Testimony of

Mr. Laughlin McDonald

May 9, 2006

Senate Judiciary Committee
Reauthorization of Section 5 of the Voting Rights Act
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On behalf of the ACLU, I want to express my support for the bill pending before the committee to extend Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, for an additional 25 years. The comprehensive record compiled by Congress of continuing discrimination in voting and the prevalence of racial polarization in the political process demonstrate that the extension of Section 5 would be a proper exercise of congressional authority to enforce the racial fairness provisions of the Fourteenth and Fifteenth Amendments.

The ACLU also supports the other provisions of the bill, including the language assistance provisions of Section 203, but since this hearing focuses specifically on Section 5, I will confine my remarks to that issue.

Prior Challenges to the Constitutionality of Section 5

The constitutionality of Section 5 has been challenged in the past, but the challenges have been consistently rejected. As soon as Section 5 was enacted in 1965, South Carolina, along with Alabama, Georgia, Louisiana, Mississippi, and Virginia,

1. 383 U.S. 301, 308 (1966). Although the 1957, 1960, and 1964 Civil Rights Act contained provisions prohibiting discrimination in voting, they depended on time consuming litigation for enforcement. As Attorney General Katzenbach explained in his testimony before Congress in support of Section 5, "existing law is inadequate. Litigation on a case-by-case basis simply cannot do the job." Hearings on S. 1563 before the Senate Comm. on the Judiciary, 89th Cong., 1sr Sess., pt. 1, 14 (1965).
2. Id. at 334.
3. Id. at 327 (quoting Ex parte Virginia, 100 U.S. 339, 345-46 (1880)).

challenged it as unconstitutional. The Supreme Court rejected the challenge in South Carolina v. Katzenbach, citing the "unremitting and ingenious defiance of the Constitution" in certain sections of the country, the failure of the case-by-case method to end discrimination, and the repeated attempts by local jurisdictions to evade the law by enacting new and different discriminatory voting procedures.1 The Court acknowledged that Section 5 was an "uncommon exercise of Congressional power," but

found that Congress's enactment was justified by the exceptional history of voting discrimination in the effected jurisdictions.2 In doing so the Court applied a broad test for congressional power to enforce the constitution, i.e., "[w]hatever legislation is appropriate . . . to secure to all persons the enjoyment of perfect equality of civil rights and equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."3

4. City of Rome v. United States, 446 U.S. 156, 180 (1980).

5. Id. at 179, 182. While the 1970 and 1975 amendments added jurisdictions by using subsequent presidential elections (1968 and 1972), the previously covered jurisdictions were not released from coverage under the original formula based on the 1964 presidential election.

Congress extended Section 5 again in 1970 and 1975, and once again its constitutionality was challenged. The City of Rome, Georgia, argued that Section 5 violated principles of federalism, or states' rights, and that even if the preclearance requirements were constitutional when enacted in 1965, "they had outlived their usefulness by 1975."4 The Court rejected the federalism argument, noting that the Fourteenth and Fifteenth Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." As for the argument that Section 5 had outlived its usefulness, the Court concluded that "Congress' considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable."5

After the extension of Section 5 in 1982, Sumter County, South Carolina, filed yet another challenge to the constitutionality of the statute. It contended that the 1982 extension was unconstitutional because the trigger, or coverage

6. Section 5 covers states, or political subdivisions, in which less than half of eligible persons were registered or voted in either the 1964, 1968, or 1972 presidential elections, and which used a test or device for voting. 42 U.S.C. § 1973b(b).

7. County Council of Sumter County, S.C. v. United States, 555 F. Supp. 694, 707 (D.D.C. 1983). 8. Id.

9. Id. at 707 n.13.

10. 521 U.S. 507.

formula, was outdated.6 The county pointed out that as of May 28, 1982, more than half of the age eligible population in South Carolina and Sumter County was registered, facts which it said "distinguish the 1982 extension as applied to them from the circumstances relied upon in South Carolina v. Katzenbach, supra, to uphold the 1965 Act."7 The three-judge court rejected the argument, noting that Section 5 "had a much larger purpose than to increase voter registration in a county like Sumter to more than 50 percent."8 In support of its conclusion, the court noted that "Congress held hearings, produced extensive reports, and held lengthy debates before deciding to extend the Act in 1982."9

Section 5 and the City of Boerne

Opponents have launched new arguments and challenges against the Voting Rights Act in light of a series of Supreme Court

decisions beginning with City of Boerne v. Flores, decided in 1997.10 In City of Boerne, the Court invalidated the Religious Freedom Restoration Act of 1993 (RFRA) because of an absence of
11. Id. at 520, 530.
5
"congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." The Court defined "congruence and proportionality" as an agreement "between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented."11 However, the Court repeatedly cited the Voting Rights Act as an example of congressional legislation that was constitutional.
The Court in Boerne cited the Act's suspension of literacy tests as an appropriate measure enacted under the Fifteenth Amendment "to combat racial discrimination in voting." It held that the seven year extension of Section 5 and the nationwide ban on literacy tests were "within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States," and that Section 5 was an "appropriate" measure '"adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against'." Congress acted in light of the "evil" of "racial discrimination [in voting] which in varying degrees manifests itself in every part of the country." The legislative record disclosed "95 years of pervasive voting discrimination," and "modern instances of
12. Id. at 520, 526, 530, 532. 13. Lopez v. Monterey County, 525 U.S. 266, 282 (1999).
14. Id. at 282-83.
6
generally applicable laws passed because of [racial] bigotry." By contrast, the legislative history of RFRA, in the view of the Court, contained no such evidence, leading it to conclude that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."12
It is especially worthy of note that the Supreme Court relied upon City of Boerne in rejecting a challenge to the constitutionality of Section 5 made by the State of California. The state argued that "§ 5 could not withstand constitutional scrutiny if it were interpreted to apply to voting measures enacted by States that have not been designated as historical wrongdoers in the voting rights sphere."13 The Court disagreed. Citing Boerne, it held:

> [l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself constitutional and intrudes into legislative spheres of autonomy previously reserved to the States.14

The Court, reaffirming its ruling in South Carolina v. Katzenbach, further held that "once a jurisdiction has been
15. Id. at 283.
16. 35 U.S.C. 271(h) & 296(a). 17. 527 U.S. 627, 640 (1999).
18. Id. at 639 and n.5.
19. 528 U.S. 62 (2000).

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designated, the Act may guard against both discriminatory animus and the potentially harmful effect of neutral laws in that jurisdiction."15
After the decision in City of Boerne, the Court in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, invalidated the Patent Remedy Act,16 allowing suits against a state because "Congress identified no pattern of patent infringement by the States, let alone a pattern of unconstitutional violations."17 But as in City of Boerne, the Court in Florida Prepaid expressly and repeatedly noted the constitutionality "of Congress' various voting rights measures" passed pursuant to the Fourteenth and Fifteenth Amendments, which it described as tailored to "remedying or preventing" discrimination based upon race.18
Kimel v. Florida Board of Regents,19 another federalism or states' rights decision, invalidated the provisions of the Age Discrimination in Employment Act of 1967 (ADEA), that subjected states to suit for money damages for age discrimination. But nothing in the opinion suggests that any provision of the Voting
20. Id. at 83-4, 86.
21. Id. at 89.
8
Rights Act is unconstitutional. First, the Court held that classifications based upon age were unlike those based upon race, and that "age is not a suspect classification under the Equal Protection Clause." Second, the Court held that states may discriminate on the basis of age if the classification is rationally related to a legitimate state interest."
Classifications based on race, however, are constitutional only if they are narrowly tailored to further a compelling governmental interest. Age classifications, unlike racial classifications, are "presumptively rational." Against this backdrop, the Court concluded that ADEA was not "responsive to, or designed to prevent, unconstitutional behavior."20 In addition, according to the Court, in the legislative history of ADEA "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."21
In United States v. Morrison, another of the post-Boerne cases, the Court invalidated a section of the Violence Against Women Act of 1994 which provided penalties against private individuals who had committed criminal acts motivated by gender bias. The Court concluded that the disputed provision could not
22. 529 U.S. 598, 626 (2000).
23. 384 U.S. 641 (1966).
24. 531 U.S. 356, 370 (2001).
9
be upheld as a proper exercise of congressional power under § 5 of the Fourteenth Amendment because "it is directed not at any State or state actor, but at individuals."22 Section 5, by contrast, is by its express terms directed at states and state actors, i.e., at "any State or political subdivision." Moreover, the Court cited as examples of the proper exercise of congressional power under the Fourteenth and Fifteenth Amendments the various voting rights laws found to be constitutional in Katzenbach v. Morgan (prohibition on English literacy tests for

voting)23 and South Carolina v. Katzenbach.
In still another case, Board of Trustees of the University of Alabama v. Garrett, the Court invalidated a portion of Title I of the Americans with Disabilities Act of 1990 (ADA) allowing state employees to recover money damages by reason of the state's failure to comply with the statute. The Court concluded that there was no evidence of a "pattern of unconstitutional discrimination on which § 5 [of the Fourteenth Amendment] legislation must be based."24 However, the Court was careful to underscore the constitutionality of the Voting Rights Act and singled it out as a preeminent example of appropriate legislation
25. Id. at 373.
26. 538 U.S. 721, 736 (2003).
27. Id. at 736, 738.

enacted to enforce the race discrimination provisions of the Civil War Amendments in the area of voting.25
Two subsequent decisions, moreover, indicate that the Court would not apply the strict congruence and proportionality standard of the Boerne line of cases where Congress has legislated to prevent discrimination on the basis of race or to protect a fundamental right, such as voting. In Nevada Department of Human Resources v. Hibbs, the Court affirmed the constitutionality of the family leave provisions of the Family and Maternal Leave Act, noting that "state gender discrimination . . . triggers a heightened level of scrutiny,"26 as opposed to the rational basis level of scrutiny that applies to age discrimination, as was the case in Garrett. Because of this difference, "it was easier for Congress to show a pattern of state constitutional violations" in Hibbs. The Court also cited with approval various decisions of the Court which rejected challenges to provisions of the Voting Rights Act "as valid exercises of Congress' § 5 power [under the Fourteenth Amendment]."27
Finally, in Tennessee v. Lane the Court held that Title II
28. 541 U.S. 509, 531 (2004).
29. Id. at 523.
30. 42 U.S.C. §§ 1973a & b.

of the Americans With Disabilities Act, as applied to the fundamental right of access to the courts, "constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment."28 According to the Court, "the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent."29
In sum, none of the recent federalism decisions of the Court casts doubt on the constitutionality of Section 5. To the extent that they discuss legislation enacted by Congress pursuant to the enforcement provisions of the Fourteenth and Fifteenth Amendments to redress the problem of racial discrimination in voting, they do so to affirm its constitutionality.
The Bailout
If there are jurisdictions that no longer need to be covered by Section 5, that is not an argument for allowing the statute to lapse. Instead, such jurisdictions can bailout from coverage under Section 4(a) of the Act.30 To bailout, a jurisdiction must essentially show that it has had a clean voting rights record

during the preceding ten years, and that it has engaged in constructive efforts to promote full voter participation.
31. S.Rep. No. 97-417, 97th Cong., 2d Sess. 60 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 239. Relatively few jurisdictions have in fact bailed out. Three jurisdictions, however, Fairfax City, Frederick County, and Shenandoah County in Virginia, did so with the consent of the Attorney General, indicating that the process is not difficult or burdensome for jurisdictions with clean voting rights records.
32. Boerne, 521 U.S. at 533.
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The ability to bailout should, moreover, refute the arguments that Section 5 is not congruent and proportional within the meaning of the Boerne line of cases. If a jurisdiction should not, or need not, be covered by Section 5, the statute provides a ready means of escape. Indeed, in enacting a new bailout in 1982, Congress expected that prior to the expiration of Section 2 in 2007 "most jurisdictions, and hopes that all of them, will have demonstrated compliance and will have utilized the new bailout procedures earlier."31
The sunset provision of any extension of Section 5, as well as its limited geographic application, would further argue for its congruence and proportionality. Boerne, for example, held that while legislation implementing the Fourteenth Amendment did not require "termination dates" or "geographic restrictions . . . limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate."32
Blaine County, Montana
A recent challenge to the constitutionality of the Voting
33. United States v. Blaine County, Montana, 363 F.3d 897, 904-05 (9th Cir. 2004).
13
Rights Act was made by Blaine County, Montana, in a suit brought by the United States alleging that the at-large method of electing the county commission diluted Indian voting strength in violation of Section 2. The county contended that Section 2 as applied in Indian Country was now unconstitutional in light of the Boerne line of cases.
In rejecting Blaine County's argument, and in affirming the finding of vote dilution by the district court, the court of appeals held the Boerne "line of authority strengthens the case for section 2's constitutionality." It noted that "in the Supreme Court's congruence-and-proportionality opinions, the VRA stands out as the prime example of a congruent and proportionate response to well documented violations of the Fourteenth and Fifteenth Amendments," that when Boerne "first announced the congruence-and-proportionality doctrine . . . it twice pointed to the VRA as the model for appropriate prophylactic legislation," and, citing Hibbs, Garrett, Morrison, and Florida Prepaid, that "the Court's subsequent congruence-and-proportionality cases have continued to rely on the Voting Rights Act as the baseline for congruent and proportionate legislation."33 The Supreme Court's subsequent decision in Lane that the appropriateness of a remedy
34. Blaine County, Montana v. United States, 125 S. Ct. 1824 (2005). Despite the rejection of the challenge to Section 2 in Blaine County, defendants in Fremont County, Wyoming, have raised an identical challenge to a Section 2 vote dilution lawsuit brought

by the ACLU on behalf of tribal members on the Wind River Indian Reservation. Large v. Fremont County, Wyoming, No. 05-CV-270J (D. Wyo.).

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depends on the gravity of the harm it seeks to prevent further supports the conclusion of the appellate court. Notably, Blaine County filed a petition for a writ of certiorari asking the Supreme Court to review its claim that Section 2 as applied in Indian Country was unconstitutional, but the Court denied the petition.34

Although the decision in Blaine County rejected a constitutional challenge to Section 2, its logic is applicable to challenges to Section 5.

The Case for Extension

The case for extension of Section 5 has been documented in reports filed by various organization and testimony at hearings conducted by the House and Senate. I won't repeat what is contained in the report previously filed by the Voting Rights Project of the ACLU, "The Case for Extending and Amending the Voting Rights Act: Voting Rights Litigation, 1982-2006." I would, however, like to update it by bringing to the committee's attention two recent developments in the courts that were not

35. Cottier v. City of Martin, ___ F.3d ___, 2006 WL 1193028 *7 (C.A. 8 (S.D.)).

36. Id. at *1.

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covered in the report.

On May 5, 2006, the court of appeal for the Eighth Circuit reversed a decision of the district court dismissing a vote dilution challenge to elections for the City of Martin, South Dakota, concluding that "plaintiffs proved by a preponderance of the evidence that the white majority usually defeated the Indianpreferred candidate in Martin aldermanic elections."35 The court also noted the history of ongoing intentional discrimination against Native Americans in Martin:

> For more than a decade Martin has been the focus of racial tension between Native-Americas and whites. In the mid-1990s, protests were held to end a racially offensive homecoming tradition that depicted Native-Americans in a demeaning, stereotypical fashion. Concurrently, the United States Department sued and later entered into a consent decree with the local bank requiring an end to 'redlining' loan practices and policies that adversely affected Native-Americans, and censuring the bank because it did not employ any Native-Americans. Most recently, resolution specialists from the Justice Department attempted to mediate an end to claims of racial discrimination by the local sheriff against Native-Americans.36

Significantly, Martin is the county seat of Bennett County, located between Shannon and Todd Counties, both of which are

37. Bone Shirt v. Hazletine, 200 F. Supp. 2d 1150 (D. S.D. 2002). The decision is discussed in detail in the ACLU's

report previously filed with this committee. 38. Act No. 477 (H.B. 1654).
39. Larry B. Mims, attorney for Randolph County Board
of Education, to Joseph D. Rich, Voting Section, June 28, 2002.
16
covered by Section 5. The history of purposeful discrimination
against Indians in South Dakota is set out in detail in the
recent opinion of the district court invalidating 2000
legislative redistricting as diluting Indian voting strength.37
As the decision of the Eighth Circuit in the City of Martin case
makes plain, problems of vote dilution and racial discrimination
are ongoing in South Dakota and support the continuation of
Section 5.
The second recent case involves Randolph County, Georgia.
The general assembly enacted legislation following the 2000
census redrawing the five single member districts for the
Randolph County Board of Education to comply with one person, one
vote.38 The redistricting plan was submitted to the Department
of Justice for preclearance under Section 5 on June 28, 2002.39
In subsequent correspondence with the department, the Georgia
Attorney General's office submitted a letter from state
Representative Gerald Green and state Senator Michael Meyer von
Bremen, whose legislative districts include Randolph County, in
which the legislators affirmatively represented that Henry L.
40. Dennis R. Dunn, Deputy Attorney General, to James
Walsh, Voting Section, August 9, 2002, with attached letter from
Green and von Bremen.
41. Joseph D. Rich, Voting Section, to Governor Roy E.
Barnes, et al., September 30, 2002. 42. In Re: Henry L. Cook, Candidate for the Board of
Education for the County of Randolph (Randolph County, Ga., Oct.
28, 2002), para. 14.
17
Cook, the Chairman of the Randolph County Board of Education and
the incumbent in "old" District Five, remained a resident of
"new" District Five.40 Cook is African American, and District
Five, both old and new, is majority black. According to the
letter from Greene and von Bremen, "[t]he understanding I had and
have to this day is that he [Cook] is in fact in his district."
The Department of Justice, based on the representations in the
submission, precleared the new redistricting plan on September
30, 2002.41
Registration cards were issued by the county registrar
assigning voters to their districts under the new plan. One of
those to whom a new registration card was issued was Cook, a
resident of "old" District Five. Consistent with the county's
representations to the Department of Justice, a new registration
card was issued to Cook on August 1, 2002, listing him as a
resident and registered voter in new District Five.42
In October 2002, Cook filed a declaration of candidacy
seeking reelection to the Board of Education from District 5.
43. Id., para. 10. 44. Id., para. 22.
45. Jordan v. Cook, 277 Ga. 155, 587 S.E.2d 52 (2003).
18
Prior to the election, Lee Norris Jordan, an opposing candidate
from District 5, filed a challenge to the qualifications of Cook
claiming that Cook was not a resident of District Five.
A hearing was conducted on the challenge by Judge Gary C.
McCorvey, Chief Judge of the Superior Courts of the Tifton

Judicial Circuit, siting by designation as Superintendent of Elections of Randolph County. Re. Greene testified at the hearing that he "attempted to make sure that no incumbent was legislated out of his (the incumbent's) district," and that it was his understanding that Cook remained a resident of "new" District Five.43 Jordan's challenge to Cook's residence was rejected on the merits. Judge McCorvey concluded that Cook resided "within the boundaries of such 'new' district five as contemplated by the Laws and Constitutions of both the State of Georgia and the United States of America."44

Jordan appealed to the superior court but the appeal was dismissed on the ground that his delay in filing the appeal until after the election rendered the appeal moot. The Supreme Court in a unanimous opinion affirmed the judgment of the superior court.45

46. Jenkins v. Ray, Civ. No. 4:06-CV-43 (CDL) (M.D. Ga.).

Prior to the next election for the Board of Education scheduled for July 2006, however, the county registrar issued a new registration card to Cook assigning him to District Four, which is majority white. The actions of the registrar in adopting a new redistricting plan for the Board of Education and reassigning previously registered voters--and in this case an incumbent board member--to a new district in derogation of the intent and action of the state legislature, the representations made by the county to the Department of Justice, the preclearance decision of the Department of Justice, the prior decision of the county registrar, and the decisions of the state courts, were changes in voting within the meaning of Section 5, but they were never submitted for preclearance.

Black residents of Randolph County, represented by the ACLU, filed suit in federal court on April 17, 2006, seeking an injunction against implementation of the new voting changes absent compliance with Section 5.46 Two days later, on April 19, 2006, the Department of Justice sent a "please submit" letter to the county attorney for Randolph County indicating that the voting changes at issue were covered by Section 5 but had not been precleared. According to the letter, "the effective change

47. John Tanner, Voting Section, to Tommy Coleman, attorney for Randolph County, April 19, 2006.

to the precleared redistricting plans through the enforcement of the plans' boundaries and the change to Mr. Cook's registration status," must be submitted for preclearance, and that the changes are "legally unenforceable without Section 5 preclearance."47 The letter pointed out that "[i]t was the understanding of the Attorney General, based on representations from county officials, that Mr. Cook resided in district 5 under the redistricting plans submitted for preclearance in 2002."

The district court, sitting as a single-judge court, held a hearing on April 21, 2007, and granted plaintiffs' motion for a temporary restraining order directing "that the qualifying period for District 5 of the Randolph County Board of Education shall begin as scheduled on April 24, 2006 and shall remain open until further order of the Court." The case is set for trial before a three-judge court on May 31, 2006.

The past and continuing history of intentional discrimination against black voters in Randolph County underscores the need for continuation of Section 5. In 1954, Randolph County registrars challenged the qualifications of 525 black voters in the county, approximately 70% of the total number of black registered voters. Approximately 225 of those

48. Thornton v. Martin, 1 R.R.L.Rptr. 213, 215 (M.D. Ga. 1956).

49. James P. Turner, Acting Assistant Attorney General, to Jesse Bowles, III, June 28, 1993.

challenged appeared and were examined, of whom 175 were found by the registrars to be disqualified from voting. Twenty-two of those who were disqualified filed suit in federal court, which found the removal of blacks from the voter lists by county registration officials "constituted an illegal discrimination against them on account of their race and color."48 The court ordered them restored to the voter rolls, and that each plaintiff collect damages from the registrars in the amount of $40.

In 1993, the Department of Justice objected to a proposed redistricting plan for the Randolph County Commission on the grounds that it unnecessarily fragmented the black population in one of the previously majority black districts. According to the objection:

> There appears to be a pattern of racially polarized voting and substantially lower levels of participation by black voters relative to white voters in Randolph County elections. In this context, the identified fragmentation of black population concentrations has the effect of limiting the opportunity for black voters to elect candidates of their choice.49

In the same letter, the Attorney General also objected to an educational requirement (diploma or GED) for school board members

on the grounds that it would have a racially discriminatory, regressive effect:

> where the pronounced disparate impact of the proposed educational requirement appears to have been well-known, your submission does not provide an adequate non-racial justification for this requirement.

The implementation of the changes at issue in the present litigation shows that minority voting rights are still in jeopardy in Randolph County. The reassignment of a black incumbent from the majority black district in which he was elected to a majority white district would deprive minority voters of the opportunity of voting for a candidate whom they had previously approved, and would undoubtedly deprive those voters of effective representation on the Board of Education.

While the Boerne line of cases consistently cited the provisions of the Voting Rights Act as proper exercises of congressional authority to enforce the Fourteenth and Fifteenth Amendment, the extensive record compiled by Congress - the hearings, reports, and debates - establishes the continuing need for Section 5.

The Deterrent Effect of Section 5

Aside from blocking discriminatory voting changes, Section 5 has a strong deterrent effect. A recent example of that involves congressional redistricting in Georgia carried out by

50. HB 499 (2005).

Republicans in 2005 once they gained control of the house, senate, and governor's office. The legislature passed resolutions that any redistricting had to be done in conformity with Section 5 and avoid retrogression. And the plan that the legislature adopted in 2005 did exactly that.50

The black percentages in the majority black districts (John Lewis, Cynthia McKinney), as well as the black percentages in the majority white coalition districts that had elected blacks (David Scott, Sanford Bishop) were kept at almost exactly the same levels as under the plan that had been passed by the Democrats in 2002. I think one can fairly conclude that the legislature was determined that it would not have a Section 5 retrogression dispute on its hands after it passed the 2005 plan. Thus, even in the absence of an objection from DOJ, Section 5 obviously played an important role in the redistricting process.

I'm not sure what the state would have done in the absence of Section 5. In the brief it filed in the Supreme Court in Georgia v. Ashcroft (2003), involving preclearance of three of the state's senate districts, the state argued that the retrogression standard of Section 5 should be abolished, and that all of the majority black districts in the state could be

51. 539 U.S. 461 (2003), Brief of Appellant State of Georgia.

abolished under the new standard for preclearance which it proposed.51

The state also argued that minorities should never be allowed to participate in the preclearance process. Thus, the very group for whose protection Section 5 was enacted would have no say on how a proposed change might impact the minority community.

There is nothing in the history of redistricting in the state, past or present, to suggest that in the absence of Section 5 the party or faction in control would refrain from manipulating black voters and diminishing their political power for partisan purposes. Those who say that Section 5 has outlived its usefulness ignore, among other things, the undeniable deterrent effect that the statute has.

Section 5's Impact on Court Ordered Remedies

Section 5 also continues to have a decided, and beneficial, impact on court ordered remedies. In its opinion in Colleton County Council (2003) implementing legislative and congressional redistricting in South Carolina, the three-judge court held that it must comply with Sections 2 and 5 of the Voting Rights Act. Accordingly, it rejected plans that had been proposed by the

52. Colleton County Council v. McConnell, 201 F.Supp.2d 618, 628 (D.S.C. 2002).

53. Id. at 659.

governor and the legislature because they were "primarily driven by policy choices designed to effect their particular partisan

goals."52 Those choices included protecting incumbents and assigning the minority population to maximize the parties' respective political opportunities.53 The plan implemented by the court increased the number of majority black house districts from 25 to 29, maintained the existing nine majority black senate districts, and maintained the Sixth Congressional District as majority black. Notably, none of the parties to the litigation appealed.

A three-judge court in Georgia in Larios v. Cox (2004) similarly applied Section 5 in implementing a court ordered legislative plan following the failure of the state to enact a plan on its own. The court appointed a special master to prepare a plan, which initially paired nearly half of all black house members (18 of 39), including long term incumbents and chairs of important house committees. The Legislative Black Caucus moved to intervene and filed a brief arguing that the proposed plan would be retrogressive in violation of Section 5, and would also violate the racial fairness standard of Section 2. The three54.

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

judge court, in agreement with the objections raised by the Black Caucus, instructed the special master to redraw the plan to avoid, where possible, the paring of incumbents. The special master did so, and the plan as finally adopted by the court cured the pairing of minority incumbents, except in an area near Savannah where the paring was unavoidable.54

Both Colleton County Council and Larios v. Cox demonstrate the critical role that Section 5 plays in court ordered redistricting. In the absence of Section 5, the courts in the South Carolina and Georgia cases may well have adopted plans that subordinated minority voting rights to partisan goals or paired black incumbents, thus depriving the black community of many of its elected officials. The continuing importance of Section 5 is apparent.

Continued Racial Bloc Voting

One of the most sobering facts to emerge from the record compiled by Congress is the continuing presence of racially polarized voting. While much progress has been made in minority registration and office holding, the persistence of racial bloc voting shows that race remains dynamic in the political process, particularly in the covered jurisdictions.

55. Colleton County Council, 201 F.Supp.2d at 641.

The issue of polarization voting is covered in detail in the ACLU's report, but I will mention one judicial finding that is particularly revealing. A three-judge court in South Carolina in 2002 concluded that racially polarized voting:

> has seen little change in the last decade. Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary and general elections. Statewide, black citizens generally are a highly politically cohesive group and whites engage in significant white bloc-voting.55

Judicial findings of this sort underscore the continued need for Section 5.

The Bossier II Fix

The House and Senate bills properly provide that a voting practice adopted with any discriminatory purpose should be denied preclearance. Bossier Parish, Louisiana, adopted a redistricting plan for its 12 member school board in 1992. The parish was 20% black, but all of the districts were majority white, despite the fact that a plan could be drawn containing two majority black districts. No black person had ever been elected to the school board, and it was undisputed that the plan adopted by the parish split black communities purposefully to avoid creating a majority black district.

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

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

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

59. Bossier II, 528 U.S. at 328.

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One board member said he favored black representation on the board, but "a number of other board members opposed the idea." Another board member said "the Board was hostile to the creation of a majority-black district." In objecting to the plan, the Attorney General concluded she was "not free to adopt a plan that unnecessarily limits the opportunity for minority voters to elect their candidates of choice."56

The District of Columbia court, however, precleared the parish's plan. It held the 1992 plan was no worse than the preexisting plan, in that neither contained any majority black districts, and thus there was no "retrogressive intent."57 The Supreme Court affirmed in a decision known as Bossier II.58 It held "in light of our longstanding interpretation of the 'effect' prong of § 5 in its application to vote dilution claims, the language of § 5 leads to the conclusion that the 'purpose' prong of § 5 covers only retrogressive dilution."59 Thus, an admittedly discriminatory plan that was the product of

60. Id. at 366.

61. Busbee v. Smith, 549 F. Supp. 494, 501 (D. D.C. 1982).

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intentional discrimination and had an undeniable discriminatory effect, was nonetheless granted preclearance under Section 5. The dissenters (Justices Souter, Stevens, Ginsburg and Breyer) concluded that:

> the full legislative history shows beyond any doubt just what the unqualified text of § 5 provides. The statute contains no reservation in favor of customary abridgment grown familiar after years of relentless discrimination, and the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles.60

Had the Bossier II standard been in effect in 1982, the District of Columbia court would have been required to preclear Georgia's congressional redistricting plan, which was found by the court to be the product of purposeful discrimination. In

that instance, the state had increased the black population in the Fifth District over the benchmark plan, but kept it as a district with a majority of white registered voters. The remaining nine congressional districts were all solidly majority white. As Joe Mack Wilson, the chief architect of redistricting in the house told his colleagues on numerous occasions, "I don't want to draw nigger districts."61 He explained to one fellow house member, "I'm not going to draw a honky Republican district
62. Id., Deposition of Bettye Lowe, p. 36.
63. 539 U.S. 461 (2003).
64. Id. at 490.

and I'm not going to draw a nigger district if I can help it."62 Since the redrawn Fifth District did not make black voters worse off than they had been under the preexisting plan, and even though it was the product of intentional discrimination, the purpose was not technically retrogressive and so, under Bossier II, the plan would have been unobjectionable. Such a result would be a parody of what the Voting Rights Act stands for. The House and Senate bills provide a necessary remedy for the Bossier II decision.

The Georgia v. Ashcroft Fix

The House and Senate bills properly provide that voting practices that diminish the ability of minority voters to elect their preferred candidates of choice should be denied preclearance. In Georgia v. Ashcroft,63 the Supreme Court vacated the decision of a three-judge court denying preclearance to three state senate districts contained in Georgia's 2000 redistricting plan because, in its view, the district court "did not engage in the correct retrogression analysis because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts."64
65. Georgia v. Ashcroft, 195 F. Supp. 2d 25, 89 (D. D.C. 2002).
66. Id., 539 U.S. at 480, 484, 486.
67. Id. at 482-83.

Although blacks were a majority of the voting age population in all three districts, the district court held the state failed to carry its burden of proof that the reductions in black voting age population from the benchmark plan would not "decrease minority voters' opportunities to elect candidates of choice."65 The Supreme Court held that while this factor "is an important one in the § 5 retrogression inquiry," and "remains an integral feature in any § 5 analysis," it "cannot be dispositive or exclusive."66 The Court held other factors, which in its view the three-judge court should have considered, included: "whether a new plan adds or subtracts 'influence districts'--where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process;" and whether a plan achieves "greater overall representation of a minority group by increasing the number of representatives sympathetic to the interest of minority voters."67

The Supreme Court opined that "Georgia likely met its burden of showing nonretrogression," but concluded: "We leave it for the District Court to determine whether Georgia has indeed met its
68. Id. at 487, 489.

69. Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), aff'd 124 S. Ct. 2806 (2004).
70. Larios v. Cox, 314 F. Supp. 2d 1357 (N.D. Ga. 2004).
71. Id. at 494.
72. Id. at 495.
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burden of proof."68 But before the district court could reconsider and decide the case on remand, a local three-judge court invalidated the senate plan on one person, one vote grounds,69 and implemented a court ordered plan.70 As a consequence, the preclearance of the three senate districts at issue in Georgia v. Ashcroft was rendered moot.
The dissent in Georgia v. Ashcroft (Justices Souter, Stevens, Ginsburg and Breyer) argued Section 5 had always meant "that changes must not leave minority voters with less chance to be effective in electing preferred candidates than they were before the change."71 The dissenters also argued that the majority's "new understanding" of Section 5 failed "to identify or measure the degree of influence necessary to avoid the retrogression the Court nominally retains as the § 5 touchstone."72
The majority opinion introduced new, difficult to apply, and contradictory standards. According to the Court, the ability to elect is "important" and "integral," but a court must now also consider the ability to "influence" and elect "sympathetic"
73. The court's findings are at RWTAAAC v. McWherter, 836 F. Supp. 447, 457, 459, 460-61, 463, 466 (W.D. Tenn. 1993). The court's subsequent refusal to order a remedial plan is at RWTAAAC v. McWherter, 877 F. Supp. 1096 (W.D. Tenn. 1995). The litigation is also discussed in detail in the ACLU's report.
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representatives. The Court took a standard that focused on the ability to elect candidates of choice, that was understood and applied, and turned it into something subjective, abstract, and impressionistic. The danger of the Court's opinion is that it may allow states to turn black and other minority voters into second class voters, who can "influence" the election of white candidates but cannot elect candidates of their choice or of their own race. That is a result Section 5 was enacted expressly to avoid.
Georgia v. Ashcroft was decided in 2003, after most of the redistricting following the 2000 census had been completed, but at least one case decided prior to Ashcroft applied an "influence" theory to the serious detriment of minority voters. In 1993, a three-judge court made extensive findings of past and continuing discrimination and extreme racial bloc voting in Rural West Tennessee, but refused to require a majority black senate district in that part of the state because of the existence of three "influence" districts in which blacks were 31% to 33% of the voting age population.73
74. Id., 887 F. Supp. 1096, 1106 (W.D.Tenn. 1995).
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The court acknowledged that as a factual matter blacks did not have the equal opportunity to elect candidates of their choice under the existing senate plan, but it was also of the view that white elected officials were often responsive to the needs of blacks and that "adding an additional majority-minority

district in western Tennessee would actually reduce the influence of black voters in the Tennessee Senate." It found "most probative" for this proposition the testimony of a white senator, Stephen Cohen, from west Tennessee concerning passage of a bill to make the birthday of Martin Luther King, Jr. a state holiday. According to Senator Cohen, the bill passed the state senate by only one vote (17 to 16), with Senator Cohen and another white senator from west Tennessee voting with the majority. Senator Cohen concluded, and the district court found, that the creation of an additional black senate district would cause the election of "at least one more conservative white senator" who "would have been inclined to vote against the Martin Luther King holiday" ensuring that the measure would not have passed.74 Senator Cohen and the court, however, were mistaken.

According to the Senate Journal, only eight senators voted against the Martin Luther King, Jr. bill, with 18 "Ayes" and six

75. Tennessee Senate Journal, May 24, 1984, p. 2831.

76. 509 U.S. 630 (1993).

77. See, e.g., Johnson v. Miller, 515 U.S. 900 (1995). Far from being segregated, as the white plaintiffs maintained, the challenged districts were among the most integrated districts in the nation.

"Present, not voting."75 The bill would have passed without Senator Cohen's vote. What the court's "influence" theory in fact accomplished was to deprive African American voters in Rural West Tennessee of the opportunity to elect a candidate of their choice to the state senate.

The inherent fallacy of the notion that influence can be a substitute for the ability to elect is apparent from the Shaw v. Reno76 line of cases, which were brought by whites who were redistricted into majority black districts. Rather than relish the fact that they could "play a substantial, if not decisive, role in the electoral process," and perhaps could achieve "greater overall representation . . . by increasing the number of representatives sympathetic to the[ir] interest," white voters argued that placing them in "influence" districts, i.e., majority black districts, was unconstitutional, and the Supreme Court agreed.77 In addition, if "influence" were all that it is said to be, whites would be clamoring to be a minority in as many districts as possible. Most white voters would reject such a suggestion out of hand.

78. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

Conclusion

The Supreme Court has called the right to vote "a fundamental political right, because preservative of all rights."78 The House and Senate bills will help ensure that the fundamental right to vote remains a reality.