Report on Section 5 Non-Compliance: The Absence of Federal Enforcement

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Section 5 is the cornerstone of the 1965 Voting Rights Act.[1] Section 5 has been directly responsible for preventing the implementation of at least 1,027 voting changes from June 19, 1968, to June 25, 2004, that had the potential for discriminating against minority voting strength.[2] The Section 5 mechanism established by Congress to secure this protection was and continues to be based primarily on a system of voluntary compliance. Covered jurisdictions are subject to a statutory command to submit for federal approval any voting changes that are adopted within certain time periods.[3] Thus, the failure to submit such voting changes is particularly detrimental to the successful enforcement of a statute that to a large degree is dependent upon voluntary compliance.[4]

There may be a perception that after 40 years, full compliance with the Section 5 submission requirements has been achieved. In testimony before Congress, the Assistant Attorney General for the Civil Rights Division in referring to the low number of objections stated, "This tiny objection rate reflects the overwhelming – indeed, near universal – compliance

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[1] 42 U.S.C. § 1973, *et seq*. (Section 5 – 42 U.S.C. § 1973c). *See* Joaquin G. Avila, *The Washington 2004, Gubernatorial Election Crisis: The Necessity of Restoring Public Confidence in the Electoral Process*, 29 Seattle L. Rev. 313, 329 (2006).

[2] Avila, *supra* note 1, at 330. Under Section 5 covered jurisdictions must submit their voting changes for administrative or judicial approval before implementation in any election. This approval is referred to as preclearance. *See* 28 C.F.R. § 51.2 ("*Preclearance* is used to refer to the obtaining of the declaratory judgment described in section 5, to the failure of the Attorney General to interpose an objection pursuant to section 5, or the withdrawal of an objection by the Attorney General pursuant to § 51.48(b)."). A covered jurisdiction has to submit a voting change either to the United States Attorney General for administrative preclearance or to the United States District Court for the District of Columbia for judicial preclearance. The burden is on the covered jurisdiction to demonstrate that the proposed voting change does not result in a retrogression of minority voting strength and was not adopted pursuant to an intent to retrogress minority voting strength. *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997); *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000). When the administrative process is utilized, the failure of the jurisdiction to meet its Section 5 burden results in a letter of objection issued by the Assistant Attorney General for the United States Department of Justice Civil Rights Division. 28 C.F.R. §§ 51.44 & 51.52(c). These letters of objection prevent the jurisdiction from implementing the proposed voting change. 28 C.F.R. § 51.10 ("It is unlawful to enforce a change affecting voting without preclearance under Section 5."). *See also Lopez v. Monterey County (I)*, 519 U.S. 9, 20 ("No new voting practice is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance.") (1996). During the time period from June 19, 1968, to June 25, 2004, the Attorney General issued 1,027 letters of objection.

[3] The relevant time periods are established by Section 5. 42 U.S.C. § 1973c. For Merced County, California, which is the subject of this Report, the operative date is November 1, 1972. 28 C.F.R. Part 51, Appendix. Accordingly, Merced County must submit for Section 5 preclearance any voting change enacted or administered since November 1, 1972.

[4] The United States Supreme Court noted the importance of this voluntary compliance since the United States Attorney General did not have sufficient resources to secure full compliance with the Section 5 submission requirements:

> "Section 5 was enacted in large part because of the acknowledged and anticipated inability of the Justice Department – given limited resources – to investigate independently all changes with respect to voting enacted by States and subdivisions covered by the Act. . . . For that reason, § 5 places the burden on the affected polities to submit all changes for prior approval."

Perkins v. Matthews, 400 U.S. 379, 391, n. 10 (1971).

with the Voting Rights Act by covered jurisdictions."[5] Unfortunately, the reality is far from universal Section 5 compliance. A recent review of voting changes enacted by local governmental entities, such as cities, water districts, and other special election districts in Merced County, California, reveals that there are a minimum of **226** annexations, formations, detachments and consolidations that have not been submitted for Section 5 preclearance.[6] Such a large number in only one county out of the 841 local government entities[7] subject to Section 5 preclearance suggests that there is a larger problem relating to non-compliance with the Section 5 submission requirements. Clearly the results of this study demonstrate the absence of any "universal" compliance with the Section 5 submission procedures.

This Report is divided into three parts. The first part will present the results of the study conducted in Merced County, California, to determine the extent of compliance with the Section 5 preclearance requirement. Since there have been no declaratory judgment actions filed seeking Section 5 judicial preclearance for any voting changes in Merced County,[8] the study focused on compliance with the Section 5 administrative preclearance process. This focus necessarily involves an examination of whether applicable voting changes have been submitted to the United States Attorney General for Section 5 approval. The second part will demonstrate that such non-compliance with the Section 5 submission requirements is a problem that has persisted since the Voting Rights Act was first adopted in 1965. The third part will argue that current United States Supreme Court precedent supports the proposition that when the goal of a federal statute has not been achieved and the statute is due to expire, the statute should be extended until the problem sought to be addressed by the federal statute has been resolved. Such a proposition assumes greater validity when the statute seeks to both protect and advance that most fundamental of all

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[5] *Modern Enforcement of the Voting Rights Act before the Sen. Comm. on the Judiciary*, 109th Cong., 2nd Sess. (Hearing Date May 10, 2006) (Statement of Wan J. Kim, Assistant Attorney General, Civil Rights Division, United States Department of Justice) (last visited June 12, 2006). http://judiciary.senate.gov/testimony.cfm?id=1885&wit_id=5329.

[6] These changes (annexations – adding property, formations – incorporating new governmental entity, detachments or deannexations – substracting property, consolidations – joining of two or more governmental entities) are considered voting changes because they have the potential of affecting the number of voters within a given jurisdiction. *See* 28 C.F.R. § 51.13(e). During the time period from 1965 to 2005, the Attorney General reviewed for Section 5 purposes: 88,923 annexations, 4,055 incorporations, and 1,252 consolidations. http://www.usdoj.gov/crt/voting/sec_5/changes.htm (last visited June 23, 2006).

[7] This figure is derived from the U.S. Department of Justice, Civil Rights Division, Voting Section website. According to the website the following local governments are located in the listed states: Alabama (67 counties), Alaska (16 Boroughs), Arizona (15 counties), Georgia (159 counties), Louisiana (64 parishes), Mississippi (82 counties), South Carolina (46 counties), Texas (254 counties), Virginia (33 counties – takes into account counties that have successfully sought exemption from Section 5 through the bailout procedures of Section 4 – 42 U.S.C. § 1973b(a); 38 independent cities – takes into account independent cities that have successfully sought exemption from Section 5 through the bailout procedures of Section 4 – 42 U.S.C. § 1973(b)(a)), California (4 counties), Florida (5 counties), New York (3 counties), North Carolina (40 counties), South Dakota (3 counties), Michigan (2 townships), New Hampshire (1 township, 8 towns, and 1 other). http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited June 23, 2006). For a listing of counties for the affected states *see* http://www.naco.org/ (last visited June 23, 2006).

[8] A review of the Voting Section's website and the author's review of declaratory judgment actions filed pursuant to Section 5 by covered jurisdictions do not reveal any such judicial preclearance actions. http://www.usdoj.gov/crt/voting/overview.htm#vra (last visited June 23, 2006).

rights – the right to vote.[9] The goal of Section 5 is to further the purposes of the Fifteenth Amendment[10] to the United States Constitution and to " 'banish the blight of racial discrimination in voting' once and for all."[11] Section 5 seeks to accomplish this goal by requiring covered jurisdictions to submit their voting changes for Section 5 review. If there is a failure by covered jurisdictions to submit such changes, then the goal of the federal statute has not been achieved and the purpose of the statute has been frustrated. Under these circumstances, reauthorization of Section 5 is appropriate to permit additional time to achieve complete compliance with a federal mandate that touches upon the most fundamental of all rights.

I. Merced County, California – A Model of Section 5 Non-Compliance

Merced County is located in the central valley of California, south of Sacramento, the State's capitol. According to the 2000 Census, there are a total 210,554 persons, of which 95,466 or 45.3% are Latina/o.[12] The County is governed by a five person board of supervisors.[13] Currently, there is one Latino serving as a county supervisor.[14] The empowerment of the Latina/o community in Merced County to participate in the political process and elect candidates of its choice was greatly facilitated by the issuance of a letter of objection by the Attorney General pursuant to Section 5. The letter prevented the implementation of a county supervisor redistricting plan that fragmented a politically cohesive Latina/o voting community.[15] The issuance of this letter of objection alone demonstrates the continued necessity for Section 5 review. However, there is a more significant reason for subjecting Merced County for continued Section 5 oversight: non-compliance with the Section 5 submission requirements by local governments.

The Section 5 preclearance requirements apply to all local governmental entities that conduct elections in a covered jurisdiction.[16] Moreover the importance of securing Section 5 compliance by local governmental entities is underscored by the Section 4 bailout provisions. A covered jurisdiction cannot secure a declaratory judgment from the United States District Court for the District of Columbia exempting the covered jurisdiction from Section 5 coverage unless

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[9] *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights.").

[10] U.S. Const. amend XV ("Section 1**.** The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

[11] *McCain v. Lybrand*, 465 U.S. 236, 244 (1984), *citing*, *State of South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

[12] U.S. Bureau of the Census, Data Set: Census 2000 Summary File 1, Fact Sheet for Merced County, California. http://factfinder.census.gov/servlet/SAFFFacts?_event=Search&geo_id=&_geoContext=&_street=&_county=Merced+County&_cityTown=Merced+County&_state=04000US06&_zip=&_lang=en&_sse=on&pctxt=fph&pgsl=010 (last visited June 23, 2006). African Americans constitute 8,064 or 3.8 of the county's population; American Indian and Alaska Native constitute 2,510 or 1.2 % of the county's population; Asians constitute 14,321 or 6.8% of the county's population; Native Hawaiian and Pacific Islanders constitute 396 or 0.2% of the county's population. *Id.*

[13] The Merced County Board of Supervisors is the governing board for Monterey County. *See* Cal. Gov. Code §§ 23005, 25000, 25207.

[14] Merced County website. http://web.co.merced.ca.us/bos/index.html (last visited June 23, 2006).

[15] U.S. Attorney General, Letter of Objection, April 3, 1992.

[16] 28 C.F.R. § 51.6 ("All political subunits within a covered jurisdiction (e.g., counties, cities, school districts) are subject to the requirement of section 5.").

for a ten year period, all governmental entities have complied with the Section 5 submission requirements.[17] The statute specifically requires securing approval of the voting change prior to its implementation in an election.[18] Based upon these statutory requirements, there is a major violation of Section 5 in Merced County since there are **226** annexations, formations, detachments, and consolidations that have not been submitted for Section 5 review.[19]

A review of governmental records demonstrates that there is a substantial non-compliance with the Section 5 submission requirements.[20] This study was conducted on-site over the month of June 2006. The following two tables summarize the findings of this study.

Table 1

Merced County, California – Section 5 Non-Compliance

Type of Political Jurisdiction	Number of Political Jurisdictions	Type and Number of Voting Changes: Annexations	Type and Number of Voting Changes: Formations	Type and Number of Voting Changes: Detachments	Type and Number of Voting Changes: Consolidations
Cities	5	100			
Water Districts	16	80			
Water Districts	6		6		
Other Districts	2	2			
Water Districts	5			37	
Other Districts	1				1
Totals	**35**	**182**	**6**	**37**	**1**

Table 2

Summary of Voting Changes Merced County, California

	Annexations	182
	Formations	6
	Detachments	37
	Consolidations	1
Total Number of Voting Changes Not Submitted for Section 5 Review		**226**

[17] 42 U.S.C. § 1973b(a)(1)(D) ("A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action – (D) such State or political subdivision and all governmental units within its territory have complied with section 1973c [Section 5] of this title, including compliance with the requirement that no change covered by section 1973c of this title has been enforced without preclearance under section 1973c of this title . . . .").

[18] *Id.*

[19] Accordingly, under the present bailout provision of the Voting Rights Act, Merced County would not be able to successfully bailout from Section 5.

[20] The records providing the information regarding these voting changes were checked against a list provided by the Voting Section that listed Section 5 submissions from Merced County. Governmental entities were not included in the final tabulation for which no information could be secured to ascertain whether board members to the entity's governing board were elected.

The tables show some remarkable figures. There have been at least 182 annexations for cities, water districts and other districts that have not been submitted for Section 5 review. Similarly, there have been 37 detachments for water districts that have also evaded Section 5 review. As the two tables plainly demonstrate, the total number of voting changes that have not been submitted for Section 5 review is **226**. These voting changes span from 1972 to 2006. With the exception of one year – 1999 – in every year from 1972 to 2006, Section 5 non-compliance instances occurred.[21] The number of non-compliance instances, 226, represents at best a minimum figure since the study did not include all governmental entities within Merced County. Moreover, not all voting changes subject to Section 5 were reviewed due to time restraints and resources. Finally, the governmental entities excluded from this study because of the inability to ascertain whether their governing board members are elected may, in fact, elect their board members. Consequently, the results of this preliminary study should be considered as a minimum threshold for assessing this substantial Section 5 violation.

Unfortunately the experience of Section 5 non-compliance is not unique to Merced County. Since the Voting Rights Act was first enacted in 1965, non-compliance with the Section 5 submission requirements has always been a major problem. The next section of this Report will describe this history.

II. There is a Well Documented History of Non-Compliance with the Section 5 Submission Requirements

The issue of non-compliance is significant. As stated previously the purpose of the Voting Rights Act is to "rid the country of racial discrimination in voting."[22] However, if covered jurisdictions simply evade the law, the congressional purpose underlying the passage of the Voting Rights Act is frustrated.

Due to this significance, the issue of non-compliance has repeatedly been raised by the United States Commission on Civil Rights and Congress throughout the history of the Voting Rights Act. Just three years after the enactment of the Voting Rights Act of 1965, the United States Commission on Civil Rights issued a report documenting the absence of Section 5 compliance and enforcement. The Commission recommended that the Attorney General "… should promptly and fully enforce Section 5 …." The Commission further recognized that continued non-compliance with Section 5 would encourage political subdivisions to ignore the Act:

> "Failure to enforce the flat prohibition of Section 5 in the face of repeated violations – most notably in Mississippi – is bound to encourage the enactment and enforcement of additional measures having the purpose or effect of diluting or inhibiting the

[21] *See* Appendix A. From 1972 to 1979, 61 non-compliance instances occurred; from 1980 to 1989, 63 non-compliance instances occurred; from 1990-1999, 67 non-compliances occurred; and, from 2000-June of 2006, 35 non-compliance instances occurred.

[22] *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

> Negro vote or making more difficult for Negroes to run for office. Swift and comprehensive enforcement of Section 5 is required to make it clear that such stratagems cannot succeed."[23]

Despite this recommendation for more increased Section 5 enforcement by the United States Attorney General, covered jurisdictions continued in their efforts to ignore the explicit command of Section 5. During congressional hearings for the first extension of the Voting Rights Act in 1969, Representative William M. McCulloch, noted the impact of continued non-compliance on progress toward fulfilling the goals of the original Act:

> "Section 5 was intended to prevent the use of most of these devices. But apparently the States rarely obeyed the mandate of that section, and the Federal Government was too timid in its enforcement. I hope that the case of *Allen v. State Board of Elections* [393 U.S. 544 (1969)], decided by the Supreme Court on March 3, 1969, is the portent of change. But in the meantime the march to political equality has been slowed."[24]

The United States Supreme Court in *Perkins v. Matthews*[25] in a decision issued after the Act was extended in 1970 also recognized that covered jurisdictions were not complying with the Section 5 preclearance provisions. The Court reviewed a table of submissions prepared by the Attorney General which demonstrated "… that only South Carolina has complied rigorously with § 5." The Court reviewed a series of voting changes enacted in Georgia which were not submitted for Section 5 review and commented that Mississippi, Alabama, Louisiana, and Virginia, for a two year period only submitted 33 voting changes. After reviewing this table, the Court stated: "The only conclusion to be drawn from this unfortunate record is that only one State is regularly complying with § 5's requirement."[26]

Non-compliance with Section 5 persisted. In 1975, the United States Commission on Civil Rights stated: "Non-compliance with the Voting Rights Act through failure to submit changes remains a problem in enforcement of the act."[27] In its recommendations, the Commission again urged stricter enforcement of Section 5. The focus of the recommendation

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[23] U.S. Comm'n on Civil Rights, Political Participation, A study of the participation by Negroes in the electoral and political processes in 10 Southern States since passage of the Voting Rights Act of 1965, at 184 (1968).

[24] *Voting Rights Act Extension: Hearings on H.R. 4249, H.R. 5538, and Similar Proposals, to Extend the Voting Rights Act of 1965 with Respect to the Discriminatory Use of Tests and Devices Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong. 4 (statement of William McCulloch, Member, House Comm. on the Judiciary), 18 (statement of Howard A. Glickstein, General Counsel and Acting Staff Director, U.S. Comm'n on Civil Rights: "Despite the requirements of section 5, the State of Mississippi made no submission to the Attorney General, and the new laws were enforced.") (1969). *See also Amendments to the Voting Rights Act of 1965: Hearings on S. 818, S. 2456, S. 2507, and Title IV of S. 2029, Bills to Amend the Voting Rights Act of 1965 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 91st Cong. 51–53 (statement of Frankie Freeman, Member, U.S. Comm'n on Civil Rights – Commissioner Freeman acknowledged that most states complied with Section 5, but did recognize that there were instances of non-compliance which could be addressed through litigation by the United States Attorney General) (1969).

[25] *Supra* note 4.

[26] *Id.*, 400 U.S. at 393, n. 11.

[27] U.S. Comm'n on Civil Rights, The Voting Rights Act: Ten Years After, at 28 (January 1975).

was a request to Congress to enact civil penalties and damages against election officials who refused to comply with federal law:

> "The effectiveness of section 5 preclearance has been limited by the failure of covered jurisdictions to submit all changes in their electoral laws and procedures for review and by the absence of direct procedures to enforce compliance with the preclearance requirement.
>
> An enforcement provision that would assess personal damages against officials who implement unsubmitted changes, without reimbursement from public funds, would foster timely submission of changes. Damages in such cases should be awarded to those who institute proceedings against such officials."[28]

Continued non-compliance with Section 5 resulted in a Government Accounting Office report highly critical of the Department of Justice's lack of administrative procedures to insure that all covered jurisdictions were submitting their voting changes for federal approval. The Report concluded that Section 5 compliance efforts have been limited.[29] The Report noted that the Department of Justice did not systematically identify and secure the submission of voting changes enacted by covered jurisdictions. The Department's efforts were at best "sporadic" and fell "far short of formal systematic procedures to make sure that changes affecting voting are submitted."[30] In addition, the Report was critical of the Department's limited efforts to periodically remind covered jurisdictions of their continuing obligations to submit voting changes for Section 5 preclearance.[31]

The GAO report did not result in any improvements. In 1982, when renewal of the Act was under congressional consideration, former Assistant Attorney General for the Civil Rights Division, Drew S. Days III, testified that many covered jurisdictions were not in Section 5 compliance. As stated by Mr. Days, the Department of Justice did not have the resources to survey covered jurisdictions to determine whether any voting changes had not been submitted for Section 5 approval:

> "One must also acknowledge, in assessing the Act's effectiveness, that covered jurisdictions have made literally hundreds of changes that have never met the preclearance requirement of Section 5. I do not think it extravagant to conclude

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[28] *Id*., at 346–47.

[29] *GAO Report on the Voting Rights Act: Hearings on GAO Report on the Voting Rights Act Before the House Subcommittee on Civil and Constitutional Rights, of the Committee on the Judiciary*, 95th Cong. 84 (1978).

[30] *Id*., at 85–86.

[31] *Id*., at 87. In the meantime, private plaintiffs continued in their efforts to enforce the Section 5 preclearance provisions. *See, e.g., Trinidad v. Koebig*, 638 F.2d 846 (5th Cir. 1981) (Section 5 enforcement action against the City of Seguin, Texas, holding that a court-adopted redistricting plan was subject to Section 5 preclearance requirements); *Gomez v. Galloway*, 428 F.Supp. 358 (S.D.Tex. 1977) (Section 5 enforcement action against the City of Beeville, Texas); *Escamilla v. Staveley*, Civ. Act. No. DR-78-CA-23 (W.D.Tex. 1978) (Section 5 enforcement action against the Terrell County Commissioners' Court, Texas).

> that many of those changes probably worked to the serious disadvantage of minority voters. I am proud of the performance of the Civil Rights Division in enforcing the Voting Rights Act during my tenure. But I will not sit before you today and assert that even during what I think was a period of vigorous enforcement of the Act that the Department was able to ensure that every, or indeed most, electoral changes by covered jurisdictions were subjected to the Section 5 process. There was neither time nor adequate resources to canvas systematically changes since 1965 that had not been precleared, to obtain compliance with such procedures or even, in a few cases, to ascertain whether submitting jurisdictions had complied with objections to proposed changes. It was not uncommon for us to find out about changes made several years earlier from a submission made by a covered jurisdiction seeking preclearance of a more recent enactment."[32]

In the Senate Report accompanying passage of the 1982 Amendments to the Voting Rights Act of 1965, the Senate Committee on the Judiciary also acknowledged that covered jurisdictions were not submitting voting changes for Section 5 preclearance. The Committee stated:

> "Non-compliance generally has taken two forms. First, there has been continued widespread failure to submit proposed changes in election law for Section 5 review before attempting to implement the change. …
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> The Subcommittee on the Constitution received testimony detailing the extent of non-compliance with the Act by covered jurisdictions. A representative of the Southern Regional Council testified that his organization's research showed that ' "since 1965 in six Southern states as many as 750 state enactments affecting voting have been passed by state legislatures and have not been submitted for review under section 5." ' "[33]

And so the Section 5 violations continue in California. Since 1982, there has been major Section 5 litigation involving the failure of Monterey County to secure approval of a series of judicial district consolidations dating back from 1968. Over the course of nine years and two U.S. Supreme Court decisions the consolidation ordinances were finally submitted for Section 5 approval.[34] Moreover, a recent Section 5 enforcement action filed against Monterey County in 2003, revealed that voting precinct consolidations from 1996 to 2002 had not been submitted for

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[32] *Extension of the Voting Rights Act: Hearings on Extension of the Voting Rights Act Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong. 2117 (statement of Drew Days, former Assistant Attorney General, Civil Rights Division, U.S. Department of Justice) (1982).

[33] S. Rep. No. 97-417, at 12 (footnote omitted) (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 190. *See also* U.S. Comm'n on Civil Rights, The Voting Rights Act: Unfullfilled Goals (September, 1981), at 70–75 (chronicling extent of failure to submit voting changes for Section 5 preclearance).

[34] *Lopez (I), supra* note 2; *Lopez v. Monterey County (II)*, 525 U.S. 266 (1999).

Section 5 preclearance.[35] Finally the present study of Merced County Section 5 non-compliance serves to document the continuing disregard of an explicit federal mandate of submitting voting changes for Section 5 approval prior to implementation in local elections.

In summary, the legislative history of the various amendments to the Act, Supreme Court precedent, oversight review by the United States Commission on Civil Rights and the Government Accounting Office, recent Section 5 cases, along with the current status of Section 5 non-compliance in Merced County, all indicate that such non-compliance by Section 5 covered jurisdictions continues to be a persistent problem. Such continued and blatant regard of the Section 5 submission requirements provides an important basis for reauthorization of the Section 5 preclearance provisions.

III. Since the Purpose of the Section 5 Preclearance Provision Has Not Been Achieved Section 5 Should be Reauthorized Until There Has Been Full Compliance.

Given the extensive historical and current record of Section 5 non-compliance, Congress should focus on whether the objectives of Congress in enacting Section 5 have been reached. The primary objective in enacting Section 5 was to prevent the implementation of voting changes enacted after certain dates unless these changes first secured federal approval. However, given the history of non-compliance with the Section 5 requirements and contemporary evidence of continued non-compliance, the congressional goal of ridding the country of voting discrimination has been frustrated. Thus, a statute enacted by Congress, whose express purpose was to impose federal review of voting changes in order the avoid the implementation of any discriminatory changes, cannot be permitted to simply expire when there is evidence that Section 5 covered states and political subdivisions have not complied with the statute's preclearance requirements. A statute which has been described as the most effective civil rights statute ever enacted by Congress and which implicates the most fundamental of all rights, the right to vote, cannot be relegated to history when there is evidence of continued non-compliance.

The extraordinary remedy of Section 5 preclearance was imposed as a response to the ingenious and persistent efforts to avoid the political integration of racial and ethnic minorities into the body politic. Congress recognized the serious cost to federalism that Section 5 exacted and for this reason the statute was to be a temporary measure. However, an explicit understanding formed the basis for this intrusion into state electoral affairs: covered jurisdictions would comply with federal law and submit all applicable voting changes for federal review. Upon completing review of these voting changes, there would be no necessity for this federal oversight. However, as suggested by the evidence presented in this Report, covered states and political subdivisions have not fulfilled their obligation to follow federal law. Given this suggestion of non-compliance and given the temporary nature of Section 5, there is even greater reason to assess whether the congressional goal of eliminating voting discrimination by requiring review of all applicable voting changes has been achieved.

Such an inquiry is certainly suggested by the United States Supreme Court decision in *Grutter v. Bollinger* where the Court sustained a law school's admissions policy that factored in

[35] *Salazar v. Monterey County, California*, Civil Action No. C-03-03584 JF (Three Judge Court) (Complaint filed August 1, 2003) (N.D.Cal.).

race as part of the student selection process.[36] In evaluating the use of race in the admissions process the Court emphasized the temporal nature of remedies that were designed to eliminate ongoing racial and ethic disparities in law school student enrollments. As stated by the Court:

> We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all "race-conscious programs must have reasonable durational limits." In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."[37]

In *Grutter* the Court permitted the use of an admissions policy that factored in the criteria of race as long as the program was limited by the goal of racial and ethnic diversity. The admissions policy was to be in place on a temporary basis to avoid violating the use of race in contravention of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Court explicitly recognized that such an admissions policy had to be narrowly tailored to achieve a compelling state interest. A critical component of this analysis was the Court's emphasis on the diversity goal sought to be achieved. The goal justified the extraordinary remedy of using race in an admissions selection process. Since the goal was deemed achievable by the Court over a fixed period of time, the challenged admissions program survived constitutional scrutiny because the program was limited in duration and would be subject to periodic reviews to determine if the goal of the program was achieved.

Although in the reauthorization of Section 5 there is no race-based remedy directly implicated, the analysis in *Grutter* can be directly applied to assess whether Section 5 should be reauthorized. The goal in *Grutter* was the achievement of racial and ethnic diversity. Similarly Congress should assess in the reauthorization legislative efforts whether the goal of Section 5 to " 'banish the blight of racial discrimination in voting' once and for all"[38] has been achieved. If the goal of Section 5 has not achieved, then Section 5 oversight should be continued. An important component in any such assessment is whether there has been "near universal" compliance with the requirements of Section 5. Section 5 mandates that all voting changes in

[36] 539 U.S. 306 (2003).
[37] *Id.*, at 341-342 (case and brief citations omitted).
[38] *Supra* note 11.

covered jurisdictions should be submitted for federal review. The purpose of this review is to determine whether proposed voting changes have the potential to discriminate against racial and ethnic minority voting strength. If there is evidence presented to Congress that there are Section 5 covered jurisdictions that have not submitted their voting changes for Section 5 review, then Congress can only conclude that the goal of Section 5 has not been achieved and should be reauthorized to permit covered jurisdictions to comply with the submission requirements.

This Report presents ample evidence of non-compliance with the Section 5 submission requirements in one county in California. The study of Section 5 compliance in Merced County presents compelling evidence of a pattern, that can be characterized at best historical neglect and at worst a blatant disregard, of the explicit mandates of a federal statute initially adopted to protect the voting rights of racial and ethnic minorities. The number of known violations in Merced County is not insignificant – **226**. This showing should place the burden on covered jurisdictions to demonstrate complete compliance with the Section 5 submission requirements for all governmental entities located within the covered jurisdiction.[39] Absent such a showing by covered jurisdictions, Congress should conclude that the protective features of Section 5 oversight are still needed since the basic statutory requirements have not been met. Accordingly, Congress should reauthorize Section 5 for another period of time to permit the Attorney General to enforce Section 5 and to permit covered jurisdictions to submit their voting changes for Section 5 approval.

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Conclusion

At this historic juncture Congress is assessing whether to extend for another period of time the most effective civil rights legislation ever enacted. The continued need for such protection is amply supported by the extensive documentation provided thus far in support of Section 5 reauthorization. As part of this assessment Congress should at a minimum determine whether there has been "near universal" compliance with the Section 5 submission requirements. The importance of this compliance is underscored by the bailout requirement that a covered jurisdiction for a ten year period must demonstrate that all governmental entities located within the covered jurisdiction are in full compliance with the Section 5 submission requirements. Given the importance of Section 5 compliance in the development of the bailout provisions in 1982, this Congress should also give the factor of Section 5 compliance significant weight in determining whether the Act should be reauthorized. The evidence presented in this Report regarding the presence of **226** voting changes in Merced County that have not been submitted for Section 5 approval clearly provides the necessary weight to tip the scales in support of Section 5 reauthorization.

Section 5 continues to be a necessary tool to combat voting discrimination. The elimination of such discrimination is indispensable to maintaining the vibrancy and cohesiveness of the body politic. Without such a tool, the commands and protections envisioned by the Fifteenth Amendment become an illusory goal and ultimately affect the continued viability of

[39] The shifting of this burden is consistent with the Section 5 burden imposed on covered jurisdictions to demonstrate the absence of a discriminatory purpose in the adoption of a proposed voting change and to demonstrate that the proposed voting change does not have a discriminatory effect on minority voting strength. *See supra* note 2.

our republican form of government. As noted by Circuit Judge John R. Brown: "For no state, and no nation, can survive if, professing democratic rule of the governed, it flagrantly denies the voting right through racial or class discrimination."[40] Those words spoken over forty years ago still continue to ring with a clarity that resonates with the current Section 5 reauthorization efforts. Moreover in assessing whether to reauthorize Section 5, Congress should recall the basic reasons expressed by Attorney General Nicholas Katzenbach in his testimony before Congress in 1965 to justify the enactment of Section 5:

> Mr. Katzenbach: The justification for that [Section 5 review] is simply this: Our experience in the areas that would be covered by this bill has been such as to indicate frequently on the part of State legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States. I refer, for example, to the new voter qualifications that have been put into the statutes of Louisiana, Mississippi, and Alabama following the enactment of the 1964 act which made things more difficult for people to vote and which were put in, I believe – and we have established in one case and I believe we will establish in other cases – for no other purpose than to perpetuate racial discrimination.
>
> The same thing was true, as the Chairman may recall, in Louisiana at the time of the initial school desegregation, where the legislature passed I don't know how many laws in the shortest period of time. Every time the judge issued a decree, the legislature, which was sitting in special session, passed a law to frustrate that decree.[41]

The concern expressed by the Attorney General focused on the adoption of new voting changes that would frustrate the implementation of court decrees or that would serve to discriminate against racial and ethnic minority voters. In response to the observation that this statement was true then and no longer true now, an examination of the vast record submitted in this present Section 5 reauthorization should demonstrate that such a concern continues to be valid today. For example, the Chualar Union Elementary School District in Monterey County sought to revert from a district election system to an at-large method of elections. The Attorney General in objecting to the proposed voting change found that such a change would serve to discriminate against the Latina/o community who sought to maintain their presence on the school board.[42] Clearly the concerns expressed by Attorney General Katzenbach in 1965 are relevant today.

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[40] *United States v. State of Mississippi*, 229 F.Supp. 925, 974 (dissenting opinion) (5th Cir. 1964).

[41] *Voting Rights, Hearings on H.R. 6400 and other proposals to enforce the 15th Amendment to the Constitution of the United States Before the H. Subcomm. No. 5 of the Comm. on the Judiciary*, 89th Cong., 1st Sess. 60 (March 18, 1965) (Statement of Nicholas deB. Katzenbach, Attorney General of the United States).

[42] *See e.g.*, U.S. Attorney General, Letter of Objection, March 29, 2002 (Chualar Union Elementary School District – Monterey County, California).

As noted in the letter of objection issued against the Chualar Union Elementary School District, federal oversight continues to be necessary to guarantee that Section 5 covered jurisdictions will not revert to old practices that result in voting discrimination. And, most importantly, federal oversight is indispensable in places such as Merced County that not only have a history of non-compliance with the Section 5 submission requirements, but that continue to this day to disregard their legal obligation to follow federal law. Accordingly, the unlawful actions of jurisdictions within Merced County provide a compelling reason for continuing the Section 5 federal oversight. Quite simply, the job is not done.

Appendix A

Merced County Section 5 Non-Compliance, By Year

Year	Number of Annexations, Formations, Detachments & Consolidation
1972	3
1973	9
1974	10
1975	10
1976	7
1977	8
1978	8
1979	6
1980	2
1981	3
1982	6
1983	4
1984	4
1985	6
1986	10
1987	9
1988	8
1989	11
1990	22
1991	4
1992	7
1993	5
1994	3
1995	5
1996	13
1997	4
1998	4
1999	0
2000	3
2001	2
2002	1
2003	9
2004	10
2005	8
2006	2
TOTAL	226