Testimony of

Mr. Gerald A. Reynolds

June 21, 2006

Testimony of
THE HONORABLE GERALD A. REYNOLDS
Chairman
UNITED STATES COMMISSION ON CIVIL RIGHTS
on

VOTING RIGHTS ACT: POLICY PERSPECTIVES AND VIEWS FROM THE FIELD

Before the
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND PROPERTY RIGHTS
U.S. SENATE

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Dirksen Senate Office Building 226
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Mr. Chairman, Senator Feingold, and members of the Subcommittee-- I am Gerald A. Reynolds and have served as Chairman of the United States Commission on Civil Rights since December 2004. The Commission is an independent bipartisan agency established by Congress in 1957 to investigate complaints alleging that citizens are being deprived of their right to vote for reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices; to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of the same bases; to appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of the same bases; to serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of the same bases; to submit reports, findings, and recommendations to the President and Congress; and to issue public service announcements to discourage discrimination or denial of equal protection of the laws. The Commission has been called the "conscience of the Nation" on civil rights matters, and our recommendations to Congress have often led to the enactment of critical legislation. In particular, the Commission was instrumental in providing the evidence of pervasive discrimination in voting that led to the passage of the Voting Rights Act in 1965. We also reported on the initial efforts to enforce the act immediately after its passage; and provided reviews and analyses that assisted Congress in deciding to extend and expand the act's temporary provisions in 1970, 1975, and 1982.
Since 1961, the Commission has adopted twelve statutory reports and has produced thirty publications on the subject. I am pleased to appear you before you today to discuss the temporary provisions of the Act, in light of the Commission's historic and vital role in its early development and subsequent reauthorizations.
Our most recent work on this subject continues the Commission's record of service in this area. Our most recent reports on the temporary provisions of the Voting Rights Act endeavor to provide this Congress with a factual predicate to consider whether current conditions justify the scope and reach of the law as originally conceived. Beginning in October 2005, the Commission undertook an extensive review of the impending expiration of the Act's emergency provisions. We heard testimony from noted experts in the field, reviewed thousands of pages of documents the Justice Department provided to the Commission, and reviewed relevant court decisions, books, articles, and previous Commission reports on the issue--all with an aim of providing objective data that can inform the

decision-making of all participants in the re-authorization process. Our resulting publications were carefully drafted and supported by an extensive factual record. Those publications include a statutory report entitled Voting Rights Enforcement and Reauthorization and a briefing report entitled Reauthorization of the Temporary Provisions of the Voting Rights Act.

I understand that Commission staff have provided copies of these publications for members of this Subcommittee. I should also note that both publications, including a dissent, are available to the general public and interested parties on our website at http://www.usccr.gov. My testimony today summarizes the findings and recommendations of both publications.

The years preceding the adoption of the Voting Rights Act were marked by systemic voting abuses which denied hundreds of thousands of Americans access to voting booths on account of race. A 1961 Commission report is particularly telling. The report identified 100 counties across the Nation where African-Americans were prevented from voting-- "by outright discrimination or by fear of physical violence or economic reprisal"; and pervasive and unlawful violence by police used to repress voting rights.

As the Supreme Court cited in Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 373 (2001), Congress had determined at that time that "there persisted an otherwise explicable e 50-percentage point gap in the registration of white and African-American voters in some states." Also, Congress relied on the findings from the Commission, the Department of Justice, and federal courts that the covered states were engaged in a pattern of unconstitutional behavior. A Senate Report from 1965 found that in every voting discrimination suit that had been brought against Alabama, Louisiana, and Mississippi for example, both the district court and the court of appeals had found "discriminatory use of tests and devices"--devices such as literacy, knowledge, and moral character tests. 89 S. REP. 162 at 9. The Senate concluded that these were not "isolated deviations from the norm," but rather "had been pursuant to a pattern of practice of racial discrimination." Id. at 10.
Such invidious practices had driven down the average registration rate for black citizens in the covered states down to 29.3 percent. See id. at 42.

We have come a long way in 45 years and the years since the Voting Rights Act was adopted. The current Commission would be hard-pressed to discover the same kinds of discriminatory voting practices that our predecessor Commissions encountered--the kinds of discriminatory practices documented in that 1961 report and others like it that impelled Congress to adopt the Voting Rights Act and, in particular, Section 5. Both government action and perhaps even a change in society's fundamental views on equality have helped to remove many of the barriers to full citizenship since that time. This is particularly true in jurisdictions that are covered by Section 5.

In those covered jurisdictions, we have seen black registration voting rates substantially increase in recent decades. Data presented to the Commission suggests that Southern blacks register and vote at rates comparable to, if not higher than, the rest of the Nation. Research also indicates that since 1984 black registered voters have closely tracked 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 non-southern states. Most notably, in two Section 5 states, black turnout has been consistently above the national average.
At the same time, we have witnessed remarkable strides in the number of blacks and other minorities holding elected office. According to data compiled by Ronald K. Gaddie, Professor of Political Science at the University of Oklahoma, in earlier times, only one black state legislator held office in all of the seven states originally covered by Section 5--combined. Today, by Dr. Gaddie's estimation, a black person in the South is more likely to have a black representative than anywhere else in the country. While none of the Section 5 states studied by Dr. Gaddie has yet reached proportionality, three states--according to his research--are approaching those levels. And the number of black representatives in the covered jurisdictions has increased at the congressional level as well--from three in 1991 to eleven today.

Another important statistic to consider is the overall declining percentage of objections that the U.S. Department of Justice has issued in response to state and local modifications to election procedures. The central placement of this finding in our statutory report directly reflects the importance that the Commission attached to this particular finding. The findings were reached based on a review of primary source documents subpoenaed by the Commission from the Department of Justice and reviewed internally by Commission staff.

As you know, Section 5 requires certain states and localities to obtain federal approval before modifying voting practices and procedures--what is known as a preclearance review process. Whenever a covered jurisdiction (as defined in Section 4 of the Act) enacts or seeks to administer a change in voting practice and procedure, that jurisdiction must obtain federal approval. Approval can be obtained from the Attorney General of the United States or, alternatively, a special panel of the U.S. District Court for the District of Columbia. The Attorney General has the option of expressly rejecting any modified change that could potentially enact new discriminatory voting practices and procedures.

Comparing the total number of proposals submitted for preclearance review with the number of objections issued by the DOJ over an extended period of time serves as an important indicator in assessing whether there is a continued need for Section 5. The overall numbers and scope of objections serve as a possible indicator of actual or potential discriminatory voting changes still occurring in the covered jurisdictions. Analysis of objections is preferable to other indicators, such as declaratory judgments or withdrawal letters because these categories are so small as compared to Justice Department objections.
Between August 1965 and June 30, 2004--according to our analysis--jurisdictions filed 117,057 voting change submissions for Justice Department review. Since 1965, the Justice Department has objected to 1,400 preclearance submissions. The current extension period between 1982 and 2004 has had the lowest level of DOJ objections of any time in Section 5's history. But, in my opinion, the most revealing fact uncovered by Commission staff is that overall DOJ records show a dramatic and continuous decline in the percentage of objections to proposed changes over the 40-year period of the Act--dropping from 14.2 percent in the period 1965-1974 to a mere 0.7 percent in the period 1982-2004. These decreases may lead one to question the continuing utility of the expiring provisions given that Section 5's frequency of application for the purpose of interposing an objection has declined to less than one percent in recent decades.

Some have argued that the number of objections interposed has increased, and indeed, our review confirms that the number of objections filed by the DOJ rose from 429 in 1975-1981 to 752 in the period 1982-2004. Although it is true that objections have increased in absolute terms, this is largely because the number of overall submissions has skyrocketed--from 1,542 in the 1965-1974 period to 101,641 total submissions over roughly the last 25 years. Additionally, the Commission observed that the ratio of objections to submitted changes dropped to 0.7 percent in recent years-- demonstrating a decline. Despite developments in the courts and other arenas, the Commission noted a broader and fairly consistent decline over an elongated 39-year period.

Many have opined that the expiring provisions of the Voting Rights Act are constitutionally worrisome and encroach heavily on the role of State and local governments. Samuel Issacharoff, the Harold R. Medina Professor of Procedural Jurisprudence at Columbia Law School, has referred to Section 5 as an "extraordinary intervention" that permits the federal government to "overcome the normal presumptions of state autonomy and respect for federalism." Indeed, in this respect Section 5 is unique among federal laws because of the change it imposes on the traditional relationship between the federal government and state and local governments.

As the statutory report documents, federal law historically presumes state and local laws are valid unless and until challenged in court and found to violate a federal provision. Under Section 5, however, the presumption is reversed, and state and local laws are presumed invalid unless and until the Attorney General or the District Court determines them lawful. Justice Black's dissent in South Carolina v. Katzenbach recognized this arrangement as an "uncommon exercise of congressional power."

The Supreme Court has not reconsidered Section 5's constitutionality since the 1982 extension. Pervasive discrimination is more distant in time and, as I discussed earlier, broader social changes have expanded opportunities to minorities. As time passes and the pervasiveness of discrimination becomes increasingly more distant, some commentators have expressed concern that Section 5's encroachment on state authority will loom larger and raise continuing constitutional concerns. In its briefing, the Commission urged Congress to consider congruence and proportionality of Section 5 to recent voting discrimination and to developing a careful and complete record of discrimination in the course of reauthorization, given Section 5's unique infringement upon traditional state and local prerogatives.

Consideration of congruence and proportionality should include a carefully developed 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. If Congress should find evidence of voter discrimination, it should also ensure that any reauthorized preclearance procedures are proportional to that evidence. With this proportionality in mind, Congress might 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 term of the extension. Such changes, if enacted by Congress, might do well to ensure Section 5's proportionality. Ultimately, however, Congress will first need to balance the question as to whether current conditions in covered jurisdictions justify a continued "extraordinary intervention," to quote Professor Issacharoff, in the first place.

Although my testimony today has focused on the continued utility of Section 5, similar arguments have been raised regarding the efficacy and continuing need for Sections 4(f)4 and 203 as well as Sections 6 through 9. These concerns are discussed at great length in the statutory report. Sections 4(f)4 and 203 require various localities to provide election materials and information in one or more languages in addition to English. In 1986 and 1997, however, the U.S. Government Accountability Office examined the costs associated with the provision of bilingual voting assistance under Section 203. The GAO study found that larger jurisdictions are required to provide assistance in multiple languages and at numerous polling places at significantly higher costs. New York and Santa Clara, California, for example, spent more than half a million dollars for this purpose in just one year alone. In response, some commentators have argued that Section 203 wastes government resources, because--as the Commission observed--it requires jurisdictions to expend limited election funds on materials that are seldom used. Sections 6 thru 9 enable the federal government to send federal voting registrars (examiners) and polling place monitors (observers) to covered jurisdictions. Examiners and observers can be sent to those political subdivisions covered in the Section 4 formula. Although, like Section 5, Sections 6 through 9 were originally intended to be in effect for only five years, these provisions were also extended in 1970, 1975, and 1982. Like Section 4(f)4 and 203, the continuing utility of Sections 6 thru 9 should also be re-examined. The last time an examiner was used was in 1982 and 1983--and that was to register voters--but registration procedures today are now governed by the National Voter Registration Act of 1993. Although the Commission noted that the observer program, by contrast, continues to play a vital role in modern elections, many jurisdictions certified for observers have not been sent observers in years. Franklin County, Mississippi, for example, was certified in 1967 but has had no observers sent since 1968.

Throughout this re-authorization process, Congress needs to carefully weigh and consider these and other issues related to the constitutional, legal, and policy aspects of the temporary provisions of the Voting Rights Act. This is not to say that the Voting Rights Act, as a whole, does not--and will not--remain an essential piece of the Nation's collective effort to ensure equal access to the ballot box. On the contrary, the Senate has not been asked today to consider the efficacy of the Act as a whole. Rather, the question before this body is whether it is constitutionally justified and appropriate as a matter of policy to renew the expiring provisions. We can all agree that the Voting Rights Act is one of the Nation's most important civil rights successes. In my opinion, its bedrock principles-- those principles explicitly made permanent in the Act and embedded in our modern national culture -- should remain permanent.

However, with regard to the expiring provisions-- those being considered by this Subcommittee today-- all of the expert panelists before the Commission acknowledged that in 1965 there was a strong need for Section 5 and the other provisions of the Act. Pervasive, systemic, and often violent repression required vigorous and direct federal intervention to secure a basic constitutional right, even though such intervention infringed on the prerogatives of localities. Such was the price to be paid in 1965 to rid the evils of intentional discrimination in voting--and this much is not in dispute. What reasonable people--even the most noted experts in the field--can dispute is whether this infringement remains as appropriate and necessary decades after the apparent cessation of the unlawful police action and physical violence that the Commission documented in 1961.

As noted in the statutory report that we released just last month, some observers may see the data I noted earlier as demonstrating that Section 5 has accomplished its goals as a deterrent and that further reauthorization is not warranted. Conversely, others may interpret the apparent success of Section 5 and related provisions to warrant extending Section 5's coverage to the rest of the 50 states, to the extent permissible under the Constitution. Alternatively, some may point to the decline in the number of objections as due to recent Supreme Court interpretations of the Section 5 nondiscrimination standard, which they might argue Congress should overturn. Still

others may conclude that Section 5 should be re-authorized--but in a different form which better reflects recent experiences--perhaps by amending the coverage formula or bailout restrictions or shortening future extension periods.

Mr. Chairman, my goal of the Commission is not to recommend any one course of action over another with respect to the options that I have just outlined. Nor is my goal to recommend outright that Congress re-authorize or not re-authorize the temporary provisions at issue. Rather, as I stated earlier, my goal today, consistent with the Commission's statutory mission, is to provide objective data that can inform this Subcommittee's decision-making process as you consider this important issue.

What the Commission has recommended, however, in light of Section 5's unique infringement on the traditional prerogatives of state and local governments, is that Congress carefully consider the congruence and proportionality of that section in light of recent voting discrimination. To this extent, Congress should carefully define the scope of voting rights discrimination by focusing on intentional discrimination as prohibited by the Fourteenth and Fifteenth Amendments. To endure legal challenge, Congress should then carefully develop a record of purposeful discrimination and, in so doing, rely upon theories of discrimination that are likely to achieve broad consensus.

Ultimately, these issues are ripe for further study by this Subcommittee. The Commission urged, in its briefing report on this matter, for Congress to hold comprehensive hearings regarding re-authorization of the temporary provisions. Such hearings will allow for decision-makers to identify and carefully consider those issues that the Commission has identified as potentially problematic in the re-authorization process. To this extent, I am personally pleased to deliver this testimony today in an effort to assist you in your efforts to perform serious fact-finding and substantial deliberation.

It has been said that the Voting Rights Act, as initially adopted, was one of the most important pieces of legislation ever crafted. The Act has been crucial in ensuring that African-Americans and other minorities have the same opportunities to participate in the American democratic process. Nonetheless, the Commission believes that the continued utility and necessity for certain temporary provisions of the Act needs to be considered in the light of all available objective data along with constitutional and federalism concerns--including the data, arguments, and analysis I have been fortunate to share with you this afternoon.

Mr. Chairman, this concludes my prepared testimony. I would be happy to answer any questions you might have.