excluded from voting because they were treated as "wards of the state" who were not full citizens.[13] American Indians in Arizona remained officially disenfranchised until 1948.[14] Even then, barriers to participation by American Indians persisted:

> Some Indian people were unsure about their newly won voting rights. Many did not see themselves as active participants in the federal and state political process—simply because they did not view it as their process. Some feared that involvement in this non-Indian process would lead to taxation, further loss of reservation lands, and the termination of their special relationship with the federal government. These fears stemmed in large part from statements generated by the non-Indian community.

In addition to fears about changes in taxation and the loss of the special federal relationship, an estimated 80 to 90 percent of the Indian population was illiterate, according to a 1948 *Arizona Republic* article.[15]

Even as Arizona allowed more American Indians to vote, Indians were still subjected to second-class citizenship. Like African Americans in the South during Reconstruction, American Indians had the legal right to vote, but were not guaranteed that they would be able to cast a meaningful ballot. Language barriers prevented many from being able to read the ballot. "Using poll taxes, literacy tests, English language tests, and refusing to place polling places in or near Indian communities, western states were successful in their efforts to prevent Indians from voting."[16]

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[12] Rolstad, Kellie, Kate S. Mahoney, and Gene V. Glass. "Weighing the Evidence: A Meta-Analysis of Bilingual Education in Arizona." Bilingual Research Journal 29 (2005): 1-18.

[13] *Porter v. Hall*, 34 Ariz. 308, 271 P. 411 (Ariz. 1928).

[14] *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (Ariz. 1948).

[15] Inter Tribal Council of Arizona. "The History of Indian Voting in Arizona." 2004.

[16] Rollings, Willard Hughes. "Citizenship and Suffrage: The American Indian Struggle for Civil Rights in the American West, 1830-1965." 5 Nev. L.J. 126.

B. Arizona's English Literacy Test and its Suspension by the VRA

Arizona enacted its first English literacy test in 1912, shortly after it became a state. The statute, as later amended, provided:

> Every resident of the state is qualified to become an elector and may register to vote at all elections authorized by law if he:
>
> 4. Is able to read the Constitution of the United States in the English language in such manner as to show he is neither prompted nor reciting from memory, unless prevented from doing so by physical disability.
> 5. Is able to write his name, unless prevented from so doing by physical disability."[17]

According to historian David Berman, the literacy test was enacted "to limit 'the ignorant Mexican vote' .... As recently as the 1960s, registrars applied the test to reduce the ability of blacks, Indians, and Hispanics to register to vote." Berman explained, "Anglos sometimes challenged minorities at the polls and asked them to read and explain 'literacy' cards. Intimidators hoped to discourage minorities from standing in line to vote."[18]

On August 7, 1965, Apache County, Arizona was included in the original list of jurisdictions covered by Section 5 of the Voting Rights Act.[19] On November 19, 1965, Navajo and Coconino Counties also became covered by Section 5.[20] As a result of this coverage, application of the literacy test was suspended in each of the three counties, where a majority of the voters were American Indian. In 1966, these three counties became the first jurisdictions to successfully bail out from coverage under Section 5 after the U.S. District Court for the District of Columbia held that Arizona's literacy test had not been discriminatorily applied against Indians in the preceding five years.[21]

When the Voting Rights Act was amended in 1970 and the temporary provisions were extended for an additional five years, one of the measures of voting discrimination was changed to registration and turnout in the 1968 presidential election. As a result of this amendment, Apache, Coconino, and Navajo Counties again became covered by Section 5, along with five additional Arizona counties. In addition, the amendments included a nationwide ban on literacy tests, which again preempted the operation of Arizona's literacy test.[22]

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[17] Ariz. Rev. Stat. Ann. §§ 16-101.A.4, 16-101.A.5 (1956).

[18] David R. Berman, *Arizona Politics and Government: The Quest for Autonomy, Democracy, and Development* (University of Nebraska Press 1998), pp. 48-49.

[19] 30 Fed. Reg. 9897 (Aug. 7, 1965).

[20] 30 Fed. Reg. 14505 (Nov. 19, 1965).

[21] *Apache County v. United States*, 256 F. Supp. 903 (D.D.C. 1966).

[22] 42 U.S.C. § 1973aa.

In *Oregon v. Mitchell*, the U.S. Supreme Court considered a challenge to several provisions of the Voting Rights Act Amendments of 1970, including the nationwide ban on literacy tests in any federal, state, or local election.[23]

Arizona maintained that the ban could not be enforced to the extent it was inconsistent with the state's literacy test requirement. The Supreme Court rejected that argument and held that the ban was constitutional under the Enforcement Clause of the Fourteenth Amendment and that it superseded the Arizona statute under the Supremacy Clause of the United States Constitution. Congress enacted Title II in order to ban literacy tests that were used to discriminate against voters on account of their race. There was overwhelming evidence showing that the ban on tests or devices in the Voting Rights Act had a remarkable impact on minority registration. There was also evidence that voter registration and participation were consistently greater in states without literacy tests.[24]

Moreover, in enacting the new legislation, Congress was aware of the history of discriminatory educational opportunities in America. The Court noted that Arizona's discriminatory education system had resulted in disenfranchisement of its American Indian citizens:

> In Arizona, for example, only two counties out of eight with Spanish surname populations in excess of 15% showed a voter registration equal to the state-wide average. Arizona also has a serious problem of deficient voter registration among Indians. Congressional concern over the use of a literacy test to disfranchise Puerto Ricans in New York State is already a matter of record in this Court. *Katzenbach v. Morgan*, supra. And as to the Nation as a whole, Congress had before it statistics which demonstrate that voter registration and voter participation are consistently greater in States without literacy tests.[25]

Justice Douglas similarly observed:

> [Congress] can rely on the fact that most States do not have literacy tests; that the tests have been used at times as a discriminatory weapon against some minorities, not only Negroes but Americans of Mexican ancestry, and American Indians; that radio and television have made it possible for a person to be well informed even though he may not be able to read and write. We know from the legislative history that these and other desiderata influenced Congress in the choice it made in the present legislation; and we certainly cannot say that the means used were inappropriate.[26]

---

[23] 400 U.S. 112 (1970).

[24] 400 U.S. at 132-33.

[25] 400 U.S. at 132-33.

[26] 400 U.S. at 147 (Douglas, J., dissenting).

The Court concluded that American citizens could be informed in their own native language and responsibly and knowledgably cast a ballot. However, Arizona did not repeal its English literacy test until 1972, two years after *Oregon v. Mitchell* was decided.

C. Section 4(f)(4) Coverage

As a result of its lengthy history of discrimination and its English literacy test, Arizona became covered by Section 5 and the other special provisions of the Voting Rights Act after the Act was amended in 1975.

Arizona is one of just three states covered statewide under Section 4(f)(4) of the Act, for Spanish Heritage (Alaska for Alaskan Natives and Texas for Spanish Heritage are the other two). Arizona became covered after the 1975 Amendments to the Voting Rights Act were passed, based upon the determination that:

- More than five percent of the voting-age citizens (persons 18 years and older) on November 1, 1972 were members of a single language minority group (Spanish); and
- The U.S. Attorney General found that election materials were provided in English only on November 1, 1972 (as a result of Arizona's English literacy requirement in Ariz. Rev. Stat. Ann. §§ 16-101.A.4, 16-101.A.5 (1956)); and
- The Director of the Census determined that fewer than fifty percent of voting-age citizens were registered to vote on November 1, 1972 or that fewer than fifty percent voted in the November 1972 presidential election.[27]

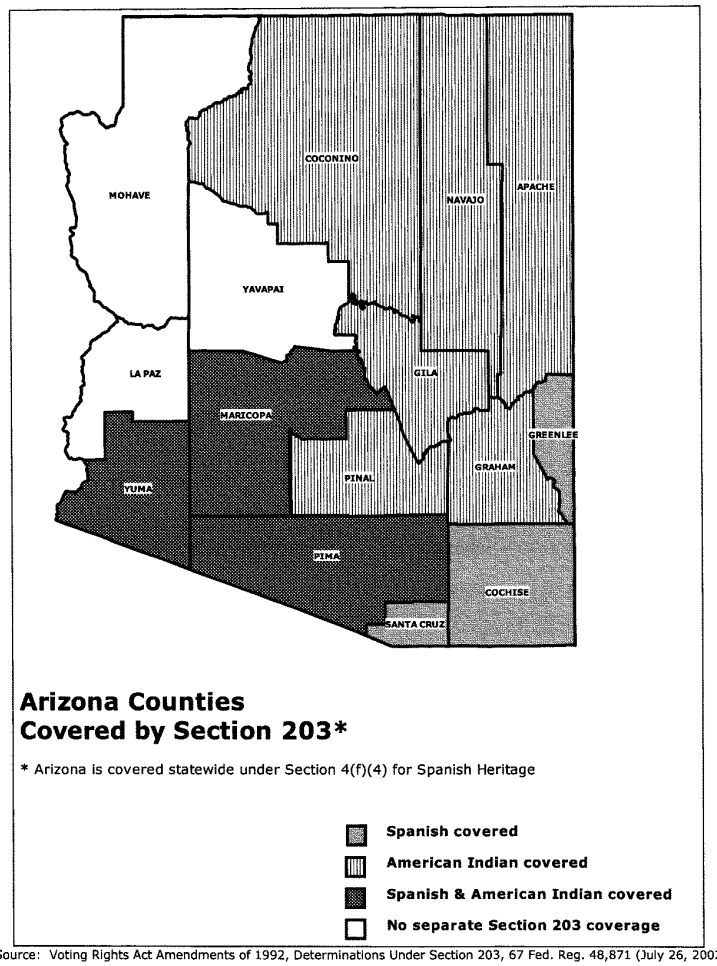
See 42 U.S.C. § 1973b(b). As a result of this determination, all political subdivisions in Arizona (including counties, cities, and special districts) must comply with Section 203 by providing all election materials, including assistance and ballots, in the language of the applicable language minority group. *See* 28 C.F.R. § 55.8(a). In addition, the jurisdictions are subject to the special provisions of the VRA, including Section 5 preclearance.

D. Section 203 Coverage

In addition to statewide coverage under Section 4(f)(4), twelve of Arizona's fifteen counties are separately covered by Section 203 of the Voting Rights Act. Six counties are covered for Spanish: Cochise, Greenlee, Maricopa, Pima, Santa Cruz, and Yuma. Nine counties are covered for American Indian languages: Apache, Coconino, Gila, Graham, Maricopa, Navajo, Pima, Pinal, and Yuma. *See* Figure 1.1. The coverage basis for each county is summarized in Figures 1.3 and 1.4.

[27] 28 C.F.R. Part 55, Appendix (summarizing coverage determinations). Coverage determinations were published at 40 Fed. Reg. 43746 (Sept. 23, 1975), 40 Fed. Reg. 49422 (Oct. 22, 1975), 41 Fed. Reg. 784 (Jan. 5, 1976) (corrected at 41 Fed. Reg. 1503 (Jan. 8, 1976)), and 41 Fed. Reg. 34329 (Aug. 13, 1976).

Figure 1.1: Arizona Counties Separately Covered by Section 203 of the Voting Rights Act.



Source: Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002)

Under Section 203(c) of the Voting Rights Act, a state or political subdivision is covered by the minority language assistance provisions if it has a sufficient number of "limited-English proficient" single-language minority citizens who experience a higher illiteracy rate than the national average. "Limited-English proficient," or "LEP," is defined as the inability "to speak or understand English adequately enough to participate in the electoral process." 42 U.S.C. § 1973aa-1a(b)(3)(B).

The 1992 House Report explains the manner in which the Director of the Census determines the number of limited-English proficient persons:

> 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.[28]

Under Section 203, a jurisdiction becomes covered if the number of limited-English proficient United States citizens of voting age in a single language group within the jurisdiction:

- Is more than 10,000; or
- Is more than five percent of all citizens of voting age; or
- On an Indian reservation, more than five percent of the American Indian voting-age citizens are members of a single language minority and are limited-English proficient; and
- The illiteracy rate of the citizens in the language minority group is higher than the national illiteracy rate.

See 42 U.S.C. § 1973aa-1a(b)(2)(A).

Once a jurisdiction is covered by the language assistance provisions, all "voting materials" it provides in English generally must be provided in the language of all groups or sub-groups that trigger coverage. Voting materials include the following:

- Voter registration materials
- Voting notices (including information about opportunities to register, registration deadlines, time/places/locations of polling places, and absentee voting)

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[28] H.R. REP. NO. 102-655 at 8, *reprinted in* 1992 U.S.C.C.A.N. 772.

- Voting materials provided by mail
- All election forms
- Polling place activities and materials
- Instructions
- Publicity
- Ballots
- Other materials or information relating to the electoral process
- Assistance

See 42 U.S.C. § 1973aa-1a(c); 28 C.F.R. §§ 55.15, 55.18. Written materials generally do not have to be provided to members of Alaskan Native and American Indian groups whose languages historically are unwritten. Instead, oral instructions, assistance, or other information in the covered language must be available for members of those groups at every stage of the electoral process. *See* 42 U.S.C. § 1973aa-1a(c). The covered jurisdiction is responsible for providing effective assistance to members of the covered minority language groups. *See* 28 C.F.R. § 55.2(c).

The minority language assistance provisions apply to all stages of the electoral process for "any type of election, whether it is a primary, general or special election." 28 C.F.R. § 55.10. This includes not only elections of officers, but also elections on such matters as bond issues, constitutional amendments and referendums. Federal, state, and local elections are covered, as well as special district elections, such as school districts and water districts. *See* 28 C.F.R. § 55.10.

Arizona's statewide coverage for Spanish language assistance is based upon its Section 4(f)(4) coverage, and not Section 203, because it cannot meet the five percent voting-age citizen LEP threshold at the state level. Nevertheless, there is a great need for language assistance among Latino voting-age citizens in Arizona. According to the 2000 Census, 20.6 percent (104,967) of Arizona's 510,488 Latino voting-age citizens speak English "less than very well" and need language assistance to vote.

The need for language assistance is equally great among eligible American Indian voters. According to the 2000 Census, 21.7 percent (38,457) of Arizona's American Indian voting-age citizens are LEP and need voting assistance. The need is particularly acute among Arizona's elderly American Indian citizens: 46.5 percent of all American Indian citizens over the age of 65 are LEP. The percentage is even higher among American Indians over 75 years of age, with 49.4 percent (2,994) of the 6,059 persons needing language assistance in the voting process. *See* Figure 1.2.

Figure 1.2: American Indian Citizens in Arizona Who Are LEP and Need Language Assistance

Age group	Number of LEP citizens	Percent of all citizens in age group
18 to 24	3808	11.4%
25 to 34	5938	14.4%
35 to 44	8340	20.1%
45 to 54	6658	23.9%
55 to 64	5983	35.9%
65 to 74	4736	44.9%
75 + Years	2994	49.4%
Total	**38,457**	**21.7%**

Source: 2000 Census, Summary Tape Files 3 and 4.

In the six Arizona counties that are separately covered under Section 203 for Spanish Heritage, there is a very high need for language assistance among Latino voting-age citizens. For example, in Maricopa County, the most populous county in the State and home to the Phoenix metropolitan area, there are 53,385 Spanish-speaking voting age citizens who need language assistance in the voting process. The illiteracy rate among these citizens is 12.71 percent, over nine times the national illiteracy rate of 1.35 percent. *See* Figure 1.3.

Figure 1.3: Arizona Counties Covered by Section 203 for Spanish Heritage

Covered Jurisdiction	Number LEP (N)	Percent LEP (P)	Illiteracy Rate	Coverage Basis
Cochise County	4325	5.36	14.34	P
Greenlee County	315	5.52	4.76	P
Maricopa County	53385	2.70	12.71	N
Pima County	23220	3.97	12.36	N
Santa Cruz County	5585	29.68	8.59	P
Yuma County	7440	8.23	15.79	P

Source: Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002)

The need for language assistance is even greater among American Indian voting-age citizens in the nine Arizona counties covered under Section 203 for American Indian languages. Apache County, home to the capital of the Navajo Nation, is the only jurisdiction in the United States that is covered under all three Section 203 coverage formulas: among all voting-age citizens in the County, 26.52 percent – numbering 11,245 – are Navajo-speaking LEP persons. Apache County is also covered by the partial reservation trigger because 36.11 percent of all persons living on the Navajo Reservation, which is divided between several states and counties, are Navajo-speaking LEP persons. The illiteracy rate among these Navajo voting-age citizens is extreme. It includes more than 25 percent of all eligible Navajo voters, which is nearly 19 times the national illiteracy rate. Apache County also is covered for the Apache and Hopi (Pueblo) languages. *See* Figure 1.4.

Figure 1.4: Arizona Counties Covered by Section 203 for American Indian Languages

Covered Jurisdiction	Covered Language	Indian Reservation (RP or RW)	Number LEP (L)	Percent LEP (P)	Illiteracy Rate	Coverage Basis
Apache County	Apache	Fort Apache Reservation	15	10	0	RP
	Navajo		11245	26.52	25.43	N, P
	Navajo	Navajo Nation Reservation and Off-Reservation Trust Land	11175	36.11	25.37	RP
	Pueblo	Zuni Reservation and Off Reservation Trust Land	0	0	0	RP
Coconino County	Navajo		5405	6.74	26.64	P
	Navajo	Navajo Nation Reservation and Off-Reservation Trust Land	4555	35.41	29.75	RP
	Pueblo	Hopi Reservation and Off-Reservation Trust Land	90	14.75	0	RP
Gila County	Apache	Fort Apache Reservation	270	32.53	1.48	RP
	Apache	San Carlos Reservation	570	22.01	2.63	RP
	Apache	Tonto Apache Reservation	0	*	*	RP
Graham County	Apache	San Carlos Reservation	715	29.24	0.56	RP
Maricopa County	Tohono O'Odham	Tohono O'odham Reservation and Off-Reservation Trust Land	190	62.3	28.95	RP

Figure 1.4: Arizona Counties Covered by Section 203 for American Indian Languages (cont.)

ARIZONA (CONT.)

Covered Jurisdiction	Covered Language	Indian Reservation (RP or RW)	Number LEP (L)	Percent LEP (P)	Illiteracy Rate	Coverage Basis
Navajo County	Apache	Fort Apache Reservation	1620	29.54	2.78	RP
	Navajo		7185	11.58	30.48	P
	Navajo	Navajo Nation Reservation and Off-Reservation Trust Land	6515	43.16	32.46	RP
	Pueblo	Hopi Reservation and Off-Reservation Trust Land	815	23.55	3.68	RP
Pima County	Tohono O'Odham	Tohono O'odham Reservation and Off-Reservation Trust Land	1670	31.48	9.28	RP
	Yaqui	Pascua Yaqui Reservation	280	18.24	10.71	RP
Pinal County	Apache	San Carlos Reservation	0	0	0	RP
	Tohono O'Odham	Maricopa (Ak Chin) Reservation	45	11.84	8.89	RP
	Tohono O'Odham	Tohono O'odham Reservation and Off-Reservation Trust Land	170	39.08	14.71	RP
Yuma County	Yuman	Cocopah Reservation	80	20.78	37.5	RP
	Yuman	Fort Yuma Reservation	0	*	*	RP

Source: Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002)

E. The Continuing Need for the Voting Rights Act in Arizona

The Voting Rights Act of 1965 has had a significant impact on Arizona. Hispanic and American Indian citizens are registering and voting in record numbers. These voters are making a difference in recent elections, representing the decisive vote in several recent statewide elections and the 2002 passage of a Indian gaming ballot proposition supported by most of the State's Indian tribes. Latino elected representatives have nearly quadrupled from 95 in 1973 to 373 in January 2005.[29]

[29] National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund, 2005 National Directory of Latino Elected Officials.

Nevertheless, Arizona still has a long way to go. More than 80 percent of Arizona's twenty-two Section 5 objections have occurred for voting changes enacted since 1982. Four post-1982 objections have been for statewide redistricting plans, including one in the 1980s, two in the 1990s and one as recently as 2002. Since 1982, the Department of Justice has interposed objections to voting changes from nearly half of Arizona's 15 counties that have had the purpose or effect of discriminating against Latino or American Indian voters.

Northern Arizona has a lengthy history of discrimination against Navajo, Apache, and Hopi voters. In 1989 and 1994, successful cases were brought against Coconino, Navajo, and Apache Counties for denying American Indian voters access to the political process. Those same three counties account for nearly half of all of the post-1982 Section 5 objections in Arizona. Prior to 1998, all of the federal observers and monitors deployed to Arizona were sent to observe elections in Apache and Navajo Counties. As recently as 2002, the Department of Justice identified significant deficiencies in the availability and quality of language assistance offered to American Indian voters in Apache County.

Other barriers to voting persist for American Indians. Polling places and registration sites can be few and far between. Geographical isolation and long travel distances make it difficult for many Indian people living on reservation to register and to vote. Disparate education opportunities for American Indians enrolled in BIA schools have also led to high illiteracy rates. Socio-economic barriers have heightened the crippling effect of illiteracy, resulting in voter registration and turnout rates that continue to lag far behind non-Hispanic white voters.

In December 2005, Arizona was cited for contempt by a federal court for failing to provide adequate English language instruction to the 175,000 limited-English proficient (LEP) students enrolled in its English Language Learner (ELL) programs in the public schools. The problem has worsened since Arizona's passage of a ban on bilingual education in 2000. According to some estimates, Arizona has under-funded ELL education by as much as ninety percent for decades, resulting in tens of thousands of voting-age citizens who are LEP and illiterate. Language barriers also remain in place because of lengthy waiting periods for English as a Second Language (ESL) and adult ELL programs.

Proposition 200 has been one of the most recent and controversial issues facing Latino and American Indian voters in Arizona. The "Protect Arizona Now" committee authored this referendum to curb the use of public services by undocumented immigrants. It passed in November 2004 with 56 percent of the vote. Proposition 200 requires individuals to produce proof of citizenship before they can register to vote or apply for public benefits and makes it a misdemeanor for public officials to fail to report persons unable to produce documentation of citizenship who apply for benefits. Opponents say the measure is unconstitutional, xenophobic, racist and inhumane.[30] The measure has not simply impaired the ability of Latino voting-age citizens to participate in elections. Many American Indian voters, particularly the elderly, do not have birth certificates or other means to prove their citizenship. Hispanic and American Indian voters have widely protested Proposition 200, and legal challenges are expected. Regardless of the outcome, one thing remains clear: the Voting Rights Act remains needed in Arizona.

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[30] http://www.pan2004.com.

II. Arizona's Demographics

A. Hispanic Voting-Age Citizens

Arizona has a growing, vibrant minority community comprising approximately one-third of its total population. According to the 2000 Census, Hispanics make up the largest single minority group, with approximately 1.3 million persons, or more than one-quarter of the state's total population. There are a little more than 800,000 Hispanic persons of voting age ("VAP"), comprising 21.3 percent of Arizona's VAP. Two-thirds (510,488) of all Hispanics of voting-age in Arizona are citizens, of whom nearly 90 percent of are Native-born.[31] *See* Figure 2.1.

Figure 2.1: Census 2000 Data for Arizona, by Racial and Ethnic Groups.

Subject	All ages		18 years and over	
	Number	Percent	Number	Percent
Total population	5,130,632	100.0	3,763,685	100.0
Hispanic or Latino (of any race)	1,295,617	25.3	802,474	21.3
Not Hispanic or Latino	3,835,015	74.7	2,961,211	78.7
One race	3,758,643	73.3	2,918,766	77.6
White	3,274,258	63.8	2,595,584	69.0
Black or African American	149,941	2.9	103,257	2.7
American Indian and Alaska Native	233,370	4.5	142,940	3.8
Asian	89,315	1.7	69,331	1.8
Native Hawaiian and Other Pacific Islander	5,639	0.1	3,957	0.1
Some other race	6,120	0.1	3,697	0.1
Two or more races	76,372	1.5	42,445	1.1

Source: U.S. Census Bureau, Census 2000 Redistricting Data (Public Law 94-171) Summary File.

Hispanic voting-age citizens trail non-Hispanic voting age citizens in every socio-economic category. According to the 2000 Census, 15.4 percent (78,538) of all Hispanic voting-age citizens live in poverty, compared to 9 percent (258,037) of non-Hispanic voting-age citizens.[32] Educational attainment for Hispanic voting-age citizens is also extremely low, compared to non-Hispanic voting age citizens: 4.2 percent (21,565) of all Hispanic voting-age citizens are illiterate – over three times the national illiteracy rate – compared to an illiteracy rate of .8 percent (21,899) for non-Hispanic voting-age citizens; 35.6 percent (181,750) of Hispanic voting-age citizens lack a high school diploma, compared to 13.1 percent (377,215) of non-Hispanic voting-age citizens; and only 8.6 percent (43,929) of Hispanic voting-age citizens have

[31] U.S. Census Bureau, Census 2000 STF-4, Matrices PCT43, PCT46, and PCT48 (Arizona).

[32] The poverty rate for non-Hispanic voting-age citizens includes American Indians, who comprise 21.1 percent (54,424) of all non-Hispanic voting-age citizens living in poverty in Arizona. If American Indians are excluded, the poverty rate among non-Hispanic non-Indian voting-age citizens is 7.5 percent (203,613) of 2,699,938 non-Hispanic non-Indian voting-age citizens.

at least a four-year college degree, compared to 24.7 percent (710,029) of non-Hispanic voting-age citizens.[33]

B. American Indian Voting-Age Citizens

There are more than a quarter million American Indians in Arizona, making up 4.5 percent of the State's total population. Like Hispanics, American Indians are, on average, a younger group, with a VAP of a little more than 140,000 persons, making up 3.8 percent of Arizona's VAP. Figure 2.1.

Most of the members of Arizona's 21 American Indian tribes live on reservations. The Census data for each of these reservations is provided in Figure 2.2, along with information about the size of the reservations.

Arizona's American Indian voting-age citizen population, like its Hispanic population, trails non-Hispanic non-Indian voting-age citizens in every significant socio-economic category. According to the 2000 Census, nearly one-third of all Indian voting-age citizens are below the poverty level. Poverty has a particularly great impact on younger Indians. Among all American Indians in Arizona:

- The average per capita income is $27,642.
- 42.1 percent are below the poverty level.
- 37.8 percent of families are below the poverty level.

See Figure 2.3.

Furthermore, over 40.9 percent of American Indians in Arizona are 65 years and older. The large percent of older American Indian citizens highlights the importance of continuing to provide language assistance in Arizona: 46.5 percent of all American Indian citizens over the age of 65 are LEP. *See* Figure 1.2.

As a result of these socio-economic barriers and other structural obstacles, particularly lack of language assistance, American Indian turnout remains low, comprising just over 54 percent of all registered American Indian voters in the 2004 presidential election, compared to the statewide turnout of 76 percent. *See* Figure 10.2.

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[33] 2000 Census, Summary Tape Files 3 and 4.

Figure 2.2: 2000 Census Data for Arizona Reservations and American Indian Populations

Reservation	Arizona Counties	# Acres	Enrolled Members	Reservation Population	Indian Population
Ak-Chin	Pinal	21,840	623	742	652
Cocopah	Yuma	6,009	880	1,025	519
Colorado River	La Paz	269,921	3,389	7,466	2,253
Fort McDowell	Maricopa	24,680	907	824	755
Fort Mohave (AZ-CA-NV)	Mohave	33,355	1,066	773	360
Fort Yuma-Quechan (AZ-CA)	Yuma	43,943	2,668	36 in AZ	9
Gila River	Maricopa, Pinal	371,820	19,266	11,257	10,353
Havasupai	Coconino	188,077	667	503	453
Hopi	Coconino, Navajo	1,561,213	12,008	6,946	6,573
Hualapai	Coconino, Mohave, Navajo	993,083	2,156	1,353	1,253
Kaibab-Paiute	Coconino, Mohave	102,413	233	196	131
Navajo	Apache, Coconino, Navajo	14,775,068	269,202	104,565 in AZ	100,382
Pascua Yaqui	Pima	6,152	12,766	3,315	3,003
Salt River	Maricopa	55,329	6,284	6,405	3,366
San Carlos	Gila, Graham, Pinal	1,853,841	10,834	9,385	8,921
San Juan Southern Paiute	Coconino	N/A	254	219	N/A
Tohono O'odham	Maricopa, Pima, Pinal	2,848,541	20,640	10,787	9,718
Tonto Apache	Gila	85	111	132	115
White Mountain (Fort Apache)	Apache, Gila, Navajo	1,664,872	12,634	12,429	11,702
Yavapai-Apache	Yavapai	635	1,550	743	650
Yavapai-Prescott	Yavapai	1,409	149	182	117
Zuni (AZ-NM)	Apache	450,000	8,397	7,758	7,426

Source: Arizona Commission of Indian Affairs, 2002-2003 Annual Report, p. 12.

Table 2.3: 2000 Census Data for Arizona Reservation Per-Capita Income and Poverty Levels

Reservation	Household Income ($)	Family Income ($)	Per Capita Income ($)	Income Below Poverty Level	Related Children Under 18	65 years and Older	Families Below Poverty Level
All Arizona reservations/trust lands	21,396	23,289	7,642	42.1%	47.3%	40.9%	37.8%
Cocopah	26,400	25,600	12,094	31.4%	53.2%	12.3%	20.7%
Colorado River	29,624	30,605	12,317	22.2%	28.1%	17.9%	17.6%
Fort Apache (White Mountain Apache)	18,903	20,891	6,358	48.8%	54.6%	39.5%	42.2%
Fort McDowell	50,313	50,556	19,292	17.4%	14.6%	10.0%	14.0%
Fort Mojave	30,417	30,104	13,221	18.5%	24.5%	15.9%	14.6%
Fort Yuma	4,375	11,250	1,872	94.4%	100%	N/A	100%
Gila River	18,599	18,769	6,133	52.1%	62.7%	44.2%	46.9%
Havasupai	20,114	21,477	7,422	50.2%	56.2%	N/A	46.1%
Hopi	21,378	22,989	8,531	41.6%	47.4%	27.9%	36.5%
Hualapai	19,833	22,000	8,147	35.8%	36.6%	50.0%	35.8%
Kaibab	20,000	21,250	7,951	31.6%	36.3%	N/A	29.7%
Maricopa (Ak Chin)	24,408	28,000	8,418	27%	36.1%	21.1%	25.3%
Navajo	21,136	23,992	7,578	41.9%	45.9%	48.5%	38.5%
Pascqua Yaqui	22,235	21,293	5,921	43.8%	49.6%	44.3%	40.3%
Salt River	24,975	28,413	9,592	30.5%	37.5%	15.2%	27.4%
San Carlos Apache	16,894	17,585	5,200	50.8%	55.4%	41.2%	48.2%
Tohono O'odham	19,970	21,223	6,998	46.4%	50.2%	50.2%	40.5%
Tonto Apache	40,417	41,667	11,258	9.8%	3.8%	N/A	8.3%
Yavapai-Apache	24,583	23,958	8,347	33.4%	34.9%	29.8%	30.8%
Yavapai-Prescott	51,250	56,250	14,217	6.6%	8.3%	0%	4.9%
Zuni (NM)	21,220	20,804	6,976	45.9%	54.3%	44.1%	43.0%

Source: Arizona Commission of Indian Affairs, 2002-2003 Annual Report, p. 14.

III. Testimonials from Arizonans about the Continuing Need for the Voting Rights Act

Project staff interviewed election officials, community leaders and activists, and voters in Apache and Pima Counties, which each have large populations of American Indian and Hispanic voters. The two counties were selected to supplement the separate voter surveys conducted in Coconino and Maricopa Counties during the November 2004 presidential election and the telephonic voter survey conducted in Maricopa County from December 2004 until March 2005.

A. Apache County Voters

Apache County has a storied history of discrimination against American Indian voters which has been documented by the United States Civil Rights Commission and a series of court decisions discussed in this report. Demographics for Apache County are likewise included in this report.

This section includes testimonials from ten members of the Navajo Nation who live in Apache County. Their life stories may differ, but they all agree on one thing: The Voting Rights Act has made a significant impact in their ability to participate in elections, and continues to be needed so they will have full access to voting in the future.

1. Matthew Noble

The office for voter outreach in District 1 of Arizona's Apache County is located in a double-wide trailer near the small town of Ganado, off of one of the only paved roads on the Navajo Reservation. Four the past four years, Matthew Noble has worked from his small office inside, seven days a week, to try and spread news about upcoming elections and ballot proposals to the district's residents. The position he holds has existed since 1993, after a consent decree in 1988 required that Apache County invest in a voting outreach office. That decree expired years ago.

The requirement from the decree expired in 1995, but the office continued to be run by Noble's father, Harold. Since 2002, when Matthew took over, the office has been moved around at the whim of the county's elected officials. The office has been re-located several times in the past few years, including a stint at a local public school. Such treatment, in addition to a severe lack of funding, indicates to Matthew that outreach is not a priority of the current administration in Apache County. "If it weren't for the Voting Rights Act, we'd be gone," Matthew says. He says he feels like an outsider, a feeling that is amplified by the fact that the county hasn't even given him a set of keys for the office he works in.

The equipment in Noble's office consists of a few filing cabinets and an outdated computer. While he is out visiting Navajo chapter houses to talk about voting issues and register people to vote, he drives around with an old trailer with no air conditioning from site to site. His cousin, Virgil, is the voter outreach coordinator for District 2. During elections, the two drive around in a rented U-Haul truck, picking up and re-distributing supplies. Many of the roads on the reservation are still unpaved, and in bad weather, it can take more than 2½ hours to reach some of the polling sites.

"It comes from the heart," he says. "You've got to love to talk to the people, or you won't make it."

In spite of the logistical obstacles, Virgil and Matthew have made much progress toward making sure every registered voter gets a chance to exercise their right to vote. They spend hours translating every proposition from English to Navajo, a process which is made even more complicated by the lack of government vocabulary in the Navajo language. Fortunately, the pair have a glossary, started by Harold Noble, to guide them, but there are still many language barriers that are hard to anticipate, much less resolve.

"A few years ago, there was a proposition on the ballot to legalize marijuana," Matthew says. "The way it was worded allowed for four ounces. We don't know how much four ounces of marijuana is, so we tried measuring four ounces of spices from our spice rack. Then we put it in a drinking cup, and saw that it filled it up about halfway. So we translated four ounces as 'half of a drinking cup.'"

Their translations are then delivered to the residents of the reservation in several forms. Printed pamphlets are distributed at the chapter houses, where Matthew and Virgil also travel on meeting days to explain the propositions and answer questions. The translations are also read in Navajo over radio stations such as KTNN, KNDN, and KGLX.

The biggest problems the two workers anticipate in the near future relate to Proposition 200. Even filling out the new elections form's portion on address proves problematic for the Navajo. The closest word for address in Navajo means "place in which you pick up your mail." Unfortunately for those registering to vote, the place in which many Elderly Navajo pick up their mail is different from what the form requires, which is physical address. If the Elderly are made to understand what is being asked of them, their actual physical address may be miles from any official roads and be hard to draw.

In addition to the address issue, many Elderly Navajo do not have any of the accepted forms of identification. Most are without driver's licenses, and because many were born outside of state hospitals, they do not have birth certificates. While some do have tribal identification cards, those who do not often have no other acceptable form to allow their votes to be counted.

Finally, the passage of Proposition 200 may exacerbate a problem that already exists. One of the biggest challenges Matthew and Virgil face is finding enough poll workers to keep polling places running efficiently on voting days. Even when they do have large turnouts of translators for the training days before elections, they do not have enough funding to pay for all of the poll workers needed. Moreover, many of the trainees fail to show up on election days. This problem has been somewhat alleviated by the distribution of audio tapes to polling places, but sometimes even these fail to show up when appropriate.

According to Matthew, Proposition 200 will create an even greater need for poll workers. Specifically, the additional identification checks will call for more personnel to help keep lines moving. Matthew and his cousin worry that with their budget already under funded, they won't be able to hire enough people to keep lines moving while meeting the new requirements.

Poll workers work closely with federal observers required by the Voting Rights Act. At first, the federal observers who showed up to help poll workers in Apache County were seen as enemies. Often, they would stand by silently, watching over people's shoulders as they voted. Now, both sides have come to a mutual understanding, with observers making sure that everyone knows why they are there and poll workers making sure the observers respect voter privacy. Still, an element of tension remains, as Matthew says many of the observers intimidate the poll workers by maintaining rigid requirements for communication. He says that this tension may be resolved if the observers had a better understanding of what was on the paper, and of the delicate nature of translation from English to Navajo.

Matthew's devotion to America is apparent just by walking into his office. Two of his four children are in the military, and the walls are covered in patriotic imagery. His biggest fear for Apache County is that someday he may no longer be able to help maintain everyone's right to vote.

"We're pushed off to the side," he says. "We are always seen as a thorn in someone's side."

2. Harold Noble

In the 1950s, the Navajo people were not voting. Harold Noble remembers when Dwight Eisenhower visited a ceremony in Gallup, New Mexico, with American Indian servicemen in attendance. Eisenhower asked them what they wanted from him in return for their support. They replied that they wanted to be treated equally; they didn't want to be separated based on their skin color in the restaurants and bars. They wanted to vote. Eisenhower promised, "When I get into office, you will vote."

"The Voting Rights Act is very necessary," says Harold.

The Department of Justice sued Arizona and Apache County for discrimination against American Indians, which resulted in a consent decree in 1989. Until 1993, Apache County was in the dark about voting when Harold started working as a voter outreach official. At that time, there was a lack of outreach and information on elections for the Navajo citizenry.

The first time Harold translated an election pamphlet from English into Navajo, it took him an entire month. When it was electronically recorded in Navajo for the bilingual poll workers, since the language is historically oral, the duration of the translation was 37 hours from start to finish. Harold called the Department of Justice (DOJ) and said, "We need to talk, we can't translate Navajo word-for-word. It takes too long!" From that point on, Harold would translate the title and legislative analysis of ballot initiatives instead of translating word-for-word; he would do an interpretation and look for meaning. According to Harold, it's no wonder that Navajos don't understand the complicated initiatives, because even the lawmakers themselves don't.

As the newly appointed Apache County voter outreach official, Harold knew that in order to improve voting conditions for the Navajo he would have to first: 1) educate himself on the issues, initiatives, and local politics; and 2) educate the people – "The Navajo people need to be

informed in every election." In 1993, he started translating the Navajo Language Election Glossary, which is an effort to make the Navajo election terminology as uniform as possible across the county.

Around the same time, voters started noticing "strange people" at the polling places. These people were actually federal observers from the DOJ. Although having the DOJ federal observers watching the election took some getting used to, Harold has no problem with them. In fact, he welcomes them as DOJ should be there to tell the county what they are doing wrong, and how they can improve. For the first time, Navajo citizens came into the elections office and asked if they had a right to run in the elections. Today, more Navajos are beginning to run, and the current county officials are becoming uneasy because of the new challengers.

Although the consent decree has technically expired, the DOJ assures Harold and the current outreach workers that the improvements in the county will continue to be built upon. "There is still a lot of work to be done," says Harold. The county is more than 11,000 square miles, making reaching and informing every voter difficult to do with only a few full-time outreach workers. It is important to Harold that everyone be able to understand the issues and vote, and that everyone hears the same thing. That is becoming more of a reality now that issues are being explained in both English and Navajo.

It is difficult for people to travel in the area; many people do not have four-wheel drive, which is essential in order to travel on the unpaved roads. It is especially difficult in bad weather, and most people would rather stay in than brave the roads and weather to vote. Even though people have the option of early voting, it is very difficult for Navajo-speakers to do so by themselves. They need the outreach workers to explain the concept to them. The Elders will often bring their early voting ballot to the outreach office on Election Day to ask for help, too late for their vote to be counted.

"Everybody lines up for assistance – young and old." In the elementary and high schools, there is very little access to information about voting. Apache County participated in "Kids Vote," with much success; however, the county has since stopped the program. There are some people in the area who do not have much education. Harold only attended school up to seventh grade. He grew up in the 1930s and 1940s, when times were even harder for the Navajo. There were a lot of problems with the school system. There was not much transportation, and the elements prevented many people from traveling. If someone was lucky enough to get to school, he or she would "just be taught to say 'yes and no'."

Although there are still problems, things are getting better. Because of the efforts of the outreach office, the Navajo are finally talking about their current situation and the issues facing them. One of the topics of discussion is the Proposition 200 voter identification requirements. According to Harold, the proposition is "scary, not needed here, and makes things too complicated." It definitely discourages people from going to the polls. It is not needed because people already have to show either their driver's license or Navajo Nation I.D. (which costs $5). Everybody knows everyone else at the polls, and Harold has never observed or heard of anyone voting twice. Proposition 200 has a disproportionate impact on Elders, most of whom do not have a photo I.D. driver's license or a birth certificate. Navajo Nation members can get a

certificate for the Navajo elections, but they still have to vote by provisional ballot for non-tribal elections because there is no picture on the certificate. Problems also arise when people get married and a woman changes her last name, but not her I.D.

3. Alice Anderson

Alice Anderson splits her time between Montana, where her husband lives, and her home, the Navajo reservation in Apache County, Arizona. She has been voting at the St. Michael's chapter house since 1970, and says she's seen lots of changes. She said sometimes this can be a source of confusion, as they change the voting form almost every year.

Anderson is fluent in Navajo, but also speaks English, so she rarely has a problem voting, though she does say that a lack of personnel at the polling places leads her to believe that it would be hard for anyone who didn't speak English to vote in Apache County.

One of these people is her father, Ben Francis. Francis doesn't speak or read English at all, but cares deeply about politics. Since officials do not care enough to come out and explain things to the Navajo speakers, Anderson says, Francis asks Anderson and her sister to read him the paper in the mornings so he knows what's going on.

"There should be a tribal representative to explain voting," she says. "The Elders don't know what's going on – there's not enough help."

4. Felicia Tsosie

Felicia Tsosie has only been voting for the past ten years, but during that time, she has had the opportunity to observe many problems with voting in Apache County. She says that older people in the tribe, especially the ones that do not speak English, have difficulties voting. Often, they'll only fill out a few of the issues, and leave the ones that they do not understand blank, she says.

As one of the more experienced workers at a hotel in Window Rock, Tsosie often talks to the younger workers about voting. She says she tries to tell them how important it is to vote so that their rights are protected.

Tsosie votes at a precinct combining the Ft. Defiance and Window Rock areas, which leads to long lines. While voters stand in line to get to the polls, they are frequently yelled at by supporters of propositions or candidates, who are technically breaking the law, but are never stopped. The wait can take hours, she says, especially since more young people have started to turn out to vote.

Tsosie says that the people she knows pay more attention to local government than the larger elections, not just because they think they have more of an impact on their lives, but also because the tribal governments make much more of an effort to reach out to everyone.

5. Stella Begay

Stella Begay works at a museum and library in Apache County, a building with an auditorium that also serves as a gathering place for various groups on the reservation. She has been voting for the past 15 years in both United States and tribal elections in the Sawmill district. She says that people are generally more interested in local and tribal issues, and more people show up at her polling place for the tribal elections than the state or federal elections. This is despite the fact that the Navajo Nation requires voters to register every four years, she says.

Begay says reservation voters face some unique barriers. She says that in addition to language issues, many Navajo live far from paved roads. If the weather is bad, the roads can become treacherous or even useless. When they do get to the polling places, help for illiterate people fluctuates – sometimes there are helpers, sometimes there are not.

In general, though, Stella says that in the past ten years, elections have been getting better. Though there seemed to be fewer people in the last few years, more people have been showing up, and more Navajo were running for office, even women, a practice that was formerly severely frowned upon. And elections are certainly better than when her mother, Nellie Begay, began voting. Stella says her mother would tell her of how in past elections, the Navajo would be put into a room, with votes taken by raised hands.

6. Ernestine Reeder

Ernestine Reeder grew up on the reservation, fluent in Navajo. When it came time to raise her own son, she thought it was more important for him to learn English. She is now being considered as a principal for a new school Arizona State University is building on the reservation, and says that education is one of the primary barriers Navajo face when they go to the polls.

"They translate the ballots into Navajo," she says. "But people who only speak Navajo usually don't know how to read it."

With illiteracy still a problem, she says that interpretation is a major issue. But even those who speak English need more outreach, she says. Reeder says that the propositions are often written in ways that are hard for many Navajo to understand. "We're not attorneys!" she says.

The polling places themselves are often problematic, too, she says. Precincts change without much notice, and during the last election, Reeder didn't even vote after spending hours waiting in lines, only to be told she was at the wrong place. Troublesome roads also prevent people from coming.

"Government officials come out here and talk about issues in the Third World," she says. "I don't think they realize that in a lot of places here on the reservation, people are *living* in the Third World."

7. Rose Williams

Rose Williams is a poll worker in Apache County. She is an Elder and speaks both English and Navajo fluently. She remembers when American Indians voted for the first time. After Eisenhower took office and the Navajo were enfranchised, the Republican registrars came to Apache County and gave the Navajos a pink sheet to vote for one candidate and a blue one for the other. Since that point, voting conditions for American Indians have been improving. Rose feels that there has been a great stride forward with the establishment of the voter outreach office in Ganado because of the consent decree. "This is just the beginning."

Speaking from her experience as a poll worker, Rose knows that as long as there is ballot language that needs to be translated and explained, outreach workers will still be needed. The current resources provided to the outreach workers are not enough, however. Funding is a big issue, and "the county's answer is to shut the office down." The office needs better equipment so it can relay information to the Navajo, instead of relying on information coming from St. Johns, one hundred miles away. Funding is also needed in order to provide more poll workers, because long lines at the polls are always a problem, and often discourage Elders who do not want to wait outside in the elements to vote. More poll workers will be needed to check I.D.s because of the new Proposition 200 voter I.D. requirement. With limited funds already, Rose does not know how this will be feasible.

Ganado is the center of tribal life. According to Rose, there needs to be a permanent outreach base, not subject to the whims of local politics, "so the Navajo people know where to go." Since the consent decree expired, the outreach workers have had to vacate the office because they were "taking up space." They moved into a spare room in a local school, but when a new superintendent was elected, they were forced to move because they were again "in the way." The poll workers know that there is no alternative though; it *has* to be there for the people. In addition to a permanent base, the county also needs more outreach workers. Two full-time employees are not enough for such a large county. More outreach workers would mean that more citizens would be informed on issues, initiatives, and candidates.

Rose believes that problems with voting are a symptom of larger problems. The Navajo Nation holds special status with the U.S. government because of its dual sovereignty. The tribe abides by the Trust signed in 1868, and they want the government to hold up to its end of the bargain. The Navajo cannot even buy the land they live on – it is owned by the federal government. Because of that, they do not have any rights to minerals or any other resources that may be found on their land. Rose wants "President Bush to do something out here" for American Indians: to educate and empower America's first people. The Navajo people need good housing, grocery stores, and healthcare: "People are suffering."

She reflected on how the government built up Hiroshima after destroying it, and how it is building up Iraq and other Third World countries. Many Navajo still live in impoverished conditions, with inadequate education, food, water, and healthcare. "What about the Navajo? The Third World is right here, right in America's backyard."

8. Lee Chee

Lee Chee has been voting since 1975, when he moved from San Francisco back to Chinle in Apache County with his wife. A true patriot, he served from 1966 to 1967 in Vietnam as a member of the 1st Infantry. He proudly dons his veteran's 1st Infantry hat wherever he goes, despite having lost much of his hearing due to his service to his country. He was on burial detail, giving last respects to his fellow Navajo who had served in the war and gave the ultimate sacrifice to their country.

Fluent in both Navajo and English, Lee is dissatisfied with his Navajo council delegates, and local and U.S. representatives. "Every time they want some votes, they run to us veterans. We vote for them because we believe in what they're saying, we believe the promises. But once we vote, that's always the last we see of them." He believes that there is no accountability, but still thinks that ballot box is the most powerful weapon people can use to affect change. He recently attended the Diné (Tribal) Change 2006 conference, which focuses on initiating change within the Navajo government. In addition to being an active citizen, he religiously reads the newspaper to stay up-to-date on issues facing his people, so he can be informed when he goes to vote.

When voting, Lee notices that many of the other Elders need assistance. "A lot of Elders don't know English, so there needs to be someone there to help them." Sometimes Lee will see bilingual poll workers helping. Other times, there is no one to help the Navajo speakers. He said that there are also people who can speak English, but are illiterate, and they need help understanding what they are voting for as well.

Lee suggests that there be more voter outreach to those who cannot read or speak English well. For example, more bilingual outreach workers need to be hired so they can reach the community chapter house meetings. This way, when people go in to vote, they will already be informed and educated on the candidates, issues, and initiatives beforehand.

9. James Henderson

Former Arizona state Senator James Henderson was one of the first American Indians in the state legislature. Born in 1942, Senator Henderson did not start paying attention to voting and voter outreach issues until he was elected to serve in the 37th Legislature in 1985. He said that like most Navajo people, "I just voted for whoever sent the most pamphlets…because that's all I had to base my choice on." At that time, there was no voter outreach office, and no one who would come to chapter house meetings to inform and educate the Navajo on issues. This can be a major issue for Navajo speakers and people who cannot read or write English because candidate pamphlets are in English. He also said that there are not enough bilingual poll workers to accommodate the Navajo speaking population.

10. Alfred Lee Kahn, Sr.

Alfred Lee Kahn Sr. has lived in Apache County his whole life. From the time he was young, he was told, "If I vote, then I can get the resources from the chapter, local, state, and national

government." He worked in construction for a number of years, and is now employed as a nurse's aide and helps out at his local chapter house as a community organizer. Alfred has been voting since he turned eighteen, about thirty years ago. He says that one of the biggest barriers to voting is education. "People don't have rights around here, especially the Elders and uneducated."

Many Navajo are uneducated, about the issues, and in general. It is not just Elders who are illiterate; many of the younger people can barely read and write. He and his children are lucky enough to have received an education; his daughter Seowah recently received her G.E.D from a program though a community college in Ganado, and hopes to pursue a college degree in environmental engineering.

Political disillusionment is also a problem. Every election season, candidates will come to the local chapter houses and ask members to vote for them, in return for the candidate keeping promises. This is the only time the tribe will see the candidates, though. Once election season is over, the Navajo never see them again and the promises are never kept. Despite the disillusionment over candidates, more Navajo are participating in politics than ever before. Alfred holds his right to vote close to his heart – it is his way of creating change. "My right to vote makes me more of a person. I am counted. I am more of a citizen."

B. Pima County Voters

Pima County is the second most populous county in Arizona, bolstered by the growth of Tucson and its suburbs. It is home to a large Latino population, in addition to the Tohono O'odham and Pascua Yacqui Indian Reservations.

According to the 2000 Census, Pima County has a total population of 843,746 persons, of whom 29.3 percent (247,578 persons) are Hispanic and 3.2 percent (27,178 persons) are American Indian. The County has a voting age population of 635,850 persons, of whom 24.9 percent (158,415 persons) are Hispanic and 2.7 percent (17,338 persons) are American Indian.

Among the Hispanic voting age population, 31.0 percent (49,205 persons) are limited-English proficient. Among the American Indian voting age population, 19.5 percent (3,525 persons) are limited-English proficient. Nearly one-third (1,670) of the voting age citizens on the Tohono O'odham Reservation are limited-English proficient. Nearly one-fifth (280) of the voting age citizens on the Pascua Yacqui Reservation are limited-English proficient. The illiteracy rate for both tribes is approximately ten percent, which is more than seven times the national illiteracy rate.

1. Manuel "Manny" Herrera

Manuel "Manny" Herrera, a 79-year-old retired postmaster, has lived in the same neighborhood in the city of South Tucson for more than 50 years. Manny's family is of Hispanic descent, but he is of the fifth generation to be born in Tucson. A World War II veteran, Manny has invested a lot of time and effort into making sure his community stays active in the political arena.

Manny said his experience in politics began when he was young. He said he remembers attending political rallies in local parks where politicians would distribute beer to the adults and the kids would run around and have fun. He said he and his wife, Yolanda, registered to vote as soon as they turned 21. "We've been voting ever since," he said. "We felt we could make a difference but we had to get involved." Manny said he remembers voting being more difficult for people who did not speak English when he was younger, because fewer materials were available for them. But Manny said language has not been an issue in recent elections as it had been in the past. Newspapers, radio shows, fliers, and voting materials are all offered in English and Spanish these days, he said. He also said polling places in his area are close enough for everyone to get to. The only drawbacks are insufficient parking and a slight socio-economic barrier. He said many workers who are paid hourly can't afford to take the time off work to vote.

While obstacles for language minority voters have decreased overall, Herrera said the media portrays candidates negatively, so many people do not want to vote. The solution to this, Herrera said, is to get rid of the view that one vote doesn't make a difference. "If more people were involved, it could be a different community, a different town, a different state or a different world," he said.

To help make a difference, Manny formed the Sunnyside Neighborhood Association — a group that hosts meetings and speakers to advertise for important issues in one square mile of South Tucson — to encourage people to get involved in their community and vote. Together with a friend and fellow WWII veteran, he also created the All-American Student Awards in the mid-1990s to award children in the community for their commitment, community service and respect toward the community. After the program drew more attention, Manny gained support from community and state leaders, including Gov. Janet Napolitano, Tucson Councilmen Steve Leal and Jose Ibarra, and Mayor Laila Sarah, who give certificates to the award recipients "so [the children] can follow in their footsteps," he said. "Involvement is voting," he added. "Who else is going to lead us in the future?"

2. Steve Leal

Steve Leal, a Tucson city councilman, has lived in Tucson since 1977. He says that through his experience as a councilman, he has seen many barriers restricting minority voters in the past decades.

The first obstacle, he said, is the ever-changing location of polling places. He said Tucson rents out local schools and churches to host polling places, but sometimes these locations will not renew their contracts with the city. Leal said this often confuses voters who have been going to the same polling place for 10 or more years. Instead of looking for their new polling place, they often do not vote, he said.

Leal said there is often a language barrier for minority voters as well. "Not all candidates go out of their way to have things done bilingually or to advertise either in Latino papers or radio," he said. This discourages people who do not speak English very well from voting, he added.

He also said he has been trying to get Spanish subtitles on the local Tucson news channel for more than six years. Leal said many people make important decisions on who to vote for based on how they have seen that candidate in the news coverage. "[Hispanics] have the right to vote. Do we not want them to make an informed choice?" he asked. He said this solution may not be appropriate for all communities, but in Tucson where there is a large Hispanic population, it could solve a lot of problems.

3. Alex Rodriguez

Alex Rodriguez, a native to Arizona, was the youngest of ten children in an immigrant working class family. The first in his family to attend college (he received his B.A. from the University of Arizona and his masters of public policy from Harvard), Alex has been involved in many Pima County organizations, including the University of Arizona Hispanic Advisory Council and the Tucson Hispanic Coalition.

Alex has also worked as the U.S. Department of Defense International Policy Advisor and in International Security Affairs. He is currently running for U.S. Congress.

As a minority citizen who has often run for public office, Alex said, "The Voting Rights Act is a landmark piece of legislation for our promised democracy. It is crucial for minorities."

But Alex said there are many barriers for Hispanic and other minority candidates who choose to engage in the political process by running for office.

Minority populations are often diluted, he said. He cited Proposition 200—the legislation passed in 2004 that requires specific forms of identification in order to vote—as a large impact on minority voters. "It has had a impact on citizens' willingness to participate in the political process," he said. While it has created a barrier for all voters by requiring additional identification, it has been an extra burden on minorities, he added. He said one would expect that more people would want to participate by voting in order to change the face of the nation. But Alex said "drastic measures" like Proposition 200 have had an opposite effect.

Another barrier barring minorities from having easy access to voting is the language on the ballots, Alex said. He said there are two issues surrounding the language.

First of all, ballots should be offered in Spanish and other minority languages, he said. While he believes American citizens should learn and be able to speak English, he said it is often easier for native Spanish speakers to understand materials when they are written in Spanish. "My mom would rather read something in Spanish that she could fully understand," Alex said. "She's a citizen just like your mom, but she is unable to understand what is being asked of her as a citizen."

The second language issue is that the ballots are often too difficult to understand even for native English-speakers. He said when he votes, he asks himself if his brother or his neighbor would understand the ballot. In general, the answer is no, he said. "The language is much too complex," he added. "You would get a lot more people involved in the political process if you

gave them the confidence of going into a polling place and understanding what they're looking at."

In addition to language barriers, there are often economic barriers to voting. Alex said there is a general lack of outreach to the less-wealthy, minority communities because the candidates have less at stake in those communities. Also, the voters have less at stake in the political process, he said. "The higher [a person's] income, the higher their propensity to vote because people have economic interests at stake in the political process," Alex said.

Though there are problems in the voting process in Arizona, Alex said the Voting Rights Act has helped. He compared the VRA to major accomplishments in U.S. history such as the abolishment of slavery, the interstate system, and public education.

"We've always gotten the big things right," he said. "The Voting Rights Act is a big thing."

III. Survey of Voters in Coconino and Maricopa Counties

A. Purposes of the Survey

This section describes a study of voters in Coconino and Maricopa Counties, designed to obtain the perspective of affected voters who voted on November 2, 2004 throughout the state of Arizona; assess the need for minority language assistance among voters; determine the availability and quality of oral and written assistance; and assess the effectiveness of the practices of public elections officials in providing oral and written language assistance to voters.

The study assessed the need for, the availability and quality of, and the effectiveness of assistance by surveying several different areas about the voter or the election process: the ethnicity and nation of origin of voters; the primary language spoken at home; the oral and written English language ability of voters; the voters' need for language assistance on election day; oral language assistance at every stage of the election process; written language materials provided to limited-English proficient voters; and the ability of voters to receive assistance from the person of their choice. These areas were selected because they commonly affect minority language assistance voters or because they are common components of successful language assistance programs.

Finally, respondents were asked their opinion of the quality of the language assistance provided to them in their primary language, and what could be done to improve written and oral language assistance provided to non-English speaking voters. A total of 829 surveys were completed by voters, including 668 in Maricopa County and 161 in Coconino County. Of these 829 completed surveys, 679 were completed on Election Day and 150 were completed through the telephonic survey that followed Election Day.

B. Overview of the Survey

Voter interviews were conducted on November 2, 2004 at polling locations in Coconino County in Arizona for American Indian language minority groups; and Maricopa County for Spanish

language minorities. In addition, telephonic interviews were conducted in February and March of 2005 in Maricopa County precincts surveyed on Election Day, to capture the large number of voters who cast early or mail-in ballots.

All survey questions were derived from the Voting Rights Act, the legislative history of the Act, Department of Justice guidelines, and commonly used Census terms.

The survey was designed to provoke honest answers from respondents about their actual election and voting experiences. Interviews were conducted in English, Spanish, or Navajo by bilingual volunteers. Survey questions were worded carefully to avoid skewing the results and were designed to take less than five minutes of the voters' time. Non-leading questions were used in combination with a non-exhaustive list of possible responses. Respondents were encouraged to provide amplifying information by checking "other" and specifying responses not included in the survey.

Several attorneys, voting rights experts, and social scientists with experience enforcing the language assistance provisions reviewed the survey questions. Early versions of the survey were also reviewed and approved by bilingual experts fluent in election terminology. All of the resulting suggestions were incorporated into the final version used in the study.

All references to Navajo voters refer to voters surveyed in Coconino County and all references to Hispanic voters refer to voter surveyed in Maricopa County.

C. Survey Questions

The Election Day voter survey and the telephone survey both consisted of twenty-two questions and were nearly identical. The only deviation arose if the respondent to the telephone survey did not vote in the November 2004 election. The survey questions were simple enough that responding voters could complete the entire survey in as little as five minutes. Respondents were advised of the likely short duration of the interview to decrease the burden on them and thereby increase the overall response rate. English and Spanish versions of the Election Day voter survey are included as Exhibit C.

Question 1 of the survey requested information about whether the respondent was able to vote that day (November 2, 2004) and what method they used; whether they have ever experienced problems voting; any reason why they were not able to vote; and whether they were offered a provisional ballot. For respondents to the telephone survey who did not vote in the 2004 presidential election, Question 1 asked why they did not vote that year and when they had most recently voted.

In Questions 2 through 8, respondents were asked to self-identify in several ways. Question 2 asked how they identify their ethnicity, and if they self-identified as Hispanic or Latino, they were then asked for their national origin. Question 3 asked for the respondent's birth year. Question 4 asked if the respondent was a first-time voter and if not, how long they had been voting in the United States. Question 5 asked for the primary language spoken at home. Questions 6 and 7 respectively asked respondents to describe their ability to speak and read

English on a scale that reflects commonly used census terms and that ranges from 'very well' to 'well' to 'not well' to 'cannot speak English.' Question 8 asked if any members of the respondent's household who are older than age 18 speak English very well.

Question 9 asked respondents to characterize the poll workers at their polling site in terms of being helpful versus rude/threatening.

Questions 10 through 16 are a series of questions aimed to determine how the availability of language assistance for voters can be improved. These questions asked whether language assistance was needed for the respondent to vote that day, and in what ways language assistance was offered to the respondent by election officials. Respondents were also asked to describe the quality of oral and written language assistance that was provided to them by election officials and to respond with suggestions for ways that oral or written language assistance for non-English speaking voters could be improved.

Questions 17 through 19 asked the respondent about circumstances in which they may have ever provided language assistance to another voter.

Questions 20 through 22 were asked to assess the needs of all voters based on their background, including their method of transportation to the polls that day, their educational level of achievement, and their citizenship status and country of origin.

After conducting the interview, the volunteer was instructed to make several notes about their interaction with the voter. They were instructed to note the voter's gender, whether or not they were accompanied and by whom, their levels of cooperation and understanding, as well as any other information necessary to successfully interpret the interview.

D. November 2, 2004 Survey

In order to accomplish the Election Day voter survey, project staff recruited more than 100 volunteers. Project staff focused recruitment efforts on Arizona State University undergraduate students from the Barrett Honors College and members of campus student organizations likely to have high percentages of bilingual students, as well as on high school students from Coconino County who were bilingual in the Navajo language.

For Maricopa County, project staff divided up approximately 105 volunteers into pairs with at least one volunteer in each pair having some Spanish proficiency. These 105 volunteers were placed at forty-three polling locations for at least one of three shifts on Election Day with each shift lasting three hours. The three shifts took place from 6:00AM-9:00AM, 10:30AM-1:30PM, and 4:00PM-7:00PM. Several volunteers worked more than one three-hour shift, and six of covered precincts had interviewers for two of the three shifts throughout the day.

For Coconino County, a total of thirteen individuals conducted interviews: one thesis project advisor, one thesis project student, two ASU student volunteers, and nine bilingual Navajo students from Page High School. The students' Navajo language teacher screened them prior to their participation to ensure they were bilingual. The surveys were conducted in two separate

teams. The two ASU student volunteers coordinated with the Page group, focusing on five polling sites (three in Page, and two chapter houses on the Navajo Reservation) from 10:00AM-4:30PM. The thesis project advisor and student coordinated the Tuba City group, focusing on four voting precincts at three polling places in Tuba City: the elementary (one precinct), middle (one precinct), and high schools (two precincts) from 11:30AM-3:45PM.

The Maricopa County volunteers were required to attend one out of the five offered training sessions throughout the week prior to November 2, 2004. The sessions lasted approximately one hour and the volunteers were trained on the laws they needed to abide by at the polling places, as well as the rules they needed to follow in order to assure accurate and honest responses from voters participating in the surveys.

The Page High School students were given a similar one-hour training session at Page High School on Election Day.

As part of the voter study, project staff placed interviewers at approximately fifty voting precincts in these two counties. The voting precincts were selected by stratified random sampling. Bilingual interviewers were instructed to select voters at random to be asked a set of questions about their ability to access election information. Interviewers were also instructed to make objective observations of the polling sites, such as the type of assistance provided and the clarity of presented information. The interviews resulted in a total of 679 completed surveys.

E. Post-Election Telephonic Survey

To capture the full range of perspectives of potential voters on Election Day, project staff followed up the Election Day voter survey with a telephonic voter survey in Maricopa County. The intent of the telephonic survey was to account for the fact that the Election Day voter survey would not have reached any of the voters who cast early (mail-in ballots) or registered voters who did not vote at all. This was a factor in Arizona, because in 2004, approximately one-half of all Arizonans voted early in the November election. Additionally, the telephonic survey aimed to reach persons who were not able to vote at all on Election Day, in order to assess whether or not the availability or quality of language assistance was a factor in preventing them from voting.

Project staff obtained phone numbers for registered voters in Maricopa County. Utilizing a portion of the volunteers from the Election Day survey, project staff made telephone calls to approximately two thousand people in nearly fifty precincts of the original precincts covered in Maricopa County on Election Day. These telephone calls took place in an on-campus calling center beginning on December 7, 2004. The calls began again in late February and continued until March 10, 2005. Approximately two thousand attempted phone calls resulted in responses from 150 registered voters because of wrong numbers, calls that went unanswered, persons who already had completed the Election Day survey, and persons who declined to answer the survey questions.

Some precincts that were selected for the telephonic survey were chosen because they have a higher percentage of Latino voters. Project staff also conducted a Spanish surname analysis to

identify registered voters who were likely of Spanish heritage and who would have a greater likelihood to need language assistance.

F. The Need for Language Assistance

The data compiled from the voter and telephonic surveys shows that there is a continuing need for language assistance during the voting process in the State of Arizona. The survey results corroborate the need for assistance established by the July 2002 Census determinations that resulted in Section 203 coverage of Coconino and Maricopa Counties. *See* Figures 1.3 and 1.4.

The Election Day survey conducted in Maricopa and Coconino Counties asked voters if they required language assistance to vote on Election Day. Among all voters surveyed, 7 percent reported needing language assistance. Among those of Navajo descent, 20 percent reported that they required language assistance in order to vote on Election Day. By comparison, 9 percent of Hispanic voters reported requiring language assistance on Election Day.

Under Section 208 of the Voting Rights Act, people who require assistance while voting are permitted to bring any person of their choice (with a few exceptions) into the voting booth. Among those Navajo voters who needed language assistance, 49 percent reported bringing someone along to assist them while voting. On the other hand, 10 percent of Hispanic voters who required assistance reported bringing someone to aid them in the voting process.

Among Arizona's voting population who needed assistance, 38 percent brought someone with them to assist in voting; the remaining 62 percent relied on government assistance at the polls in order to cast a meaningful ballot. This finding highlights the need for election officials to ensure that language assistance is available for non-English speaking voters at every stage of the election process.

It appears that the lower percentage of Hispanic voters who reported bringing someone with them to assist in voting may be because they believed they would be able to obtain language assistance at the polls, as is required by Section 203. Many of these voters reported that assistance was not available to them in Maricopa County.

The high number of Navajo respondents in Coconino County who brought someone with to assist them could be a result of many elections being held at chapter houses where there were many Navajo-speaking people available to assist voters. The distance many Navajo voters had to travel to vote combined with the limited availability of transportation meant that many voters came in groups and were able to assist each other.

The percentage of voters who have assisted another voter on Election Day is much higher among Hispanic and Navajo voters compared to the general population. Among those surveyed, 29 percent of Hispanic voters and 24 percent of Navajo voters have assisted another voter at the polls. By comparison, 19 percent of all voters surveyed (including Hispanic, Navajo, and non-Hispanic voters) reported assisting another voter.

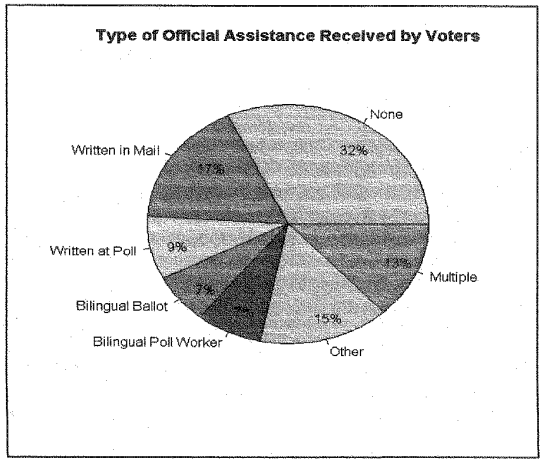
Survey respondents were asked to report their primary language, that is, the language they speak at home. The results showed that 8 percent of surveyed voters reported Navajo was their primary language and 8 percent reported Spanish was their primary language.

There is a clear need for language assistance among language minority voting age citizens in Arizona. The data shows that at least 20 percent of surveyed Navajo voters and at least 9 percent of surveyed Hispanic voters require language assistance when they vote. These percentages are actually a little bit lower than the need for assistance identified by the July 2002 Census determinations, probably because of a lower turnout rate among voters who need language assistance. *See* Figures 1.3 and 1.4. Nevertheless, they confirm that there is a substantial need for language assistance among the language groups covered in Arizona.

G. The Availability of Language Assistance

The Election Day and telephonic surveys revealed that 68 percent of surveyed Hispanic and Navajo voters reported receiving some type of language assistance when voting. Among these voters, 17 percent reported receiving written assistance in the mail, 9 percent reported receiving written assistance at the polls, 7 percent reported receiving a bilingual ballot, 7 percent reported receiving assistance from a bilingual poll worker, 13 percent reported receiving assistance from two or more of these categories, and 15 percent reported receiving language assistance from some other source. The remaining 32 percent of voters reported receiving no language assistance of ant kind. *See* Figure 4.1.

Figure 4.1



Hispanic and Navajo voters from Arizona who speak English as their primary language and voters who speak another language as their primary language were compared according to their perceptions of receiving language assistance on Election Day. Among these voters whose primary language is English, 64 percent reported receiving language assistance, while the remaining 36 percent reported that they did not receive any type of language assistance. Among those voters who speak a primary language other than English, 76 percent reported receiving language assistance and 24 percent reported receiving no assistance. This difference between voters with English as their primary language and voters with a non-English primary language is statistically significant (difference-of-means test: $t = 2.34$, $p < 0.02$). Therefore, there is a 98 percent certainty that the primary language spoken by a voter significantly affects his or her perceptions of the availability of language assistance.

This test was repeated in order to compare voters who speak Spanish as their primary language and voters who speak English as their primary language. Among voters who speak Spanish as their primary language, 67 percent reported receiving language assistance. Since this percentage is very similar to the percentage of voters who reported English as their primary language (64 percent), it demonstrates that voters whose primary language is Spanish do not significantly differ in their perceptions of language assistance availability from voters whose primary language is English.

On the other hand, there is a statistically significant difference between voters whose primary language is Navajo compared to voters whose primary language is English. Eighty-one percent of voters with a primary language of Navajo reported receiving some type of language assistance. Therefore, the difference in perceptions of language assistance between English and non-English primary language groups is most likely driven by Navajo-speaking voters.

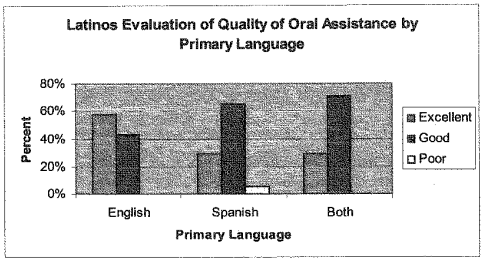
It appears that there are at least two explanations for why voters whose primary language is Navajo perceive more availability of language assistance than voters whose primary language is either Spanish or English. First, Navajo is not a written language and Navajo-speaking voters therefore must rely exclusively on oral language assistance, unlike Spanish-speaking voters who may have access to both written and oral language assistance. Second, it also appears that although Navajo-speaking poll workers are available in covered polling places for Navajo voters in Coconino County, Spanish-speaking poll workers may not be available in all covered polling places in Maricopa County.

H. The Quality of Language Assistance

The Election Day and telephonic voter surveys also provide information on voters' perceptions of the quality of oral and written language assistance that is available to them. Perceptions vary slightly based upon ethnicity and primary language used at home. Among Hispanic voters, 44 percent rated the quality of oral assistance as "excellent," and 54 percent as "good." Among Navajo voters, 43 percent rated the quality of oral assistance as "excellent," and 51 percent as "good."

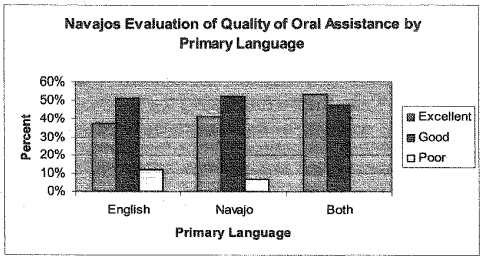
Within both groups of voters, however, there are notable differences in perception of the quality of oral assistance based on the primary language used at home. Among Hispanic voters whose primary language is English, 57 percent rated oral assistance as "excellent," whereas among Hispanic voters whose primary language was Spanish or both English and Spanish, only 29 percent rated the quality of oral assistance as "excellent." *See* Figure 4.2.

Figure 4.2



Among Navajo voters whose primary language is English, 37 percent rated oral assistance as "excellent." Among Navajo voters whose primary language is Navajo, 41 percent rated the quality of oral assistance as "excellent," while 53 percent of Navajo voters whose primary language is both English and Navajo rated oral assistance as "excellent." *See* Figure 4.3.

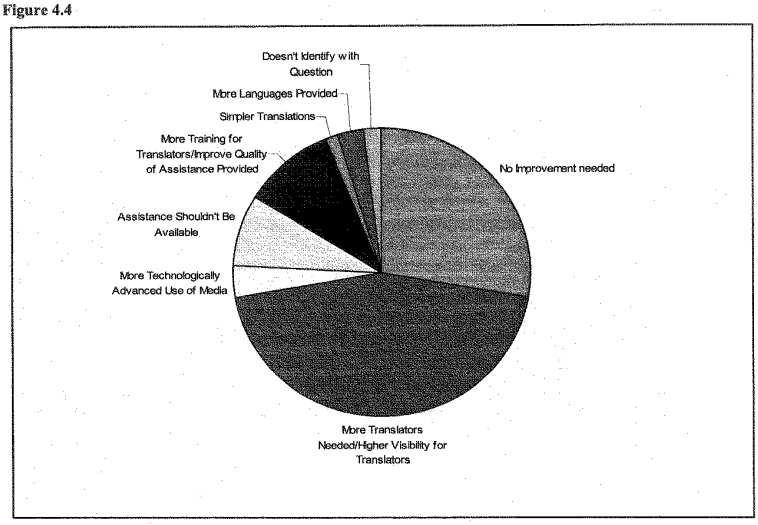
Figure 4.3



Unlike Hispanic voters, it appears that Navajo voters' perception of the quality of oral assistance is invariant to the primary language spoken at home. Sixteen percent of Navajo respondents rated the quality of written assistance as "poor." In contrast, 6 percent of Navajo voters rated the quality of oral assistance as "poor." The difference in these results may be explained by the fact that Navajo is primarily an oral language that does not encompass election terminology.

Voters were asked their perceptions about the quality of both oral and written language assistance. Their responses are summarized in Figure 4.4.

Figure 4.4



The data depicted in Figure 4.4 shows that majority of voters who answered this question felt that more translators would be helpful or should have a higher visibility if they were available to assist. The second largest response was that there is no improvement needed on the part of the government in provided both oral and written assistance. Some other responses listed in order of highest to least amount or responses include: more training for translators/improve quality of assistance provided, assistance should not be provided, more technology/advanced use of media, more languages provided, does not identify with question, and simpler translations. Overall, the quality of language assistance available to voting age citizens in Arizona's covered languages can be improved significantly.

V. Voting Discrimination in Apache County

A. Background and Demographics

Apache County is home to the Navajo Nation, the most populous Indian Reservation in the United States. In addition, the county is home to the Apache (located on the Fort Apache Reservation), and the Hopi (located on the Zuni Reservation).

Apache County is, in acreage, the third largest county in Arizona, but by population is the tenth largest. According to the 2000 Census, Apache County has a total population of 69,423 persons, of whom 76.9 percent (53375 persons) are American Indian. The county has a voting age population of 42,692, of whom 73.7 percent (31,470 persons) are American Indian. In the 1990s, Apache County's American Indian population was one of the fastest growing in the United States, growing by more than 11 percent, a net increase of over 5,000 citizens.

The county's population density is extremely low, with an average of just six citizens per square mile. By comparison, Arizona's average density is 45 people per square mile, and Phoenix's density is almost 3,000 people per square mile. Even in Apache County's seat, St. Johns, the most densely populated area of the county, the average density doesn't exceed 500 persons per square mile.

Apache County is one of just three counties in the United States in which the predominant languages spoken are American Indian. Of these languages, the most commonly used is Navajo, a historically unwritten language. As a result of its demographics, over one-third (11,175) of the voting age citizens on the Navajo Nation Reservation are limited-English proficient. Over one-quarter of the voting age citizens on the Navajo Nation Reservation are illiterate, which is nearly nineteen times the national illiteracy rate. *See* Figure 1-4.

American Indians in Apache County have been the victims of voting discrimination since the County was organized in 1879. Some of the key voting cases in the county in the last three decades are described below.

B. *Shirley v. Superior Court for Apache County* (1973)

In 1973, the Apache County Board of Supervisors (the county's three-member governing body) obtained a permanent injunction preventing Tom Shirley from assuming his office as a County Supervisor from District 3. Shirley was an enrolled member of the Navajo Indian tribe, residing on the portion of the Navajo Indian Reservation in the County's Supervisorial District Number 3.

In the November 1972 election, Shirley had soundly defeated his non-Indian opponent by a margin of approximately three to one. Nevertheless, the Board of Supervisors refused to certify Shirley as duly elected. The unsuccessful non-Indian candidate brought an action against the county Board of Supervisors seeking an injunction restraining the board from certifying that Shirley had been elected. The Superior Court agreed, holding that Shirley was ineligible to serve as a supervisor because he was immune from service of process while on the reservation, he did not own any real or personal property subject to taxation by the state of Arizona, and he had been a trustee for the Apache County School District at the time he was elected (though he resigned within three weeks after his election).

In *Shirley v. Superior Court*, the Arizona Supreme Court reversed the Superior Court's decision.[34] The court first noted that in light of its 1948 decision in *Harrison v. Laveen*,[35]

[34] 109 Ariz. 510, 513 P.2d 939 (Ariz. 1973).

[35] 67 Ariz. 337, 196 P.2d 456 (Ariz. 1948).

Indians who lived on a reservation, such as Shirley, were eligible to vote and therefore qualified to run for office. The court further held that Shirley was not disqualified from serving because he was a school trustee for two reasons. First, he had resigned well before the time of assuming office in January 1973. Second, the unpaid position of school trustee was not a conflicting "public office," and Shirley therefore could remain in that office without being disqualified as Supervisor.

The court rejected out of hand the remaining reasons cited by the Superior Court for disqualifying Shirley. The fact that he was immune from service of civil process did not negate the fact that he was subject to recall like any other state officer. The court also dismissed the lower court's reliance on the argument that Shirley was not subject to state taxation, observing, "That Tom Shirley is not a taxpayer has been declared no obstacle to voting or holding office. The Supreme Court of the United States has resolved this question ...." Accordingly, the Arizona Supreme Court vacated the Superior Court's injunction and directed the Apache County Board of Supervisors to certify Shirley as the elected supervisor of District 3.[36]

C. *Goodluck v. Apache County* (1975)

Apache County and its non-Indian governing Board of Supervisors also resorted to gerrymandering in its effort to prevent Navajo voters, who made up an overwhelming majority of the County, from taking control of the Board. The county drew lines for its three supervisor districts with the following populations: District 1 with a population of 1,700, of whom 70 were Indian; District 2 with a population of 3,900, of whom 300 were Indian; and District 3 with a population of 26,700, of whom 23,600 were Indian. Each district elected one representative.

In *Goodluck v. Apache* County, several Indian voters who lived on the Navajo Reservation sued the county for violating the one-person, one-vote principle. The plaintiffs argued that: (1) the districts were unconstitutionally malapportioned in violation of the Fourteenth Amendment; (2) the malapportionment abridged their right to vote on account of race or color in violation of the Fifteenth Amendment and Section 2 of the Voting Rights Act; (3) the apportionment plan was a distinction by race in voting in violation of 42 U.S.C. §1971; and (4) the apportionment plan was a racially discriminatory application of state laws in violation of 42 U.S.C. §1971.[37]

In response, Apache County made two arguments. First, they asserted that 8 U.S.C. § 1401, which granted citizenship to Indians, was unconstitutional. Second, they maintained that Indians could not vote because they were not "subject to the jurisdiction" of the United States and did not pay state taxes, both qualifications mentioned in the Fourteenth Amendment. The defendants based their second argument on *Elk v. Wilkins*, an 1884 case holding that Indians not taxed were not to be counted for purposes of representation under the Fourteenth Amendment because they were not citizens of the United States.

The three-judge federal court summarily rejected Apache County's arguments. The court found that "it is clear that a malapportionment of supervisorial districts is present. It therefore appears

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[36] 109 Ariz. at 516, 513 P.2d at 945.

[37] 417 F. Supp. 13, 14 (D. Ariz. 1975), aff'd, 429 U.S. 876 (1976).

that Apache County Arizona must be redistricted so that the apportionment may conform to the standards dictated in *Baker v. Carr*..." Consequently, the *Goodluck* court granted the Indian plaintiffs summary judgment.[38]

D. *Apache County High School District 90 v. United States* (1980)

In 1976, Apache County attempted to avoid integration of its public schools to include Indian students by holding a special bond election to fund a new school in the almost entirely non-Indian southern part of the county. Although the special election afected Indian students who would be denied equal schooling, Indian turnout for the election was abnormally low. The circumstances that led to this election were subsequently addressed in a series of Section 5 objections.

Several changes in the number, location, availability, and convenience of polling places for the special bond election prevented most Indians from voting. Between 1974 and 1976, 11 polling places were closed down and no new ones were opened. Of these 11 polling places, nine were on the Navajo Reservation. These closings forced most Navajo voters without transportation to travel at least 12 more miles to get to their polling place. At the same time, the polling place changes had virtually no impact on non-Indian voters. Although the population of Indian voters had not changed, the number of reservation polling places was reduced nearly in half, compared to only a 20 percent decrease in non-Indian areas.

The polling place changes were compounded by the total lack of language assistance provided to Indian voters on the reservation, leading to dramatically low voter turnout. Although two Navajo poll workers were provided for each polling place on the reservation, none of these workers were designated or trained as interpreters. All of the absentee voting procedures were conducted in English-only.

No Navajo language informational meetings regarding the bond election took place anywhere in the county. Even the English-language informational meeting excluded most Indian voters who spoke English because it was held almost 100 miles from any Navajo community.

As a result of the outright disenfranchisement of Indian voters, the attorney general objected to several of the changes and procedures when they were submitted for Section 5 preclearance. The first of these objections came in 1976, when the attorney general objected to the redistricting of School District 90 because of the inadequacy of Navajo-language voting materials and assistance. Similar objections continued over the next four and one-half years, in which the county would meet every objection with a new method of voting discrimination.

Finally, Apache County responded to the objections raised by the special bond election by completely dissolving School District 90. In its place, the county sought to create six smaller school districts, closing 18 polling places (including 15 on the Navajo Reservation). When the Attorney General objected, Apache County responded by starting to provide Navajo language assistance, coordinating with a board of Navajo officials to select new polling places, and

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[38] 417 F. Supp. at 16.

offering oral language assistance for non-English speaking Navajo voters trying to cast absentee ballots. As a result of these, and other remedial steps, the county's six district plan was approved in a May 1980 Consent Decree.[39]

E. Navapache Hospital Region Section 5 Objection (1985)

Voting discrimination also occurred in an area of western Apache County (and eastern Navajo County) known as the Navapache Hospital Region. In 1985, the Apache County Board of Supervisors proposed several voting changes including the elimination of two polling places; the implementation of a rotating polling place system; and a reduction in the daily hours of operation for those voting stations that remained open. Of the two polling places that were closing, one was the last remaining polling place on the Fort Apache Reservation. The elimination of all polling places on the reservation was exacerbated by the new rotating poll system, which made polling places even less accessible to Navajo voters. Absentee voting opportunities also were not provided to Indian voters. As a result of the clear discriminatory purpose and effect of these voting changes, the attorney general objected to the voting changes.

F. Failure to Provide Language Assistance to Navajo Voters (1987)

By 1987, Apache County had still failed to provide adequate language assistance to non-English speaking Indian voters in Apache County. When Apache County submitted new guidelines for multilingual election procedures, the attorney general objected because they did not provide language assistance to the primary Navajo speakers in the County.

The attorney general informed Apache County that although some English-only documents and assistance were provided to Indians on the reservation, the county still failed to provide adequate language assistance to the 55 percent of the American Indian population who could not speak or read English. The attorney general acknowledged that the county provided oral absentee ballots and had reformed voter registration processes and voting deadlines to accommodate Navajo speakers. However, the attorney general concluded that the lack of Navajo language assistance prevented the county from effectively promoting the availability of the materials and procedures to voters who required them.

The assistant attorney general further pointed out that Apache County had taken no steps to improve the quality of on-site assistance offered to non-English speakers. Although some Navajo poll workers were provided, the county did not train them on translations and how to provide assistance and there was no process for having English-language documents disseminated to non-English speakers at a local level.

The Apache County Board of Supervisors responded by forming an advisory committee, which would seek to better inform new voting protocol and multilingual election procedure. However, the Attorney General insisted that the mere promise of a future remedy was not sufficient, and

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[39] Consent Decree, *Apache County High School District No. 90 v. United States* (D.D.C. June 12, 1980) (No. 77-1815).

continued to deny preclearance until the adequate language assistance was provided to non-English speaking Indian voters covered by Section 203 of the Voting Rights Act.

G. *United States v. State of Arizona* (1989)

In 1989, the attorney general agreed to allow Apache County to implement a series of improvements to its language assistance program in a Consent Decree.[40] The United States alleged that the State of Arizona and Apache and Navajo Counties employed various election standards, practices, and procedures that denied or abridged the voting rights of Navajo citizens residing in the two counties.[41]

The consent decree summarized the complaint: "The challenged practices include alleged discriminatory voter registration, absentee ballot, and voter registration cancellation procedures, and the alleged failure of the defendants to implement, as required by Section 4(f)(4), effective bilingual election procedures, including the effective dissemination of election information in Navajo and providing for a sufficient number of adequately trained bilingual persons to serve as translators for Navajo voters needing assistance at the polls on election day."[42]

In response, the defendants agreed to a variety of relief to bring them into compliance with Sections 2, 4(f)(4), 5, 203, and 208 of the Voting Rights Act. Without admitting liability, the defendants agreed to the court's May 22, 1989 consent decree requiring that defendants:

- Adopt a Navajo Language Election Information Program that would be submitted to the Attorney General for preclearance under Section 5 of the Voting Rights Act within thirty days of entry of the decree;
- Employ at least two full-time, permanent, voter outreach employees who were bilingual in Navajo and English to serve as deputy voter registrars for purposes of voter registration and implementation of the language program;
- Train translators and election personnel who were responsible for implementing the language program and encourage the participation of the Navajo Nation's government;
- Increase the number and availability of Navajo-speaking deputy registrars to increase voter registration opportunities;
- Appoint and train as deputy registrars at least three persons fluent in English and Navajo in each county precinct situated entirely or in part on the Navajo Reservation;
- Make training available to all deputy registrars about all phases of the election process, including voter registration, candidate qualification

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[40] Consent Decree, *United States v. Arizona* (D. Ariz. May 22, 1989) (amended Sept. 27, 1993) (No. 88-1989-PHX EHC).

[41] Slip p. at 1-2.

[42] Ibid.

procedures and deadlines, election day activities, the differences between state and tribal election regulations and procedures, voter purges and reinstatement, and absentee voting;

- Train all deputy registrars in Navajo and English, as requested;
- Conduct periodic voter registration drives at tribal chapter houses, to be coordinated with the Navajo Nation to occur at times convenient for Navajo citizens;
- Disseminate and publicize election information to Navajo voters, including at scheduled chapter house meetings;
- Prepare and disseminate audio tapes with oral translations in the Navajo language of ballot propositions;
- Make public service announcements about election activities and requirements in the Navajo language on designated radio stations and provide written announcements in newspapers relied upon by Navajo voters;
- Provide information and publicity about absentee voting to Navajo voters;
- Ensure sufficient staffing of polling places with effectively trained precinct board workers fluent in Navajo and English;
- Prevent unreasonable delays in voting or translation of ballots on election day;
- Provide training in the proper translation of election information;
- Disseminate information about Navajo voters purged from voter registration lists to allow them to register again;
- Inform voters about registration and voter purge procedures;
- Maintain copies of all records and prepare reports of their efforts under the consent decree, to be provided to members of the public and the United States on request; and
- Adjust the program as necessary to address unforeseen problems.

Nevertheless, even after entry of the consent decree, Apache County continued to fail to provide adequate language assistance.

H. The Continued Lack of Language Assistance for Navajo Voters (2002)

In September of 2002, the U.S. Department of Justice (DOJ) documented several Indian voter complaints in Apache and Navajo counties. DOJ noted that in the November 5, 2002 election, the counties improved their practices in opening polling places on time, allowing for early voting at some reservation locations, providing better inter-county cooperation, and making language flip charts available. However, DOJ also documented several problems.

First, training for poll workers and interpreters was too brief to be useful. At the time, training was completely contained in a two-hour session that left some poll workers confused about the location of, and use for, certain components of the elections supply box they were provided with. The Justice Department suggested that the training be extended to a full day, but Apache County only extended the training to six and a half hours.

DOJ also expressed concern about cross-over voting within tribal communities. Because tribal elections take place independently of county elections, Indians who live on the Navajo Reservation near to county lines often vote in tribal elections at different locations than they do for county or state elections. The confusion created by the use of separate voting places caused many voters to attempt to vote in a County in which they are not registered, resulting in them being turned away from the polls or having their votes disqualified. To address this issue, the Justice Department suggested that each polling site near a county line be provided with registration lists from each county so that they could inform voters and try to contact appropriate county election departments before refusing voters. Although the counties acted on this suggestion, federal observers later found that most poll workers did not use the registration lists.

I. Recent Improvements in Voter Registration and Turnout (2005)

In November of 2005, Penny Pew, the elections director for Apache County, testified before the House Judiciary Committee in support of reauthorizing the expiring provisions of the Voting Rights Act.[43] Ms. Pew emphasized the importance of Sections 6 and 8 of the Voting Rights Act in helping Apache County to establish an effective "indigenous" Navajo Language Election Information Program. Ms. Pew also stressed the importance of voter outreach and education, the effective use of radio and newspaper advertisement to raise voter awareness, and the development of a Navajo Language Election Glossary to assist with translating election materials.[44] She also informed the committee that the use of a uniform manual, role playing, and the establishment of a training cassette library for personal use have all served to improve the effectiveness of the training for poll workers and translators.

Ms. Pew highlighted the importance of the tri-county, tri-state coordination to monitor the effectiveness of programs initiated to improve Indian voter awareness and turnout. She also cited the 25 percent increase in voter turnout between 2000 and 2004 resulting from the increase in voter education and enthusiasm garnered by the "Get the Vote Out" campaign. This campaign was accompanied by the distribution of Navajo language brochures and the distribution of "I Voted" stickers in the Navajo language. Ms. Pew concluded by linking the success of all of Apache County's programs to the continued use of local and federal observers to monitor proceedings and offer educated solutions.

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[43] Oversight Testimony: Written testimony of Penny L. Pew, Apache County Elections Director, US House of Representative Committee on the Judiciary (November 15, 2005), available at <http://judiciary.house.gov/OversightTestimony.aspx?ID=526>.

[44] Copies of Apache County's Navajo language election terminology guide and an example of bilingual instructions on Proposition 200 are provided as Appendix D to this report.

Additional Sources

Section 5 Objection letters

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VI. United States Department of Justice Activities in Arizona

A. Enforcement Actions Since 1982

1. ***United States v. State of Arizona,*** No. CIV-94-1845, 1994 U.S. Dist. LEXIS 17606 (D. Ariz. 1994).

Decision by: Carroll, District Judge, Browning, Circuit Judge, Roll, District Judge. Majority: Carroll and Browning; Minority: Roll.

Complaint: Coconino County created two new Superior Court divisions in 1980 and 1990 and held elections to fill the judgeships. Navajo County established two divisions in 1975 and 1988. Neither county sought preclearance under the Voting Rights Act. Despite warnings from the attorney general that further activity would violate the Act, the counties proceeded to qualify candidates for the 1994 election.

VRA Claim(s): In creating new Superior Court divisions, the federal government claimed that the two state counties made changes that are subject to Section 5 preclearance and therefore, must be precleared before adoption. *Id.* at *8. Both counties are "covered" jurisdictions under the VRA. *Id.* at *10.

Issue(s): (1) Whether the creation of new judgeships qualifies as a change of voting practices subject to Section 5 preclearance requirements. And if so, (2) whether preclearance is necessary in this case. *Id.* at *10.

Holding: Section 5 applies to the creation of new judgeships because they directly affect voting standards and practices. *Id.* at *12. The court further held that the creation of the new

judgeships "does have the potential of causing discrimination or retrogression"[45] and therefore should be subject to preclearance. *Id.* at *18.

Settlement/Consent Decree/Order: The court held that the establishment of judgeships constituted a "covered change" under the Act that had the potential of causing discrimination or retrogression with respect to minorities within those jurisdictions. 1994 U.S. Dist. LEXIS 17606 at *12, 18. The challenged elections were preliminarily enjoined pending resolution of the defendants' declaratory action. *Id.* at *25.

2. ***United States v. State of Arizona***, No. CIV-88-1989-PHX-EHC (D. Ariz. 1989) (unpublished).

Decision by: Carroll, District Judge.

Complaint: The United States alleged that the state of Arizona and Apache and Navajo Counties employed various election standards, practices, and procedures that denied or abridged the voting rights of Navajo citizens residing in the two counties. Slip Op. at 1-2.

VRA Claim(s): "The challenged practices include alleged discriminatory voter registration, absentee ballot, and voter registration cancellation procedures, and the alleged failure of the defendants to implement, as required by Section 4(f)(4), effective bilingual election procedures, including the effective dissemination of election information in Navajo and providing for a sufficient number of adequately trained bilingual persons to serve as translators for Navajo voters needing assistance at the polls on election day." *Id.* at 1-2.

Settlement/Consent Decree/Order: For more details, see previous discussion on Apache County.

B. Federal Observers and Monitors Since 1982

Since 1982, the U.S. Department of Justice has deployed at least 1,204 federal observers who are employees of the Office of Personnel Management (OPM) to Arizona to monitor compliance with federal consent decrees and the availability and quality of language assistance to voters provided under Section 203 of the VRA. Of these observers, 93.8 percent (1,129) have been deployed to monitor access of American Indians in Apache and Navajo Counties, with the remaining 6.2 percent (75) deployed to Yuma to monitor access of American Indian and Latino voters. *See* Figures 6.1 and 6.2. The presence of the federal observers has made a tremendous impact on the ability of American Indian and Spanish-speaking voting-age citizens to participate in elections, as demonstrated by the successful VRA enforcement actions described above in the previous discussion of Apache County.

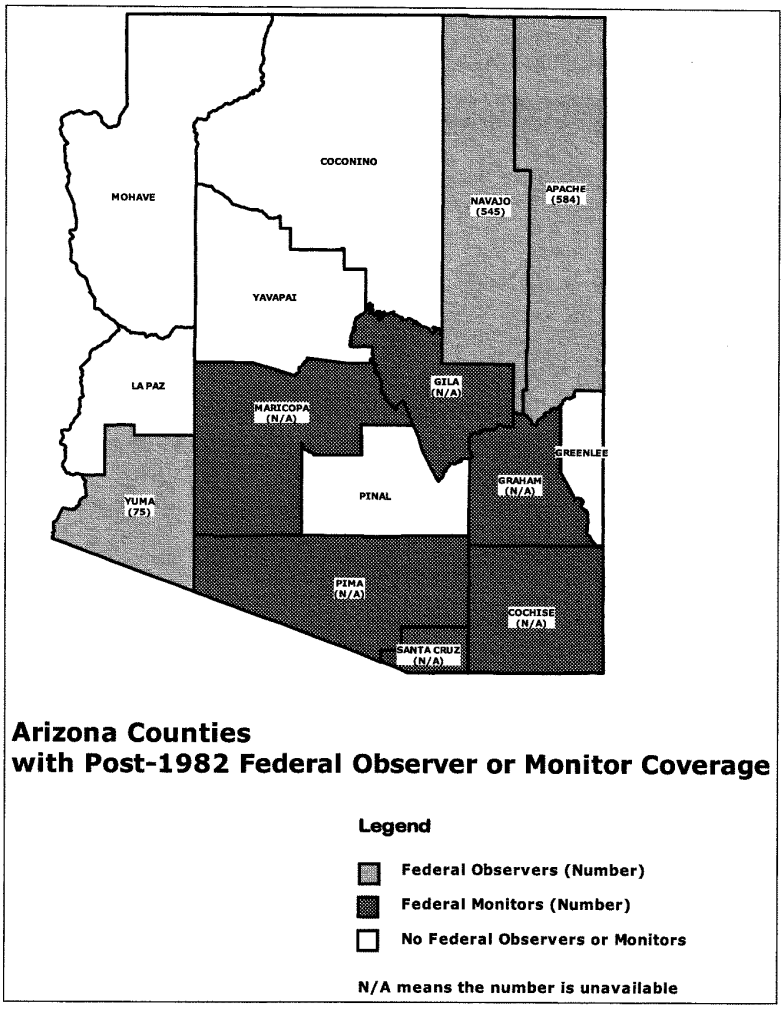
In addition, since 2004, the Department of Justice has deployed dozens of monitors in elections held in six other counties: Cochise, Gila, Graham, Maricopa, Pima, and Santa Cruz Counties. *See* Figures 6.1 and 6.2. Federal monitors are generally attorneys, paralegals, or civil rights

[45] "'Retrogression' has been defined as the reduction or diminution of minority voting rights or strength." *United States v. State of Arizona*, 1994 U.S. Dist. LEXIS 17606 at *13.

analysts employed by the Department of Justice, and not OPM employees. Unlike federal observers, federal monitors have no statutory right to observe elections in polling places. Federal monitors typically are used where there are suspected issues of non-compliance, but a jurisdiction has not been designated for coverage by a federal court or the Attorney General. Although each of these six counties is covered by one or more non-English languages under Section 203, none of these counties has been designated for observer coverage.

The growing use of monitors highlights the need for modifications to Sections 6 through 9 of the VRA to facilitate the ability of the Department of Justice to use federal observers in non-designated jurisdictions to enforce the Act.

Figure 6.1: Federal Observers and Monitors Deployed to Arizona Since 1982



Source: United States Department of Justice

Figure 6.2: Number of Federal Observers and Monitors Deployed to Arizona Since 1982

County	Date	Election Type	Number of Observers/ Monitors	Press Release/ Newspaper Comments and Notes
Apache	11/4/1986	Federal	24 obs.	Department of Justice
Apache	9/13/1988	Primary	43 obs.	Department of Justice
Apache	9/8/1988	Federal	41 obs.	Department of Justice
Apache	9/11/1990	Primary	26 obs.	Department of Justice
Apache	11/6/1990	Federal	43 obs.	Department of Justice
Apache	9/8/1992	Primary	45 obs.	Department of Justice
Apache	11/3/1992	Federal	45 obs.	Department of Justice
Apache	9/13/1994	Primary	25 obs.	Department of Justice; http://www.usdoj.gov/opa/pr/Pre_96/September94/516.txt.html
Apache	11/8/1994	Federal	35 obs.	Department of Justice
Apache	9/10/1996	Primary	25 obs.	Department of Justice
Apache	11/5/1996	Federal	36 obs.	Department of Justice; http://www.usdoj.gov/opa/pr/1996/Nov96/538cr.htm
Apache	9/8/1998	Primary	41 obs.	Department of Justice; http://www.usdoj.gov/opa/pr/1998/September/408cr.htm
Apache	11/3/1998	Federal	24 obs.	Department of Justice; http://www.usdoj.gov/opa/pr/1998/November/516cr.htm
Apache	9/12/2000	Primary	16 obs.	Department of Justice
Apache	11/7/2000	Federal	37 obs.	Department of Justice; http://www.usdoj.gov/opa/pr/2000/November/650.htm
Apache	9/10/2002	Primary	52 obs.	Department of Justice; http://www.usdoj.gov/opa/pr/2002/September/02_crm_517.htm
Apache	11/5/2002	Federal	? obs.	http://www.usdoj.gov/opa/pr/2002/November/02_crt_640.htm
Apache	9/7/2004	Primary	? mon.	http://www.usdoj.gov/opa/pr/2004/September/04_crt_598.htm
Apache	11/2/2004	Federal	26 obs.	Department of Justice; http://www.usdoj.gov/opa/pr/2004/October/04_crt_725.htm
Cochise	9/7/2004	Primary	? mon.	http://www.usdoj.gov/opa/pr/2004/September/04_crt_598.htm
Cochise	11/2/2004	Federal	? mon.	http://www.usdoj.gov/opa/pr/2004/October/04_crt_725.htm
Cochise	5/17/2005	Local	? mon.	http://www.usdoj.gov/opa/pr/2005/May/05_crt_267.htm
Gila	9/7/2004	Primary	? mon.	http://www.usdoj.gov/opa/pr/2004/September/04_crt_598.htm
Gila	11/2/2004	Federal	? mon.	http://www.usdoj.gov/opa/pr/2004/October/04_crt_725.htm
Graham	9/7/2004	Primary	? mon.	http://www.usdoj.gov/opa/pr/2004/September/04_crt_598.htm
Graham	11/2/2004	Federal	? mon.	http://www.usdoj.gov/opa/pr/2004/October/04_crt_725.htm
Maricopa	9/7/2004	Primary	? mon.	http://www.usdoj.gov/opa/pr/2004/September/04_crt_598.htm
Maricopa	s11/2/2004	Federal	? mon.	http://www.usdoj.gov/opa/pr/2004/October/04_crt_725.htm
Navajo	11/4/1988	Federal	16 obs.	Department of Justice
Navajo	9/13/1988	Primary	29 obs.	Department of Justice
Navajo	11/8/1988	Federal	34 obs.	Department of Justice
Navajo	9/11/1990	Primary	34 obs.	Department of Justice
Navajo	11/6/1990	Federal	39 obs.	Department of Justice
Navajo	9/8/1992	Primary	42 obs.	Department of Justice
Navajo	11/3/1992	Federal	34 obs.	Department of Justice
Navajo	9/13/1994	Primary	21 obs.	Department of Justice; http://www.usdoj.gov/opa/pr/Pre_96/September94/516.txt.html
Navajo	11/8/1994	Federal	28 obs.	Department of Justice
Navajo	9/10/1996	Primary	19 obs.	Department of Justice
Navajo	11/5/1996	Federal	28 obs.	Department of Justice; http://www.usdoj.gov/opa/pr/1996/Nov96/538cr.htm
Navajo	9/8/1998	Primary	23 obs.	Department of Justice; http://www.usdoj.gov/opa/pr/1998/September/408cr.htm

County	Date	Election Type	Number of Observers/ Monitors	Press Release/ Newspaper Comments and Notes
Navajo	11/3/1998	Federal	16 obs.	Department of Justice; http://www.usdoj.gov/opa/pr/1998/November/516cr.htm
Navajo	9/12/2000	Primary	17 obs.	Department of Justice
Navajo	11/7/2000	Federal	35 obs.	Department of Justice;http://www.usdoj.gov/opa/pr/2000/November/650.htm
Navajo	9/10/2002	Primary	28 obs.	Department of Justice; http://www.usdoj.gov/opa/pr/2002/September/02_crm_517.htm
Navajo	11/5/2002	Federal	40 obs.	Department of Justice; http://www.usdoj.gov/opa/pr/2002/November/02_crt_640.htm
Navajo	9/7/2004	Primary	38 obs.	Department of Justice
Navajo	11/2/2004	Federal	28 obs.	Department of Justice; http://www.usdoj.gov/opa/pr/2004/October/04_crt_725.htm
Pima	11/2/2004	Federal	? mon.	http://www.usdoj.gov/opa/pr/2004/October/04_crt_725.htm
Santa Cruz	9/7/2004	Primary	? mon.	http://www.usdoj.gov/opa/pr/2004/September/04_crt_598.htm
Santa Cruz	11/2/2004	Federal	? mon.	http://www.usdoj.gov/opa/pr/2004/October/04_crt_725.htm
Yuma	9/8/1998	Primary	5 obs.	http://www.usdoj.gov/opa/pr/1998/September/408cr.htm
Yuma	9/7/2004	Primary	29 obs.	Department of Justice
Yuma	11/2/2004	Federal	41 obs.	Department of Justice; http://www.usdoj.gov/opa/pr/2004/October/04_crt_725.htm

Source: National Commission on the Voting Rights Act, Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005.

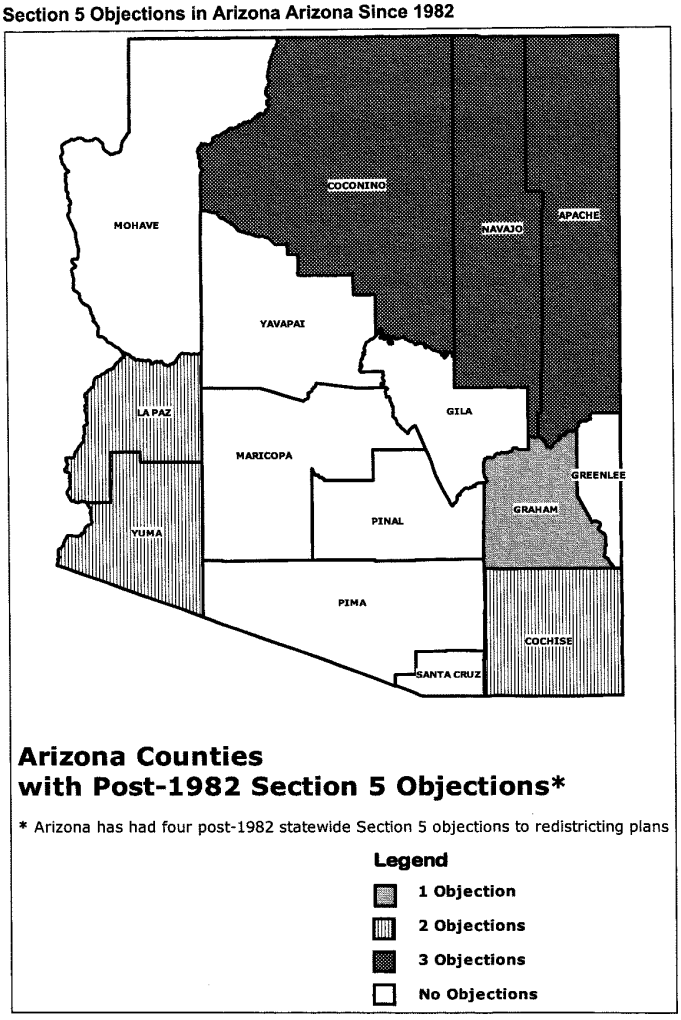
C. Section 5 Objections Since 1982

Since 1982, Arizona has had eighteen Section 5 objections – over eighty percent of all Section 5 objections since Arizona or its political subdivisions were first covered in 1965. Four of these post-1982 objections have been for statewide redistricting plans, including one in the 1980s, two in the 1990s and one as recently as 2002. These objections have affected nearly half (seven) of Arizona's 15 counties, with DOJ finding that these voting changes had the purpose or effect of discriminating against the State's Latino or American Indian voters. *See* Figure 6.3.

The objections affecting American Indian voters in northern Arizona are described at length in the discussion of Apache County. The remaining objections are summarized in Figure 6.4.

The large number of recent Section 5 objections and the impact of the discriminatory practices those objections prevented highlight the importance of reauthorization to American Indian and Latino voting-age citizens in Arizona. For these reasons and the others stated elsewhere in this report, Section 5 should be reauthorized for 25 years and Section 4(f)(4) coverage of Arizona should be kept intact.

Figure 6.3: Section 5 Objections in Arizona Arizona Since 1982



Source: United States Department of Justice

Figure 6.4: Section 5 Objections to Voting Changes in Arizona

Submitting Authority (DOJ Submission No.)	Description of Voting Change	Disposition and Date
State (V5782)	Chapter 159--method of circulating recall petitions	10-9-73 Withdrawn 3-15-74
Cochise Cty. College Board (7071A)	Redistricting	2-3-75
Apache Cty. High School District No. 90 (X7759)	Bond election; multilingual procedures	10-4-76 Declaratory judgment denied in Apache County High School District No. 90 v. United States, No. 77-1815
Apache Cty. High School District No. 90 (7X-0067)	Special dissolution election and changes relating to election, including polling places and multilingual procedures (D.D.C. June 12, 1980)	3-20-80 Withdrawn 5-7-80
State (82-1539)	H.B. No. 2001--House and Senate reapportionment	3-8-82
Douglas (Cochise Cty.) (83-1403, 83-1404)	At-large method of election; residency districts; staggered terms; majority vote requirements; limitation on the number of terms council members may serve; special election	12-5-83 Withdrawn 6-23-98
Navajo County (84-1778)	Redistricting for the five supervisor districts	8-31-84
Navapache Hospital District (Navajo and Apache Ctys.) (85-1768)	Elimination of two polling places, the implementation of a five-polling place rotation system, and the reduction in the polling hours	8-16-85
Cochise Cty. Community College District (83-1398)	1983 redistricting plan	11-3-86
Apache County (80-1278)	Navajo-language bilingual election procedures	7-17-87
Apache County (87-1799)	Navajo-language bilingual election procedures	2-10-88
Coconino County (91-3167)	Voter registration challenge and purge procedures	11-4-91
State (92-1347)	Act No. 1 (1992)--Senate and House redistricting plan	6-10-92
La Paz County (92-2285)	1992 redistricting plan for the board of	7-17-92

Submitting Authority (DOJ Submission No.)	Description of Voting Change	Disposition and Date
	supervisors	
State (92-3395)	Act No. 240 (1992)--House and Senate redistricting plan	8-12-92
Yuma County (92-2355)	1992 redistricting plan for the board of supervisors	9-28-92
Arizona Western College District (Yuma and La Paz Ctys.) (88-2479)	1992 and existing redistricting plans for Yuma County portion of the district	9-28-92
Graham County (92-2466)	1992 redistricting plan for the board of supervisors	2-22-93
Coconino County (93-0681)	Two additional superior court judgeships	4-8-94
Navajo County (93-0684)	Two additional superior court judgeships	5-16-94
State (2002-0276) (pdf)	2001 legislative redistricting plan	5-20-02
Coconino Association for Vocations, Industry, and Technology (Coconino Cty.) (2002-3844) (pdf)	Method of election	2-4-03

Source: United States Department of Justice

VII. The Continued Need for Language Assistance: English-Only Education in Arizona's Public Schools

The following discussion demonstrates the continuing importance of the language assistance provisions of the Act.

A. The English-Only Amendment and its Impact on Arizona's Schools

In October 1987, Arizonans for Official English initiated a petition drive to amend Arizona's constitution to designate English as the state's official language and to require state and local governments in Arizona to conduct business only in English. As a result of the general election in November 1988, the amendment was added to the Arizona Constitution, receiving affirmative votes from 50.5 percent of Arizona citizens casting ballots.[46] The amendment, entitled "English as the Official Language," provides that "[t]he State and all political subdivisions of [the] State shall act in English and in no other language." The amendment bound all government officials and employees in Arizona during the performance of all government business, and provided that any "person who resides in or does business in this State shall have standing to bring suit to enforce this article in a court of record of the State."

Two days after the voters passed the amendment, Maria-Kelley F. Yniguez sued the state of Arizona, the governor, and various parties pursuant to 42 U.S.C. § 1983 in the U.S. District Court for the District of Arizona, seeking to enjoin enforcement of the amendment and to have it declared unconstitutional under the First and Fourteenth Amendments. She also contended that it violated federal civil rights laws. When she filed her action, Yniquez was employed by the Arizona Department of Administration and handled medical malpractice claims asserted against the state. Yniguez was bilingual, fluent and literate in both Spanish and English, and, prior to the amendment's passage, she communicated in Spanish with monolingual Spanish-speaking claimants and in a combination of English and Spanish with bilingual claimants.[47]

In November 1992, ten plaintiffs brought a separate action in Superior Court against then-Governor J. Fife Symington, III and the attorney general. The plaintiffs sought a declaratory judgment that the Amendment violated the First, Ninth, and Fourteenth Amendments of the U.S. Constitution. The plaintiffs included four elected officials, five state employees, and one public school teacher. They were all bilingual and regularly communicated in both Spanish and English as private citizens and during the performance of government business. The plaintiffs alleged that they spoke Spanish during the performance of their government jobs and that they feared "communicating in Spanish 'during the performance of government business' in violation of Article XXVIII of the Arizona Constitution."

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[46] See *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 924 (9th Cir.1995) (en banc).

[47] *Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz.1990).

In *Ruiz v. Hull*,[48] the Arizona Supreme Court struck down the English-only amendment as unconstitutional under the First and Fourteenth Amendments. The *Ruiz* court described the breadth of the amendment:

> Although English-only provisions have recently become quite common, Arizona's is unique.... Twenty-one states and forty municipalities have official English statutes. However, most of those provisions are substantially less encompassing and certainly less proscriptive than the Amendment. The official English provisions in most states appear to be primarily symbolic.... Indeed, the Amendment has been identified as "by far the most restrictively worded official-English law to date" ... This observation is shared by other commentators – who note that the Amendment "is the *most restrictive* of the current wave of official-language laws," and "is so far the *most restrictive* Official English measure."[49]

The court based its reasoning in part on the impact the amendment had on public school teachers such as one of the plaintiffs:

> Assuming *arguendo* that the government may, under certain circumstances and for appropriate reasons, restrict public employees from using non-English languages to communicate while performing their duties, the Amendment's reach is too broad. For example, by its express language, it prohibits a public school teacher, such as Appellant Garcia, and a monolingual Spanish-speaking parent from speaking in Spanish about a child's education ....[50]

The court also described the dramatically negative impact the amendment would have on political participation by language minorities:

> Citizens of limited English proficiency, such as many of the named legislator's constituents, often face obstacles in petitioning their government for redress and in accessing the political system. Legislators and other elected officials attempting to serve limited-English-proficient constituents face a difficult task in helping provide those constituents with government services and in assisting those constituents in both understanding and accessing government. The Amendment makes the use of non-English communication to accomplish that task illegal. In Arizona, English is not the primary language of many citizens. A substantial number of Arizona's American Indians, Spanish-speaking citizens, and other citizens for whom English is not a primary language, either do not speak English at all or do not speak English well enough to be able to express their political beliefs, opinions, or needs to their elected officials. Under the Amendment, with few exceptions, no elected official can speak with his or her constituents except in English, even though such a requirement renders the speaking useless. While certainly not dispositive, it is also worth noting that in everyday experience, even

[48] 191 Ariz. 441, 957 P.2d 984 (Ariz. 1998).

[49] 191 Ariz at 451-52, 957 P.2d at 994-95.

[50] 191 Ariz at 453, 957 P.2d at 996.

> among persons fluent in English as a second language, it is often more effective to communicate complex ideas in a person's primary language because some words, such as idioms and colloquialisms, do not translate well, if at all. In many cases, though, it is clear that the Amendment jeopardizes or prevents meaningful communication between constituents and their elected representatives, and thus contravenes core principles and values undergirding the First Amendment.[51]

As a result, the state Supreme Court concluded that the English-only amendment was unconstitutional.

B. Proposition 203: A Growing Language Gap in Arizona's Schools

In 2000, Arizona voters passed Proposition 203, a ballot initiative that banned bilingual education and required schools to use mostly English immersion programs to educate children who have limited English proficiency. The proposition was the second one of its kind in the United States. It was adopted two years after California adopted a less restrictive measure in its Proposition 227,[52] which was widely regarded as having a negative impact on English-learners.[53] Proposition 203 ended the flexibility in local program options by repealing Article 3.1 of the Arizona Revised Statutes, replacing it with a requirement that all English-learners in the state be taught using Structured English Immersion (SEI).[54] Proposition 203 includes the following components:

- Prohibits any "teaching of reading, writing, or subject matter" and the use of "books and instructional materials" in a language other than English;
- Restricts "waivers" of the English-only rule for children under age 10 to those with "physical or psychological handicaps" such as special education students. Schools only have flexibility to exercise an "informed belief" about what is in the best interest of the student for children age 10 and older;
- Allows parental waiver requests to be denied "without explanation or legal consequence;"[55]
- Requires English learners to be reassigned to mainstream classrooms once they have acquired "a good working knowledge of English," which is a standard that the Proposition leaves undefined;

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[51] 191 Ariz at 455, 957 P.2d at 998.

[52] For an extended discussion of Proposition 227 and its impact on English language learners, *see* Kevin R. Johnson & George A Martínez, *Discrimination by proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U. CAL.-DAVIS L. REV. 1227 (2002).

[53] Nearly two years after Proposition 227 was passed in California, nearly one million LEP students in the state were still classified as limited-English proficient after more than a year of English-only immersion. O Ricardo Pimentel. "Facts Carry Little Clout in Bilingual-Ed Debate." *Arizona Republic*. (Sept. 6, 2001).

[54] Rolstad, Kellie, Kate S. Mahoney, and Gene V. Glass. "Weighing the Evidence: A Meta-Analysis of Bilingual Education in Arizona." Bilingual Research Journal 29 (2005): 1-18. Westlaw.

[55] This provision was included to avoid waivers such as those provided to 170,000 LEP students in California – 12 percent of all English learners – to continue to receive bilingual education.

- Repeals all Arizona statutes governing the education of English learners, including standards of student assessment, teacher training, program accountability, parental choice, and other civil rights guarantees;
- Mandates English language achievement tests for all Arizona students, regardless of their English proficiency;
- Permits any "parent or legal guardian of any Arizona school child" to have standing to enforce the requirements;
- Holds educational administrators and school board members who violate the law personally liable for damages, which cannot be paid by an insurance policy or other third party; and
- May never be repealed by the Arizona legislature. Amendments to "further the purposes" of the law are permitted with a three-fourths super-majority vote in both houses, but substantive changes can only be enacted through another statewide ballot measure.

Proponents of the initiative stressed that limited-English proficient students should not receive unfair advantages, such as native language instruction in the classroom. They contended that bilingual education is an ineffective approach to English instruction. They argued that English immersion would help improve academic performance among English-learners by drawing them into education's mainstream, but so far there have been no marked improvements.[56]

Children who have trouble speaking English are one of the largest and fastest-growing segments of the school population in Arizona. The vast majority of those children are mostly segregated in a small number of schools. These children also tend to be low-income and live in households where little, if any, English is spoken. For example, the Isaac School district serves largely Spanish speaking immigrant neighborhoods in west Phoenix. More than half of its 9,000 students are English learners, and 93 percent are poor.

School officials in the district say that additional funding would allow schools to create more ELL programs, reduce class sizes, and provide more teacher training. Currently, Arizona provides an additional $360 per English-learner student, but this is far below the $1,200 to $2,500 recommended by a court-ordered cost study in the *Flores* decision, discussed above. These circumstances compound the challenges for public schools, who are already struggling to meet new federal academic standards, according to studies by researchers with two D.C.-based nonpartisan research groups, the Migration Policy Institute and the Urban Institute.[57] These

[56] The Arizona Supreme Court struck down the Legislative Council's written description of Proposition 203 stating that "the existing laws of this state require that public schools provide bilingual education instruction to every pupil who is not fluent in English, without a specific time limit on services." According to the state Supreme Court, "This is misleading because it suggests that English and Spanish instruction must be given in all classes. However, state law requires schools to 'provide a bilingual program or English as a second language [ESL] program for ... limited English proficient pupils.' Ariz.Rev.Stat. § 15-754(A) (1991). ESL instruction is performed entirely in English, and therefore is not bilingual. In Arizona, over 67% of limited English proficient students attend English-taught ESL classes." *Sotomayor v. Burns*, 199 Ariz. 81, 82, 13 P.3d 1198, 1199 (Ariz. 2000).

[57] Gonzalez, Daniel. "Language Gap Grows." *Arizona Republic* 12 Oct. 2005. Westlaw.

studies are particularly relevant in Arizona, which is one of the few states to ban bilingual education.

1. Studies Showing the Effects of Inadequate Education to ELL Students

The studies by the Urban Institute and Migration Policy Institute measured the size and growth of the school population of ELL students to determine how that population is affecting schools trying to meet the federal standards of the federal No Child Left Behind Act. In 2000, there were 56,000 ELL students in pre-kindergarten to fifth grade, or 12 percent of the whole population of pre-kindergarten though fifth grade students, the fourth highest share of all states. Only California, Texas, and New Mexico have a higher proportion of ELL students. Arizona currently has between 150,000 and 175,000 students enrolled in its ELL programs.

Nationwide, the studies found that one half of all ELL students were born in the United States, including ELL students in high school – which means that they spent their entire lives attending school in the U.S. yet failed to learn English adequately. It was also found that ELL students tend to be highly segregated, with 70 percent attending 10 percent of U.S. schools, mostly located in urban settings. Additionally, more ELL students attend schools most likely to fail federal standards and face sanctions. In 2000, there were 3.4 million school children in the U.S. with limited English proficiency, or 6 percent of the total student population. The most common language spoken was Spanish, although many students speak other languages including Arizona's many American Indian languages and dialects.[58]

2. Waiver Options under Proposition 203

Proposition 203 permits extremely limited waivers from SEI programs for some students. It allows parents to submit waivers for children younger than 10 years of age who "already know English," which is defined as good English skills as measured by oral or standardized tests, in which the child scores at or above the state average for his or her grade level or at or above the fifth grade average, whichever is lower. The state grade level average on English oral language assessments has not yet been determined for students in Arizona, so some districts asked test publishers for estimated averages and some estimated an average based on their own district test data.

However, in February 2003, the Tom Horne, the newly elected State Superintendent of Public Instruction who had run for office on the promise of enforcing Proposition 203, issued guidelines that had the effect of altering the waiver requirement. These changes have imposed the most restrictions in any state in the nation for ELL, leaving parents who seek a bilingual education for their children with no alternative to SEI. Horne insisted that the "passing score" listed by the test publisher serve as the minimum requirement for a waiver. The publisher scores are determined arbitrarily, and do not factor in ELL students, only English-proficient test takers. The available evidence reveals that bilingual education programs have been more effective at raising students' test scores than SEI in Arizona.[59]

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[58] Gonzalez, Daniel. "Language Gap Grows." *Arizona Republic* 12 Oct. 2005. Westlaw.

[59] Rolstad, Kellie, Kate S. Mahoney, and Gene V. Glass. "Weighing the Evidence: A Meta-Analysis of Bilingual Education in Arizona." *Bilingual Research Journal* 29 (2005): 1-18. Westlaw.

3. Confusion and Discrimination Resulting from Implementation of Proposition 203

There have been widespread instances of confusion and discrimination over how non-English languages can be used in the schools after Proposition 203:

- Teachers are afraid that they will be disciplined or fired if they speak to a student in Spanish at any time. Teachers in the Isaac Elementary School District were asked to keep Spanish out of the cafeteria, hallways, and recess. The principal and district superintendent believed that the spirit of Proposition 203 meant that no Spanish could be spoken at school under any circumstance, when teachers and students can actually use Spanish for non-instructional purposes.

- In April 2004, the Roosevelt School District was reprimanded by a State Department of Education employee because "to conduct a Spanish spelling bee was against the law: 'For kids that are just learning English, they should be just learning English.'"

- In April 2003, a teacher allegedly slapped students for speaking Spanish: "[A] school district investigation said she hit and slapped students for speaking Spanish in class…[The teacher] told district investigators that she was enforcing the district's English immersion program."

- A study was conducted in Tucson, where many ELL students were forced into all-English instruction and showed signs of trauma, such as depression, fear of school, crying, and acting out at school and at home.[60]

4. Tribal Languages Targeted by English-Only Initiatives

Given the unique demographics of the state of Arizona, the English-only Proposition 203 not only has an impact on Spanish-speaking students, but members of Arizona's 21 American Indian tribes as well. Margaret Garcia-Dugan, co-chairwoman of the Arizona English for the Children group, was under the impression that tribal sovereignty would exempt American Indians from English-only requirements. That would be true if American Indian children were being taught in tribal schools; however, eighty percent of tribal children are in public and charter schools. American Indians well remember the era from the 1800s to the 1960s when American Indian children were placed in government-run boarding schools and punished for speaking their native language. Proposition 203 revitalizes that much-maligned policy.

Arizona Superintendent of Public Instruction Tom Horne stated in August 2004, "Now that we are enforcing the voter-approved requirement that students who are not proficient in English be in structured English immersion programs, hopefully there are no additional students subjected to these educationally inferior bilingual programs." How this agenda will apply to the Navajo

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[60] Hunnicutt, Kay, and Mario Castro. "How Census 2000 Data Suggest Hostility Toward Mexican-Origin Arizonians." *Bilingual Research Journal* 29 (2005). Westlaw.

Nation is unclear. Horne thinks that the impact is minor because most Navajo children come to school proficient in English: "It's a much more serious problem with Latinos."

Since voters approved Proposition 203, Arizona and the Navajo Nation have struggled to establish how the law applies to Navajo students. Horne said that for those who come to school where Navajo is spoken at home, a bilingual program would be inappropriate. The controversy is due largely to the vagueness of the language in the legislation. While the preface addresses immigration and makes no mention of American Indians, the body text fails to specify whom the law will apply to. At its heart, the debate is over tribal sovereignty.

The opposition to English-only has forged a coalition between the tribes and Latino organizations. The initiative spurred many American Indians to register to vote, and a rally at the state Capitol drew almost 1,000 protesters from even the most remote reservations. The rally was the largest American Indian protest in Arizona in recent history.[61]

5. The Impact on Schools

Many school administrators and teachers in Arizona's schools complained about the negative impact that Proposition 203 would have on their ability to run successful ELL programs. For example, in 2000 Martha Carrasco, bilingual and ELL coordinator at Frye Elementary School in Chandler, said that Proposition 203 would "dismantle the school's successful bilingual program and leave Spanish speaking children at an academic disadvantage." At the time, nearly 300 students were enrolled in Frye's bilingual program and according to Principal Paul Ritz, within four years most would be "transferred to regular classes proficient in reading, writing and speaking English." According to Ms. Carrasco, "We need to have the freedom to say this child is not ready to be put in a regular class with no support, and we won't have the opportunity to do that any more. Immersion is very limited and won't work for all kids."[62]

VIII: *Flores v. Arizona* (2005) – the Failure to Teach ELL Students

A. Background on the *Flores* Litigation

Federal courts have found that the state of Arizona has repeatedly failed to provide adequate funding to teach non-English speaking students how to speak English proficiently enough to get an education. The lack of funding has resulted in high dropout rates and depressed voter registration and turnout that are exacerbated by inadequate language assistance. The problem has significantly worsened with the passage of Proposition 203 and the burgeoning number of LEP students in Arizona's public schools.

Spanish-speaking plaintiffs have spent more than thirteen years battling with the State over its violations of federal law. In December 2005, the lengthy battle came to an end in the lower court, resulting in fines levied against the state of $500,000 per day that are being placed directly into programs to teach limited-English proficient (LEP) students. The state's intransigence in

[61] Cart, Julie. "Tribal Languages Unintended Target in English-Only Drive." *Navajo Times*. 4 Nov. 2000.

[62] David Proffit. "Districts Fret Over Bilingual Ed Ban." *Arizona Republic* (Nov. 15, 2000).

complying with the federal court orders was pointedly noted by the court, observing that its ruling "came against a backdrop of state inaction, existing in 1992 when Plaintiffs filed the class action law suit and continuing through the duration of the case."[63]

On August 20, 1992, Miriam Flores filed a class action as a parent and on behalf of her child seeking declaratory relief against the state of Arizona for failing to provide LEP children with a program of instruction calculated to make them proficient in speaking, understanding, reading, and writing English, while enabling them to master the standard academic curriculum as required of all students. The case was brought under *Lau v. Nichols*,[64] in which the U.S. Supreme Court held that the failure to provide English instruction to students of Chinese descent who do not speak English denies them a meaningful opportunity to participate in public education. The plaintiffs further challenged the defendants' funding, administration and oversight of the public school system in districts enrolling predominantly low-income minority children because defendants allowed these schools to provide fewer educational benefits and opportunities than those available to students who attend predominantly Anglo-schools.[65]

The plaintiffs alleged that the state of Arizona and other defendants violated the Equal Education Act of 1974 (EEOA),[66] and the implementing regulations, (34 C.F.R. Part 100), for Title VI of the Civil Rights Act of 1964 (Title VI)[67]. Plaintiffs sought relief against all the defendants, except the state of Arizona, under 42 U.S.C. § 1983 which provides "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ..."

B. Judicial Findings of Widespread Violations of *Lau v. Nichols* (2000)

On January 24, 2000, U.S. District Judge Alfredo Marquez issued a declaratory judgment against the defendants following a bench trial. Judge Marquez concluded that the state's system of ELL programs that appropriated only $150 for each non-English speaking student was "arbitrary and

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[63] 160 F. Supp.2d 1043, 1044 (D. Ariz. 2000).

[64] 414 U.S. 563 (1974). Lau was cited extensively by Congress in adding the language assistance provisions to the Voting Rights Act in 1975.

[65] *Flores v. State of Arizona*, Case No. No. CIV. 92-596-TUC-ACM (D. Ariz.).

[66] The EEOA provides that "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by - (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703.

[67] Title VI provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

capricious."[68] The impact of the lack of funding was particularly hard on local school districts, which were asked to shoulder the burden despite the absence of a tax base to do so.[69]

The court held as a matter of law the state's minimum base level for funding *Lau* programs bore no relation to the actual funding needed to ensure that LEP students are achieving mastery of the State's specified "essential skills." The court ruled that the State's appropriation per LEP student was arbitrary and capricious because it was not reasonably calculated to effectively implement the *Lau* programs adopted by the Nogales Unified School District (NUSD), which have been approved by the State. The court cited the following *Lau* program deficiencies in support of its judgment:

- Too many students in a classroom.
- Not enough classrooms.
- Not enough qualified teachers, including teachers to teach ELL and bilingual teachers to teach content area studies.
- Not enough teacher aides.
- An inadequate tutoring program, and
- Insufficient teaching materials for both ELL classes and content area courses.

The court concluded that these "deficiencies are not the result of an inadequate model. The model was prescribed by the state and adopted by NUSD. The problem is the state's inadequate funding to support the model."[70] The court made this finding based on a 1987-88 cost study that showed it cost approximately $450.00 per LEP student – three times what the State actually budgeted – to provide *Lau* program instruction.[71]

C. Arizona's Intransigence in Remedying the Violations

At the time the court ruled, the state defendants questioned the reliability of their own 1987-88 cost study. Defendants attacked their study's credibility because it was so old, and the methodology for the study was not ascertainable, calling into question its integrity. Moreover, the study had never been updated. At trial, the defendants informed the court that the state legislature had established the English as a Second Language and Bilingual Education Study Committee to conduct a cost study to determine the amount of funding provided by the state and federal governments for English instruction of LEP students and the amount of money being spent by schools to educate those students. The court noted that this was the first step the state

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[68] *Flores v. State of Arizona*, 172 F.Supp.2d 1225 (D. Ariz. 2000).

[69] For example, Washington Elementary School District reported in 2001 that the state only paid approximately ten percent of the cost of its ESL program, or $159 out of the $1,527 per pupil annual cost. The District was forced to levy "desegregation taxes" to try to fill in as much of the funding gap as possible. Lori Baker. "Proposal Would Hike WESD Taxes by 37 Percent." *Arizona Republic* (July 7, 2001).

[70] *Flores v. State of Arizona*, 172 F.Supp.2d 1225 (D. Ariz. 2000).

[71] 160 F. Supp.2d 1043, 1044 (D. Ariz. 2000).

needed to take towards setting a minimum base funding level for *Lau* programs that would not be arbitrary and capricious.[72]

A state legislative committee was supposed to submit the report to the governor's office by December 1, 1999, to recommend the level of funding necessary to support the programs that it determined to be the most effective. The report was timely submitted, but it failed to contain the recommendations for funding levels. After the regular legislative session convened in January, 2000, the plaintiffs sent a letter to the legislature asking that the cost study be performed. A Senate bill was introduced that would have provided for the study, but it was defeated. Several amendments were also defeated which would have provided funding for the State Department of Education to perform the cost study. The legislative session ended April 18, 2000, with the state continuing its pattern of inaction.[73]

On June 6, 2000, Governor Jane Hull convened a special session on education to address a 0.6 percent funding increase in the state sales tax for specified educational programs. *Lau* programs were removed from the list of permissible items to be funded by the state sales tax. Again, the legislature rejected an amendment that required the state to conduct the cost study of *Lau* programs. On June 30, 2000, Governor Hull signed the bill providing for the increase in state sales tax to finance education. Again, the state failed to take any action to fund *Lau* programs in Arizona at a level reasonably calculated to make LEP students proficient in speaking, understanding, reading, and writing English. The court found that "contrary to the information provided to this Court in January of 2000, the State has not even taken the first step of conducting the cost study."[74]

On October 12, 2000, the federal court granted post-judgment relief to the plaintiffs to address Arizona's failure to comply with the January 2000 judgment. In doing so, the court rejected the state's argument for more delay:

> There is no reason to wait to address [the] cost of the deficiencies identified by the Court. The cost implications of those deficiencies have not changed as a result of the Consent Order. The Consent Order did not change the models for providing bilingual and ELL instruction at all. Instead, the Consent Order prescribes implementation procedures for those models.... While there may be additional cost implications associated with the Consent Order, they are most assuredly modest compared to the structural funding problems identified by the Court.[75]

The court also rejected the state's argument to await development of a "new" English immersion model after the passage of Proposition 203 because "there are costs which are common to all programs of instruction for LEP students."[76] The court found that "unless a realistic cost

[72] Ibid.

[73] Ibid.

[74] Ibid.

[75] 160 F. Supp.2d at 1046-47.

[76] 160 F. Supp.2d at 1047.

assessment is prepared and available this legislative session, which begins January 8, 2001, Plaintiffs will miss the biannual budget process and will have to wait until 2003 for *Lau* programs to be funded at a level that is not arbitrary and capricious."[77] The court concluded that "against the egregious backdrop of state agency and judicial inactivity .... without judicial action, the federal law violations as set out in this Court's Order of January 24, 2000, will continue for at least another three years."[78]

On January 11, 2001, members of Arizona's Senate released a report estimating that it would cost an additional $170 million per year to meet the requirements of the *Flores* decision. At the time, only $20 million was budgeted for ELL programs in Arizona's public schools. According to one report, "Arizona spends about $150 on every student who is classified as an 'English learner.' The study says about $1,500 per student would fulfill the judge's ruling."[79]

In December of 2001, the legislature passed House Bill 2010. This bill was to be an interim measure that would allow for the study to be completed and for the legislature to have time to pass the necessary legislation to comply with the Court's order. Ultimately, with the court's consent, the legislature gave itself nearly three years to accomplish this process.

D. Post-Judgment Order Requiring Arizona to Adequately Fund ELL Programs (Jan. 2005)

In January 2005, the plaintiffs approached the court (now presided over by U.S. District Judge Raner Collins) to complain that the study had yet to be completed and that they believed more than enough time had passed for the legislature to complete its obligation.

On January 28, 2005, the court gave the state until the close of the 2005 legislative session to comply with the court's order and essentially fulfill its promise to set the appropriate funding for ELL programs. Against that backdrop, the court gave the legislature and the state one last chance to comply with Judge Marquez's February 2000 order before applying sanctions. The legislature passed HB 2718 at the end of the 2005 session, which would have added $13.5 million to the $80 million that the state currently spends a year on English-learner programs. However, Governor Janet Napolitano vetoed it because she believed it was inadequate to comply with the court's order and was far less than the $1,200 to $2,500 annual cost per student recommended by a court-ordered cost study of *Lau* compliance.[80]

E. Competing Studies of What is Required to Adequately Fund Arizona's ELL Programs

The parties and amici in the *Flores* litigation have offered several competing studies of how much funding is required to bring Arizona into compliance with Title VI and *Lau v. Nichols*.

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[77] Ibid.

[78] Ibid.

[79] Chip Scutari. "Bilingual Spending Falls Short, Court Order Puts State in a Jam." *Arizona Republic* (Jan. 11, 2001).

[80] *Flores v. State of Arizona*, 2005 WL 3455102, at *1 (D. Ariz. Dec. 15, 2005).

Although the studies reported different amounts for what the authors believed was necessary to satisfy the *Flores* order, each of the studies agreed on the bottom line: Arizona's ELL programs are significantly underfunded.

The Arizona Legislative Council, a statutory committee of Arizona's State Legislature, contracted with the National Conference of State Legislature's (NCSL) National Center on Education Finance to estimate the additional cost of educating ELL students. The NCSL study analyzed data from fourteen school districts and charter schools, looking at student instruction costs (such as teacher and aide salaries and benefits), the costs of administering ELL programs and student assessments, and staff development. As a result of its analysis, the NCSL concluded that the average additional annual cost for an effective ELL program in Arizona was $670 per ELL student. Thus, according to the state legislature's own study, Arizona needed to spend approximately four and one-half times the $150 per ELL student in 2001, and nearly twice the currently budgeted $360 per ELL student.[81] The NCSL study proposes funding significantly less than what the Arizona state Senate previously found in 2001, when it estimated an annual cost of $170 million (compared to the existing $20 million) was needed to comply with *Flores*, at a time that the education costs were lower.

Two professional panels disagreed with the NCSL's findings and the state's proposal. A panel of ELL experts from Arizona recommended spending that based on grade level, ranging from annual costs of $1,785 per ELL student in K-2, to $1,447 in grades 3012. The ELL experts proposed the differential in funding levels because they believed that earlier investment would result in greater proficiency and lower costs later on. The panels further found that the ELL programs could be improved by establishing clearer oversight and accountability, placing ELL specialists in schools to work with staff, and providing native language support programs in schools with large ELL populations.

National experts examining the issue have determined that the appropriate annual per student costs range from $1,026 for lower-need, high school ELLs, to $2,571 for high-need, elementary school ELLs. The panel based its conclusions on a combination of proficiency, socioeconomic status, and age. The panel further recommended that Arizona provide adequate funding and adopt quality ELL curricula and train administrators, among other recommendations.

The plan from the state Legislature proposes ELL-per student funding of $432, far short of the $670 per student proposed by its own NCSL report. Governor Napolitano has said that she wants an increase to $1,289 per ELL student.[82]

F. Arizona Cited for Contempt and Fined Minimum of $500,000 Per Day (Dec. 2005)

Despite the federal court order, the state of Arizona still failed to comply. On December 15, 2005 – over five years after the court granted post-judgment relief and over thirteen years after

[81] National Conference of State Legislatures, "Arizona English Language Learner Cost Study" (Feb. 2005).

[82] *See* ACCESS, Project of the Campaign for Educational Equity, Teachers College, Columbia University (visited Mar. 11, 2006), at http://www.schoolfunding.info/news/litigation/2-28-06azellcoststudy.php3.

the action was filed – Judge Collins cited the defendants for contempt. In doing so, Judge Collins observed that "thousands of children who have now been impacted by the State's continued inadequate funding of ELL programs had yet to begin school when Plaintiffs filed this case."[83] The court strongly criticized Arizona's intransigence:

> The Court can only imagine how many students have started school since Judge Marquez entered the Order in February 2000, declaring these programs were inadequately funded in an arbitrary and capricious manner that violates ELL students' rights under the EEOA. How many students may have stopped school, by dropping out or failing because of foot-dragging by the State and its failure to comply with the original Order and compliance directives such as the Order issued on January 28, 2005? Plaintiffs are no longer inclined to depend on the good faith of the Defendants or to have faith that without some extraordinary pressure, the State will ever comply with the mandates of the respective Orders issued by this Court.[84]

The court granted the plaintiffs' request to enjoin the state from requiring that ELL students be subject to passing the state-mandated AIMS test as a graduation requirement "until such time as ELL student's education have been funded at an appropriate level and have had appropriate time to benefit from such funding." Judge Collins reasoned, "The State has failed to comply with the Court's judgment for almost six years by under-funding ELL programs, which would provide ELL students with the necessary tools to pass the AIMS test. The State's offering tutoring outside the classroom and other things to all students for the purpose of passing the AIMS test does not remedy the fact that the under-funded ELL programs deprive ELL students of an equal opportunity to pass the AIMS test in the first instance."[85]

In addition, the court held that if the state of Arizona did not comply with its January 28, 2005 order within 15 calendar days after the beginning of the 2006 legislative session, it would impose a fine of $500,000 per day for the first thirty days, $1 million per day for the next thirty days, followed by fines of $1.5 million per day until the end of the legislative session, and $2 million per day if appropriate funding was not allocated during the 2006 legislative session.[86]

Despite the state's lengthy history of noncompliance with the decisions of two federal judges in the *Flores* case, State Superintendent of Schools Tom Horne expressed his intent to continue to fight the decision. In a press release issued on December 16, 2005, the day after the state was cited for contempt, Superintendent Horne stated, "I am asking the Attorney General to file an immediate appeal to the Ninth Circuit, with a request that the district judge's order not take effect until the Ninth Circuit has a chance to review the important public policy issues presented." Horne cited many reasons for wanting to continue to delay providing adequate

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[83] 2005 WL 3455102, at *2.

[84] Ibid.

[85] 2005 WL 3455102, at *8.

[86] Ibid.

funding for Arizona's ELL programs, including that "this problem was originally created, in part, by the negligence of the federal government in guarding our borders."[87]

Arizona lawmakers passed a bill that adds $14 million for one year into programs for Arizona's 150,000 ELL students. Furthermore, the funding would last for only one year. New requests could be rejected by Superintendent of Public Instruction Tom Horne and lawmakers if the schools were not spending enough of their federal education and desegregation money on ELL programs. Governor Napolitano vetoed the bill because she believed it was necessary to add $185 million a year to the programs and make an ongoing commitment to compliance with the court order.[88]

On January 24, 2006, Arizona failed to meet the court deadline, accumulating $20 million in fines though the end of February 2006.[89] Governor Napolitano currently has new draft legislation that retains the core of her previous proposals to increase the state's current per-student funding for ELL programs. In the interim period, at the request of Arizona's Attorney General, Judge Collins has directed that all of the fines paid under the contempt order be placed directly in the State's ELL programs.

G. The Impact of Arizona's Inadequate ELL and ESL Funding

1. Low Test Scores by Language Minorities

The inadequate public education provided to Arizona's language minorities is reflected in the low test scores that they receive on national and state standardized tests. Arizona uses what it calls the AIMS test, which ranks students in four categories:

- "Exceeds the standard": Academic performance goes substantially beyond the state's goals.
- "Meets the standard": Solid academic performance with challenging subject matter. Students at this level are ready to begin working on material required for the next grade.
- "Approaches the standard": Partial understanding of subject matter. Students demonstrate competency in required skills but do not demonstrate full understanding.
- "Falls far below the standard": Insufficient evidence of skills needed to meet standards. Students at this level have serious gaps in knowledge and

[87] Arizona Department of Education. "State Superintendent of Schools Horne Issues Statement in Court Order of Dec. 15." 2005 WL 20506849 (Dec. 16, 2005).

[88] Scutari, Chip, and Robbie Sherwood. "English Bill Beats Deadline." *Arizona Republic* 24 Jan. 2006, sec. A: 1-4.

[89] *See* ACCESS, Project of the Campaign for Educational Equity, Teachers College, Columbia University (visited Mar. 11, 2006), at http://www.schoolfunding.info/news/litigation/2-28-06azellcoststudy.php3.

> probably will require more work on skills needed at the current grade level.[90]

Students must pass the AIMS test to graduate from high school in Arizona.

A 2005 study by Arizona's three public universities demonstrated that language minorities, particularly Hispanic and American Indian students, lagged well behind non-Hispanic white students in every category:

- 83 percent of 3,254 juniors who qualify as English learners failed key portions of the AIMS test such as reading and writing. Approximately the same percentage of 5,000 English-learner sophomores also failed the test.
- While about half of non-Hispanic whites have passed all of the AIMS sections, more than three-quarters of Latinos, African Americans, and American Indians have not.
- Sixty-five percent of non-Hispanic whites passed the math section, twice the percentage of African-American and Hispanic students.
- Only about 25 percent of American Indian students have passed the math section.
- 13,279 students continued to score in the lowest of four possible categories and 70 percent of those students were minorities.
- In fifth-grade reading, 70 percent of non-Hispanic white students met or exceeded the AIMS standard, compared with only 42 percent of Hispanic students.
- In eighth-grade math, 29 percent of non-Hispanic white students met or exceeded the AIMS standard, compared with 10 percent of Hispanic students.

As a result of the *Flores* decision, 1437 Hispanic students who are LEP have been exempted from the requirement that they pass the AIMs test.[91] As board member Cecilia Owen, Coconino County Superintendent of Schools observed, "It's completely unacceptable to me to disenfranchise this percentage of the population."[92]

Language minorities have not fared any better on national tests. According to the 2005 results of the National Assessment of Educational Progress test administered to Arizona's students,

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[90] "Elementary, Junior High School Results by District." *Tucson Citizen* (July 13, 2005).

[91] Mel Melendez. "Still Unequal: Socioeconomics Fuel Gaps in County's Schools." *Arizona Republic* (May 16, 2004); Pat Kossan, "Minorities Score Low in AIMS." *Arizona Republic* (April 22, 2005); Robert Robb. "AIMS' Moving Target Gives Arizona an F." *Arizona Republic* (May 1, 2005); Robbie Sherwood. "Federal Court asked to waive AIMS Test for English Learners." *Arizona Republic* (July 26, 2005); Pat Kossan, "18,000 Down to AIMS Wire." *Arizona Republic* (December 21, 2005).

[92] Pat Kossan, "Minorities Score Low in AIMS." *Arizona Republic* (April 22, 2005).

Arizona's scores were far below the national average of students who scored below the "basic" grade level:

- 48 percent of Arizona's students scored below "basic" in fourth grade reading, compared to the national average of 38 percent.
- 30 percent of Arizona's students scored below "basic" in fourth grade math, compared to the national average of 21 percent.
- 35 percent of Arizona's students scored below "basic" in eighth grade reading, compared to the national average of 29 percent.
- 36 percent of Arizona's students scored below "basic" in eighth grade math, compared to the national average of 32 percent.

According to one commentator, "The test results were grim for poor and minority children. More than 60 percent of Arizona's poor, African-American, and Latino kids in the fourth grade scored below grade level in reading, double the percent of White and wealthier kids falling behind."[93]

2. Waiting Lists for ESL Programs

The absence of adequate ESL programs for adults exacerbates the lack of ESL education that children are receiving in Arizona's schools. For example, it was reported in 2000 that 16,000 adults completed Rio Salado Community College's ESL classes in Maricopa County in a single year as part of the college's basic education program in 1999. Rio Salado is the largest provider of ESL classes in the Phoenix area. Despite the large number of adults completing the ESL program, Rio Salado has been unable to keep up with demand. According to Kelly Price, who coordinates the college's Adult Basic Education program, "The school could add 20 more classes at any given time and still not meet the demand."[94]

IX. Proposition 200

A. Background

The latest voting controversy in Arizona has arisen from a ballot-approved initiative in the state-wide election of 2004. The bill is known as the Arizona Taxpayer and Citizen Protection Act, and is more popularly referred to by its proposition number, Proposition 200. Its supporters say that it exists to prevent undocumented immigrants from voting, or taking advantage of other benefits of United States citizenships. Its detractors say that it prevents many legal citizens from voting, or taking advantage of those benefits. Two years after its passage, debate over its impact on Arizona's racial and ethnic minority voting-age citizens continues.

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[93] Pat Kossan. "Arizona Students Lag on National Test." *Arizona Republic* (October 20, 2005).

[94] O Ricardo Pimentel. "Who are these Mexicans who won't Learn English?" *Arizona Republic* (Oct. 28, 2000).

B. Court Challenges and Section 5 Preclearance

Concerned about the changes to voting and concerned about Arizona's jurisdiction in regulating undocumented immigrants, Arizona's governor, Janet Napolitano, decided to wait for Section 5 preclearance before signing the voter-approved measures into law.

On November 30, U.S. District Court Judge David C. Bury signed an order prohibiting the implementation of the provisions in Proposition 200 that apply to public services, stating that further investigation into whether or not the new law would illegally contradict federal regulations was necessary. He did, however, rule that Napolitano could sign into law the portions of the Proposition dealing with changes on the requirements to register to vote.

The law requires that proof of citizenship be provided in order to register to vote and that identification be shown at the polls in order to vote. According to the Maricopa County Recorder's Office, acceptable forms of identification include: an Arizona driver's license number (or copy of the license) or non-operating identification license number (or copy of the identification license), issued after October, 1, 1996; a driver's license or non-operating identification license from another state that identifies United States Citizenship; a legible photocopy of a birth certificate with the name of the applicant that verifies United States Citizenship; a legible photocopy of the pertinent pages of the United States passport; United States naturalization certificate number or the presentation of the original certificate of naturalization. (If only the number is provided, the County Recorder must verify the number with INS prior to adding the applicant to the voter rolls.); Bureau of Indian Affairs Card Number, Tribal Treaty Card Number or Tribal Enrollment Number.

In January 2005, the Department of Justice precleared the proposed changes. Arizona Secretary of State Jan Brewer then moved forward to implement the changes necessary for registration to meet the new requirements.

Resistance to Proposition 200 continued throughout the year. In one attempt to stop Proposition 200, a group of state employees sought to prevent the law from going into effect in *Friendly House v. Napolitano*. Initially denied by the District Court, the group continued to the Ninth Circuit Court of Appeals, where the court upheld the District Court's decision in the summer of 2005.[95] The courts both held that the employees did not have sufficient standing as persons who would be adversely affected by the laws, as they could offer no example of how they would personally be potentially injured by it.

C. Community Responses

The response among Hispanic community organizations has been varied. Some argue that Hispanic voters supported the Proposition, even though the majority of Hispanic rights groups voiced strong opposition to the effect they thought it would have on Hispanic Americans. They claim that the legislation will prevent legal citizens from voting, and legal residents from

[95] *Friendly House v. Napolitano*, 419 F.3d 930 (9th Cir. 2005).

receiving benefits. Community groups offering resistance included the League of United Latin American Citizens (LULAC) and the Mexican American Legal Defense and Educational Fund.

One way in which the Latino community attempted to derail Proposition 200 was through the use of their economic power. Several groups called for boycotts across the Phoenix area, hoping that by flexing their economic muscle they would be able to convince local business owners to pull support of the legislation. While the boycotts had varying levels of economic impact, for the most part, they did little to convince the business owners that supporting Proposition 200 was an unwise decision.

In a different move, one group chose to provide a toll free number to Hispanic voters who may have difficulties understanding the new requirements of the Proposition. The group, Unidos Contra 200, provided the number with an answering service. Callers could ask any question they might have about the new legislation. Messages were then returned, and questions answered, by volunteers. Unidos Contra 200 is not necessarily operating in opposition to the law, but is trying to educate as many Hispanic residents of Arizona as possible about what Proposition 200 will mean for them. Representing the broad-based concern about the legislation among Hispanic community leaders, Unidos Contra 200 was founded by members of the Phoenix Catholic Diocese, the Arizona Bankers Association, the superintendent of the Tolleson Union High School District, Value Options, the Phoenix Police Department, and the First New Life Baptist Church.

The City Council of Phoenix has declared that the city will pay to defend any city employee charged for failing to report an undocumented migrant; other cities may follow suit.[96]

D. Impact of Proposition 200

Between the time the new voting requirements went into effect and November of 2005, the results of Proposition 200 on voter registration were severe. More than 12,000 applications were rejected because of the new requirements in Pima and Maricopa counties alone. In addition, in the period from April until August in Pima County, only 5,872 new voters even attempted to register (1,492 were denied), compared to 2004, when more than 30,000 voters were successfully registered. Had the laws been in effect in 2004, more than 10,000 of those new voters would have been rejected.

Of the voter registration applications rejected in Pima Country, none were because the applicant was a non-citizen. In Maricopa County, county officials identified and charged 10 non-citizens attempting to register to vote, 3 of whom cast effective ballots in the 2004 election. According to several reports, the non-citizens were incorrectly told by individuals paid to circulate petitions that they could register to vote because they were in the final stages of becoming naturalized citizens.

Proponents of Proposition 200 contend that one of the purposes of the bill is to prevent undocumented immigrants from voting. The lack of results from the new law may reflect the

[96] http://en.wikipedia.org/wiki/Arizona_Proposition_200_%282004%29

already existing misperceptions about the number of undocumented residents of Arizona, as shown in studies by the Behavior Research Center. In September of 2005, the Center reported that a poll with a five percent margin of error showed that adults in Maricopa County, on average, think that 39 percent of Hispanic people in Arizona are undocumented immigrants. Census data reports that only 24 percent of Hispanic people in Arizona are non-citizens, which includes legal resident aliens who have not yet attained citizenship.

E. The Future of Proposition 200

With the first statewide election approaching in 2006, voting outreach officials, as well as potential new voters, face many new obstacles. The new current address requirement for identification presents many unique problems for American Indians, some of whom may not have traditional mailing addresses. The new requirements are also expected to be a problem for college-age voters, especially those who may be living in Arizona from out-of-state. Students may not have long-term addresses, and may not have access to other forms such as birth certificates, which are often the parent's responsibility to keep up with. Married couples may face barriers as well, as often the forms of proof-of-residence may only have one of the spouses name on it. Elderly voters, especially those who may be living in assisted living, may also lack the necessary identification.

The biggest problem for election officials may come after election days. Voters who show up with improper identification (a driver's license with an old address, for example) or no license at all will vote provisionally. Each provisional ballot must be verified and counted by hand in the days after the election. The new requirements in manpower and training will be intense.

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X. Electoral Participation and Representation in Arizona

A. Hispanic and American Indian Voter Registration and Turnout

As a result of its large Hispanic and American Indian citizen voting age populations, Arizona continues to have one of the lowest voter turnout rates in the United States. According to a recent study, Arizona ranks 47th out of the 50 states in voter turnout.[97] The depressed voter registration and turnout has a negative impact on Latino and Indian voters in their representation at the state level. It also has a particularly detrimental effect on minority voters because of the number of ballot initiatives. According to the Morrison Institute, Arizona ranks fifth nationally in ballot initiatives at 150, trailing only Oregon, California, Colorado, and North Dakota.[98] Many of these ballot measures, such as Proposition 203's ban on bilingual education (see above) and Proposition 200's impact on minority voters through new registration and identification procedures (see above), have a particularly high impact on Hispanic and American Indian voters.

The turnout rate of Hispanics of voting age who turn out to vote substantially trails the turnout rate of non-Latinos. *See* Figure 10.1.

Figure 10.1: Hispanic Registration & Turnout in Arizona Between 1992 & 2002

Year	Hispanic Turnout of Reg. Voters %	Total Turnout of Reg. Voters %
1992	79.2%	91.8%
1994	69.7%	74.0%
1996	70.9%	80.7%
1998	58.3%	66.0%
2000	81.3%	87.5%
2002	59.8%	72.4%

Source: U.S. Census Bureau, Current Population Reports: Voting and Registration in the Election of November 1992, 1994, 1996, 1998, 2000, and 2002.

American Indian voter registration and turnout in Arizona has also increased as a result of the Voting Rights Act, although in most cases it is still far below the statewide average. In the two most recent presidential elections, in which turnout is historically the highest, American Indians continued to trail the statewide average by approximately 23 percent. At the same time, however, some Indian tribes continue to see record numbers of voters turning out. In 2004, the Ft. McDowell tribe matched the statewide turnout average of 77 percent. The Colorado River and Salt River tribes had all-time highs of over 60 percent of registered voters turning out, and most of the remaining tribes had turnout over 50 percent. *See* Figure 10.2. Reauthorization of

[97] See Arizona State University, Morrison Institute for Public Policy in the School of Public Affairs/College of Public Programs, How Arizona Compares: Real Numbers and Hot Topics, Government 46 (2005).

[98] Ibid. at 47-48.

the Voting Rights Act is necessary to lower the disparity between American Indians and non-Indians in voter registration and turnout.

Figure 10.2: Increases in American Indian Registration & Turnout in Arizona Between 2000 & 2004

	2000 Voter Reg.	2000 Voter Turnout	2000 Turnout %	2004 Voter Reg.	2004 Voter Turnout	2004 Turnout %
Navajo	56,326	27,736	49.24%	63,618	34,213	53.79%
Hopi	1,851	555	29.99%	2,075	905	43.63%
Tohono O'odham	3,964	2,236	56.43%	4,739	2,806	59.24%
Gila River	2,836	964	34.00%	3,166	1,504	47.51%
White Mountain	4,243	1,876	44.22%	4,865	2,442	50.20%
San Carlos	1,418	721	50.86%	1,735	1,012	58.34%
Colorado River	1,414	757	53.56%	2,187	1,370	62.66%
Hualapai	365	184	50.43%	420	233	55.49%
Cocopah	2,089	1,010	48.35%	2,647	1,457	55.07%
Ft. McDowell	196	97	49.50%	355	274	77.22%
Havasupai	131	59	45.05%	102	57	55.90%
Salt River	1,763	939	53.28%	2,444	1,475	60.39%
Totals	**76,596**	**37,133**	**48.48%**	**88,350**	**47,748**	**54.04%**
Statewide Totals	**2.17M**	**1.56M**	**71.79%**	**2.64M**	**2.04M**	**77.16%**

Source: First American Education Project, Native Vote 2004: A National Survey and Analysis of Efforts to Increase the Native Vote in 2004 and the Results Achieved 17-18 (2005).

As a result of language assistance and outreach efforts pursuant to Section 203, turnout in Navajo precincts in Apache County, Arizona increased 26 percent in four years. In 2004, 17,955 registered voters cast ballots in the 33 Navajo precincts, compared to 14,277 voters in 2000.[99]

This follows the trend of increasing registration and turnout since Arizona has been covered by Section 4(f)(4) of the Voting Rights Act. Voter turnout in precincts on seven Arizona Indian reservations rose from 11,789 in 1972 to 15,982 in 1980, with voter registration increasing by 87

[99] Testimony of Penny Pew, Election Director of Apache County, Arizona, before the Subcomm. on the Const. of the House Judiciary Committee (Nov. 15, 2005).

percent in Navajo County, Arizona, and 165 percent in Coconino County, Arizona. Turnout among American Indians in Navajo County increased by 120 percent between 1972 and 1990, while Apache County, Arizona experienced an 88 percent increase during the same period. American Indians in New Mexico and Utah experienced similar increases in voter registration and turnout.[100]

B. Number of Hispanic and American Indian Elected Officials

The Voting Rights Act has had a substantial impact on the number of Hispanic and American Indian candidates elected to public office in Arizona. The impact has come in many forms. Section 2 of the Act has removed structural barriers to participation in places such as Apache County and other areas. Section 5 of the Act also has eliminated barriers and prevented their implementation. Section 203 has dramatically increased voter registration and turnout of language minorities by making oral and written language assistance available to non-English speaking voting age citizens. The federal examiner and observer provisions have allowed the U.S. Department of Justice to monitor state and local compliance in Arizona.

American Indian representation has been greatest at the local level, as a direct result of the litigation in northern counties including Apache, Coconino, and Navajo Counties. On the other hand, American Indian representation in the state legislature has declined in the last five years as a result of statewide redistricting changes following the 2000 Census and demographic changes because of the large growth of non-Indian population moving into Arizona. The National Conference of State Legislatures reported that there were five American Indian state legislators in 2001, dropping to three in 2003 and two in 2006. Both of the American Indians in Arizona's legislature, Senator Albert Hale and Representative Albert Tom, are Navajo.[101]

American Indians also have had a substantial impact on recent elections in Arizona. In 2002, American Indian turnout was credited with the passage of Proposition 202, an Indian gaming initiative supported by 17 of the State's tribes, which passed by 20,836 votes (about two percent of all of the ballots cast).[102] In that same election, American Indians were the difference in a close gubernatorial race decided by only 11,819 votes, less than one percent of all those cast.[103]

The Act's impact is most apparent in the number of Hispanics elected to every level of public office in Arizona. Between 1973 and 1984, Latino representation in Arizona increased by 154 percent, growing from 95 to 184 elected officials.[104] That trend has continued in the past twenty

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[100] H. Rep. No. 102-655 at 6-7, reprinted in 1992 U.S.C.C.A.N. 770-71; S. Rep. No. 102-315 at 12; S. 2236 Hearings, 102d Cong., 2d Sess., S. Hrg. 102-1066, at 181-89 (1992) (statement of Navajo Nation Vice-President Marshall Plummer).

[101] National Conference of State Legislatures, at http://www.ncsl.org/programs/statetribe/2006triblg.htm.

[102] Russ Lehrman and the First American Education Project, *The Emerging Role of American Indians in the American Electoral Process* 14-15 (Jan. 2003).

[103] First American Education Project, Native Vote 2004: A National Survey and Analysis of Efforts to Increase the Native Vote in 2004 and the Results Achieved 13, 19 (2005).

[104] National Association of Latino Elected Officials (NALEO) Educational Fund, National Roster of Hispanic Elected Officials xiii (1985).

years. Between 1985 and 2005, the number of Latino elected officials in Arizona increased by 62 percent, from 230 to 373.

Latinos are elected at every level of office in Arizona, except for statewide office where elections are at-large among all voters in the State. In 1974, Raul Castro, born to indigent parents in Cananea, Sonora, Mexico, became Arizona's first Mexican-American governor.[105] Arizona has added two Hispanic representatives to its congressional delegation, the Honorable Raul Grivalja (elected in 2003) and the Honorable Ed Pastor (elected in 1991). The greatest increases have occurred at the local level, particularly on county commissions and local school boards where Latinos have more than doubled their representation in the past twenty years. *See* Figure 10.3.

Figure 10.3: Increases in Latinos Elected to Office in Arizona Between 1985 and 2005.

Level of Office	1985 Total	2005 Total	Change	% Change
U.S. Representatives	0	2	+ 2	N/A
State Officials	0	0	0	0%
State Senators	6	5	- 1	- 17%
State Representatives	6	11	+ 5	+ 83%
County Officials	9	19	+ 10	+ 111%
Municipal Officials	104	122	+ 18	+ 17%
Judicial/Law Enforcement	29	44	+ 15	+ 52%
Education/School Board	76	159	+ 83	+ 109%
Special District Officials	0	11	+ 11	N/A
Totals	230	373	+ 143	+ 62%

Source: National Association of Latino Elected Officials (NALEO) Educational Fund, 1985 National Roster of Hispanic Elected Officials and 2005 National Roster of Hispanic Elected Officials.

[105] http://www.azcentral.com/culturesaz/hispanic/HISTcastro.html

Appendix A:

Project Co-Directors

Dr. James Thomas Tucker (Chandler, Arizona)

Dr. Tucker is an Adjunct Professor at the Barrett Honors College at Arizona State University, and co-director of the study of minority language assistance practices in public elections. Dr. Tucker is a Shareholder with the Phoenix law firm of Ogletree Deakins, P.C. He formerly served as a senior trial attorney with the Voting Section of the Civil Rights Division at the United States Department of Justice in Washington, D.C. He has authored several articles on the Voting Rights Act, including a forthcoming piece on the language assistance provisions of the VRA. Dr. Tucker received his S.J.D. and LL.M. from the University of Pennsylvania, his J.D. from the University of Florida, his M.P.A. from the University of Oklahoma, and his B.A. in History from Arizona State University's Barrett Honors College.

Dr. Rodolfo Espino (Phoenix, Arizona)

Dr. Rodolfo Espino is an Assistant Professor in the Department of Political Science at Arizona State University, and is co-director of the study of minority language assistance practices in public elections. Dr. Espino received his B.A from Luther College and his M.A. and Ph.D. from the University of Wisconsin-Madison. Dr. Espino's primary research and teaching interests are in the fields of American politics and political methodology. Dr. Espino is presently engaged in a number of research projects, including an examination of the effects of residency patterns on public policy attitudes, the determinants of instability in congressional roll call voting, translation effects in surveys of Latinos in the United States, and midpoint inflation bias in public opinion surveys.

Student Researchers at the Barrett Honors College

Tara Brite (Phoenix, Arizona)

Ms. Brite is a junior in the Barrett Honors College majoring in print journalism with a minor in Italian. She is currently serving her third semester working at the ASU student newspaper *The State Press*. After graduation, Ms. Brite plans to either participate in Teach For America or work as a reporter for a daily metropolitan newspaper.

Shannon Conley (Wyandotte, Michigan)

Ms. Conley is a Junior in the Barrett Honors College at Arizona State University, with a double major in Justice and Social Inquiry and Political Science, in addition to a certificate in Philosophy, Politics, and Law. She is currently a Political Science Junior Fellow. Ms. Conley is a Pat Tillman Scholar and a recipient of the Sun Devil scholarship. After graduation she plans to attend law school.

Ben Horowitz (Jacksonville, Florida)

Mr. Horowitz is a Junior in the Barrett Honors College at Arizona State University, majoring in Media Analysis and Criticism with a minor in Political Science. Mr. Horowitz is a National Merit Scholar, and is a recipient of the Freedom Forum Scholarship. In addition to being an active writer for the State Press, Arizona State's student newspaper, he has received a Swarthout Award for short fiction. Mr. Horowitz is undecided about his post-graduation plans, but hopes it makes a positive impact somewhere.

Zak Walter (Neenah, Wisconsin)

Mr. Walter is a Senior in the Barrett Honors College at ASU, majoring in Secondary Education with a focus/minor in Political Science. He was awarded a National Merit Scholarship and the Herb Kohl Student Excellence Award, and serves as a Resident Advisor and soccer coach. Mr. Walter is undecided about his post-graduation plans.

Shon Zelman (Phoenix, Arizona)

Mr. Zelman is a Senior in the Barrett Honors College at Arizona State University, majoring in Political Science. Mr. Zelman is a recipient of the ASU Provost Scholarship and the ASU Parents Association First Generation Scholarship. After graduation, Mr. Zelman plans to participate in Teach For America and then attend law school.

Appendix B: Explanation of Census Data from July 2002 Section 203(c) Coverage Determinations

Figures 1.3 and 1.4 were compiled from sampled data used by the Census Bureau to make its July 26, 2002 determinations under Section 203 of the Voting Rights Act. According to the Voting Rights Output File Documentation, the determination data was created from sampled weights of data from the Census 2000 long forms (Summary Table Files 3 and 4). The file contains records for the entire United States, including all states and political subdivisions, which are defined as "counties for all states except for Connecticut, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, Vermont, and Wisconsin" where political subdivisions are minor civil divisions ("MCDs") or MCD equivalents. There are 62 records in the file, including one each for total population and Spanish/Hispanic/Latino, one for American Indian/Alaskan Native and 42 for American Indian/Alaskan Natives tribal groups, one for Asian and 16 for Asian groups.

The Census Bureau has suppressed data for jurisdictions indicated by an asterisk ("*") to avoid disclosure of specific persons. According to Census documentation, "[t]his means that data in a record are suppressed if the unweighted count of voting age citizens for a record is less than 50 and the weighted population count for the record is not 0 or the unweighted population count for the record is not 0." The Census Bureau rounded data that has not been suppressed. Section 203 determinations are based on data prior to rounding and prior to suppression.

"LEP Number (N)" refers to the number of voting age citizens in the identified language group who are limited-English proficient, or "LEP." A person is LEP if they speak English less than "very well."

"LEP Percent (P)" refers to the percentage of voting age citizens in the identified language group who are LEP.

"Illiteracy Rate" refers to the percent of voting age citizens in the identified language group who are LEP and illiterate. According to the Census Bureau, "voting age limited-English proficient illiteracy" refers to all voting age citizens who are limited-English proficient and who have completed less than fifth grade. Jurisdictions are covered if they meet one of the population triggers and have an illiteracy rate among voting age citizens in a single language minority group that exceeds the national illiteracy rate of all voting age citizens of 1.35 percent.

"Coverage basis" refers to the population trigger resulting in Section 203 coverage. There are four different bases for coverage: "N" if the number of LEP voting age citizens in a single language group is more than 10,000; "P" if the percentage of LEP voting age citizens in a single language group is more than five percent of all voting age citizens; "RW" if an Alaskan Native or American Indian reservation is wholly located within the jurisdiction and the percentage of LEP voting age citizens in a single language group is more than five percent of all voting age citizens on that reservation; and "RP" if an Alaskan Native or American Indian reservation is partially located within the jurisdiction and the percentage of LEP voting age citizens in a single language group is more than five percent of all voting age citizens on that reservation. A jurisdiction can be covered for a single language group by multiple population triggers.

Appendix C:

Language Assistance in Voting Survey (English Version)

Precinct # ____ Surveyor #_____ Voter #_____ Time _____ AM / PM

---

1. Were you able to vote today?
☐ Yes ☐ No

(If Yes**)**

a.: In what way did you vote today? (Read Choices**)**
- ☐ Paper ballot fed through machine
- ☐ Provisional ballot (paper ballot not fed through machine)
- ☐ Early or Mail-in Ballot

b.: Have you ever experienced any problems voting?
☐ Yes ☐ No

If yes, please explain_____

_____

_____

(If No**)**

c.: Why were you not able to vote?

_____

_____

i. Were you offered a provisional ballot?
☐ Yes ☐ No

---

2. How do you identify your ethnicity? (Read Choices**)**
- ☐ Hispanic or Latino
- ☐ White
- ☐ Black or African-American
- ☐ American Indian
- ☐ Asian-American or Pacific Islander
- ☐ Other _____

(If Hispanic or Latino**)**

a. What is your national origin? For example, Mexican, Guatemalan, etc.

_____

---

3. What year were you born? 19☐☐

4. Is this your first time voting in an election in the United States?
☐ Yes ☐ No

(If no**)**
a. How long have you been voting in the United States? _____ years

5. What is the primary language you speak at home?
☐ English
☐ Spanish
☐ Other _____

6. How would you describe your ability to speak English? (Read Choices**)**
☐ very well
☐ well
☐ not well
☐ cannot speak English

7. How would you describe your ability to read English? (Read Choices**)**
☐ very well
☐ well
☐ not well
☐ cannot speak English

(if respondent answered "very well" on #6 & #7, skip to question #9**)**

8. Do any members of your household age 18 or older speak English very well?
☐ Yes ☐ No

9. Which word(s) describe the poll workers at your polling site? (Read Choices**)**
☐ Very helpful
☐ Helpful
☐ Not helpful
☐ Rude/ threatening, please specify _____

_____

Comment #1: **(**Comment to Voter**): "We would now to like to ask you a series of questions to help us determine how the availability of language assistance for voters can be improved."**

---

10. Did you need language assistance in Spanish today to vote?

☐ Yes ☐ No

(if "no", skip to question #12**)**

---

11. Did you bring someone with you today to provide you with language assistance?

☐ Yes ☐ No

a. Was this person allowed to provide you with language assistance at every point in which you required it?

☐ Yes ☐ No (**if no**), please explain _____

_____

_____

---

12. In this election did election officials offer you language assistance in Spanish through any of the following: (check all those that apply**) (**Read Choices**)**

☐ Written materials mailed to your home
☐ Written materials available at the polls
☐ ballot
☐ A bilingual poll worker fluent in your native language
☐ audio recorded instructions

☐ other _____

---

13. How would you describe the quality of *ORAL* language assistance in your primary language provided to you by election officials: (Read Choices**)**

☐ excellent
☐ good
☐ poor
☐ no oral language assistance was provided

---

14. In what ways, if any, can *ORAL* language assistance for non-English speaking voters be improved?

_____

_____

_____

15. How would you describe the quality of *WRITTEN* language materials available to you in your primary language? (Read Choices**)**

- ☐ excellent
- ☐ good
- ☐ poor
- ☐ no written language assistance was provided

16. In what ways, if any, can *WRITTEN* language assistance for non-English speaking voters be improved?

_____

_____

_____

17. Have you ever been asked by the government to be a poll worker?

☐ Yes ☐ No

18. Have you ever provided language assistance to another voter?

☐ Yes ☐ No

(if "no", skip to Comment #2**)**

19. Have you ever experienced problems giving language assistance to another voter?

☐ Yes ☐ No

(If "yes"), please explain** _____

_____

Comment #2: **(**Comment to voter**):**
"To help us understand the needs of all voters we would like to ask you a few questions about your background. Again, all your answers are strictly confidential."

20. What was your method of transportation here today? (Read Choices**)**
- ☐ Drove yourself
- ☐ Someone else drove you here
- ☐ Bus
- ☐ Walk
- ☐ Other _____

21. Please select your highest level of education from this chart?
- ☐ less than fifth grade
- ☐ completed fifth grade
- ☐ high school
- ☐ some college
- ☐ college

22. What is your citizenship status? Were you....
- ☐ Born a U.S. citizen?
- ☐ Naturalized less than 3 years ago?
- ☐ Naturalized 3-10 years ago?
- ☐ Naturalized more than 10 years ago?

(If Naturalized**): a. When did you come to the United States?** 19☐☐

b. What is your country of origin? _____

(Comment to Voter**): "Thank you very much for participating in this survey. We greatly appreciate your help. If you have any questions or concerns about this survey you can contact us with the information on this sheet." (**Hand voter Contact Sheet**)**

Interviewer Notes

23. What is the gender of the voter?
☐ Male ☐ Female

24. Was anyone else accompanying the voter?
☐ Yes ☐ No
(If yes, check all that apply**)**
☐ Adult Male(s). How many? _____
☐ Adult Female(s). How many?_____
☐ Anyone under 18. How many?_____

a. Did (he/she/they) make any comments during the interview about the questions or the respondent's answers?
☐ Yes ☐ No

25. Respondent's overall level of cooperation was:
☐ Very Good
☐ Good
☐ Fair
☐ Poor

26. Respondent's overall level of understanding of the questions was:
☐ Very Good
☐ Good
☐ Fair
☐ Poor

27. Is there anything else you think we ought to know that would help us to understand or interpret the interview?