Testimony of

Mr. Armand Derfner

Attorney
Derfner, Altman & Wilborn
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STATEMENT OF ARMAND DERFNER
Derfner, Altman & Wilborn
Charleston, South Carolina
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Mr. Chairman and members of the Committee, thank you for the opportunity to appear and testify concerning the important legislatioil before you. I have had the privilege of testifying
before this Committee before, and I know its members are vigilant in protecting the right to vote. It is fitting that we are here today on the anniversary of the Supreme Court's decision in Brown v. Board of Education (although we in South Carolina usually call it Briggs v. Elliott, which was the case in that group that came from our Clarendon County).

In the wake of the Civil War, our Constitution was radically changed to give the National government power to protect citizens from the States. That is why we are here today. One of the Civil War amendments, the 1 5th amendment, said that a State could not abridge or deny the right to vote on account of race, color or previous condition of servitude. For 90 years that
amendment was violated freely by many States, and that is also why we are here today.

The Voting Rights Act was passed on August 6, 1965, against a background of the nearcentury of wholesale desecration of the 1 amendment. The Act contained an interlocking set of procedures and remedies, all designed to protect against denial or abridgement of the right to vote.

The original heart of the Voting Rights Act was Section 4, which suspended literacy and understanding tests, and similar devices, in certain "covered jurisdictions," mostly in the Deep South.

The suspension of the tests was for five years. During the five years, other remedies were in play, all based on the coverage formula, or "trigger" contained in Section 4 of the Act, which
was codified at 42 U.S.C. fj 1973b. The most important was Section 5, the preclearance provision. In 1965, Congress knew that in the past, whenever one type of discrimination had
been blocked another had sprung up to take its place, sometimes within twenty-four hours. Section 5 was Congress's answer to this problem. Section 5 simply provided that in a covered
jurisdiction, no change in any voting law or procedure could be enforced until the change had been precleared by the jurisdiction through either a three-judge U.S. District Court in the District of Columbia or the Attorney General. In order to gain preclearance, the covered jurisdiction would have to show that its proposed change was not discriminatory in purpose and not discriminatory in effect - did not have the purpose or effect of denying or abridging the right to vote.. Section 5 was deliberately drawn as broadly as possible, to cover changes that could affect voting even in a minor way, because although Congress was confident that there would be widespread attempts to evade the Voting Rights Act, it could not predict exactly what forms those evasions would take.

The initial focus of efforts under the Act was on registration and voting, i. e., denial of the right to vote, through suspension of literacy tests. By 1970, as the initial five-year special coverage period was winding up, the literacy test suspension had resulted in registration of an estimated one million new black voters in the covered states.

On the other hand, as black citizens overcame barriers to registering and casting ballots, new barriers were being erected to abridge the newly gained right to vote, to insure that, while
blacks might vote, their favored candidates couldn't win. Congress's faith in the ingenuity of those who had been relying on discriminatory literacy tests was being quickly rewarded. A 1968 report of the Civil Rights Commission perceptively reported a sharp growth in vote dilution techniques as new methods of voting discrimination. The report specifically singled out
redistricting measures, shifts to at-large elections, and changes in local government boundaries.

In other words, opponents of black voting had simply shifted from denial to abridgement of the right to vote. Many people refer to the new tactics as vote dilution, and this may have
obscured the fact that they were really abridgements of the right to vote - direct targets of the 1 5th amendment's words and meaning. The reason I emphasize this is that some people say that these vote "dilution" schemes are not really the proper focus of the Voting Rights Act, or that the Act has been taken on a detour. The word "abridge" means, "cut," or "reduce" or "contract." That is exactly what these dilution schemes do, and that is exactly what the precise words of the 1 5th
amendment and the Voting Rights Act prohibit.

The right to be protected against abridgement of the vote was recognized by the Supreme Court in 1969, in the first interpretation of section 5. Rejecting the argument that Section 5 should be limited to measures directly affecting the right to register and to cast a ballot, the Supreme Court held that the broad reach of Section 5 covered these changes in "systems of
representation" because, as the reapportioment cases recognized, "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."

The trends perceived by the Civil Rights Commission in 1968 were the beginning of an epidemic of dilution or abridgement changes in the covered jurisdictions. In fact, of the 1300+ changes to which the Attorney General has objected to date, the vast majority have involved changes in representational systems, or, to put it in plainer terms, "rigged" election systems like
gerrymanders; redistricting; changes to winner-take-all at-large or multimember districts; annexations superimposed upon at-large election systems; majority-runoff requirements; and anti-single-shot methods such as full-slate laws and numbered places. Since an objection is the equivalent of a court injunction, the large number of objections shows how central the role of preclearance is in guarding the right to vote.

Furthermore, well over half of the objections have come since the last reauthorization of the Act in 1982, which makes it plain that the problem has not disappeared, and the need for
preclearance continues today.

The story of the Voting Rights Act did not end in 1965; it was just beginning. Because of its effectiveness in checking the growth of vote dilution and the demonstrated need to continue
its protections, Congress extended Section 5 for five years in 1970, seven more years in 1975, and 25 years in 1982. Each of these extensions was marked by vigorous debate in Congress and
by extensive hearings and reports documenting the continuing abuses that justified the continued need for the preclearance remedy.

The 1982 extension was for 25 years. The 25 year interval reflected a Congressional reassessment, in light of experience, of how long it might take to overcome voting discrimination. In a Nation where slavery lasted for a quarter of a millennium, where another century went by with racial segregation in fbll force before the Voting Rights Act, where, in other words, the Voting Rights Act sought to change nearly 20 generations of human behavior, the problem could certainly not be solved in 5 or 10 or 17 years.

Indeed, I do not assume that the Congresses of 1965, 1970 or 1975 thought they were solving the problem of voting discrimination once and for all. Rather, they were acting judiciously and cautiously to apply an appropriate remedy for a limited time period, and calling for a review at the end of that period to see if conditions had changed sufficiently to end the statute. Each time before now, that review has led Congress to decide that the time had not yet arrived to end the statute. In fact, each time Congress has held extensive hearings and compiled a detailed record of continuing probleins not oniy justifLing extension of Section 5 and the other temporary provisions but adding new remedies to address newly recognized problems. A prime example is the way literacy tests were banned in three successive steps - from a temporary suspension in the covered jurisdictions (1965), to a temporary suspension nationwide (1 970), to permanent elimination nationwide (1 975). The Voting Rights Act has probably had more congressional review and oversight than any other civil rights statute - or possibly any other type of statute - in our history.

I practice law in Charleston, South Carolina, and I have studied voting and elections not only there but elsewhere in my state and in the surrounding states. I know that the need for Section 5 is still there and I would like to tell you some of what I have seen that tells me so. Although these comments reflect only my own experience, I should say that I have lived in the South for nearly 40 years, and in Charleston for about 35 years. I love my city and my state, and would like them to be, as the Amy recruiting ad says, the best that they can be.

Unquestionably, there bas been enormous progress since 1965, and I am very pleased with that. But we started so far down that even with great progress we have too far to go to be ready to abandon a protection that is responsible for much of the progress.

As an overview, let me refer to two major reports on South Carolina that have been presented to this Committee, one by the American Civil Liberties Union (Laughlin McDonald, Dan Levitas and others), and the other by the Leadership Conference on Civil Rights (John Ruoff and Herbert Buhl).

Both these reports present painstaking detail, case by case, of South Carolina's forced march forward. The history of our nation and of my state make it all too clear that progress does not come by itself, and these two studies show how difficult it is. My OWTI experience, in many cases, shows how arduous it is as well.

As these reports show, South Carolina has had several dozen voting rights suits during the life of the Voting Rights Act. But the number of Section 5 objections is 120, far exceeding the number of lawsuits. That means 120 voting violations by the State and its local governments. That is an astounding number. More to the point, 73 of the section 5 objections have come since renewal of the Act in 1982. That too is an astounding number. And nine of the objections have come in just the past five years. But even these numbers are poor substitutes for the story which lies beneath the statistics. The point is that, by there very nature, voting laws and practices apply broadly to entire classes of people; thus when a Section 5 objection or a lawsuit blocks or interrupts a law which would have abridged or was abridging the right to vote, the rights of many citizens are vindicated and protected. In a very real sense, the Voting Rights Act is a Congressional promise that the nation stands by the principles enunciated in the Constitution, and the view from South Carolina since the time of the 1982 renewal suggests that now is not the time to retreat from that promise.

Here is what Ruoff & Buhl say in summarizing the past five years:

"These objections since 2000 demonstrate the continued need for Section 5 and its vigorous enforcement. Absence of Section 5 review of the General Assembly's efforts to impose a racially discriminatory election system for Charleston County, school trustees would have imposed on Charleston's black citizens the obligation to mount closely Section 2 litigation to challenge an electoral system that the district court had just found discriminatory. In the city of Charleston, African-American citizens would have forseeably and avoidably seen a district in which black citizens could elect candidates of their choice quickly change to one in which they could not. In Sumter County, the county council could have deprived black citizens of the ability to elect a candidate of their choice in District 7, protecting a white incumbent and continuing a thirty-year pattern of opposing full voting rights for Sumter's African-American citizens. In Union County, a local state representative could have imposed on the school board a

redistricting plan
that made it much less likely African-American citizens would continue to be able to elect two candidates of their choice to the Board of Trustees. In Greer, in order to protect a white incumbent and cater to white citizens' demands, African-
American citizens would have been deprived of the ability to elect even one candidate of their choice to the city council. In Richland County, imposition of majority vote requirements would have put off the day that a growing black population would be able to elect a candidate of its choice to the Richland-
Lexington School District 5 Board of Trustees. In North, white city officials would have continued admitting white citizens, while excluding their black neighbors from annexing and participating in town elections."

Now let me go from the wholesale to the retail - my own experience. I will address briefly five sets of cases I have personally litigated in my home state during the past two decades. - i. e., since the last extension of Section 5. This is not ancient history, rather, what I will talk about happened in the time since the 1982 extension, indeed a lot of it in this very decade - the 21st century.

I should also emphasize that my state is not alone. I do not believe South Carolina legislators or officials are more likely to do things that require the protection of the Voting Rights
Act than their counterparts in other Section 5 covered states. On the contrary, my experience tells me that my state is on the same wave length as other jurisdictions covered by Section 5, and
that those other covered states need Section 5 just as much as my state.

The problems I will talk about are some of the same types that we encountered in earlier times - but they are still with us.

First, one of the problems that has plagued voters is manipulation of city boundaries to maintain white control. This was the trick in Tuskegee, Alabama, that produced the famous 1960
Supreme Court case of Gomillion v. Lightjoot. A few years later, one of the earliest Supreme Court cases under the Voting Rights Act was decided. In that 1971 case that I tried, Perkins v.
Matthews, Section 5 was successfully used to block the city of Canton, Mississippi from carrying out an annexation that added new white residents to offset growth in black voting registration.

The problem continues. In 1987 I brought a lawsuit against the city of Orangeburg, South Carolina, for the same thing. Orangeburg was once a round town, that is, it had been formed,
like many cities, by drawing a circumference from a center point. As black voting grew, however, the town officials responded by a series of annexations that turned the town border into a jagged design of the most irregular shape. Our lawsuit resulted in a decision which allowed the annexations but minimized their discriminatory effect by changing from at-large elections to elections by fairly drawn districts or wards. A similar lawsuit in the mid-1990's in Hemingway, South Carolina, also blocked that city's annexations, and the discriminatow nature of those annexations was plainly shown when the city decided that rather than annex nearby areas of black residents, it would simply undo the annexations of white people. In other words, if it could not carry out its discriminatory design, it had no use for these annexed areas.

A second type of problem frequently encountered, the harassment of poor or black voters at the polls, bears the hallmarks of the intentional discrimination that some people mistakenly think lives only in the history books. In a 1990 election for Probate Judge of Charleston County, a black candidate faced a white candidate. There was widespread intimidation of black voters at
rural polling places, especially black voters who needed assistance because they were old, infirm or not fully literate. (And, by the way, it is no shame to need help when casting a vote in our elections: if you saw some of the Constitutional referendums on our ballot, you would need a Ph.D. to read them or make heads or tails out of them.)

Despite the attempts to suppress black voting, the black candidate, Bernard Fielding, won that election. However, the State Election Commission, acting on unverified complaints from
some of the same people who had tried to intimidate the black voters, set the election aside. We had to appeal to the South Carolina Supreme Court, which fortunately upheld Fielding's election. One of the other features of that

campaign was the white candidate's tactic of running an ad with his black opponent's picture, to make sure that every white voter knew exactly who was white and who was black.

That was not the last time we have seen intimidation of voters. In a trial in 2002, which I will discuss in a few minutes, there was testimony that attempts to intimidate black voters
continues as a frequent tactic.

Another threat to voting rights occurred when Congress passed the National Voter Registration Act in the mid-1990's ("Motor Voter law"). Our then Governor announced that South Carolina would not comply with the Act, and our then-Attorney General went to court to defend South Carolina's right to ignore the law. Again, fortunately, the court - this time a federal court - issued an injunction bringing the Motor Voter law to South Carolina.

Based upon my very recent experience I can say that the presence of pervasive racial polarization among voters has not abated. Studies by experts on all sides, including experts hired
by the State, and repeated judicial decisions, have highlighted the continuing phenomenon. It is not just in elections here and there, but throughout our State. In the most recent statewide
redistricting case following the 2000 Census, where the Court analyzed the plans before it under both Sections 5 and 2, a three-judge court took extensive note of the persistence of racially polarized voting, and how it affects the fundamental right to vote. Among the court's findings, it said "the history of racially polarized voting in South Carolina is long and well-documented," and the court cited the "disturbing fact" that there has been "little change in the last decade." These findings echoed earlier findings, as well as the conclusions of plaintiffs' and defendants' experts who have repeatedly confirmed the persistence of racially polarized voting in my state.

Going from the large-scale to the intensely local, even the most minor, seemingly innocuous changes can be fraught with problems that hinder voters. Last year, in Charleston County, the registration office - which is also the location for "early absentee voting" and resolving election day registration disputes - was moved from a central location, well served by
bus lines and adjacent to other government offices - including public assistance agencies - to a remote location nearly half a mile from the nearest bus service. What does that mean if you
don't have a car, especially if you are a minority voter - who disproportionately don't own cars? What it means is another barrier to the right to vote.

Perhaps the most notable case is a very recent one that started in 2001 and ended with a Supreme Court order less than two years ago. This case involved the method of electing the County Council in Charleston County. The County Council members were elected from nine separate districts until 1969, when there was a sudden change to at-large elections for the nine members.

Unfortunately, when that change took place in 1969, it was precleared under Section 5. The reason is not entirely clear, but that was in the infancy of Section 5 and it was before the
Supreme Court had highlighted the dilutive effects of at-large elections.

In any event, in 2001 the U.S. Department of Justice, along with a group of individual voters, brought a lawsuit to challenge the at-large elections as racially discriminatory. I was one of the lawyers representing the plaintiffs in that case. The case was tried for six weeks in 2002, and it resulted in a sweeping decision overturning the at-large elections on the ground that system discriminates against black voters on account of their race. The court issued a 75-page opinion analyzing in minute detail what the role of race has been and continues to be in our elections. Much of the evidence supporting the decision came from the County's own expert witness. The decision is a virtual primer about corrosive voting discrimination in my state and my county today, in the 2 1 st century.

Let me outline a few of the things this case tells us. First, there is severely racially polarized voting, meaning that white voters rarely vote for candidates favored by black voters,
especially if those candidates are black themselves. This was based on analysis not of old elections, but elections during the past 15 years, by experts for all sides. Moreover, the evidence
of polarization affects primaries and general elections, as well as non-partisan elections.

This pattern has had a predictable result. In a county with a population more than onethird black, only three of the 41 people elected to County Council since 1970 were minority, including only one in the last decade. In that last decade, all nine black candidates supported cohesively by black voters were defeated in the general elections, as well as 90% of the 21 preferred candidates of whatever race. For example, black voters did best in 1998, but even in that year, the two white candidates they supported won but the two black candidates they supported lost.

Nor were these results accidental. There was powerful evidence of people intimidating and harassing black voters at the polls during the 1980s and 1990s and even as late as the 2000 general election. There was also evidence of race baiting tactics used by political strategists.

Perhaps the most telling sign of voting discrimination in Charleston County elections was the Court's finding that racial appeals of a subtle or not-so-subtle (i. e., overt) nature were used in election campaigns. The most telling of these examples were white candidates running ads or circulating fliers with photos of their black opponents - sometimes even darkened to leave no mistake - to call attention to the black candidates' race in case any white voter happened to be unaware of it.

This tactic is the surest sign of an atmosphere where voting discrimination flourishes; in locales where the tactic is used, this tactic says local politicians know race "sells," and that is
why they use it. How much more would they use race to buy and sell elections if the Voting Rights Act were not in place?

After the district court's decision, the County appealed, and the decision was resoundingly affirmed by the Fourth Circuit in an opinion by Judge J. Harvie Wilkinson, joined by Judge Paul Neimeyer and Judge Allyson Duncan. (all appointed by Republican Presidents, two by President Reagan, and one by President, George W. Bush.) Still the County did not give up, but petitioned the U.S. Supreme Court, which refused to hear the case, and it finally ended with a new system designed to provide equal rights to all voters of all races.

One important note: the County spent over $2,000,000 of taxpayers' money in its defense of the discriminatory method of electing County Council members. Incidentally, nearly $100,000 of this was for expert witnesses. I understand that one provision of the bill before you would include expert witness expenses as part of the attorneys' fees recoverable by prevailing
parties. The huge amount spent by Charleston County on expert witnesses shows what private citizens have to be prepared to match in order to vindicate bonafide claims. This is why it is so
important that expert witness expenses be compensable in Voting Rights litigation as is the case under many other civil rights statutes.

Another telling note that may be particularly instructive to this Committee in seeing the relationship and distinctions between Sections 5 and 2: the Charleston County School Board has
an election method that is similar but not identical to the County Council. While the County Council case was going on, the South Carolina General Assembly, led by legislators from
Charleston County, tried to change the school board method to adopt the most discriminatory features of the County Council. The then-Governor vetoed the first attempt, but the General
Assembly tried again - even after the method had already been thrown out by the federal court. This time, the new Governor let the bill become law (although he would not sign it). Fortunately, Section 5 of the Voting Rights Act covered this voting change and when it was presented for preclearance under Section 5, preclearance was denied. If Section 5 had gone out
of existence, this bill would have become law even though its precise twin had already been found to be racially discriminatory and African-American citizens would have endured years of vote dilution and expense before Section 2 could successfully undo the law.

I believe that every one of the changes involved in the instances above was purposeful. Not all of them were adjudged to be discriminatory in purpose, because once a judge on the
Attorney General finds a voting change or a voting practice is discriminatory in effect or result, there is no need to go on to the inflammatory issue of discriminatory purpose. Indeed,
recognition of how inflammatory that is, and hard it was to expect judges to find that the acts of state and local

officials were intentionally discriminatory was, in part, what led to the course that Congress followed when modifying Section 2 in 1982.

The specific topic of today's hearing is the benefits and burdens of section 5. I believe the discussion above has clearly shown the benefits.

Let's talk about the burdens. First, of course, is the practical burden, that of doing the paperwork to file a submission with the Attorney General. This is not arduous. The task of preparing the submission is usually a fraction of the work involved in making the voting change: thus, a redistricting calls for more information, but barely a fraction of the time and work that
went into considering and adopting the plan. By the same token, a polling place change is a simple submission, ordinarily taking a fraction of the time needed to find and settle on the new
polling place location. I can attest to this from personal experience, from having talked many times to city attorneys or state Attorneys General who were responsible for the submissions. I have also had the experience of being retained by a city to prepare a redistricting submission, and
it was not burdensome.

Indeed, the nature of the administrative process, which gives the Justice Department 60 days (and one opportunity to request more information) is probably the most streamlined
administrative process known to the federal government. Unlike agencies that can sit on decisions for months or years, if the Department does not object within the 60 days, the change is
cleared. That is it. Those jurisdictions that prefer can seek preclearance under the same standard before a 3-judge court in Washington D.C. in a declaratory judgment action. The same court
route is available to a jurisdiction that receives an objection from the Attorney General - and the court proceeding is de novo.

Of course, I will not ignore the burden on our federal system, of having this unusual remedy, and having it apply only to certain states or jurisdictions. But a State, no less than any
government, is an institution that is really a collection of its people. For too long, the covered states were in the invariable habit of representing only some of the people and ignoring (at best) the others. The history of 1 5th Amendment violations created a situation in 1965 that required the federal government to pass the Voting Rights Act in order to enforce the Constitution. The record of the continuing need now calls for keeping the remedy for a while longer. Thus, while I am fully sensitive to the demands of federalism, our federal systeni is not the one we created in the Articles of Confederation. Rather, it is the system that replaced the Articles: the Constitution, augmented by the Civil War amendments. Under the Constitution, the need to protect citizens' right to vote, and the historical patterns showing persistence of the problem, require an effective remedy here, and warrant an extension of this law for what we can all hope will be the final time.

Finally, let me say something about history. In 1894, three decades after the War, Congress repealed most of the civil rights laws it had passed during Reconstruction, concluding
that they were no longer needed. That hopeful belief turned out to be tragically wrong. The period that followed is called the nadir of race relations in American history. Black voters were
eliminated from the rolls, by state law or by lynch rope, while the Supreme Court issued a series of decisions upholding the most transparent forms of discrimination. When Woodrow Wilson
became President, he promptly segregated the entire civil service, and that 50 years after the War!

I obviously do not believe we will return to segregation or wholesale disfranchisement if Section 5 expires, but I do believe it is premature to imagine that we will not regress without this crucial protection.

Striving for fbll equality in all matters, especially the right to vote, is an obligation of every American. Earlier congressional efforts to address the problems that I have described here failed; this law has not. When we have such an effective protection in the form of the Voting Rights Act, we should not rush to abandon that protection prematurely simply in the hope that equality will come.

In 1981, during his testimony on the Voting Rights Act, the great historian C. Vann Woodward was asked why Congress should be concerned about history. Even today, I can remember his words almost by heart:

"It makes evident that advances and revolutions in popular rights can be reversed, that history can move backward, that enormous gains can be lost despite the enormous cost we paid for them. My history teaches me that if it can happen once, it can happen again."

Thank you, Mr. Chairman.