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Reauthorization of the Temporary Provisions of The Voting Rights Act

An Examination of the Act's Section 5 Preclearance Provision

U.S. Commission on Civil Rights
Washington, DC 20425

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- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
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Reauthorization of the Temporary Provisions of the Voting Rights Act

An Examination of the Act's Section 5 Preclearance Provision

A Briefing Before the United States Commission on Civil Rights
Washington, DC
October 7, 2005

Briefing Report

Letter of Transmittal

The President
The President of the Senate
The Speaker of the House

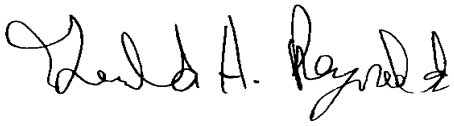
Sirs:

The United States Commission on Civil Rights transmits this briefing report, *Reauthorization of the Temporary Provisions of the Voting Rights Act*, pursuant to Public Law 103-419. The Commission's mission is to appraise federal laws and policies with respect to discrimination or denial of equal protection because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice. The Commission also is duty-bound to submit reports, findings, and recommendations to the President and Congress. Forty years ago, when Congress passed the Voting Rights Act of 1965, widespread discrimination, particularly in the South, denied African Americans the right to cast ballots and diluted the effectiveness of their votes. Federal, state, and local enforcement has stimulated progress since the law's inception, leading some to question whether the Act's "emergency" or temporary provisions remain necessary.

In the coming months, Congress will consider whether or not to extend or amend clauses set to expire in 2007, including Section 5, which requires covered jurisdictions to obtain Department of Justice or DC District Court approval prior to instituting any voting changes. The Commission convened a panel of experts on October 7, 2005 on Capitol Hill in Washington, DC, who along with the Commission, examined Section 5 and offered evidence relating to its continuing utility. This report summarizes the discussion and offers recommendations to Congress on how it might determine whether or not expiring sections should be renewed.

Among recommendations, the Commission urges Congress to (1) hold comprehensive hearings regarding constitutional, legal, and policy aspects of the Act's temporary provisions, including careful examination of predicates to the Act's enactment and progress that has since occurred in covered and non-covered jurisdictions; and (2) evaluate the congruence and proportionality of Section 5 to voting discrimination and develop a complete record of the occurrence of purposeful discrimination. In so doing, Congress should rely upon theories of discrimination that are likely to enjoy broad consensus and stand up to judicial scrutiny, rather than controversial arguments that may entail greater litigation risk. Moreover, Congress should consider amendments to Section 5 regarding the formula for determining coverage, the stringency of the standards by which states can be released from coverage, the range of state and local procedures subject to preclearance, and the length of the extension term.

For the Commissioners,



Gerald A. Reynolds
Chairman

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Briefing Overview and Summary

THE VOTING RIGHTS ACT OF 1965

The Voting Rights Act of 1965 (VRA) is generally recognized as one of the nation's most successful civil rights statutes. The act codified and implemented the 15th Amendment's permanent guarantee that no person, regardless of race or color, shall be denied the right to vote. Section 2 of the act, as originally enacted, stated, "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."[1] In 1982, Congress amended Section 2 to state that a violation of the act occurs when, based on the totality of circumstances, the political process is "not equally open to participation" by members of a protected class and they "have less opportunities than other members of the electorate to participate in the electoral process and to elect representatives of their choice."[2] The Attorney General, as well as private citizens, may bring lawsuits under Section 2 to enforce the act's provisions.

Section 4 banned the use of literacy tests and other devices in jurisdictions in which less than 50 percent of voting age citizens were registered on Nov. 1, 1964, or less than 50 percent of such citizens participated in the 1964 presidential elections.[3] The formula targeted southern states that used literacy tests and had low voter participation rates, the latter a sign that the former was being used fraudulently. The Section 4 statistical criteria also determined coverage for purposes of a number of other provisions of the act, including Section 5, which requires federal review of changes in voting procedures, and the sections that allow, with Attorney General certification, the dispatch of election examiners and observers.[4]

In 1965, Congress designed Section 5 as an emergency provision that required "covered" states—all of them in the Deep South, with its history of egregious 15th Amendment violations—to obtain federal approval (known as "preclearance") before implementing any changes in their voting procedures. Such changes came to include those ranging from moving a

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[1] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973-1973bb (2000)).

[2] 42 U.S.C. 1973b (2000). Section 2, as amended, states that, to determine whether a violation has occurred, the extent to which members of a protected class have been elected to office is one circumstance that may be considered. However, it also states that nothing in the section establishes the right to proportional representation.

[3] 42 U.S.C. § 1973b (2000). In 1965, the act banned tests and devices for a period of five years. In 1975, Congress made the ban permanent and nationwide. 42 U.S.C. § 1973aa (2000). Congress also amended the section 5 coverage formula in 1970 and 1975 to include voter participation rates as of Nov. 1, 1968 and 1972, respectively.

[4] Sections 6 through 9 of the act authorize the Attorney General to send federal registrars, or "examiners," to jurisdictions covered under section 4, and Election Day monitors, or "observers," to jurisdictions designated for examiners. Section 3 authorizes the court to appoint federal examiners to any jurisdiction against which the Attorney General has instituted a proceeding alleging violation of the 14th or 15th Amendments.

polling place to changing district lines after a decennial census.[5] Section 5 put the burden of proof on a covered state, county, or local government entity to demonstrate that a voting change did not have a racially discriminatory purpose or effect.[6] The Supreme Court later defined discriminatory "effect" as a change that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[7] Preclearance is obtained either through the Department of Justice or the United States District Court for the District of Columbia, although the latter is seldom used. As originally adopted, Section 5 was expected to expire in 1970.

In 1970 and 1975 Congress recognized the continuing need for Section 5 and extended its life first for five years and then for seven years.[8] Congress also broadened coverage to include members of language minority groups and altered the Section 4 trigger to include voter turnout in 1968 and 1972. The additional coverage formulas adopted in 1970 and 1975 extended Section 5 coverage to political subdivisions in a number of additional states, including Alaska, Arizona, and Texas in their entirety, and portions of California, Florida, Michigan, New York, North Carolina, and South Dakota.

In 1982 Congress extended Section 5 for an additional 25 years.[9] The 1982 amendments also included a new standard allowing jurisdictions to terminate (or bail out) from coverage under Section 4. Further, as noted above, Congress amended Section 2 to provide that a plaintiff in any jurisdiction in the nation could establish a violation without having to prove discriminatory purpose, thus eliminating the need for plaintiffs to plead their cases under the 14th Amendment.

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[5] 42 U.S.C. 1973c (2000). At present, all or part of 16 states are covered by Section 5. Originally, Section 5 applied to Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and most counties in North Carolina. Today, it applies to nine states in their entirety (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, although nine counties and independent cities in Virginia have bailed out since 1997) and one or more counties or townships in seven other states (California, Florida, New York, North Carolina, South Dakota, Michigan, and New Hampshire). *See* U.S. Department of Justice, Civil Rights Division, Voting Rights Section, "Section 5 Covered Jurisdictions," no date, <http://www.justice.gov/crt/voting/sec_sec5/covered.htm> (last accessed Sept. 13, 2005). Changes subject to Section 5 include, but are not limited to, those involving: the manner of voting; candidacy requirements and qualifications; the composition of the electorate that may vote for candidates for a given office; and the creation or abolition of an elective office. U.S. Department of Justice, Civil Rights Division, Voting Rights Section, "What Must Be Submitted Under Section 5," no date, <http://www.justice.gov/crt/voting/sec_5/types.htm> (last accessed Sept. 13, 2005).

[6] 42 U.S.C. § 1973c (2000).

[7] Beer v. United States, 425 U.S. 130, 141 (1976). The Court upheld the retrogression standard in *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997).

[8] Act as of June 1970, Pub. L. No. 91-285, §§ 2–5, 84 Stat. 314, 315 (codified as amended at 42 U.S.C. § 1973b (2000)); Act as of Aug. 16, 1975, Pub. L. No. 94-73, Title II, §§ 203, 206, 207, 89 Stat. 400, 401–402 (codified as amended at 42 U.S.C. §§ 1973(a), 1973b(f), 1973d, 1973k, 1973(c)(3) (2000)).

[9] Act as of June 29, 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973(a) (1996)).

Section 5, along with other temporary provisions of the act, requires reauthorization prior to 2007.[10]

The mission of the U.S. Commission on Civil Rights (Commission) includes the investigation of complaints alleging that citizens are being deprived of their right to vote by reason of race, color, religion, sex, age, disability, or national origin or by reason of fraudulent practices. The Commission also studies and collects information relating to denial of equal protection of the laws under the Constitution, and appraises federal laws and policies accordingly.

On October 7, 2005, the Commission convened a panel of voting rights experts on Capitol Hill in Washington, DC, namely: Edward Blum, visiting fellow at the American Enterprise Institute; Roger Clegg, Vice President and General Counsel of the Center for Equal Opportunity; Ronald K. Gaddie, Professor of Political Science at the University of Oklahoma; and Jon M. Greenbaum, Director of the Voting Rights Project at the Lawyers' Committee for Civil Rights Under Law and the National Commission on the Voting Rights Act.[11] The briefing's intent was to foster a greater understanding of the issues surrounding the question of a further extension of Section 5.

The following summarizes the discussion and presents statements from panelists and Commissioners. Based on the evidence in this record, the Commission offers a conclusion and recommendations on page 19. A transcript of the briefing is available on the Commission's Web site, www.usccr.gov, and by request from the Commission's Administrative Services and Clearinghouse Division, Robert S. Rankin Library, 624 Ninth Street, NW, Room 600, Washington, DC 20425, by phone at (202) 376-8128, or by email at publications@usccr.gov.

SUMMARY OF PANELISTS' STATEMENTS

Edward Blum

Mr. Blum offered a brief history of the Voting Rights Act, noting the conditions in the South in the early 1960s that hindered African Americans' ability to cast votes and to have their votes counted. He credited VRA with significantly increasing voter registration among blacks in the years immediately after passage and asserted that Section 5 was an appropriate measure to redress any new contrivances jurisdictions might have employed to hinder black voting at the time. Mr. Blum also noted that Congress recognized Section 5 as a "unique infringement" on the separation of state and federal powers, and therefore intended it to be temporary.[12]

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[10] Also expiring are the language minority and observer/examiner provisions. The minority language provisions of Section 203 require more than 450 counties and townships with a significant number of voting age citizens with limited English proficiency and who speak a covered minority language to provide assistance in that language at all stages of the electoral process. The examiner and observer provisions of Sections 6 through 9 authorize the Department of Justice to appoint an examiner and send observers to the polls to deter, witness, and report discriminatory activities in any Section 5 jurisdiction.

[11] *See* Appendix A for the panelists' full biographies.

[12] U.S. Commission on Civil Rights, briefing on the reauthorization of the temporary provisions of the Voting Rights Act, Washington, DC, Oct. 7, 2005, transcript, p. 32 (hereafter cited as VRA briefing transcript).

In Mr. Blum's estimation, the fact that Section 5 applies only to certain jurisdictions is problematic and probably unconstitutional, and the criteria for selecting those jurisdictions are nonsensical. He noted, "[I]t makes no sense to cover Virginia today and not West Virginia, just as it makes no sense to cover Arizona, but not New Mexico, Texas but not Arkansas, Manhattan, the Bronx and Brooklyn, but not Staten Island and Queens."[13]

Case law pertaining to VRA, and Section 5 in particular, is muddled, according to Mr. Blum. In the 1969 case of *Allen v. State Board of Elections*, the Supreme Court expanded its interpretation of Section 5 from guaranteeing the right to vote to guaranteeing the "effectiveness" of the vote.[14] As a result, subtle and unintentional actions violated the law.[15]

What began as a tool to prevent anyone from being discriminated against at the ballot box because of skin color, turned into a means of second guessing legitimate nonracial policies, such as ballot security and absentee ballots, Mr. Blum stated.[16] In his view, Section 5 abuses climaxed in the 1990s when covered jurisdictions—often demanded by the Voting Section at the Department of Justice—engaged in widespread redistricting to create majority-minority districts with the goal of guaranteeing racial proportionality in every legislative body. Section 5 was, therefore, no longer about ending racial discrimination.[17]

The Supreme Court attempted to establish parameters, Mr. Blum explained. In the 1993 case of *Shaw v. Reno*, the Court ruled that grouping voters simply based on race, regardless of political or geographic differences, was wrong and reinforces the perception that members of the same racial group share political interests and prefer the same candidates.[18] In the 2003 case of *Georgia v. Ashcroft*, the Court found that the Department of Justice's (DOJ) retrogression standard, which sought to maintain minority percentages in newly drawn districts, was impermissible.[19]

Mr. Blum concluded by stating, "Section 5 has degenerated into an unworkable, unfair, and unconstitutional mandate that is bad for our two political parties, bad for race relations, and bad for our body politic."[20] He offered several reasons why Congress should allow Section 5 to expire. In short, he argued that the emergency Section 5 sought to redress has passed, as evidenced by the now identical or higher registration and voting rates among blacks compared to whites. He asserted that the abuses of the past are permanently banned by other sections of the act. Moreover, Mr. Blum noted that Section 5 does not apply to the nature of problems that have emerged in recent elections (hanging chads, long lines at the polls, etc.).

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[13] Ibid., p. 38.

[14] Allen v. State Board of Elections, 393 U.S. 544 (1969).

[15] VRA briefing transcript, p. 33.

[16] Ibid., p. 34.

[17] Ibid., pp. 34–35.

[18] Ibid., p. 35 *citing* Shaw v. Reno, 509 U.S. 630 (1993).

[19] VRA briefing transcript, p. 35 *citing* Georgia v. Ashcroft, 539 U.S. 461 (2003).

[20] VRA briefing transcript, p. 36.

Finally, Mr. Blum noted that any voter who feels he or she has been discriminated against can challenge an election policy or statute under Section 2. Mr. Blum asserted that political parties have used Section 5 to create "safe" districts and ensure incumbency, thereby making it impossible to parse out racial from partisan electoral issues.[21] He stated that Section 5 unfairly targets the South and Southwest, a distinction that is no longer warranted. He referred to reauthorization of Section 5 in the covered jurisdictions as "constitutionally problematic."[22] He asked Congress to invite a strong debate and encourage testimony from a range of voices, and refrain from overturning *Georgia v. Ashcroft*, which he believes would lead to segregating minority voters and ensuring political partisanship.[23]

Ronald K. Gaddie

Dr. Gaddie recounted the historical context out of which VRA grew, describing the widespread disenfranchisement of and discrimination against southern blacks. He noted that exclusion from the vote reinforced the status of southern blacks; by exercising political power through ballots, policies would change in the long run.[24] Dr. Gaddie views the impending expiration of the Voting Rights Act's temporary provisions as an opportunity to ask what the nation has accomplished and how far it has come. He noted that the nation has the opportunity, following 25 years of implementation since the law's most recent renewal, for a frank, informed conversation about a workable Voting Rights Act for the future.[25]

Congress should, according to Dr. Gaddie, consider present circumstances when debating renewal. To support this proposition, he presented data demonstrating the growth in black representation among elected officials. According to the data, in 1964, only one black state legislator held office in all of the seven states originally covered by Section 5. Today, by his estimation, a black person in the South is more likely to have a black representative than anywhere else in the country.[26] Southern blacks also register and vote at rates comparable to, if not higher than, the rest of the nation.

In addition, Dr. Gaddie presented data to demonstrate how Section 5 has advanced minority participation in the political process. His data indicate that by 1984 black registered voters tracked closely the voting age population in the original Section 5 states. For most of the period studied, black registration rates lagged behind those for whites, but for the last four elections for which data are available, black registration in five of the six original Section 5 states exceeded that of black registration in nonsouthern states. In two states, black turnout was consistently above the national average.[27]

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[21] Ibid., p. 37.

[22] Ibid., p. 38.

[23] Ibid., p. 39.

[24] Ibid., pp. 42–43.

[25] Ibid., p. 43.

[26] Ibid., p. 44.

[27] Ibid., p. 47.

Dr. Gaddie noted that voter participation has translated into seats in state legislatures.[28] Although none of the states studied has achieved proportionality, three are approaching. The number of black representatives has also increased at the congressional level—from three in 1991 to 11 today.[29] Dr. Gaddie noted that black representation in Congress from the Section 5 states is not proportional to the black citizen voting age population, but it is as high as it has ever been.[30]

In addition, Dr. Gaddie stated that it is similarly important to examine the extent to which racial coalitions support candidates of specific political parties irrespective of race. For example, he noted that data analysis reveals that black candidates often garner the same proportion of white votes in general elections as other Democrats.[31]

In that light, Dr. Gaddie also noted that the political use of Section 5, i.e. creating districts to maintain party control over an office, should be openly discussed. He asserted that the Republican Party historically used VRA to create majority-minority districts and to limit opportunities to create cross-racial coalitions in support of Democrats.[32] White Democratic candidates and office holders, on the other hand, have sought to create districts with sizable, but not majority, minority populations believing biracial coalitions could command more seats. Black Democratic officials preferred districts with black majorities sufficient to elect black candidates. Dr. Gaddie concluded that using VRA to create majority-minority districts resulted in an electoral map that shifted one-third of all southern congressional districts from the Democratic Party to the Republican Party in three election cycles between 1992 and 1996.[33]

Dr. Gaddie stated that the Justice Department encouraged the creation of majority-minority districts using preclearance as a "policy lever."[34] However, many DOJ-approved state plans were later overturned by the courts because race was used as a primary factor. Dr. Gaddie argued that political players have treated minority voters as building blocks to craft legislative districts. As a result of this manipulation, Section 5 has evolved from a lever to guarantee minority access to the process into a political tool.[35] He recommended that Congress revisit the need for Section 5 in all covered jurisdictions, noting that not all states can obtain a waiver from its provisions.[36]

Roger Clegg

Mr. Clegg's testimony centered on the constitutionality of the Section 5 preclearance requirement. He noted that permission to make voting changes, or preclearance, can be given only if the proposed change does not have the purpose and intent of disadvantaging one race over

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[28] Ibid., p. 48.
[29] Ibid., pp. 48–49.
[30] Ibid., p. 49.
[31] Ibid., p. 50.
[32] Ibid., p. 51.
[33] Ibid.
[34] Ibid., p. 52.
[35] Ibid., p. 53.
[36] Ibid., p. 54.

another.[37] Mr. Clegg identified what he views as two constitutional tensions in the underlying premise of preclearance: (1) activities that are historically and constitutionally left to state and local governments are, under Section 5, reliant on the federal government's approval; and (2) the standard for preclearance is not only whether the change disparately treats individuals on account of race, but also whether it has a disparate impact. Mr. Clegg asserted that the Supreme Court has established that disparate impact alone is not illegal.[38]

According to Mr. Clegg, the law's upcoming renewal presents a good opportunity for the Commission to examine Section 5. He also stated that it is an essential time for Congress to assess these issues by holding hearings. He cautioned that Congress should not embark on hearings with a preconception about the outcome, but rather assess whether Section 5 remains necessary.[39] Mr. Clegg observed that the two issues he raised—federalism and disparate impact—are more likely to concern courts today than in 1965. He called upon Congress to determine whether: (1) the preclearance mechanism makes sense; (2) Section 5 applies to the appropriate jurisdictions; (3) there are better ways to identify Section 5 jurisdictions; (4) there are better mechanisms than preclearance; (5) the types of applicable voting changes are accurately and appropriately identified, or whether they should be narrower; and (6) the preclearance mechanism is constitutional.[40]

Jon M. Greenbaum

Mr. Greenbaum acknowledged the significant impact VRA has had on minority participation in elections. He attributed much of the act's success to Section 5 in particular.[41] According to Mr. Greenbaum, despite progress, there remain present-day examples in which people in power manipulate processes or change rules to their benefit, often at the expense of minority voters. This is why, he argued, Section 5 remains necessary and why Congress should create a record on the existence of voting discrimination today.[42]

Congress has consistently expanded the act with each reauthorization amid more evidence of discrimination around the country, Mr. Greenbaum noted. For example, in the 1970 reauthorization, Congress recognized that jurisdictions had devised new methods, including at-large elections and redistricting, to ensure that even though minorities could vote, their votes would not be meaningful.[43] Such actions led the Supreme Court, in 1969, to determine that Section 5 must cover all actions necessary to make a vote effective.[44]

The power of Section 5, in Mr. Greenbaum's view, is that it places the responsibility for ensuring compliance on jurisdictions, as opposed to individual plaintiffs, as is the case with discrimination

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[37] Ibid., p. 56.

[38] Ibid.

[39] Ibid., pp. 57–58.

[40] Ibid., p. 58.

[41] Ibid., p. 59.

[42] Ibid., p. 60.

[43] Ibid., pp. 62–63.

[44] Ibid., p. 63 *citing* Allen v. State Board of Elections, 393 U.S. 544 (1969).

claims under Section 2.[45] He asserted that relying on Section 2 alone precludes individuals who lack the resources to file a suit from doing so. Section 5, on the other hand, places the burden on jurisdictions to demonstrate why a particular change is not discriminatory. It also forces election officials to consider racial fairness at the outset, before implementation.[46] According to Mr. Greenbaum, DOJ preclears more than 99 percent of voting changes. Since 1982, by Mr. Greenbaum's count, DOJ has issued more than 600 objections covering more than 800 proposed changes.[47] His data showed that objections correspond to jurisdictions which have substantial minority populations.[48]

Mr. Greenbaum stated that majority-minority districts are necessary because of racially polarized voting, a phenomenon which has been recognized by the courts in challenges to statewide redistricting plans in Louisiana, Georgia, South Carolina, and South Dakota in the last decade.[49] He explained that polarized voting means that candidates preferred by black voters, and black candidates in particular, usually cannot win elections unless they run in a majority-minority district. He cited evidence offered in the Supreme Court case of *Georgia v. Ashcroft*. DOJ data showed that, as of 2002, the only Georgia State Senate districts in which blacks were elected to office were those in which blacks constituted a majority of the voting age population.[50] In some majority-black districts, there were white or Latino representatives, but in none of the minority-black districts were there black representatives.[51]

While racial blindness is the ideal, in reality, racially polarized voting necessitates the use of majority-minority districts, according to Mr. Greenbaum. He used Mississippi as an example; black registration and turnout have remained steady for the past 20 years, but representation has increased due to litigation and Section 5 enforcement.[52]

Addressing the issue of Section 5's constitutionality, Mr. Greenbaum said that the Supreme Court has spoken favorably about the provision, noting that it is limited in scope and duration.[53] He concluded that when considering reauthorization, it is important to examine not only objections, but also the number of times observers have been sent and affirmative litigation in

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[45] VRA briefing transcript, p. 63.

[46] Ibid., pp. 63–64.

[47] Although Mr. Greenbaum expressed at the briefing that the 600 objections since 1982 accounted for more than 22,000 proposed changes, his organization has since revised the method by which it counts voting changes. At the time of the briefing, it considered each annexation in a submission as one change (e.g., 10 annexations = 10 changes). It now considers the aggregate of all annexations within a submission as one change (e.g., 10 annexations within 1 submission = 1 change). Thus, based on his organization's new counting method, Mr. Greenbaum later estimated that DOJ objections since 1982 accounted for 800 proposed changes. *See* Jon M. Greenbaum, email to the U.S. Commission on Civil Rights, Dec. 13, 2005, re: review of draft briefing report.

[48] VRA briefing transcript, pp. 64, 66.

[49] Ibid., p. 67.

[50] Ibid., p. 68 *citing* Georgia v. Ashcroft, 539 U.S. 461 (2003).

[51] VRA briefing transcript, p. 68.

[52] Ibid., p. 69.

[53] Ibid., pp. 69–70.

specific jurisdictions. Finally, he noted that the Voting Rights Act has amassed a stronger record demonstrating discrimination than other nondiscrimination legislation upheld by the Court.[54]

DISCUSSION SUMMARY

Several themes emerged from the discussion between the Commissioners and the panelists, including: (1) Section 5 in the historical context compared with present-day need; (2) coverage criteria and evidentiary indicators of progress; (3) preclearance standards, specifically intent versus outcome; (4) DOJ's efforts to apply the standards; (5) racially polarized voting; and (6) congressional alternatives.

Section 5 Then and Now: Historical Context vs. Continuing Need

The panelists agreed that the country has witnessed significant voting rights improvements over the last 40 years. They attributed much of the positive change to VRA; however, with respect to Section 5 specifically, the link is less clear. Did Section 5 bring about significant change and, therefore, is it no longer needed? Or, if Section 5 is responsible, should it remain intact as an enforcement tool? The panelists and Commissioners presented different perspectives on these questions.

Chairman Gerald A. Reynolds asked whether the factual predicate upon which Section 5 was initially based is still in place. He suggested that specific measures should be used to determine when discriminatory conduct has dissipated to the point that Section 5 is no longer needed.[55] Mr. Greenbaum responded that an enforcement record—including whether DOJ has sent observers, whether objections have been filed, and whether successful cases have been litigated—in covered jurisdictions facilitates efforts to measure whether discriminatory conduct continues. In jurisdictions not covered, Congress could consider similar information.[56]

Probing further, Chairman Reynolds asked whether, if today's facts were true in 1965, Section 5 could have survived a constitutional challenge. Mr. Greenbaum responded in the affirmative, asserting that the Supreme Court has repeatedly held Section 5 as model legislation.[57] Chairman Reynolds disagreed, noting that in 1965 blacks were widely disenfranchised in the South, in violation of the Constitution; therefore, he believes that Section 5 was justified. However, he asserted, Section 5 would not have survived constitutionally based on circumstances different than those in 1965.[58] Mr. Greenbaum countered, restating that, unlike other laws that the Supreme Court has struck down for lack of evidence, the Voting Rights Act has amassed an extensive enforcement record over the last 20 years, one that is substantially stronger than for other statutes.[59]

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[54] Ibid., p. 71.

[55] Ibid., p. 87.

[56] Ibid., pp. 87–88.

[57] Ibid., pp. 88–89.

[58] Ibid., p. 89.

[59] Ibid., p. 90.

Commissioner Michael Yaki later commented on the fact that one of the Commission's first reports documented the "horrendous disparity" in registration and voting in the South. The report was cited as the factual basis for the original Voting Rights Act.[60] He continued that he hoped the Commission would not recommend to Congress that Section 5 be allowed to expire, adding that based on recent experiences, "there is still a great divide between the races."[61] In his view, to ignore that fact and to suggest that the federal government need not be involved is naïve.

Vice Chairman Abigail Thernstrom, on the other hand, reminded the audience of the Supreme Court's insistence that there be congruence and proportionality between wrong and remedy in statutes like the Voting Rights Act. Everyone acknowledges, she said, that the legislation was draconian, intruding as it did on established state prerogatives to set electoral rules (with certain exceptions). This intrusiveness was justified in 1965, and even 1970, but today, after decades of racial change, legitimate questions about the ongoing need for such unusual federal power can be raised.[62] She stated that in 1965, Section 5 served as a prophylactic measure to make sure southern states did not revert to racist schemes to disenfranchise blacks. But the provision had a very different meaning in the very different context of the time.[63] Dr. Gaddie also noted that the South is growing and changing: 75 percent of current voters in Georgia and Texas were not yet born or did not live in the states the last time Congress established coverage criteria.[64]

Section 5 Coverage Criteria

Section 5 coverage commanded the most attention in the discussion period. Commissioners asked whether the law should be expanded to apply to more, if not all, jurisdictions, or whether the criteria for determining coverage are even appropriate today. Several Commissioners expressed the view that the law's current application does not take into account progress covered jurisdictions have made.

Commissioner Peter N. Kirsanow noted that even though historical discrimination may have existed, if it no longer exists, covered jurisdictions may find preclearance unfair.[65] Vice Chairman Thernstrom asked why Section 5 should not block last minute changes in uncovered jurisdictions too. She pointed out that the counties in Florida and Ohio that had problems in recent elections are not covered by Section 5.[66] Similarly, Chairman Reynolds stated the belief that voters in covered jurisdictions have enhanced protections, and asked whether all Americans should not have the same legal protections across the country.[67]

Dr. Gaddie agreed with the Chairman, and noted that the crux of the problem is whether exceptional coverage is required elsewhere or whether general coverage is required everywhere.

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[60] Ibid., p. 95.
[61] Ibid.
[62] Ibid., pp. 115–16.
[63] Ibid., p. 118.
[64] Ibid., p. 94.
[65] Ibid., p. 85.
[66] Ibid., p. 114.
[67] Ibid., pp. 104–05.

He added that protection from discrimination should not be based on where one resides, especially in a highly mobile population.[68]

In Mr. Blum's view, the only option is to apply VRA nationally; he views targeting specific jurisdictions, based on problems they had in the 1960s, as unfair.[69] He later added that it also seems unfair that minority communities in Cincinnati and St. Louis, for example, do not have the same coverage as communities in Atlanta, Houston, or Phoenix. [70] Mr. Greenbaum disagreed, responding that extending Section 5 nationwide would be constitutionally problematic, and noting that the law was intended to remedy racial discrimination.[71] He acknowledged the difficulty of extending Section 5 coverage to jurisdictions with small minority populations and where there is no evidence or history of discrimination.

Commissioner Ashley L. Taylor asked the panelists to discuss the policy implications of applying Section 5 to every jurisdiction.[72] Mr. Greenbaum believes doing so would not be a good policy decision, not only for the constitutional reasons noted above, but also because Section 5 has a limited purpose to remedy and protect against racial discrimination in voting.[73] He further noted that many problems exist with the voting process that are not based on race, and called for substantial election reform apart from the Voting Rights Act.[74] Dr. Gaddie stated that if Section 5 were extended nationwide, it would create an enormous workload for DOJ which would have to approve election changes for the 87,000 governments across the United States that elect 585,000 public officials.[75]

Panelists also opined on the types of indicators Congress could use to determine coverage. Dr. Gaddie suggested that nationwide data on the number of Section 2 challenges and judgments, as well as the indicators built into the bailout provisions, could serve as a new trigger for examining jurisdictions not covered by Section 5.[76] Dr. Gaddie commented that as Congress shapes the Section 5 triggers, it should examine a variety of evidence nationwide. He noted that such analysis is doable, but expensive. Mr. Blum concurred with Dr. Gaddie and added that in determining the triggers, Congress will have to obtain updated data (which is currently based on the 1972 elections) to examine every jurisdiction in the country, not just those already covered.[77]

Commissioner Taylor further probed whether the panelists would agree that the reauthorization process should begin anew. He asked whether, even though the panelists may disagree on how to judge which jurisdictions should be covered, they could agree that the process should start

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[68] Ibid., pp. 105–06.
[69] Ibid., p. 84.
[70] Ibid., p. 106.
[71] Ibid., p. 84.
[72] Ibid., p. 103.
[73] Ibid.
[74] Ibid., pp. 103–04.
[75] Ibid., p. 104.
[76] Ibid., pp. 90–91.
[77] Ibid., pp. 92–93.

without presumptions.[78] Mr. Greenbaum disagreed, noting that a substantial record already exists for the covered jurisdictions. He argued that while analysis should begin without any assumptions, jurisdiction-by-jurisdiction analyses should rely on the historical information available at the time.[79] Mr. Greenbaum also noted that the Voting Rights Act, as a racial remedy, must be narrowly tailored, which is why determinations must be made on a case-by-case basis.[80]

Mr. Blum countered that he believes the inquiry should begin with a clean slate. He stated that, if Congress wants to include a history of discrimination for states such as South Carolina or Georgia, it can, but the discussion must look forward. According to Mr. Blum, the country cannot create public policy solely based on the past.[81]

Vice Chairman Thernstrom later asked Mr. Greenbaum to explain why 1972 turnout figures are still used to determine coverage by the emergency provisions. In 1965, everyone agreed that their constitutionality depended on a limited life of five years. She added that if the trigger were updated based on 2004 turnout data, Hawaii would be the only state covered.[82] Mr. Greenbaum agreed with her data assessment, but again restated that today there is a record, and it is easier to identify the record in covered jurisdictions. In his experience, most covered jurisdictions have had racial discrimination problems related to voting.[83]

Vice Chairman Thernstrom noted that Section 5 is not restricted to jurisdictions with a history of disenfranchisement. For example, Texas never used literacy tests to screen citizens eligible to vote, which was a primary means of keeping blacks from the polls in the Jim Crow South. Texas, she said, is covered only because of a dubious equation between English-only ballots and fraudulent literacy tests. In her view, the simple solution to the disenfranchising effect of English-only ballots would have been a requirement that states provide bilingual ballots.[84] Mr. Greenbaum indicated that he has no problem with Congress deciding that additional jurisdictions should be covered. Regarding the Texas example, however, he indicated that when Congress extended coverage to the state in 1975, it had a very detailed record of discrimination against Latinos.[85] Vice Chairman Thernstrom disagreed that the record was substantial, referring to it as anecdotal.[86]

Preclearance Standards: Intent vs. Outcome

Commissioners and panelists discussed extensively how Supreme Court decisions have transformed the preclearance standards DOJ has used over the years, particularly with respect to redistricting. Current case law requires DOJ to use a nonretrogression standard, meaning the

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[78] Ibid., pp. 106–07.
[79] Ibid., p. 107.
[80] Ibid., p. 108.
[81] Ibid., p. 109.
[82] Ibid., p. 112.
[83] Ibid., p. 123.
[84] Ibid., pp. 119–20.
[85] Ibid., pp. 128–29.
[86] Ibid., p. 129.

agency must preclear (approve) any changes in the method of voting that do not leave voters worse off with respect to their effective exercise of the franchise.[87] In the past, the Court had established intent, not outcome, as the Section 2 standard, tracking that of the 14th Amendment. Vice Chairman Thernstrom indicated that she agrees with the Court's 1969 decision in *Allen v. State Board of Elections*, which held that switching from single-member districts to at-large systems in the 1969 Mississippi context could render the black vote meaningless.[88] She stated that it was the right decision at the time, but further noted that at-large voting is not, per se, a violation of the Voting Rights Act.[89]

The larger discussion centered on what standard could best serve today's circumstances. Commissioner Yaki predicted that among problems Congress will look at is whether to reinstate the intent standards the Court removed in *Reno v. Bossier Parish School Board* (known as *Bossier II*), among other cases, and whether or not those decisions have affected the number of preclearance challenges over the past 10 years.[90]

Mr. Greenbaum responded that he would like Congress to improve Section 5 by bringing back the pre-*Bossier* standard. He explained that before 2000, both DOJ and the courts had interpreted the word "purpose" under Section 5 to mean intentional, unconstitutional purpose.[91] In *Bossier II*, the Supreme Court said that "purpose" means only a purpose to make things worse. He explained that the retrogression standard currently in place means that, if a district had no black representatives to begin with and after a change still had none, the district would not be in violation of Section 5.[92]

Mr. Greenbaum offered a redistricting example from Louisiana, in which officials increased the population of black voters in three districts that were already majority-minority and decreased a fourth district that was 47 percent black to avoid creating a fourth majority-minority district. Officials informed the public about the plan 15 minutes before the meeting in which they voted on it. DOJ had to preclear the plan because it was not retrogressive. In response, in 2003, the Lawyers' Committee for Civil Rights Under Law filed a lawsuit claiming discrimination under Section 2. As a result of settlement, the 47 percent district became 52 percent black, giving minorities a majority of the voting age population. Mr. Greenbaum noted that the change would not have happened without legal intervention and the resources to challenge the original plan.[93]

Vice Chairman Thernstrom said that the problem of limited resources is not specific to Section 2 claims, but also affects Section 5 preclearance procedures. For example, an impoverished rural county in a covered jurisdiction is not going to have the resources to file a claim with the DC District Court, which is one of its options. Instead, the jurisdiction is forced to rely on DOJ's

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[87] *See* Georgia v. Ashcroft, 539 U.S. 461 (2003).

[88] Allen v. State Board of Elections, 393 U.S. 544 (1969).

[89] VRA briefing transcript, pp. 112–13.

[90] Ibid., p. 97 *citing* Reno v. Bossier Parish School Board, 528 U.S. 320 (2000).

[91] VRA briefing transcript, p. 98.

[92] Ibid., p. 99.

[93] Ibid., pp. 100–01.

judgment, from which there is no appeal.[94] Mr. Greenbaum agreed that limited resources are a problem for some jurisdictions, but stated that there are statewide experts and state officials who can help local jurisdictions.[95]

Vice Chairman Thernstrom also stated that municipal annexations often occur for economic reasons. She added that the annexations, which often result in miniscule reductions in the minority population of a city, do not necessarily affect minority political power. And yet DOJ insists that cities that use at-large voting switch to single-member districts in the wake of an annexation, and that districting lines be drawn to provide proportional racial and ethnic representation to the degree possible.[96] She pointed out the contradiction that the civil rights community, which had historically said that intent was too difficult to prove, now is pushing for the intent standard.[97] Mr. Greenbaum countered that it is difficult for local courts to determine intent, particularly in instances where the local judge is hesitant to challenge officials in his or her community because of involvement in other cases or other responsibilities.[98]

Panelists discussed whether proportional representation should be a goal that is factored into preclearance decisions. Vice Chairman Thernstrom stated that the effort to overturn the *Bossier II* decision through congressional action is driven by the civil rights community's dislike of the retrogression standard.[99] Civil rights groups would rather, she asserted, rely on the proportional racial and ethnic representation standard. Mr. Greenbaum responded that if proportional ethnic representation were the desired standard, the civil rights community would have failed in its mission because proportional representation has not been achieved.[100] On the other hand, he stated the importance of keeping geographically compact communities of a particular racial or ethnic group together. Most of the problems with drawing dispersed districts have occurred in statewide redistricting cases. At the local level, the population is much more compact because residential segregation remains high.[101]

In Vice Chairman Thernstrom's assessment, using proportional racial and ethnic representation as the standard of racial fairness to judge the legality of proposed redistricting plans is an underlying assumption that has driven Voting Rights Act enforcement. She asserted that DOJ, the DC District Court, and on occasion the Supreme Court, have applied the proportional representation standard. She also noted that the Supreme Court's decisions have been inconsistent, and DOJ and the district court have often been indifferent to High Court rulings, fashioning their own legal standards.[102] Congress must address these issues as it considers reauthorization.

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[94] Ibid., pp. 113–14.
[95] Ibid., p. 124.
[96] Ibid., pp. 116–17.
[97] Ibid., p. 118.
[98] Ibid., p. 128.
[99] Ibid., pp. 118–19.
[100] Ibid., p. 121.
[101] Ibid., p. 122.
[102] Ibid., p. 111.

Applying the Standards: Preclearance Requests and Objections

The preclearance standard DOJ applies—whether intent or outcome—determines whether the agency approves or objects to proposed voting changes. Analysis of DOJ's workload and the outcomes of preclearance requests serve as predictors of Section 5's continuing necessity, and thus piqued Commissioners' interest. Commissioner Kirsanow asked Mr. Greenbaum how many preclearance submissions DOJ receives each year. Mr. Greenbaum responded that, based on his experience, in an average year, the number approximates between 5,000 and 6,000. During redistricting cycles and after census data are released, the number increases.[103] He also noted that each submission may include multiple changes.

Dr. Gaddie later presented data on preclearance objections, showing that in the 10-year periods between 1975 and 1984, and between 1985 and 1994, DOJ filed approximately 400 objections. In the 10 years since 1995, the agency has filed a total of 87 Section 5 objections. The number of objections in southern states, including Texas, Alabama, Georgia, Mississippi, and Louisiana, fell significantly.[104] Dr. Gaddie suggested that this trend can be attributed either to states knowing they are subject to Section 5 scrutiny and wanting to avoid objection, or to their having learned from the past. He said the notion that the South has changed cannot be discounted. Today's South is different, and evidently the policy is working, he stated.[105]

Commissioner Yaki asked the panelists whether factors, other than improved voting conditions, could have contributed to the decline in objections in recent years, such as changing Supreme Court criteria that replaced discriminatory purpose with a retrogression standard.[106] Mr. Greenbaum responded that the new standards have had a significant impact and that states are aware of the parameters when they develop redistricting plans. He stated that the decrease in the number of objections does not mean that Section 5 does not significantly impact the redistricting process.[107]

Vice Chairman Thernstrom stated that examining raw numbers of objections reveals nothing. Instead, analysts must consider the numbers in categories.[108] Mr. Greenbaum agreed that the types of objections being raised are important.[109] He offered a more detailed look at the nature of objections and cited data showing that 74 percent of objections in 1990 were based on discriminatory purpose; in 43 percent of objections, discriminatory purpose was the sole reason.[110] He stated that he believes jurisdictions are better about complying with the law because of experience under Section 5. He also noted that a series of cases in the 1990s held that jurisdictions cannot use race as the overriding factor in redistricting unless a good reason exists

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[103] Ibid., p. 81.
[104] Ibid., pp. 91–92.
[105] Ibid., p. 92.
[106] Ibid., p. 96.
[107] Ibid., p. 102.
[108] Ibid., p. 115.
[109] Ibid., p. 123.
[110] Ibid., pp. 100–01.

for doing so, and in the post-2000 redistricting cycle, no courts have found that jurisdictions violated that principle.[111]

Racially Polarized Voting

The proportional representation theory assumes that voters select candidates along racial lines. The panelists debated the effects of racially polarized voting on redistricting, election outcomes, and ultimately representation.

Chairman Reynolds noted that voter polarization is not limited to the South, which in his view leads to the question of Section 5 coverage.[112] Commissioner Kirsanow asked Mr. Greenbaum about racial polarization in voting, and whether in fact alliance is more related to party affiliation than race. Mr. Greenbaum responded that the federal courts have found racial polarization to be a factor independent of partisanship when that issue has been raised. In one case he litigated as an attorney with DOJ, he looked at data to determine the effect of political party as opposed to race and found that race plays a factor even within parties (i.e., white voters are more likely to vote for white Democrats than for black Democrats), a trend that affects who gets elected to office.[113]

Mr. Greenbaum also stated that, in the most recent redistricting cycle, federal courts found racially polarized voting in both Georgia and Texas. He noted that a conservative judge in Texas not only found polarized voting, but a legacy of discrimination.[114] Dr. Gaddie clarified that the finding was in the context of the Democratic Party primaries, to which Mr. Greenbaum responded that, regardless, the finding was in the opinion.

Vice Chairman Thernstrom presented a different view. She stated that the effect that Section 5, as an independent variable, has had on the level of black office holding is difficult to determine. Black office holding has inevitably increased with the dramatic racial progress that has occurred over the past 40 years. She also argued that race-based districts (majority-minority) have created a ceiling on the number of blacks and Hispanics in office, apart from the fact that black and Hispanic candidates lose for reasons other than race.[115] For example, Vice Chairman Thernstrom asserted that black Democrats tend to be politically left of the mainstream Democratic Party and, in any case, Democrats (whether white or black) lose elections for nonracial reasons.[116]

Mr. Greenbaum acknowledged that some policy-related reasons may explain in part why whites tend to vote more for white Democrats, but a case involving nonpartisan school board elections clearly demonstrated racially polarized voting, where voters were consistently aware of the candidates' race even though there was very little media coverage on the elections in question.[117] Vice Chairman Thernstrom responded that isolated cases of racially polarized voting may occur,

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[111] Ibid., p. 102.
[112] Ibid., p. 87.
[113] Ibid., pp. 85–86.
[114] Ibid., p. 94.
[115] Ibid., p. 117.
[116] Ibid., pp. 117–18.
[117] Ibid., pp. 125–26.

but measuring the extent presents tough methodological questions, which is why she disagrees with many DOJ objections.[118]

Looking Ahead: Congressional Deliberations and Alternatives

As noted, Congress will, over the next year, gather testimony and other evidence as it deliberates Section 5 renewal. As of this writing, the House Judiciary Committee had already commenced hearings. Despite Congress' early and intense interest in VRA, or perhaps because of it, several Commissioners and panelists expressed concern about the nature of the congressional hearings.

Commissioner Kirsanow, for example, expressed concern that momentum is building toward full renewal of Section 5, and possibly expansion, even before Congress has finished its hearings.[119] Mr. Blum responded that he believes, as congressional hearings continue and the political discussion develops, Section 5's reauthorization in its current form may not be a certainty. He believes the jury is out until Congress takes a good look at the issues.[120]

Vice Chairman Thernstrom agreed that Congress should explore thoroughly the history of Section 5, its ongoing need, and the amendments being proposed.[121] She expressed hope that Congress will engage in an honest debate and explore the difficult issues. She noted that large questions loom about the assumptions behind VRA enforcement that must be answered. Vice Chairman Thernstrom further indicated that she is appalled by indications that Congress will conduct a public venue without answering all of the important questions related to Section 5.[122]

Throughout the discussion the Commissioners probed the panelists to suggest viable alternatives to full renewal of Section 5. Commissioner Kirsanow asked Mr. Blum what he views as a potential reauthorization compromise that would be acceptable.[123] Mr. Blum responded that Section 5 has turned into a thorny problem for legislators.[124] He indicated that he does not see any benefit to renewing Section 5, but if Congress decides to do so, the provision's harms will continue. In Mr. Blum's view, if Congress overturns the nonretrogression standard and finds a way to "repack" majority-minority districts, the courts will once again get involved.[125]

Commissioner Jennifer C. Braceras asked for panelists' opinions on an approach put forward by Harvard Law School Professor Heather Gerken. Professor Gerken's approach would require Section 5 jurisdictions to provide advance notice of any election changes to the public, rather than to DOJ for preclearance.[126] Civil rights groups would then have the chance to negotiate with

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[118] Ibid., p. 126.

[119] Ibid., pp. 81–82.

[120] Ibid., p. 83.

[121] Ibid., p. 110.

[122] Ibid., p. 120.

[123] Ibid., p. 83.

[124] Ibid.

[125] Ibid., p. 84.

[126] Ibid., p. 71, *citing* Heather Gerken, "Race (Optional)," *The New Republic*, Sept. 26, 2005, p. 11 (hereafter cited as Gerken, "Race (Optional)").

local officials over changes they find objectionable, and to "opt in" to VRA enforcement by filing a formal civil rights complaint.[127]

Mr. Blum responded that, although he is willing to keep his options open on legitimate proposals to solve what he sees as Section 5's legal problems, he rejects the idea behind the "opt in" approach.[128] He believes that if Congress finds, jurisdiction by jurisdiction, hard evidence of discrimination, Section 5 should be applied to those jurisdictions. Those covered should be allowed to bail out. He does not think that advocacy groups should be in the position to decide what proposals are sent to DOJ for review.[129]

Mr. Greenbaum also stated that he does not think the "opt in" proposal would work in the real world, noting that it would place the burden on minority groups to identify problems rather than the jurisdiction making the potentially discriminatory change. Section 5, he argued, makes the government responsible for rooting out discrimination and working with minority groups prior to making changes.[130]

Commissioner Braceras also asked whether separating redistricting issues from procedural voting issues with respect to Section 5 coverage constitutes a workable alternative. She asked whether the panelists would support a reauthorized Section 5 that preserves the preclearance requirement for procedures that limit access to the ballot box, but that deals with redistricting issues differently or not at all.[131]

Mr. Greenbaum responded that, in his view, the two are linked. He noted that between 1965 and 1970 access improved significantly, but then other devices, including the creation of new districts, were used to minimize the effect of minority votes. He indicated that he would not exempt redistricting from Section 5 coverage. He acknowledged that political parties manipulate the process through redistricting, but cautioned against blaming Section 5 for the politicization of redistricting.[132]

Commissioner Braceras responded that she does not view Section 5 as the sole cause of redistricting problems, but if it is one of the causes, then perhaps the solution is to limit its reach.[133] Mr. Clegg agreed that hers is the kind of question Congress should explore. Congress should ask whether certain types of changes more appropriately invoke the preclearance process than others. He acknowledged that some redistricting can be done in a racist way, but stated that much is not racist, but still has a disparate impact.[134] On the other hand, he noted, some non-redistricting changes are innocent, but others are not. He supports the Supreme Court's distinction between actions that treat voters differently because of race, and those that do not. To

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[127] Gerken, "Race (Optional)."

[128] VRA briefing transcript, pp. 71–72.

[129] Ibid., p. 72.

[130] Ibid., pp. 73–74.

[131] Ibid., p. 74.

[132] Ibid., p. 76.

[133] Ibid., p. 77.

[134] Ibid.

ensure that the courts do not strike down whatever Congress passes as unconstitutional, the law must enforce the 15th Amendment. This does not include, by Mr. Clegg's interpretation, requiring proportional results or banning disparate impact.[135]

Dr. Gaddie added that Congress must remember the context of history and changes to both partisanship and racial representation. In his view, Section 5 has been a powerful influence on change.[136] However, he asserted that the question remains whether Section 5 should continue to function in its current form. He argued that even precleared districting maps may be problematic, and problems occur in jurisdictions not covered by Section 5.[137]

Commissioner Yaki stated that, based on the evidence, undoubtedly places exist to which Section 5 should be expanded, and in his view, the goal should be to encourage national voting rights, not local voting. The federal government has the resources to ensure that those rights are not lessened or the content of the vote diminished. Commissioner Yaki asserted that localities and individual groups should not carry that burden.[138] He concluded, "We are a more perfect union, but we are not the perfect union that we would like to have in the future."[139]

CONCLUSION AND RECOMMENDATIONS

In summary, each panelist acknowledged the need for a strong Voting Rights Act—Section 5 in particular—when Congress initially passed the law in 1965. They also agreed that the Voting Rights Act has been instrumental in shaping the political process into one that ensures the right to vote and protects minority voters from discriminatory practices. Some, however, pointed to significant progress in recent years and argued that Section 5 is no longer appropriate in light of its infringement upon traditional state and local prerogatives. Others suggested that this progress indicates that Section 5 is effective and should not be abandoned. The panelists presented different views about the continuing need for preclearance, and about the utility of the current process for determining coverage. Both panelists and Commissioners agreed, however, that Congress should engage in serious factfinding during the renewal debate, and encouraged substantial deliberation.

Based on the information presented during the October 7 briefing, the Commission offers the following preliminary recommendations to Congress:

1) Congress should hold comprehensive hearings regarding constitutional, legal, and policy aspects of the temporary provisions of the Voting Rights Act. For instance, Congress should examine the aptness of applying old data and historical evidence to present-day coverage decisions. Congress should consider both the long history of discrimination that preceded enactment of the act, as well as changes that have occurred in both covered and noncovered jurisdictions since 1965 to assess the efficacy and continuing need for Section 5.

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[135] Ibid., p. 78.
[136] Ibid., pp. 78–79.
[137] Ibid., pp. 79–80.
[138] Ibid., p. 97.
[139] Ibid.

2) In light of Section 5's infringement upon traditional state and local prerogatives, Congress should carefully consider the congruence and proportionality of that section to recent voting discrimination, developing a careful and complete record of discrimination.

    A. First, Congress should carefully define the scope of voting rights discrimination, focusing on intentional discrimination prohibited by the 14th and 15th Amendments.

    B. Second, Congress should carefully develop a record of purposeful voting discrimination, including denial of ballot access and vote dilution. Congress should concentrate on developing records of evidence that are comparable for both covered and noncovered jurisdictions so that laws governing each may be appropriately directed. As much as possible, Congress should rely upon theories of discrimination that are likely to achieve broad consensus and survive judicial scrutiny, rather than upon controversial arguments that may be vulnerable to legal challenge.

    C. Third, to the extent that Congress finds constitutionally sufficient evidence of voter discrimination, it should ensure that any reauthorized preclearance procedures are proportional to the evidentiary record of voter discrimination. In order to ensure proportionality, Congress might do well to consider amendments regarding the formula for determining covered jurisdictions, the stringency of the bailout standard, the extent of state and local procedures subject to preclearance, and the length of the extension term.

The Emergency is Over: The Case for Not Reauthorizing Section 5 of the Voting Rights Act

Statement of Edward Blum

My name is Edward Blum and I am a visiting fellow at the American Enterprise Institute. I am also co-director at AEI with Commissioner Abigail Thernstrom of the Project on Fair Representation. Prior to my AEI affiliation, I have held a number of positions at other think tanks including the Center for Equal Opportunity, the American Civil Rights Institute, and the Campaign for a Color-Blind America, Legal Defense and Education Foundation. While at the Campaign, I directed the legal challenge to over a dozen racially gerrymandered voting districts in states from New York to Texas.

My presentation today is divided into three parts: I will review the historical background of the two basic elements of the Voting Rights Act that will be discussed throughout this briefing; second, I'll briefly discuss the state of the law regarding Section 5 of the Voting Rights Act; and finally, I will discuss the reasons I believe Section 5 of the act—the most important provision up for reauthorization in August 2007—should be allowed to expire.

Let me begin by giving a brief explanation and history of the two most critical sections of the act—Section 5 and Section 2.

As everyone knows, blacks in the Deep South were massively disenfranchised until the passage of the Voting Rights Act in 1965. President Johnson ordered his staff to write the "goddamnedest and toughest" voting rights bill they could devise. The president was wise in asking for such a draconian statute at the time since the opportunity for blacks in the Deep South to register to vote and participate in elections had been successfully foiled by southern jurisdictions since Reconstruction. By every measure, Johnson got what he asked for. Less than three years after the VRA's passage, voter registration among blacks in Georgia, for instance, had jumped from 19 percent to 51 percent; in Mississippi, black registration swelled from less than 7 percent to nearly 60 percent.

This remarkable outcome was largely due to Section 4 of the act which provided a five-year suspension of "a test or device," such as a literacy test, as a prerequisite to register to vote. It was sustained by Section 5 of the act which required that any changes to voting procedures in the jurisdictions covered by the law be "precleared" by the U.S. Attorney General or the U.S. District Court for the District of Columbia before being implemented. Section 5 in 1965 applied to Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia and to most counties of North Carolina.

Section 5 was not a major concern during congressional debate in 1965. Its inclusion in the bill was designed to trump any new contrivances jurisdictions might impose to slow the growth of black voting. Given the massive resistance to school desegregation and other civil rights actions by the federal government at the time, it was not an unreasonable addition to the law. It is most noteworthy, however, that Congress recognized that the preclearance provision was a unique

infringement on traditional separation of powers prerogatives and, therefore, limited Section 5's life to five years. It was extended by Congress in 1970, 1975, and 1982.

Section 2 of the 1965 act was little more than a clone of the 15th Amendment's prohibition to deny or abridge the right to vote on account of race, color, or previous condition of servitude. Originally, this section allowed no qualification or prerequisite to voting to be imposed by any state or jurisdiction on account of race. Unlike Section 5, this section applied to the nation as a whole. And most importantly, unlike Section 5, this section was and is permanent.

The case law that has developed over the years under Section 5 and Section 2 is quite muddled; some would say illogical. Since Congress is faced with only the reauthorization of Section 5, let's focus today on the legal evolution of that provision.

As a result of the passage of Section 5 and subsequent litigation, hundreds of jurisdictions began going hat-in-hand to the Department of Justice, asking permission to annex land, change voting district lines, expand the number of representatives to an elective body, and so forth. Beginning with *Allen v. State Board of Elections* in 1969, the courts expanded Section 5 from guaranteeing black access to the polls to guaranteeing the "effectiveness" of their vote. Not only blatant and obvious, but also subtle and even unintentional actions, were held to violate the law. Again, much of this was understandable in the years immediately following the passage of the VRA, since southern chicanery in the past required the Department of Justice to keep a close eye on unusual developments in voting procedures. And, as judges and bureaucrats got in the habit of stretching the meaning of the VRA to reach any and all ends they considered desirable, the groundwork was laid for abuses. What started out as a tool to prevent anyone from being turned away at the ballot box because of skin color turned into a means of second-guessing perfectly legitimate, nonracial policies concerning, for example, ballot security and absentee ballots.

The pinnacle of Section 5 abuses occurred after the 1990 census and the cycle of redistricting that followed in the now expanded covered jurisdictions. Due to amendments passed in the 1970s, jurisdictions such as Manhattan and Brooklyn, and the entire states of Texas, Arizona, and Alaska, were now covered by Section 5.

The Department of Justice, cheered on by the old-line racial advocacy groups and some in the Republican Party, began to distort the VRA to require a "max-black" redistricting outcome. In other words, the preclearance provision of Section 5 became a sword, rather than a shield, in the hands of government commissars whose single-minded goal was not ending racial discrimination but guaranteeing racial and ethnic proportionality in every legislative body for which they had control. The result was the creation of dozens of racial gerrymanders—Rorschach-test-like bug splats—that systematically harvested blacks and Hispanics out of multiracial communities to form safe minority districts.

In a series of cases beginning with *Shaw v. Reno* and culminating in *Georgia v. Ashcroft*, the Supreme Court has marginally attempted to bring some sanity back to the law. In *Shaw*, the Court in 1993 found that a "reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who have little in common with another but the color of their skins, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of

the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and prefer the same candidates at the polls."

Ten years later, the Court issued a murky opinion in *Georgia v. Ashcroft*, finding that the retrogression standard that had been used by DOJ to force the strict maintenance of minority percentages in newly redrawn voting districts were wrong, noting that "the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters." This barely scratches the surface of the current state of the law.

It is important now to examine what Section 5 has wrought today. The central question Congress will be forced to consider by August 6, 2007 is whether Section 5 should be reauthorized in its current form, a reconstituted form, or finally allowed to expire altogether.

In my opinion, Section 5 has degenerated into an unworkable, unfair, and unconstitutional mandate that is bad for our two political parties, bad for race relations, and bad for our body politic. I encourage this Commission to recommend formally to Congress and the Bush Administration that Section 5 be allowed to expire.

Here are some of the reasons why Section 5 should expire:

1. Bull Connor is dead, and so is nearly every Jim Crow-era segregationist intent on keeping blacks from the polls. The emergency has passed. Blacks throughout the covered jurisdictions register to vote and participate at the polls in numbers nearly identical to white voters.

2. The worst abuses of the Jim Crow era—such as poll taxes, literacy tests, and grandfather clauses—are permanently banned in other sections already. Moreover, any voter can challenge any discriminating election policy or statute using Section 2 of the act. It is permanent and applies to every state in the nation.

3. Section 5 has contributed to the ever-growing lack of election competitiveness, resulting in safe-seats-for-life for incumbents of both parties. The inability of a newly created bipartisan, independent redistricting commission in Arizona to create competitive districts is a direct result of Section 5 requirements. This in turn contributes to the creation of ideologically polarized voting districts.

4. Section 5 has evolved into a gerrymandering tool used by Democrats and Republicans to further their parties' election prospects. It is nearly impossible today under Section 5 to tease out racial electoral issues from partisan electoral issues, as we have recently witnessed in a handful of redistricting lawsuits from Texas to Boston.

5. Section 5 is unfairly directed at the South and Southwest. Its application to these areas is unwarranted today. It may have made sense to cover Virginia in 1965, but it makes no sense to cover Virginia today, and not West Virginia; just as it makes no sense today to cover Arizona, but not New Mexico; Texas, but not Arkansas; Manhattan, the Bronx, and Brooklyn, but not Staten Island and Queens. Election data gathered during litigation during the last 10 years or so suggest that whites in states like Texas, Virginia, and Georgia cross

over to support black and Hispanic candidates in ever-increasing numbers; in fact, the crossover support in these states is often higher than in noncovered jurisdictions such as New York, Missouri, Tennessee, and Oklahoma. This body of national election data makes reauthorization of Section 5 in the currently covered jurisdictions constitutionally problematic.

6. This provision has had the effect of insulating white Republican officeholders from minority voters and issues specific to minority communities; and, in turn, it insulates minority elected officials from white voters and acts as a glass ceiling for higher statewide or at-large officeseekers.

7. Section 5 does not address in any way the long list of election issues that have surfaced during the last five years: hanging chads in Florida; long lines of voters in Ohio; too few polling places on college campuses in Wisconsin.

Finally, I want to address a special concern I have about the reauthorization. The nation deserves a debate on the necessity of extending these provisions once again. It is my hope that Congress will allow and encourage testimony and data to be presented from a wide group of voices. Shutting out anyone from this process would be wrong and shouldn't be tolerated. Furthermore, it would be a cynical mistake for Congress to use the reauthorization as an opportunity to turn the Voting Rights Act into the "Leave No Gerrymander Behind Act" by overturning the Supreme Court's last Section 5 case, *Georgia v. Ashcroft*. This would result in blacks and Hispanics being cordoned off in densely packed legislative enclaves, safe from the need to pull, haul, and compromise with whites in order to achieve election success—all in a shameless attempt to create bleached-out Republican districts surrounding them.

Thank you for allowing me this time.

The Constitutionality of Reauthorizing Section 5 of the Voting Rights Act

Statement of Roger Clegg

INTRODUCTION

Thank you, Mr. Chairman, for the opportunity to testify this morning before the Commission.

My name is Roger Clegg, and I am vice president and general counsel of the Center for Equal Opportunity, a nonprofit research and educational organization that is based in Sterling, Virginia. Our president is Linda Chavez, and our focus is on public policy issues that involve race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. I should also note that I was a deputy in the U.S. Department of Justice's Civil Rights Division for four years, from 1987 to 1991.

In my testimony today, I will focus on the constitutionality of reauthorizing Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. Let me note at the outset, however, that there are other important legal and policy issues regarding the reauthorization of the VRA, such as those involving Section 2 and the bilingual ballot provisions. (I would refer the Commission to a column I wrote for *National Review Online*, "Revise before Reauthorizing," on August 8, 2005. Link: http://www.nationalreview.com/clegg/clegg200508040826.asp.) To a degree, those provisions also involve the constitutional issues that I will be discussing today.

THE TWO BASIC ISSUES RAISED BY SECTION 5

Section 5 requires certain jurisdictions—called "covered jurisdictions"—to "preclear" changes in, to quote the statute itself, "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" with the U.S. Department of Justice or the U.S. District Court for the District of Columbia. This includes anything from a relatively minor change (like moving a voting booth from an elementary school to the high school across the street) to an undoubtedly major change (like redrawing a state's congressional districts). The change cannot be precleared unless it is determined that it "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."

Section 5 raises constitutional issues for two reasons, and I think that these two reasons together are likely to create judicial concerns greater than their sum alone. First, there are federalism concerns insofar as it requires states (and state instrumentalities, like cities and counties) to get advance federal approval in areas traditionally—and, often, textually, by the language of the Constitution itself—committed to state discretion. These federalism concerns are arguably heightened by the fact that some states are covered and others are not. Second, since the federal government can bar a proposed change that has a racially disproportionate "effect" but not a racially discriminatory "purpose," Congress arguably exceeds its enforcement authority under Section 5 of the 14th Amendment and Section 2 of the 15th Amendment, since those two

amendments ban state disparate *treatment* on the basis of race but not mere disparate *impact* on that basis.

Now, one may ask why the Commission should be interested in this now, when the statute has been on the books since 1965. The reason is that Section 5 will expire in 2007, so that Congress will need to reauthorize it if it is to stay on the books. And the fact is that both the law and the facts have changed over the past 40 years, so that a reevaluation of Section 5—by the Commission and, of course, by Congress—is appropriate.

THE SHIFTING FACTUAL AND LEGAL LANDSCAPES

As to the facts, few would dispute that a great deal of progress has been made over the last 40 years in eliminating the scourge of state-sponsored racial discrimination, particularly in the South (which is where most of the covered jurisdictions are). No one would deny that there is still additional progress to be made, but clearly the gap between the South and the rest of the country has narrowed considerably in this arena. I will not dwell on this point for two reasons. First, I think it is obvious. Second, it is precisely this point that Congress *should* dwell on: It should carefully use hearings to explore the extent to which racial discrimination in voting remains, and remains a regional problem.

As to the law, during the time since the Voting Rights Act was first enacted in 1965, the Supreme Court has made clear that the 14th Amendment bans only disparate treatment, not state actions that have only a disparate impact and were undertaken without regard to race. *See, e.g.*, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977) ("Our decision last Term in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact."). A plurality of the Court has drawn the same distinction for the 15th Amendment. *City of Mobile v. Bolden*, 446 U.S. 55, 62-65 (1980) (plurality opinion) ("[The 15th] Amendment prohibits only purposefully discriminatory denial or abridgment by government of freedom to vote 'on account of race, color, or previous condition of servitude'.") (quoting the 15th Amendment).

The Supreme Court has also ruled even more recently that Congress can use its enforcement authority under the 14th Amendment to ban actions with only a disparate impact only if those bans have a "congruence and proportionality" to the end of ensuring no disparate treatment. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). It is likely that this limitation applies also to the 15th Amendment; there is no reason to think that Congress' enforcement authority would be different under the 14th Amendment than under the 15th, when the two were ratified within 19 months of each other, have nearly identical enforcement clauses, were both prompted by a desire to protect the rights of just-freed slaves, and indeed have both been used to ensure our citizens' voting rights.

Finally, the Supreme Court has, in any number of recent decisions, stressed its commitment to principles of federalism and to ensuring the division of powers between the federal government and state governments. *See, e.g., Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). It has also stressed what is obvious from the text of the Constitution: "The

Constitution creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995).

CONSTITUTIONAL PROBLEMS

Putting all this together, it is very likely that the courts will look hard at a law that requires states and state instrumentalities to ask permission of the federal government before taking action in areas that are traditionally, even textually, committed to state discretion under the Constitution, and to meet a much more difficult standard for legality than is found in the Constitution itself.

It is true that in the leading case *City of Boerne v. Flores*, the Court explicitly distinguished the actions Congress had taken under the Voting Rights Act. On the other hand, however, in doing so it stressed Congress' careful findings and rifle-shot provisions. 521 U.S. at 532–33. If Congress were to reauthorize Section 5 without ensuring its congruence and proportionality to the end of banning disparate treatment on the basis of race in voting, the language in *Flores* could as easily be cited against the new statute's constitutionality as in its favor. Likewise, the Court's decision in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003)—upholding Congress' abrogation of state immunity under the federal Family and Medical Leave Act—also stressed Congress' factual findings and the challenged statute's limited scope.

One frequently noted byproduct of the use of the effects test—under both Section 5 and Section 2—has been racial gerrymandering. It is ironic that the Voting Rights Act should be used to encourage the segregation of voting, but it has. In the closing pages of his opinion for the Court in *Miller v. Johnson*, 515 U.S. 900 (1995), Justice Kennedy noted the constitutional problems raised for the statute if it is interpreted to require such gerrymandering. (The Supreme Court has likewise, in the employment context, noted the danger of effects tests leading to more, rather than less, disparate treatment. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652–53 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 992–94 & n.2 (1988) (plurality opinion); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J. concurring in judgment).) This byproduct of racial gerrymandering obviously raises a policy problem of the Voting Rights Act, in additional to the constitutional one.

In this regard, let me note that it has been suggested that, in the course of its reauthorization of the Voting Rights Act, Congress should draft a provision that would overturn the Supreme Court's ruling in *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003), on the grounds that it insufficiently guarantees the creation of majority-minority districts. While it is difficult to comment on such a provision in the abstract and without seeing the actual statutory language, it is also difficult to see how this could be accomplished without using and intending the sort of racial classifications the Supreme Court has ruled will always trigger strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993). (While we're on the subject of dubious amendments to the VRA, let me also note that it has been suggested that the act should be amended to force states to allow felons to vote; such a provision would clearly be neither proportional nor congruent to the core constitutional provisions at issue, especially when the 14th Amendment itself expressly contemplates felon disenfranchisement. *See* Roger Clegg, "Who Should Vote?," 6 Tex. Rev. L. & Pol. 159 (2001); Roger Clegg, George T. Conway III, & Kenneth K. Lee, "The Bullet *and* the Ballot? The Case for Felon Disenfranchisement Statutes," Am. U. J. Gender, Soc. Pol'y & L. (forthcoming).)

CONCLUSION: WHAT CONGRESS SHOULD DO

Let me conclude by noting that the best course is for Congress to hold thorough hearings on the question of how best to ensure compliance with the 15th Amendment, and to go into them with an open mind. If one is skeptical about the continued need for Section 5 in its present form, as I am, then naturally such probing makes sense. But it also makes sense even if one is inclined to think that Section 5 in some form ought to be reauthorized, since—to ensure that such a reauthorization is upheld when it is challenged (as will likely happen)—it will be prudent for Congress to have made the case through its hearings and subsequent findings that the reauthorized law is indeed congruent and proportional to ensuring the guarantees of the 15th Amendment.

In particular, Congress must find that the preclearance approach and the "effects" test are necessary to ensure that the right to vote is not "denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," to quote the 15th Amendment. Without these updated findings, a reauthorized Section 5 will not pass the tests of constitutionality the Supreme Court has set out.

And, legal requirements aside, these hearings make perfect policy sense as well. After all, how likely is it that, 40 years after the initial passage of Section 5, there is no need for making some alterations to that statute? The facts have changed, and the law has changed.

If the problems that remain are national in scope, then to focus on only particular jurisdictions makes no policy sense and may aggravate federalism concerns. If the problems remain regional or remain only in even more widely scattered jurisdictions, then applying the statute's preclearance provisions where they are no longer justified will also aggravate federalism concerns.

The government has only limited resources, and it makes little sense to focus those resources on one part of the country if there is no longer much difference from region to region in discrimination. Nor may it make much sense to require that all voting changes be precleared if the federal government's objections are concentrated in only a few subject-matter areas. Indeed, it may not make sense to use the preclearance mechanism any more at all.

In sum, surely Congress would want to take this opportunity to ensure that the Voting Rights Act is still fashioned to do the best job it can to guarantee the right to vote, and to do so in a way that also honors the principle of federalism—which, after all, is also a bulwark against government abridgment of our rights as citizens.

Thank you again, Mr. Chairman, for the opportunity to present this testimony today.

The Problem, the Opportunity, and Some Thoughts for Discussion of the Renewal of Section 5 of the Voting Rights Act

Statement of Ronald K. Gaddie

The Voting Rights Act has framed American electoral politics for 40 years. The act stands as the enforcement mechanism for one of two "superior" principles of voting rights, racial fairness (the other principle being the one-person, one-vote guarantee). The most proactive tools of the Voting Rights Act are up for renewal. This periodic review and renewal of legislation gives us the chance to ask, "What have we done and how far have we come?"

To do justice to the impact of the Voting Rights Act, and specifically Section 5, on voting rights and minority political empowerment would take days, not minutes, to recount, and volumes, rather than pages, to record. My brief statement is at best a thumbnail sketch, a superficial social history of the impact of the act, with an emphasis on those jurisdictions that have been continuously covered since 1965, followed by the framing of some topics for discussion as we move toward the renewal of the act.

THE PROBLEM

The initial concern of the Voting Rights Act was access to the political process. Political scientist V. O. Key, writing over a half-century ago in his classic *Southern Politics: In State and Nation*, observed that "the South may not be the nation's number one political problem . . . but politics is the South's number one problem" (1949: 3). Participation was necessary to a functioning democracy, for Key, who observed that the problem of participation in the South, like every other problem, could be traced to the status of blacks.

What was the status of southern blacks? Well, depending on where you went in the South variations were in evidence, but southern blacks were generally disfranchised, generally discriminated against, and generally held at a distance from white society—specifically the prosperous part of white society—by public policy. Key observed that "whites govern and win for themselves the benefits of discriminatory public policy" and further noted that "discrimination in favor of whites tends to increase roughly as Negroes are more completely excluded from the suffrage" (1949: 528). Exclusion from the vote did not cause discriminatory treatment, but it most certainly reinforced the status of southern blacks. Key observed in a clinical fashion what Martin Luther King, Jr., argued passionately in 1965, "give us the vote and we will change the South." It was only by the exercise of political power through ballots that politicians would change policy in the long run.

THE OPPORTUNITY

We have the opportunity for a frank, informed conversation about the shape of the Voting Rights Act for the future. What does this mean?

First, we should consider the context of the adoption of Section 5, and examine the modern circumstances of the renewal debate.

In 1964, there was one black state legislator in the seven states originally covered by Section 5. The South lumbered under an archaic and outdated political and social culture that clung to the past at the possible cost of the future. There was no viable competition to the Democratic Party, which was locally a contrary adjunct to the national party, opposed to the Democrats in the rest of the nation on most every dimension of politics.

The contemporary South is vibrant, the largest and fastest-growing region of the nation. Southern children are more likely to attend integrated schools than in the rest of the nation, and a black person is more likely to have black representation in the South than anywhere else in the nation. Education and income differences across the races are matters of degree rather than orders of magnitude. Southern blacks are registered and voting at rates comparable to black voters in the rest of the nation. There is a two-party system in the South which fosters black political empowerment and officeholding.

Race still divides the South, but southern blacks are not helpless in the pursuit of political, social, and economic goals when compared to five decades ago.

Second, we must examine the data on minority participation in the political process, and ascertain how Section 5 advanced that cause.

As a starting point, in Table 1 information from Earl and Merle Black's *Politics and Society in the South* is presented, showing the growth of black voters in the South. South Carolina and Mississippi rank at the top of proportion black electorate in 1984 while Mississippi and Alabama registered the largest proportional gain of size in the black electorate. Georgia and Louisiana rank near the bottom of proportional gain in part because of having the highest rates of black registration of any state originally covered by Section 5. By 1984, the black percentage among registrants tracks closely with the black percentage in the voting age population. Generally speaking, the states with the largest *potential* black electorate indeed had the most heavily African American voter registration rolls.

The Black brothers' analysis informs us as to the proportionately largest black electorates in the South. Tables 2 and 3 indicate the differences in black voter registration and participation since 1980 for six of seven states originally covered by Section 5 (all but Alabama). Black registration lags white registration for most of the time period in the six covered states analyzed (as it does in nonsouthern states throughout the time series). But, for the last four elections for which there are comparative data, black registration in five of the six states (all but Virginia) exceeds black registration rates in the nonsouthern states. In three of the states (Georgia, South Carolina, and Mississippi), black registration rates exceeded white registration rates for at least two of the last four elections.

Black turnout rates are less consistently above the national average. As indicated in Table 3, two of the original Section 5 states—Mississippi and Louisiana—have black turnout consistently above the national average. Every covered state except Virginia reports higher black turnout than white turnout at least once since 1990, and Georgia reports higher black turnout in three of the

last four general elections. Differences in racial registration and participation have become differences of degree rather than of magnitude.

These votes translated into seats. Figure 1 presents timelines, since 1964, of the percentage of state legislative seats held by black incumbents in the state legislatures of the seven original Section 5 states. None of the states have yet achieved proportionality in their legislatures. Alabama, Mississippi, and North Carolina are approaching proportionality (data for this graphic appear in Table 4).

At the congressional level, the 1990s saw significant advancement of descriptive African American representation. The number of southern, African American members of Congress tripled. In the states covered by Section 5, the number increased from three in 1991 to a current 11 (one from Virginia, two from North Carolina, one from South Carolina, four from Georgia, one from Alabama, one from Mississippi, and one from Louisiana)—18 percent of all congressmen from these states are African American, compared to 25 percent African American citizen voting age population (see Table 5). If we also add the black congressmen elected from the other two Section 5 southern states—Texas and Florida—we total 17 black members of Congress, or 15 percent of all members from nine states that are collectively 18.9 percent black by citizen voting age population.[1] Black representation in the Section 5 states is not proportional to the black citizen voting age population. But, black descriptive representation is as high as it has ever been in southern legislatures, and is approaching proportionality to the extent that the geographic placement of black voters and the tendencies of electorates in general elect black candidates who seek legislative office.

There is much more analysis required than this cursory recount of black descriptive advancement. We must examine elections using appropriate methods such as ecological regression, the emergent ecological inference technique of Gary King, homogenous precinct analysis, and polling data to ascertain when the preferences of minority voters do prevail in legislative elections, and to establish proper baselines for comparison, as we do when assessing potential retrogression. But, to understand the means by which one satisfies nonretrogression, we need to consider the nature of Section 5. Has it become so blurred by recent litigation that the provision is emerging as a vehicle for the pursuit of partisan advantage rather than ensuring access to the political process? I will revisit this point later.

Third, the political use of Section 5 should be frankly and openly discussed.

Republican administrations historically used the Voting Rights Act as a lever to encourage the creation of majority-minority districts, and to limit the opportunities to create cross-racial coalitions in support of Democrats. White Democrats in turn preferred districts with sizeable (but not majority) minority populations because of the biracial coalitions that could command more seats. In the 1980 and 1990 rounds of redistricting, African American Democrats preferred districts with black majorities sufficient to elect an African American.

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[1] The nine southern states that are Section 5-covered contain one-fourth of the citizen voting age population (VAP) in the United States. Those states are 18.9 percent African American citizen VAP, and contain 43.9 percent of all citizen VAP blacks in the United States. The original seven Section 5 states are 24.9 percent citizen VAP by population, and contain 30.8 percent of all citizen VAP black in the United States.

The aggressive use of the Voting Rights Act to create majority-minority districts in the early 1990s resulted in an electoral map that shifted one-third of all southern congressional districts to the GOP in a three-election period. That these districts were largely bereft of minority voters and next door to majority-minority districts is more than coincidence. These districts were urged by the Justice Department as part of a "maximization strategy," using preclearance as a policy lever. State legislative or congressional plans (or both), many of which were approved by the Justice Department were overturned by courts in Alabama (state legislative), Georgia (Congress, state legislative), Louisiana (Congress), North Carolina (Congress), Texas (Congress), and Virginia (Congress).

More recently, Georgia and Texas offer opposite perspectives on the effort to seize electoral advantage while playing politics with the Voting Rights Act in the latest redistricting round. Georgia Democrats moved to retain control of the state legislature while also expanding their foothold in the state's congressional delegation. This was accomplished through the efficient allocation of black, Democratic voters in a fashion opposed by the Justice Department, and which required litigation to establish. This efficient allocation reduced minority majorities in some districts and was considered retrogressive by the Justice Department. Because the elected representatives of the community of interest approved of the strategy, and because minority choices could prevail in the coalition districts, the Supreme Court held that the use of coalition districts as an alternative to majority-minority districts was permissible (though not required) to satisfy Section 5.[2]

This change in the definition of retrogression occurred during the recent Texas redistricting. In Texas, plaintiffs challenged the mid-decade congressional redistricting on several dimensions. One claim was that districts lacking a majority of a minority, but electing candidates preferred by minority voters, were protected from change under Section 5. A plaintiff's expert testified that districts as low as 5 percent minority population might be protected from change under the Voting Rights Act, unless agreed to by the minority community's leadership. This reasoning was rejected by the Justice Department, which precleared the new Texas map (a controversial decision left to others to explain) and approved also by the Federal district court in Austin, which explicitly rejected the argument that there is an obligation to create coalition districts under federal law.

Section 5 in redistricting has become a political lever to achieve partisan advantage, either packing or cracking minority populations to serve the political ends of the major parties. From the perspective of the Republican Party, it has been successfully used, given the dramatic realignment of southern congressional delegation in the early 1990s. The redistricting compelled by the Justice Department under Section 5 is not solely responsible, but when combined with the departure of incumbents and wedge issues, the redistricting facilitated the doubling of southern Republican congressional strength.

[2] The Justice Department did approve of 53 of 56 proposed Georgia Senate districts, indicating the relatively narrow scope of objection to the total map.

Fourth, we need to revisit the need to continue Section 5 in all covered jurisdictions.

Virginia offers evidence that local circumstances can change in order to allow jurisdictions to "bail out" from under Section 5. Efforts should be made to explore how the Justice Department can further work with jurisdictions that have made real strides in improving their racial political climate, in order to remove the footprint of federal oversight where it is no longer required. The existing rules for bailing out from Section 5 set impressive, high evidentiary standards for jurisdictions to attain. Do those standards impede the removal of the preclearance mechanism in states where recent evidence of progress is overwhelming?

A state that presents such a dilemma is Georgia. The fastest-growing of the original Section 5 states offers real evidence of voting rights progress in the last decade. African American candidates run as well or better than white candidates for statewide office of the same party. African American legislative candidates are capable of winning nonmajority black districts on an even basis. The state has the most heavily black congressional delegation in the U.S. House (31 percent of seats). Georgia's African American Attorney General Thurburt Baker asserted that:

> The State (sic) racial and political experience in recent years is radically different than it was 10 or 20 years ago, and that is exemplified on every level of politics from statewide elections on down. The election history for legislative offices in Georgia—House, Senate and Congress—reflect a high level of success by African American candidates [Post-trial brief of the state of Georgia, *Georgia v. Ashcroft* C.A. No. 01-2111 (EGS) (D.C., DC 2002), p. 2].

However, the current rules governing bailing out from under Section 5 preclude Georgia's departure, due to recent objections by the Justice Department. And, many local jurisdictions have a history of necessary Section 5 objections. At the highest levels of government, Georgia accomplished more than any other state covered by Section 5.

Finally, it needs to be made abundantly clear that the Voting Rights Act is not expiring, but only certain provisions of the act.

Section 2, the nationally applicable mechanism for applying proactive remedies where racially polarizing voting is in evidence, exists now and into the future. Any jurisdiction which implements election law that has a discriminatory effect will be subject to judicial remedy as demanding as any alternative possible under Section 5. Section 5 preclearance does not preclude a Section 2 challenge.

Table 1: The Changing Size of the Black Share of the Electorate from 1960 to 1984

	Percent Black Among Registered Voters		
State	**1960**	**1984**	**Proportion Gain**
South Carolina	11	28	2.54
Mississippi	4	26	6.50
Alabama	7	22	3.14
North Carolina	10	19	1.90
Louisiana	14	25	1.79
Virginia	10	17	1.70
Georgia	15	22	1.47

Source: From Table 6.2 of Earl Black and Merle Black, *Politics and Society in the South* (Cambridge: Harvard, 1987) (at page 139).

Table 2. Voter Registration by Race, Six Original Section 5 States Versus Nonsouthern States

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
Georgia													
Black	59.8	51.9	58	55.3	56.8	57	53.9	57.6	64.6	64.1	66.3	61.6	64.2
White	67.0	59.7	65.7	60.4	63.9	58.1	67.3	55	67.8	62.0	59.3	62.7	63.5
Louisiana													
Black	69.0	68.5	74.8	71.9	77.1	72.0	82.3	65.7	71.9	69.5	73.5	73.5	71.1
White	74.5	67.5	73.2	71.4	75.1	74.1	76.2	72.7	74.5	75.2	77.5	74.2	75.1
Mississippi													
Black	72.2	75.8	85.6	75.9	74.2	71.4	78.5	69.9	67.4	71.3	73.7	67.9	76.1
White	85.2	76.9	81.4	77.3	80.5	70.8	80.2	74.6	75.0	75.2	72.2	70.7	72.3
North Carolina													
Black	49.2	43.6	59.5	57.1	58.2	60.1	64	53.1	65.5	57.4	62.9	58.2	70.4
White	63.7	62.5	67.0	65.8	65.6	63.6	70.8	63.9	70.4	65.6	67.9	63.1	69.4
South Carolina													
Black	61.4	53.3	62.2	58.8	56.7	61.9	62	59	64.3	68.0	68.6	68.3	71.1
White	57.2	54.5	57.3	56.4	61.8	56.2	69.2	62.6	69.7	67.9	68.2	66.2	74.4
Virginia													
Black	49.7	53.6	62.1	66.5	63.8	58.1	64.5	51.1	64.0	53.6	58.0	47.5	57.4
White	65.4	60.8	63.7	63.3	68.5	61.9	67.2	63.6	68.4	63.5	67.6	64.1	68.2
Non-South													
Black	60.6	61.7	67.2	63.1	65.9	58.4	63	58.3	62.0	58.5	61.7	57.0	na
White	69.3	66.7	70.5	66.2	68.5	64.4	70.9	65.6	68.1	63.9	65.9	63.0	na

Source: Various post-election reports by the U.S. Bureau of the Census.

Table 3. Voter Turnout by Race, Six Original Section 5 States Versus Nonsouthern States

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
Georgia													
Black	43.7	32.5	45.9	37.3	42.4	42.3	47.1	30.9	45.6	40.2	51.6	38.5	54.4
White	56.0	40.7	55.3	40.5	53.2	42.6	58.7	38.3	52.3	36.8	48.3	44.8	53.6
Louisiana													
Black	60.1	32	66.4	55.8	61.5	55.9	71.5	30.9	60.9	46.0	63.2	46.9	62.1
White	65.6	23.6	64.7	57.5	67.5	50.2	68.3	35.6	62.6	35.7	66.4	51.0	64.0
Mississippi													
Black	59.5	50.8	69.6	40.2	60.3	32.5	61.9	41.7	48.8	40.4	58.5	40.2	66.8
White	70.9	52.4	69.2	45.8	64.2	35.8	69.4	46.2	59.3	40.7	61.2	43.6	58.9
North Carolina													
Black	38.8	30.4	47.2	39.1	46.6	48.1	54.1	28.3	48.7	38.2	47.6	42.2	63.1
White	55.9	41.7	59.1	47.1	55.2	49.9	62.4	38.4	56.4	40.5	55.9	43.5	58.1
South Carolina													
Black	51.3	38.9	51.4	42.0	40.7	44.6	48.8	38.7	49.9	42.8	60.7	48.7	59.5
White	51.7	37.0	47.9	41.3	52.3	42.0	61.6	49.4	56.2	48.8	58.7	45.1	63.4
Virginia													
Black	42.9	44.3	55	42.5	47.7	32.0	59.0	33.8	53.3	23.8	52.7	27.2	49.6
White	58.3	46.2	57.8	36.8	61.1	39.6	63.4	50.4	58.5	32.4	60.4	37.8	63.0
Non-South													
Black	52.8	48.5	58.9	44.2	55.6	38.4	53.8	40.2	51.4	40.4	53.1	39.3	na
White	62.4	53.1	63.0	48.7	60.4	48.2	64.9	49.3	57.4	45.4	57.5	44.7	na

Source: Various post-election reports by the U.S. Bureau of the Census.

Figure 1. Proportion of State Legislators who are African American, Seven States Covered by Section 5

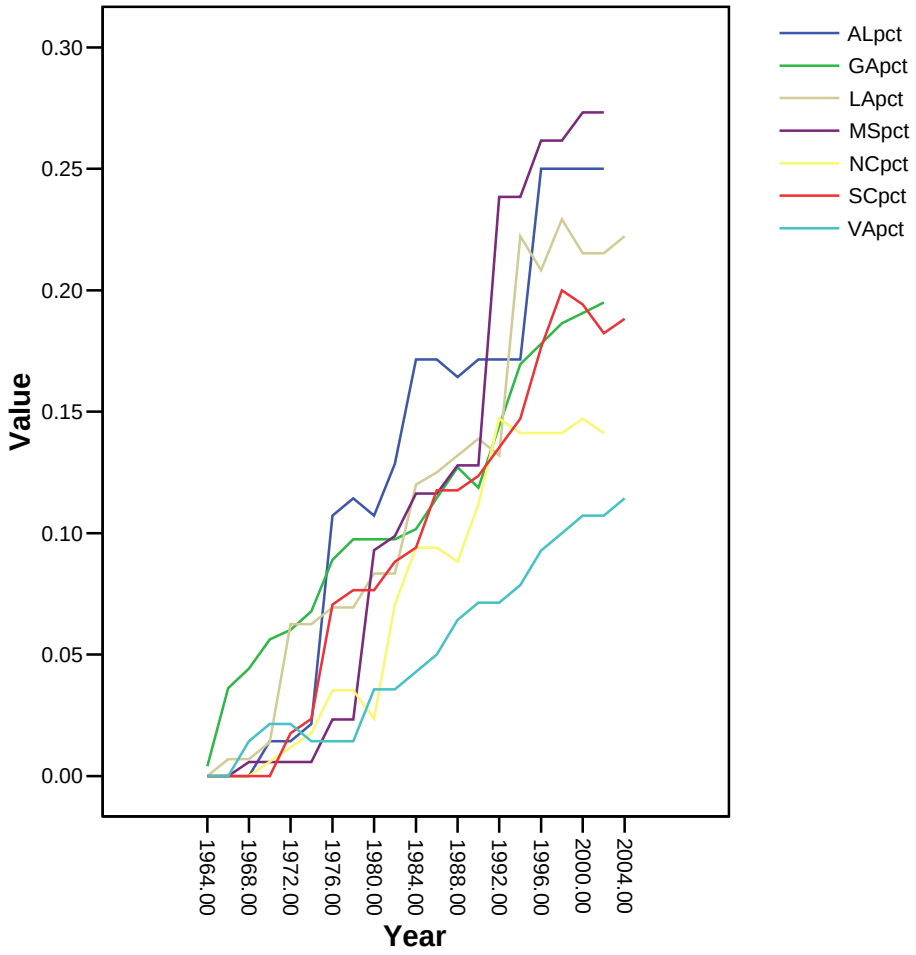


Table 4. Data on Black Legislative Officeholding from Figure 1

	Alabama	Georgia	Louisiana	Mississippi	North Carolina	South Carolina	Virginia
1964	0	1	0	0	0	0	0
1966	0	9	1	0	0	0	0
1968	0	11	1	1	0	0	2
1970	2	14	2	1	1		3
1972	2	15	9	1	2	3	3
1974	3	16	9	1	3	4	2
1976	15	21	10	4	6	12	2
1978	16	23	10	4	6	13	2
1980	15	23	12	16	4	13	5
1982	18	23	12	17	12	15	5
1984	24	24	13	20	16	16	6
1986	24	27	18	20	16	20	7
1988	23	30	19	22	15	20	9
1990	24	28	20	22	19	21	10
1992	24	34	19	41	25	23	10
1994	24	40	32	41	24	25	11
1996	35	42	30	45	24	30	13
1998	35	44	33	45	24	34	14
2000	35	45	31	47	25	33	15
2002	35	46	31	47	24	31	15
2004	.	.	32	.	.	32	16
N	140	236*	144	172	170	170	140

* Georgia: N = 259 until 1973
Source: Charles S. Bullock III and Mark J. Rozell, Forthcoming. *The New Politics of the Old South.* Boulder: Rowman and Littlefield.

Statement of Jon M. Greenbaum

INTRODUCTION

I am Jon Greenbaum, Director of the Voting Rights Project for the Lawyers' Committee for Civil Rights Under Law. I would like to thank the United States Commission on Civil Rights for inviting me to this briefing. This written submission incorporates issues and questions that were raised during the October 7, 2005 briefing.

It is a great honor to appear before the U.S. Commission, who since its founding in 1957 has been a leader in documenting the existence and degree of racial discrimination in voting and in advocating for federal voting rights legislation and enforcement to confront such discrimination. Indeed, on my desk, I have the excellent report the U.S. Commission produced in connection with the 1982 Reauthorization of the Voting Rights Act. I understand that the U.S. Commission will be producing a report this year regarding the upcoming reauthorization of the Voting Rights Act. I hope and expect the U.S. Commission will engage in the same type of detailed analysis it has performed in past decades, and if it does, I believe that the U.S. Commission will find that there remains significant discrimination in voting.

The Voting Rights Act is generally considered to be the most effective piece of civil rights legislation ever passed by the Congress. Forty years ago, in the face of great social turmoil, the Congress passed legislation that made the promise of the right to vote under the 15th Amendment of the U.S. Constitution a reality, 95 years after its passage. The act, with its combination of permanent and temporary provisions, has enabled tens of millions of minority voters to fully exercise their right to participate in the political process and elect candidates of their choice. Since 1965, Congress has reauthorized the Voting Rights Act in 1970, 1975, 1982, and 1992. Each time Congress reauthorized the act, it has expanded its scope to confront emerging issues of voting discrimination that were introduced into the record.

Today I am going to discuss the continued problem of discrimination in voting and the necessity of the provisions of the Voting Rights Act that are set to expire in 2007 to remedy and protect against such discrimination. Compared to 1965 there has been progress in regard to race and voting, and there has been a decrease in blatant racist activity as it relates to voting. Nonetheless, there are a significant number of state actors who in an effort to maintain or enhance their power have taken actions that clearly discriminate against minority voters. Whether the impetus is bigotry or power the end result—discrimination against minority voters—is the same.

BACKGROUND ON THE LAWYERS' COMMITTEE, JON GREENBAUM, AND THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT

Before beginning the substance of my presentation, I wanted to provide some background on the Lawyers' Committee, me, and the National Commission on the Voting Rights Act. The Lawyers' Committee was formed in 1963 at the urging of President Kennedy, and since that time, has worked with the private bar to promote civil rights through litigation, education, and advocacy.

Along with voting, the Lawyers' Committee works on education, employment, environmental justice, and housing and community development matters. The Lawyers' Committee worked on the original enactment of the Voting Rights Act in 1965 as well as each of the subsequent reauthorizations.

I have been the Director of the Voting Rights Project for the Lawyers' Committee since December 2003 where I have the responsibility of leading the Lawyers' Committee's voting work, which includes litigation, education, and advocacy on a host of voting issues, including the Voting Rights Act. From January 1997 to November 2003, I was a trial attorney in the Voting Section of the United States Department of Justice, where I enforced several provisions of the Voting Rights Act throughout the country, including Section 2 and all of the temporary provisions of the Voting Rights Act.

The Lawyers' Committee for Civil Rights Under Law—acting on behalf of the civil rights community—created the nonpartisan National Commission on the Voting Rights Act to document the record of enforcement of these provisions and the state of discrimination in voting since the last comprehensive reauthorization of the Voting Rights Act in 1982. The National Commission is comprised of eight advocates, academics, legislators, and civil rights leaders who represent the diversity that is such an important part of our nation. The Honorary Chair of the Commission is the Honorable Charles Mathias, former Republican U.S. Senator from Maryland, and the Commission Chair is Bill Lann Lee, former Assistant Attorney General for Civil Rights. The other commissioners are: the Honorable John Buchanan, former Congressman from Alabama; Chandler Davidson, scholar and co-editor of one of the seminal works on the Voting Rights Act; Dolores Huerta, co-founder of the United Farm Workers of America; Elsie Meeks, first Native American member of the United States Commission on Civil Rights; Charles Ogletree, Harvard law professor and civil rights advocate; and Joe Rogers, former lieutenant governor of Colorado. The National Commission has two primary tasks: first, to conduct field hearings across the country to gather testimony relating to discrimination in voting, and second, to write a comprehensive report detailing the existence of discrimination in voting since 1982, the last time there was a comprehensive reauthorization of the Voting Rights Act.

To date, the National Commission has held nine of 10 planned hearings. It has held regional hearings in Montgomery, Alabama (March 11, 2005); Phoenix, Arizona (April 7, 2005); New York, New York (June 14, 2005); Minneapolis, Minnesota (July 22, 2005); Orlando, Florida (August 4, 2005); Los Angeles, California (September 27, 2005); and Washington, DC (October 14, 2005). The National Commission has also held state hearings in Americus, Georgia (August 2, 2004); Rapid City, South Dakota (September 9, 2005); and Jackson, Mississippi (October 29, 2005). We have heard from approximately 100 witnesses, who range from elected officials, election officials, voting rights attorneys and social science experts, community leaders, and concerned citizens who have testified about their experiences related to discrimination in voting.

The National Commission's report will contain information from the hearings and extensive research culled from many sources including findings, reports, and testimony from court cases and the Department of Justice enforcement record. The report's analysis will be quantitative and qualitative. The report will utilize maps to show graphically where there has been discrimination in the last 23 years. The report will not advocate for any particular legislative action. Instead, the purpose of the report is to detail the facts that will inform the debate concerning reauthorization.

STRUCTURE OF THE VOTING RIGHTS ACT

The Voting Rights Act contains a number of permanent and temporary provisions. The permanent provisions include the following:

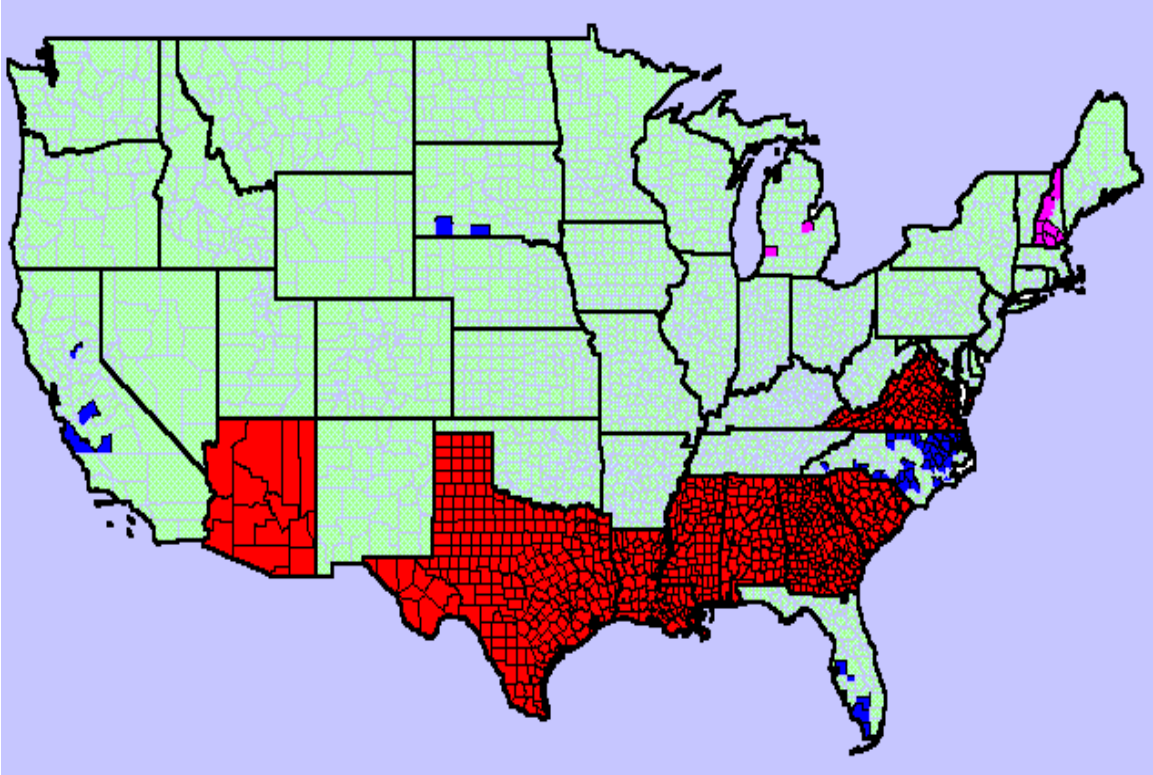
- A ban on tests and devices: for example, no jurisdiction can impose a literacy test;
- Section 2: this provision enables affected citizens to file suits establishing that a voting practice or procedure results in a racial or language minority group not having an equal opportunity to participate in the political process and elect candidates of their choice through a totality of circumstances analysis;
- Section 208: this provision enables voters who cannot read the ballot to have an assistor of their choice help them at the polls;
- Section 3: this provision enables a court to impose Section 5 preclearance obligations on a jurisdiction and/or certify a jurisdiction for examiner/observer coverage (see below);
- Sections 11 and 12: civil and criminal penalties; and
- Section 201: special provisions relating to presidential elections.

The temporary provisions will expire if not reauthorized by Congress prior to August 2007. They include some of the core provisions of the act. In addition to the coverage formula for some of the temporary provisions that is set forth in Section 4 of the act, three substantive provisions will expire in 2007 if not reauthorized. *First*, Section 5 of the act requires certain states, counties, and townships with a history of discrimination against minority voters to obtain approval or "preclearance" from the United States Department of Justice or the United States District Court in Washington, DC before they make any change affecting voting. These changes include, but are not limited to, redistrictings, changes to methods of election, polling place changes, and annexations. Jurisdictions covered by Section 5 must prove that the changes do not have the purpose or effect of denying or abridging the right to vote on account of race, color, or membership in a language minority. In recent years, the Supreme Court has limited the scope of Section 5 to voting changes that have the purpose or effect of worsening the position of minority voters. *Second*, Section 203 of the act requires that language assistance be provided in jurisdictions or reservations where 5 percent or a total of 10,000 of the voting age citizens have limited English proficiency and speak a particular minority language. Four language groups are covered by Section 203: American Indian, Asian, Alaskan Native, and Spanish. Covered jurisdictions must provide language assistance at all stages of the electoral process. As of 2002, a total of 466 local jurisdictions across 31 states are covered by these provisions. *Third*, Sections 6(b), 7, 8, 9, and 13(a) of the act authorize the Attorney General to certify the appointment of a federal examiner to jurisdictions covered by Section 5's preclearance provisions on good cause and/or to send a federal observer to any jurisdiction where a federal examiner has been assigned. Since 1966, 25,000 federal observers have been deployed in approximately 1,000 elections.

The sections relating to the coverage formula for the Section 5 preclearance, and the examiner/observer provisions were originally enacted in 1965 and reauthorized in 1970, 1975,

and 1982. The minority language provisions were enacted in 1975 and reauthorized in 1982 and 1992. The coverage formula used for Section 5 and the examiner/observer provisions was designed to capture jurisdictions with a history of voter discrimination. Jurisdictions were covered because they met two criteria: (1) less than 50 percent voter registration or voter turnout in the 1964, 1968, and 1972 presidential elections and (2) use of a test or device at the time. Nine states are covered under the coverage formula—Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, and there are covered jurisdictions (counties or municipalities) within seven other states—California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. Ten Virginia jurisdictions have successfully sought to bail out from coverage as provided in Section 4 of the act. The following map shows the covered jurisdictions:

Map of Section 5 Covered Jurisdictions



SECTION 5 PRECLEARANCE

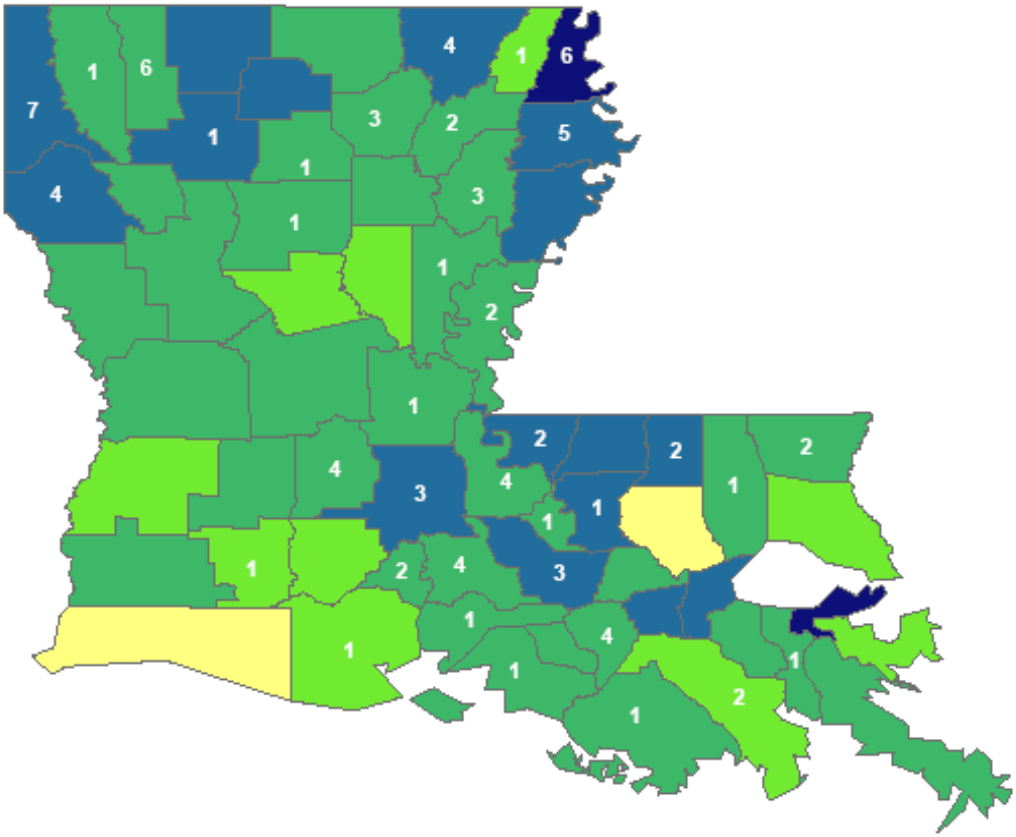
As detailed in the legislative history supporting the original enactment of Section 5, the Department of Justice would spend years litigating a voting lawsuit and after DOJ prevailed, the offending jurisdiction would simply devise a new way to disenfranchise minority voters. Section 5 was designed to prevent covered jurisdictions from implementing new voting procedures that perpetuated the effect of past discrimination. Section 5 has many benefits, including but not limited to the following:

- As the Supreme Court recognized in *South Carolina v. Katzenbach*, 1966, Section 5 "shifts the advantages of time and inertia" from the victims of discrimination to jurisdictions.
- Section 5 makes racial fairness a consideration whenever jurisdictions make changes. For example, when states like Georgia and Alabama redistricted in this past decade, compliance with Section 5 was one of their redistricting principles.
- Section 5 prevents gains from being eroded; for example, where a jurisdiction switches from an at-large to single-member district method of election as a result of a minority vote dilution claim under Section 2, when it redistricts following the next census, the jurisdiction cannot negate the effect of the remedy from the lawsuit.
- Section 5 prevents discriminatory last-minute voting changes (see Waller County example below).
- Section 5 is efficient and fair: DOJ must make a determination on a voting change within 60 days of receipt (provided the jurisdiction has submitted all of the necessary information) and 99 percent of submitted voting changes are precleared. Additionally, the bailout provision permits compliant and nondiscriminating jurisdictions to be exempted.

The impact and scope of Section 5 have been enormous. There have been objections made to 627 submissions and more than 2,000 voting changes from August 1982 to June 2004, including in every state where there are covered jurisdictions except for New Hampshire and Michigan. In addition, jurisdictions withdrew 501 changes and 206 submissions since 1982 after the Department of Justice sent a more information letter which suggested problems with the submission. Moreover, there have been 24 Section 5 declaratory judgment actions since 1982 where Section 5 made a difference: meaning that the declaratory judgment action was denied or withdrawn when it became apparent that the federal district court was not going to preclear the change. For example, when Louisiana redistricted its State House after the 2000 census, it bypassed the Department of Justice and sought a declaratory judgment in the District Court of the District of Columbia. The plan eliminated a majority-black district in Orleans Parish. When it became apparent that the Court was unlikely to grant the declaratory judgment, the state withdrew its case, abandoned the plan, and devised a new plan that restored the majority-black district.

The following are maps showing where the Department of Justice has objected to local submissions in Louisiana, Mississippi, and South Carolina since 1982. It does not reflect the several submissions from the states that resulted in objections. The maps are noteworthy in that they show that most of the counties with substantial minority population have had at least one objection.

Objections by County: Louisiana
(August 5, 1982 - 2004)

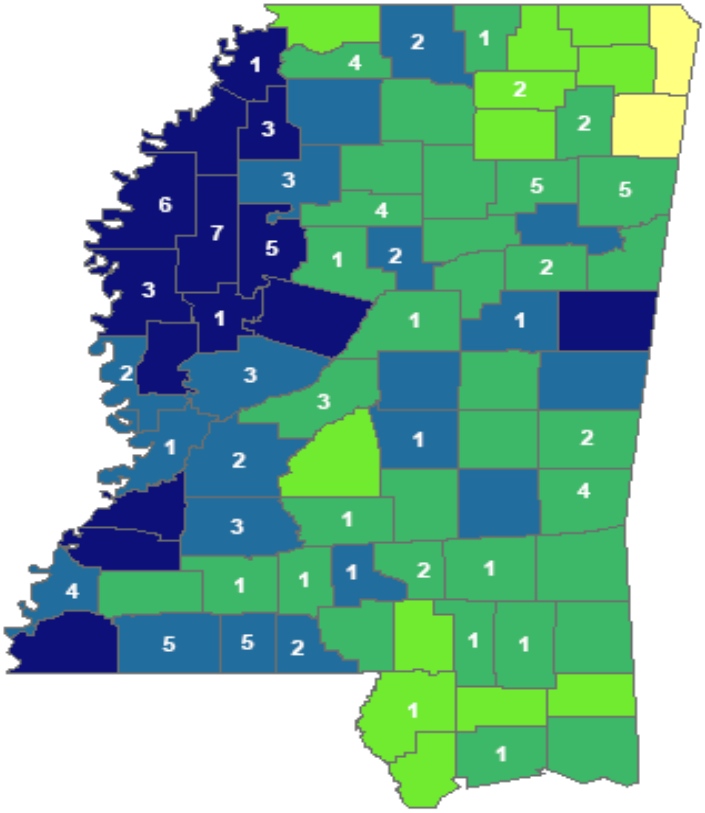


Percent Nonwhite Voting-Age Population (2000)

- 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

Objections by County: Mississippi
(August 5, 1982 - 2004)

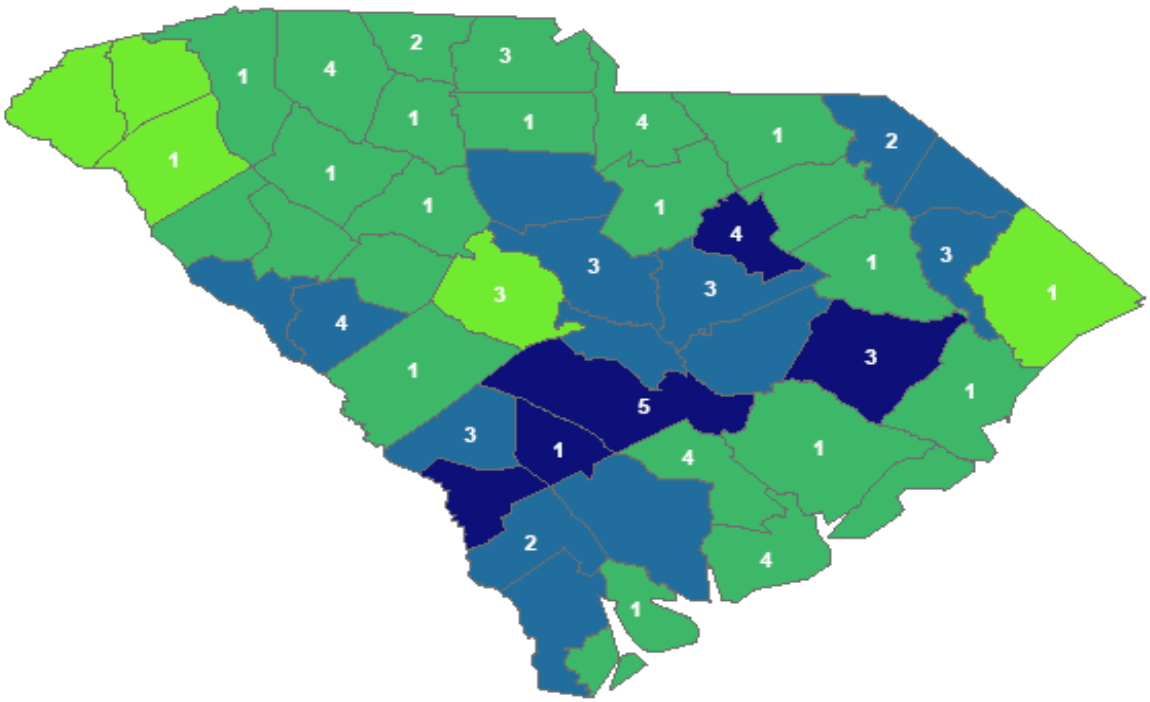


Percent Nonwhite Voting-Age Population (2000)

- 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

Objections by County: South Carolina
(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

RESTORING SECTION 5

Two recent Supreme Court opinions interpreting Section 5—*Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier II*) and *Georgia v. Ashcroft*, 539 U.S. 461 (2003)—have significantly limited Section 5. We believe Congress should restore Section 5 to the pre-*Bossier II* and *Georgia v. Ashcroft* standard.

In *Bossier II*, the Supreme Court held that a voting change that was adopted with a discriminatory intent did not violate Section 5 unless the change worsened the position of minority voters—what the Court called a purpose to retrogress. This was a reversal of 35 years of practice. Based on a study done by Rick Valelly, Peyton McCrary, and Chris Seaman, it is abundantly clear that the *Bossier II* case has had an enormous impact. In the decade prior to *Bossier II*, discriminatory purpose was a ground for 74 percent of DOJ's objections and the sole ground of 43 percent. Since *Bossier II*, retrogressive purpose has been the sole basis for only two objections.

In *Georgia v. Ashcroft*, the Supreme Court reversed the three judge district court and stated that a jurisdiction could substitute a district where minority voters usually elected their candidates of choice for a greater number of districts where minority voters usually would not elect their candidate of choice but could influence who might get elected.

Because *Georgia v. Ashcroft* was decided at the end of the most recent redistricting cycle, its impact cannot be calculated in the way that *Bossier II* can be calculated. One likely effect is that it would appear to decrease the opportunity for minority voters to elect their candidates of choice where there is significant racially polarized voting. Indeed, where there is significant racially polarized voting, it is difficult for minority voters to have influence because the more sympathetic a candidate is to minority voters, the more likely that candidate will lose the white vote. Moreover, the opinion is unclear in several respects; for example, it does not provide a clear definition of what an influence district is and it does not say how many influence districts must be created to counterbalance one "ability to elect" district.

SUPPLEMENTAL RESPONSE TO ISSUES RAISED DURING THE BRIEFING

Several issues were raised during the briefing. The following supplements my responses given during the briefing.

Section 2 as a Substitute

One of the other panelists, Ed Blum, contends that Section 5 is not necessary because of Section 2. There are several critical differences between Section 5 and Section 2 and that make Section 2 an inadequate substitute for Section 5. As the Supreme Court held in 1966 and Congress has stated in subsequent reauthorizations of the act, Section 5 shifts the advantage of time and inertia from jurisdictions to minority voters. At little or no cost to minority voters and their advocates, voting changes that violate Section 5 are never implemented. In contrast, to establish a Section 2 violation, minority voters must hire a lawyer and experts and file an expensive lawsuit that may take several years to resolve.

For example, in early 2001, the Department of Justice and private plaintiffs filed a lawsuit alleging that the method for electing the County Council for Charleston, South Carolina violated Section 2. The plaintiffs prevailed and three black-preferred candidates (all of whom were African American) were elected in the first election under single-member districts in 2004. The county spent over $2 million defending the lawsuit and has been ordered to pay the plaintiffs $700,000 in attorneys' fees. The Department of Justice also expended substantial resources. In 2003, after the federal district court had found in plaintiffs' favor, the South Carolina General Assembly passed a law which changed the method of electing the Charleston County School Board to that used by the County Council before the lawsuit. The Department of Justice objected to this change under Section 5, thus preventing a second lawsuit that would have taken several years and cost millions of dollars.

In addition, Section 5 blocks jurisdictions from making last-minute voting changes that harm minority voters. In months preceding the 2004 primary election, the Criminal District Attorney of Waller County, Texas threatened students at Prairie View A&M University, which has a 90 percent African American student body, with felony prosecution if they voted. The Prairie View A&M University NAACP filed a lawsuit against him that was settled shortly thereafter. Five days after the lawsuit was filed, and a month before the March 2004 primary election, the Waller County Commissioners' Court, the county governing body, voted to decrease the number of hours of early voting at the polling place where the students voted from 17 hours to six hours. This was particularly discriminatory because the students were on spring break on the date of the primary. A second lawsuit was filed on the ground that the Commissioners' Court had not sought Section 5 preclearance for this last minute change. Within a week after the Section 5 enforcement action was filed, the Commissioners' Court restored the number of early voting hours. A total of 346 students voted during the restored early voting period and a student running for Commissioners' Court prevailed in his primary by less than 40 votes.

Limiting the Scope of Section 5

There were some questions aimed at limiting the scope of Section 5. Commissioner Braceras inquired as to as whether Section 5 should be limited to changes involving voting access, as opposed to changes that affect the opportunity of minority voters to elect their candidates of choice.

Both Congress and the Supreme Court have properly determined that all changes affecting the right to vote should be considered. In the years immediately following the 1965 enactment of the act, minority voter participation increased dramatically in the covered jurisdictions, as reflected in Mr. Gaddie's tables. The ban on tests and devices in the Voting Rights Act played the most significant role in increasing minority voter participation. Covered jurisdictions engaged in a number of devices to counteract the effect of increased minority participation including changing from single-member to at-large districts, manipulating district lines to either pack or fragment minority voters, moving polling places, selectively annexing or deannexing property to affect the racial demographics of a jurisdiction, and changing elective offices to appointment offices. In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the Supreme Court held Section 5 covered not only voting changes that affected access to the polls, but all changes related to making a vote effective. Congress in subsequent reauthorizations has recognized the impact of these new devices and confirmed its agreement with the *Allen* decision.

In many areas of the country, voting continues to be racially polarized—most whites vote for different candidates than most minority voters. In the last decade, federal court cases involving statewide redistricting plans in Georgia, Louisiana, South Carolina, South Dakota, and Texas have found that racially polarized voting exists in their states. This is consistent with the testimony of witnesses before the National Commission on the Voting Rights Act who have discussed the existence of racially polarized voting. For example, Professor Richard Engstrom, one of the leading experts in the field, testified that his analysis shows that race still forms a demographic division in politics. Since the 2000 census, he conducted studies of racially polarized voting in several states. He found that racially polarized voting played a role in all levels of office from governor to the school board. This overwhelming pattern of racially polarized voting means that minority voters usually cannot elect candidates of choice unless they are a majority or near majority of the electorate. Professor Engstrom found this phenomenon prevalent in Alabama, Florida, Georgia, Mississippi, and North Carolina.

One byproduct of racially polarized voting is that a new voting procedure that harms minority voters is likely to achieve the electoral result desired by state actors who make the change. For example, when election officials dismantle a majority-minority district or change to at-large elections in a jurisdiction where voting is extremely racially polarized, the predicted result is that minority voters usually will not be able to elect their candidates of choice.

Commissioner Braceras also asked about the idea proposed by Harvard Law School Professor Heather Gerken that would only require jurisdictions to submit changes for Section 5 preclearance when minority voters request it—what she calls an "opt-in" provision. Such a provision would eviscerate the purpose of Section 5: to shift the advantages of time and inertia from minority voters to jurisdictions. Under Professor Gerken's proposal, a local board of elections could simply put a notice of meeting in the local newspaper and then hold the meeting and make a number of voting changes. The minority community may never be aware that such a change was made. Under Section 5, a jurisdiction has a legal obligation to submit a voting change, and the Department of Justice checks with local minority contacts to find out whether they were aware of the change and whether the change presents a problem.

Politics and Section 5

Both Mr. Blum and Mr. Gaddie expressed concern that Section 5 was problematic because both the major political parties had manipulated or attempted to manipulate Section 5 to their advantage. I agree that in statewide redistricting matters, both political parties have tried to use Section 5 to their political advantage. This is not a problem inherent to Section 5, however. The issues of partisan gerrymandering and lack of competitiveness in legislative districts is as present in non-Section 5 covered jurisdictions as in Section 5 covered jurisdictions. There are initiatives or proposed initiatives in several noncovered states, such as Ohio, that are designed to minimize the impact of political parties on the process.

In addition, most of the voting changes occur at the local level, where many elections are nonpartisan. Even where elections are partisan, partisanship plays less of a role. A sole black or Latino member of a five-member county commission is likely to need Section 5 to protect his or her majority-minority district—there will not be a partisan legislative delegation there to protect the district.

The Case of Georgia

Mr. Gaddie has suggested in his testimony that Georgia should not be covered by Section 5 because of a purported lack of polarized voting and the success of minority candidates in a study done by him and Charles Bullock. The Gaddie/Bullock study is incomplete and misleading. The Gaddie/Bullock study ignores the following:

- The only black members of the Georgia Senate represent majority-black districts and only one black has ever been elected to the Georgia Senate from a district that was not majority-black;
- Most of the black officials elected statewide in Georgia are in lower-level offices and were originally appointed by whites to their position before they ran for election;
- In none of the black/white contests analyzed in the study did black voters receive a majority of the white vote;
- With one exception, the black members of Georgia's congressional delegation were originally elected from majority-black districts;
- Georgia recently passed a government-issued photo identification requirement that was found by the federal district court to constitute a poll tax and a violation of the fundamental right to vote; and
- The district court found racially polarized voting in all the districts at issue in *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 77 (D.D.C. 2002), a factual finding that was undisturbed by the later Supreme Court opinion.

The Gaddie/Bullock study is also woefully incomplete in that does not analyze any local elections—where partisanship is less of a factor and where minority voters often need the most protection—and Democratic primaries to see how polarized those elections were.

In fact, as demonstrated above, Georgia does not present a strong case for a state that should be allowed to bail out under Section 5.

Constitutionality and Coverage Formula Concerns

The bulk of the questions at the briefing concerned constitutionality and the coverage formula for Section 5. It is extremely important for Congress to set forth a strong factual record justifying the continued need for Section 5. The reason an examination of the factual record is so important is that in order for Congress to reauthorize the Voting Rights Act in a manner consistent with recent Supreme Court rulings, Congress must have before it a record of discrimination in voting that is "congruent and proportional" to the remedies provided in the Voting Rights Act. Congress always has met this requirement in past reauthorizations of the act. In fact, in recent cases where the Supreme Court has found that Congress exceeded its authority in enacting remedial legislation that went beyond the record supporting such legislation, the Court has cited the enactment and reauthorizations of the Voting Rights Act as the prime example where Congress developed a record of discrimination that necessitated a legislative remedy.

As a general matter, we expect that the record demonstrating continued voting discrimination and supporting the reauthorization will be extremely strong, including the number and geographic scope of (1) Section 5 objections; (2) observer coverages; (3) more information letters that resulted in withdrawals; (4) Section 5 enforcement actions; (5) Section 2 cases; (6) court findings of racially polarized voting, racial appeals, and a history of discrimination touching the right to vote; (7) information contained in expert reports; and (8) anecdotal testimony.

Regarding the formula used for Section 5 coverage, Congress should review the current coverage formula to see if it is appropriate. It should be noted that all of the covered states and a substantial majority of the covered subjurisdictions have had "voting rights activity" (Section 5 objection, observers, successful Section 2 case, etc.) since 1982, and the statute provides for compliant and nondiscriminating jurisdictions to bailout.

Section 203 and Examiner and Observer Provisions

The U.S. Commission's briefing did not cover the other temporary provisions of the Voting Rights Act—the minority language provisions and the examiner/observer provisions. I wanted to briefly share some observations about each.

Application of the minority language provisions frequently results in increased participation of minority language voters and a dramatic impact on the ability of such voters to elect candidates of their choice. Here are two of the several examples we have heard during the hearings of the National Commission on the Voting Rights Act. Although the City of Lawrence, Massachusetts had been covered by Section 203 since 1984, the jurisdiction had done little to comply with the law until the Department of Justice filed suit against the city in 1998. When the suit was filed, there was only one Latino elected to the city council in its history. The lawsuit was settled in 1999, and one of the key provisions of the settlement was that the city was required to hire a Spanish-language elections coordinator. In the first election after the settlement, three Latinos were elected to the nine-member city council, and today four Latinos sit on the nine-member city council. This increased electoral power has led to more responsive city government with the city hiring its first Latino police chief and school superintendent after the filing of the lawsuit. In Harris County, Texas, the county did not fulfill its obligations under Section 203 to provide language assistance to its Vietnamese voters. After an agreement with the Department of Justice in 2003, the county provided the required assistance: bilingual poll workers and properly translated materials. In November 2004, voters in Harris County elected Hubert Vo, the first Vietnamese member of the Texas state legislature, by a handful of votes.

In addition, the federal mandate of Section 203 enables election administrators to provide needed minority language assistance without political influence. In a soon to be released comprehensive survey of Section 203 covered jurisdictions by professors and students at Arizona State University, 71 percent of election administrators who responded to the question supported reauthorization of Section 203. Several election administrators have testified that because of the federal mandate, they are able to provide language assistance that otherwise might not be provided as a result of cost or policy issues raised by the elected governing body. The ASU survey also found that 46 percent of respondents stated that they incurred no additional expense in providing language assistance.

Federal observers are an important component of DOJ's enforcement of the Voting Rights Act. The following is taken from testimony before for the National Commission on the Voting Rights Act from Joseph Rich, who was Chief of the Voting Section, from 1999 to April 2005:

> The role [of] federal examiners in assisting minority voters in registering to vote has been virtually eliminated since the early days of the Voting Rights Act and is probably no longer necessary. However, the ability of the Attorney General to assign federal observers to monitor elections pursuant to section 8 of the Act in jurisdictions to which federal examiners have been appointed remains a crucial provision. For, like section 5, the presence of federal observers serves as an important deterrent—in this case to discriminatory actions during an election.
>
> As is the case for section 5, 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 is evidence of potential Voting Rights Act violations which arise most often in elections pitting minority candidates against white candidates, resulting in increased racial or ethnic tensions. The federal observers, who are employees of the Office of Personnel Management, are carefully trained to observe elections in a neutral manner and report any voting irregularities to their supervisors, who work closely with Voting Section attorneys. Where appropriate and after consultation with section management, Voting Section attorneys will take steps to resolve the irregularities with election officials or use the information for more formal legal action.
>
> The federal presence at elections consistently has 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. On several occasions it has been important to an enforcement action. A good example of this is the presence of federal observers at elections held in Passaic County, New Jersey. The county was under a consent decree which required specific actions to bring the county into compliance with section 203 of the Act. The consent decree also authorized the Attorney General to send federal observers to elections. On the basis of information gathered by federal observers at several elections, the Department took legal action to ensure full implementation of Passaic's court-mandated language assistance program.
>
> The need for the Attorney General's continued authority to send federal observers to elections is clear from the increase[d] monitoring activity in recent years. Not only has the department increased its use of federal observers, but also has started monitoring elections with department employees where it does not have authority to place federal observers. For example, in the 2004 general election, the Department dispatched 840 federal observers to 27 jurisdictions and sent monitors to 58 other jurisdictions.

CONCLUSION

In conclusion, there remains substantial discrimination in voting and a continued need for the temporary provisions. I remain available to discuss any questions the Commission and its staff may have and will provide a copy of the report of the National Commission on the Voting Rights Act when the report is completed.

Statement of Vice Chair Abigail Thernstrom

First, let me commend the Commission staff who selected the panelists and put this briefing together. All four panelists were splendid. Such high quality discussions of complicated public policy issues are rare, and I believe this little volume will prove an invaluable guide to those who want an excellent overview of the central issues surrounding the proposed reauthorization of the temporary provisions of the Voting Rights Act, scheduled to expire in August 2007.

The main topics discussed were:

1. The structure and logic of the original statute—in particular of Section 5.

2. The legal standards that govern the enforcement of Section 5.

3. The extent of racial change in the "covered" jurisdictions, and the continuing necessity of preclearance 40 years after the passage of the statute.

4. The constitutionality of a renewed Section 5, in light of *City of Boerne v. Flores* (1997).

5. Miscellaneous suggested changes/arguments: the argument for revising the preclearance provision—if it is to be retained—to apply to all 50 states; the case for and against overturning by statute *Reno v. Bossier Parish* (2000) and *Georgia v. Ashcroft* (2003); and Section 2 as an adequate substitute for Section 5 by now.

These topics could be addressed at length; of necessity, the discussion that follows is very abbreviated. I take them in order. For those who are interested in a fuller history of the Voting Rights Act from 1965 to 1985, see Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (Harvard University Press, 1987).

1. The structure and logic of the original statute—in particular of Section 5.

The original conception behind Section 5 might seem like ancient history, but it is directly pertinent to its reauthorization today. Even in 1965, that tough provision—passed on a temporary, emergency basis—was constitutionally questionable. It intruded on traditional state prerogatives to set election rules, and survived Supreme Court scrutiny in 1966 only because the entire act was so beautifully designed. Every section had a clear and legitimate end: the enfranchisement of southern blacks 95 years after the passage of the 15th Amendment.

It was important that the emergency provisions of the statute applied only to the states of the Deep South, which were never singled out by name in the legislation. Instead, knowing which jurisdictions they wanted to target, the framers designed a statistical trigger to identify them. States and counties that met two criteria—the use of a literacy test and total voter turnout (black and white) below 50 percent in the 1964 presidential election—were "covered" by those provisions.

In other words, literacy tests in general had been constitutionally sanctioned by the Supreme Court in 1959, but the framers of the act knew the South was using fraudulent tests to stop blacks from registering. They wanted, however, to avoid endless litigation over which tests were legitimate and which were not. Hence the statistical trigger. They took the well-established relationship between literacy tests and low voter turnout in the South, and used the carefully-chosen 50 percent turnout figure as circumstantial evidence indicating the use of intentionally fraudulent and thus disfranchising tests.

From the inferred presence of egregious and *intentional* 15th Amendment violations in the states with both a literacy test and low voter turnout, several consequences followed. All literacy tests in the covered jurisdictions—and only in them—were suspended, and federal registrars to replace local authorities were assigned, where necessary. Moreover, those states and counties could institute no new "voting qualification or prerequisite to voting" without "preclearance" (approval) by the Attorney General or the District Court of the District of Columbia. No southern court was given jurisdiction. The DC court was actually very seldom used.

In 1965—hard as it is to believe today—the preclearance provision, Section 5, was barely discussed. Obstacles to registration and voting were the sole concern of those who framed the legislation. And the point of preclearance was to reinforce the suspension of the literacy tests. Section 4 banned literacy tests in the covered jurisdictions—those southern states in which the emergency provisions applied. Section 5, preclearance, made sure the effect of that ban stuck. It was simply a prophylactic measure—a means of guarding against renewed disfranchisement, renewed efforts to stop blacks from registering and voting.

In short, the Supreme Court signed off on extraordinary federal control over state and local electoral matters *only* because the entire act was meticulously designed for a clearly legitimate end—opening registration sites and polling booths to southern blacks. The emergency provisions were passed, as Chief Justice Earl Warren said, in the context of the "unremitting and ingenious defiance of the Constitution." But, in recognition of their extraordinary nature, these special provisions were expected to sunset in five years. Even with the five-year limit, the constitutional doubts of the great liberal Justice, Hugo Black, were not assuaged—a point that underscores the draconian nature of this emergency provision.

By now, the Voting Rights Act is almost unrecognizable. Congress and the courts have carelessly turned the act into a hodge-podge of indefensible provisions. And five years has turned into 40 and still counting. Evidently the original emergency has come to be considered permanent—or something close to it.

A few words on the hodge-podge of indefensible provisions, since they too are relevant to the question of reauthorization. In 1970 and 1975 the trigger for coverage was updated, so that the turnout figures used were those of the presidential elections of 1968 and then 1972. National turnout was low in the presidential election of 1968, with the result that the trigger carefully designed to place under extraordinary federal oversight only those jurisdictions known to have been using a literacy test for deliberate disfranchisement no longer worked. Coverage was extended to places without any history of 15th Amendment violations. And yet the whole Voting Rights Act rested on the enforcement clause of the 15th Amendment. Today, the 1972 turnout

figures (more than 30 years old obviously) still determine coverage, for no discernible or logical reason.

As a consequence of the extension and amendment of the special provisions in 1970 and 1975, the entire states of Texas and Arizona as well as three boroughs in New York City, some counties in California, townships in New Hampshire, and other scattered jurisdictions across the nation came under coverage. These were places that were not analogous to the South in 1965.

With respect to Texas, specifically, as a Mexican American Legal Defense and Education Fund (MALDEF) representative would later say, "We were able to produce those [needed] horror stories" to suggest disfranchisement. "But," he went on, "not many of them…We really did it by the skin of our teeth." Those who wrote the 1965 legislation had had a rich source upon which to draw—the extensive litigation experience of the Justice Department. But there were no equivalent suits against Texas registrars and other officials. As Joseph Rauh, counsel for the Leadership Council on Civil Rights, bluntly put it, "You do not have the same situation…the murders, the awful things that happened to blacks." A U.S. Commission on Civil Rights memorandum made the same point: "Statistics on minority registration and voting and the election of minorities to office do not paint the shocking picture that, for example, the 1965 statistics on Mississippi did."

Yet Texas and other newly covered jurisdictions could no longer redistrict after a decennial census or move a polling place without checking with federal bureaucrats far removed from the local scene, who inevitably knew little about the complexities of race and politics in places they were passing judgment on.

New York at least had a literacy test (never used fraudulently to keep blacks from the polls), but Texas never did. Yet in 1975 Congress bought the indefensible argument that English-only ballots were equivalent to a fraudulent literacy test in the Jim Crow South. And it officially signed on to the idea that the measure of racially "fair" districting was lines drawn to ensure (to the extent possible) proportional racial and ethnic officeholding. Anything less amounted to disfranchisement—equivalent to the impact of racist registrars and the KKK in Mississippi in 1964. As one civil rights attorney argued at congressional hearings, "now the blacks register and vote, even in great numbers, but *it doesn't make any difference*." There was still a wide discrepancy been the number of black voters and the number elected to office. Protecting minority candidates from white competition, guaranteeing reserved black and Hispanic seats, had become the point of Section 5. And in the enforcement of Section 5, it has remained the point, in the view of career attorneys in the Voting Section of the Justice Department.

All of this history is pertinent to the question of the reauthorization of preclearance. A further extension of Section 5 perpetuates extraordinary federal oversight over states and counties, a significant number of which were not disfranchising voters (as the term "disfranchising" is commonly understood) in 1965, no less in 1975. Moreover, as Dr. Gaddie points out, black participation rates are today very high in the South—and high levels of registration and turnout today surely cannot be attributed to preclearance. Lastly, reauthorization perpetuates patterns of enforcement resting on arguably unfortunate assumptions about race and representation—assumptions that most Americans object to, survey data suggest.

2. The legal standards that govern the enforcement of Section 5.

In theory, the preclearance provision only protects against "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." That backsliding test for discriminatory redistricting and other proposed changes in election law was spelled out by the Supreme Court in *Beer v. United States* (1976), and squares precisely with the original notion behind Section 5, the point of which was to make sure southern states did not find ways around the enfranchisement promised in Section 4, robbing black voters of gains that Section 4 had brought.

Nevertheless, the civil rights community, staff attorneys at DOJ, and the DC District Court have never liked the retrogression standard, since it does not force jurisdictions to adopt maps that contain the maximum number of safe majority-minority districts—what the ACLU felicitously called "max-black" (or max-Hispanic) districts. Or rather, it does not mandate such districting except in the case of municipal annexations, which are considered voting changes.

Opposition to the retrogression standard is implicit in Jon Greenbaum's statement that " Section 5 makes racial fairness a consideration whenever jurisdictions make changes." The point would be accurate if he were referring to Section 2 of the act; it is not with respect to preclearance, as the Supreme Court has made clear. How is "racial fairness" to be measured? No one has a good answer to that question—short of a resort to proportional racial and ethnic representation. And yet, the High Court's rulings notwithstanding, proportionality is the legal standard embraced by the career staff at DOJ, their allies in the civil rights community, and the DC District Court. As a consequence, it is a highly questionable commitment that reauthorization would perpetuate.

In 2003, a majority on the Supreme Court, in *Ashcroft v. Georgia*, gave states permission to create districting plans that contained fewer overwhelmingly black districts in exchange for more that were likely to contain a significant number of minority voters. Such districts were likely to elect more Democrats—described by the Court as the party supported by almost all blacks. As part of the reauthorization package, civil rights spokesmen are urging Congress to overturn *Ashcroft v. Georgia* and return to the de facto legal standard—namely that of racial "fairness" or proportional racial and ethnic representation. And yet the Supreme Court arguably had a point: Districts that are, say, 60 percent black "waste" minority votes. Moreover, the Court's implicit argument that whites often represent black interests—that counting minorities in office is no measure of representation—was one that the civil rights advocates should have taken seriously. On other occasions, as well, the High Court has questioned the maximization policy as one that segregates American voters and perpetuates racial stereotypes.

3. The extent of racial change in the "covered" jurisdictions, and the continuing necessity of preclearance 40 years after the passage of the statute.

By now, the Voting Rights Act is almost unrecognizable—and so is the South. Dr. Gaddie makes that case, and there is no need to repeat it. My own views on America's racial transformation over the last half century are spelled out in Thernstrom and Thernstrom, *America in Black and White: One Nation, Indivisible* (Simon & Schuster, 1997).

Mr. Greenbaum recognizes the fact of change (although he sees a nation much more steeped in ongoing racism than I do), but argues: "Nonetheless, there are a significant number of state actors who in an effort to maintain or enhance their power have taken actions that clearly discriminate against minority voters. Whether the impetus is bigotry or power the end result—discrimination against minority voters—is the same."

In arguing for the continuing need for preclearance, Mr. Greenbaum points to the cost of the Section 2 lawsuit over at-large voting for the County Council of Charleston, South Carolina. But that was a much more complicated story than Mr. Greenbaum suggests. He assumes that all at-large voting is discriminatory. In fact, single-member districts confine the impact of minority voters to the district in which they reside, whereas county-wide voting, with blacks a third of the population, meant that every vote mattered in the election of all nine county council members. Moreover, while candidates ran county-wide, they were required to live in specific districts; the council could not be composed of elected members all of whom resided in one particular neighborhood.

The council had one black member who was, however, a Republican—which meant, in the eyes of the civil rights groups, he did not count as a minority. There is another way of looking at the matter, however: The election of three black Democrats from safe black single-member districts would simply mean the political isolation of black representatives. Less power, rather than more. In addition, the argument that blacks could not get elected county-wide cannot be sustained in the face of the fact that voting for the Charleston County school board was also at-large and five of its nine members were black. But they ran in nonpartisan elections, which underscores the point that the real split in the county was along partisan lines, not racial ones.

Mr. Greenbaum also tells the story of Prairie View A&M. But that story could have happened in any school in any state. It is not an argument for the continuing need for Section 5.

Mr. Greenbaum notes the pervasiveness of racially polarized voting. Yes, in states and other jurisdictions in which the majority of whites are Republicans and almost all black voters are Democrats, the vote will look racially split and minority-supported candidates (who are usually far left politically) will not be elected. Mr. Greenbaum seems to think a test of racially fair outcomes is the willingness of a majority of whites to vote for a successful minority candidate. Does the same logic hold with respect to a successful white candidate? If he or she depended on black and Hispanic support, is there something questionable about the election outcome?

Moreover, if black and Hispanic candidates do not choose to run in majority-white constituencies, they cannot get elected; you can't win where you don't run. And the erroneous message that whites will not vote for minority candidates likely reduces the number of minorities willing to take the plunge and run for seats that are not absolutely safe for minority officeholding.

In general, there is very little agreement on the definition of racially polarized voting; Richard Engstrom may be a "leading expert in the field," but I would never recommend what I would describe as results-driven work. Other experts measure polarization quite differently.

4. The constitutionality of a renewed Section 5, in light of City of Boerne v. Flores (1997).

Mr. Greenbaum agrees that "Congress must have before it a record of discrimination in voting that is 'congruent and proportional' to the remedies provided in the Voting Rights Act." It is my belief that that record cannot be created in 2005. There has been too much racial change by now to support the extraordinary federal oversight mandated by Section 5. Mr. Greenbaum notes that the Supreme Court has approvingly cited the congruence and proportionality between wrong and remedy in the Voting Rights Act. Yes, but the Court was referring to the statute in the 1965 context when the South was refusing to enforce the most basic 15th Amendment rights.

5. Miscellaneous suggested changes/arguments: the argument for revising the preclearance provision—if it is to be retained—to apply to all 50 states; the case for and against overturning by statute Reno v. Bossier Parish (2000) and Georgia v. Ashcroft (2003); and Section 2 as an adequate substitute for Section 5 by now.

The argument for extending preclearance to all 50 states is very simple: The 1965 act was concerned with simple disfranchisement in the South; that is no longer the case. And voting rights violations, as they are now defined, are no longer confined to the region that intentionally and systematically kept blacks from the polls.

On *Georgia v. Ashcroft*, see above. *Bossier II* simply reiterates the point that Section 5 protects against backsliding—new arrangements that leave minority voters worse off than they had been previously.

On the adequacy of Section 2 as a substitute for Section 5 by now: Mr. Greenbaum stresses the fact that the preclearance provision places the burden of proof on the jurisdiction, whereas, in order to establish a Section 2 violation, minority voters must hire a lawyer, etc. But placing the burden of proof on the jurisdictions made sense in 1965 when the covered states were all in the South and thus all changes affecting black voters were properly suspect. That day is long past, and there is no more reason in 2006 for regarding new election rules in Virginia as any more suspect than those in Ohio. In addition, the burden of hiring a lawyer is hardly unique to these cases; nor is it onerous. Plenty of well-funded civil rights groups have attorneys ready and eager to defend black and Hispanic voters against any arrangement that arguably dilutes the impact of their vote.

Statement of Commissioner Arlan Melendez

Several key provisions of the Voting Rights Act, which is widely viewed as the nation's most effective civil rights law, will expire in 2007 without reauthorization. These provisions, including Section 5, which requires certain state and local governments to "preclear" proposed changes in voting or election procedures with the federal government, and Section 203, which requires that certain state and local jurisdictions provide assistance in languages other than English to voters who are not literate or fluent in English, have been important tools for increasing Native American political participation. Several jurisdictions with large Native populations—including all of Arizona and Alaska and certain counties in South Dakota—are "covered jurisdictions" for Section 5 purposes. In addition, 88 jurisdictions in 17 states qualify for Native language assistance under Section 203. In anticipation of the expiration of these provisions, I hope that Congress will analyze, in particular, how the Voting Rights Act has been a tool for remedying the long history of discrimination against Native Americans, and will consider possibilities for strengthening and expanding the reach of the Section 5 preclearance requirement into additional areas with large Native populations.

Native Americans have experienced a long history of disenfranchisement and discrimination in the United States. Although Indians were given full citizenship rights in 1924, it took nearly 40 years for all 50 states to give Native Americans the right to vote. For years, a number of states denied Indians the right to vote because they were "under guardianship." In other places, Indians were denied the right to vote unless they could prove they were "civilized" by moving off the reservation and renouncing their tribal ties. New Mexico was the last state to remove all express legal impediments to voting for Native Americans in 1962, three years before the passage of the Voting Rights Act. In addition to this disenfranchisement as a matter of law, Native Americans have experienced many of the discriminatory tactics that kept African Americans in the South from exercising the franchise, including poll taxes, literacy tests, and intimidation. Native people continue to face ongoing struggles when trying to exercise their right to vote today. For example, many Native people live in rural reservation communities and have to travel long distances to get to their polling places, which are more conveniently located for non-Indian voters. In addition, vote dilution continues to be a problem for many Native communities, and large numbers of Native voters continue to report intimidation and harassment at the polls. Overt hostility to Indians voting, unfortunately, also persists in some areas. For example, in 2002 a South Dakota state legislator stated on the floor of the Senate that 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."[1]

With the passage of the 1965 Voting Rights Act, Congress took the first necessary steps to start the process of remedying this history of discrimination and disenfranchisement. And while we have made tremendous progress in the last 40 years, there is still have a long way to go. Courts

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[1] Boneshirt v. Hazeltine, 200 F. Supp. 2d 987, 1046 (*quoting* Rep. John Teupel).

across the country have considered at least 70 Indian voting rights cases, and the Indian plaintiffs have prevailed in over 90 percent of these cases. Vote dilution is a major problem in many areas with high concentrations of Native people, and a number of redistricting schemes have been successfully challenged by Indian plaintiffs.

Although there is currently limited Section 5 coverage in areas with high Native populations, the experience of Indian voters in South Dakota provides an undeniable example of the continued importance of Section 5 for Indian Country.[2] When Section 5 was extended to cover Shannon and Todd counties in South Dakota, where the Pine Ridge and Rosebud reservations are located, in 1975, then Attorney General William Janklow wrote an opinion for the Secretary of State calling the law a "facial absurdity" that would undoubtedly be struck down by the courts. Janklow recommended that South Dakota ignore the mandates of the act, and from that time until 2002 when a court ordered the state to comply with the act, the state enacted more than 600 laws that impacted Indian voters in Shannon and Todd counties, but submitted fewer than 10 for preclearance. Only now is the Department of Justice in the process of reviewing the backlog of election changes in South Dakota. The state has also demonstrated continuing resistance to Section 5 in a recent redistricting case. In granting an injunction requiring the state to submit a new redistricting law for preclearance earlier this year, a three judge panel of district court judges found that "Plaintiffs have shown that for over 25 years [South Dakota has] intended to violate and ha[s] violated the preclearance requirements of the VRA."[3] The court further stated that the redistricting law at issue in the case "gives the appearance of a rushed attempt to circumvent the VRA." In light of South Dakota's historic and ongoing refusal to comply with the mandates of Section 5 of the Voting Rights Act, it is difficult to argue that the need for Section 5 coverage to protect the Indian voters in South Dakota has dissipated. Unfortunately, South Dakota is not alone; the situation is similarly grim for Indians attempting to cast ballots in other states across the West.

Although the Commission's briefing is intended to focus on Section 5 of the Voting Rights Act, I would like to take this opportunity to comment briefly on the expiring minority language provisions of the Voting Rights Act as well. Minority language assistance enables those who understand their own language better than they understand English to effectively participate in the democratic process. While no one knows exactly how many Native American language speakers live in the United States today, the minority language provisions of the Voting Rights Act continue to be critical. In many Native communities, tribal business is conducted exclusively or primarily in Native languages. Many Native people, particularly our elders, speak English only as a second language. Even if they have English language skills, many Indian people have said that they feel more comfortable speaking their Native language and are better able to understand complicated ballot issues in their Native language. Furthermore, it is the policy of the federal government, as expressed in the Native American Languages Act of 1990 (NALA) to "preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages."[4] The NALA was the first and only federal law to

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[2] *See*, Laughlin McDonald, "The Voting Rights Act in Indian Country: South Dakota, A Case Study, *American Indian Law Review*, vol. 29 (2004), p. 43.

[3] Quiver v. Nelson, 2005 WL 2706004 (DSD, 2005).

[4] 25 U.S.C. 2901, et seq.

guarantee the right of a language minority group to use its language in "public proceedings." Disenfranchising Native Americans by failing to provide language assistance in the electoral process to those who need it would surely violate this statutory right. Section 203 ensures all Native people, particularly our elders, many of whom speak English poorly if at all, have access to the ballot box. At the same time, it recognizes the importance of preserving and honoring indigenous languages and cultures.

Traditionally, voter participation rates by American Indians and Alaskan Natives have been among the lowest of all communities within the United States. While voter registration and turnout by Native American voters is still below non-Native averages in many parts of the country, many Native communities have seen steady, even significant increases, since the passage of the Voting Rights Act. In recent years, there has been a steady increase in the number of Native American candidates who are being elected to local school boards, county commissions, and state legislatures. People across the country are becoming aware of the power of the Indian vote, and as more and more Native Americans turnout to vote, the protections of the Voting Rights Act will be more important than ever.

Statement of Commissioner Michael Yaki

I am, for one, heartened by the announcement of the Chair of the House Judiciary Committee that he favors extension of the temporary provisions of the Voting Rights Act. The devil, of course, is in the details; there are many hobgoblins that could, intentionally or not, diminish or defeat the purposes of reauthorization. Nevertheless, I remain optimistic and look forward to following the hearings of the Committee over the coming months.

The Commission has a long and proud history of participation in the creation and subsequent iterations of the Voting Rights Act. Our seminal report on the abuses of voting rights in Jefferson Parish, Louisiana in the early 1960s was cited by many as providing the factual underpinnings of the 1965 legislation. Indeed, the need for facts to legitimize and sustain the continued extension of Section 5 and the other "temporary" provisions of the Voting Rights Act will be one of the most important duties of the Congress to ensure the continued viability of the act.

It is easy to produce numbers and show that the number of minority voters has increased since the Voting Rights Act—that is undisputed fact. It is also easy to produce numbers that show that the number of minority elected officials—of which, in my life, I have been one—has increased dramatically since the enactment of the Voting Rights Act. But to say that, by reliance on the raw number and percentage changes, as well as our society's generally more tolerant landscape than 40 years ago, is not to say that all the evils that Section 4 and Section 5 sought to undo are, in fact, diminished to the point where the sections' utilities are unnecessary.

The true fact, as hard and as plain as it is to say or write, is that racism has not vanished in our society. Racial divides and polarities continue to strata the society of our great nation. Watching the coverage of Hurricane Katrina, one could not help but notice that the people left, abandoned, stranded, and begging for relief in New Orleans were overwhelmingly African American. But we need not confine ourselves to visual evidence to understand that racism persists. Many who toil in the fields of civil rights law, especially voting rights, can demonstrate, beyond the shadow of a doubt, that attempts to undermine, diminish, or dilute the voting power of minority communities still exist. Some of these attempts are intentional; others are not, though the consequence is the same.

The beauty and power of Section 5 is that it gives minority communities the overwhelming power and resources of the federal government to enforce their constitutional rights. The Supreme Court has said it shifts "time and inertia away from the victims to the jurisdictions that victimize." In plain English, jurisdictions which historically deprived minorities of the right to vote must justify their activities at the denial of the national franchise to the national government. Nothing could be simpler, plainer, more powerful, or more effective.

It is, of course, this very exercise of federal power that has critics of Section 5 in a tizzy. Why should, for example, a small municipality in Texas have to spend its resources filing a "preclearance" application with the Justice Department or a federal court? The answer, of course, is simple and self-evident from any examination of where some of the most egregious examples of voting rights violations have occurred. Small town politics, taken together across jurisdictions,

create large-scale problems. Inconvenience cannot be the handmaiden of a policy of benign neglect to so-called local control of voting rights.

Ultimately, however, having power alone is useless if it cannot be exercised. The Emperor cannot rule without his clothes and, in some respects, the United States Supreme Court has stripped bare some of the most important components of that power. In *Bossier II* and *Georgia v. Ashcroft*, the Court has backtracked on the commitments and promises made 40 years ago to minority communities in this country. The substitution of a "retrogression" rather than "discriminatory purpose" or "intent" standard has allowed inertia to shift back away from jurisdictions and to create a dynamic and invidious status quo. Dynamic in that racism no longer wears sheriffs' hats and wields billy clubs; instead, people armed with census tracts and sophisticated computer programs can, with the click of a mouse or a change in input or field, create districts that do not "retrogress" but nevertheless deny the continued expansion and evolution of minority voting power and representation. Invidious in that it continues today, with egregious examples in Texas and other Section 5 jurisdictions that, but for the retrogression standard, would probably not withstand Justice Department or judicial scrutiny.

If the Committee is truly committed to extending Section 5, it should do so by reincorporating the full powers of that section. The Voting Rights Act was not meant to have limits placed upon the power of the franchise that had been long denied to minority communities. This is not to say that there is or should be a proportionality standard in the translation from voting to political power; it is to say that a proportional relationship between minority voting and minority representation should not be feared. If, in fact, racially polarized voting continues as it has been, the mere fact that voting districts and minority representation expand together is not a failure or demon of the Voting Rights Act—it is a failure of elected officials and political leaders.

In sum, the extension of Section 5 is a continued necessity, even in the beginning of the 21st century. True, much progress has been made, but further progress has been stifled by court decisions and more sophisticated means of voter intimidation, dilution, and disfranchisement. The Committee would do well to restore the pre-*Bossier* and pre-*Georgia v. Ashcroft* standards if we are to truly proceed to that grail of race neutrality and color blindness that we all aspire to have in our society.

Finally, I would be remiss in not addressing the continued importance of the Section 203 provisions for language minority voters and the examiner and observer provisions of the Voting Rights Act that are also subject to renewal. Section 203 is a vital means of ensuring that the next generation of Americans is fully integrated into the political, cultural, and economic life of this country. Particularly for Asian Pacific Islanders and Latino communities, Section 203 is and must be a priority for extension by the Congress. And as for the examiner and observer provisions of the Voting Rights Act, it goes without saying that there remains compelling documentation of continued abuses by voting officials and so-called "official" observers who attempt to intimidate and deny access to the polling place to minority voters.

Appendix A: Panelists' Biographies

Edward Blum is a visiting fellow at the American Enterprise Institute in Washington, DC, where he studies civil rights policies and co-directs the Project on Fair Representation. Prior to joining AEI he was chairman of the Campaign for a Color-Blind America, Legal Defense and Educational Foundation. In that capacity he facilitated the legal challenge to numerous racially gerrymandered voting districts, race-based school admissions policies, and municipal contracting programs throughout the country.

Roger Clegg is the Vice President and General Counsel of the Center for Equal Opportunity. He writes, speaks, and conducts research on legal issues raised by civil rights laws. The Center for Equal Opportunity is a conservative research and educational organization that specializes in civil rights, immigration, and bilingual education issues. Mr. Clegg is also a former U.S. Department of Justice official, having held a number of positions, including Assistant to the Solicitor General, where he argued three cases before the United States Supreme Court, and the number two official in the Civil Rights Division and Environment Division.

Ronald K. Gaddie is a Full Professor in the Department of Political Science at the University of Oklahoma. Dr. Gaddie offers courses in the graduate methods sequence, as well as courses on campaigns, elections, and southern politics, and he regularly offers an American Federal Government course. He is the author of eight books and is currently working on two others: one, *DeLayed Democracy: The Texas Redistricting War of 2001-2004*, and also *Battlelines: Power Plays, Redistricting, and Election Law*. In a project for the American Enterprise Institute, Dr. Gaddie is developing a method to assess progress in voting rights. Dr. Gaddie also works as a litigation consultant in voting rights and redistricting cases in nine states, mostly in the South and Midwest.

Jon M. Greenbaum is the Director of the Voting Rights Project at the Lawyers' Committee for Civil Rights Under Law. He is responsible for directing the Committee's voting rights litigation, which challenges all forms of voting rights discrimination against minority groups in the United States. Mr. Greenbaum also directs the project's nonlitigative activities, including efforts to maintain and expand the voting rights of minority citizens through legislation and outreach efforts. Prior to joining the Lawyers' Committee, Mr. Greenbaum was a trial attorney in the Voting Section of the U.S. Department of Justice for seven years, where he tried several significant cases involving minority vote dilution.