

**Response of Robert McDuff to Written Questions from Senator Tom Coburn
May 10, 2006 Hearing on Renewal of the Voting Rights Act**

Question 1.

Can you each give one example of a covered jurisdiction denying a minority the right to vote over the last ten years?

As an initial matter, the question omits a broad class of conduct that falls within the reach of Section 5 – voting changes that result in *abridgement* of the right to vote on account of race or color.¹ Voting changes that result in vote denial or those that abridge minority voting rights may be denied preclearance if those changes place minority voters in a worse position. Further, those changes that are precleared under Section 5 may later be subject to challenge under constitutional or other statutory grounds.

While there are many examples of vote denial within the covered jurisdictions over the last ten years, I will highlight one recent occurrence in the State of Mississippi. In 2001, the Town of Kilmichael, Mississippi, cancelled their local elections for aldermen and mayor after a unanimous vote from the town's board. No public notice of the meeting was provided to the community. After the 2000 census, African Americans constituted a majority of the town's population and registered voters for the first time.² African Americans qualified for office in Kilmichael in unprecedented numbers for the mayoral and aldermanic seats. Specifically, one African American qualified to run for mayor and four African Americans qualified for five Aldermanic seats. Prior to 2001, no African American had ever run for mayor, and only four African Americans had run for the position of alderman (only one was elected).

The opportunity for African Americans to elect candidates of choice led the town to cancel the election and adopt a single-member ward system. The Department of Justice objected to the cancellation thus, requiring that elections proceed as scheduled. DOJ found that “[h]ad the election been held, blacks would have exercised the opportunity to attempt to elect candidates of their choice to the mayoral and board seats. The cancellation of this election leaves black citizens worse off because of the denial of that opportunity.” This was an unequivocal attempted denial of the right to vote that was remedied only because of Section 5.

¹ U.S. Const., Amend. XIV, § I; 42 U.S.C. § 1973.

² Letter from Ralph Boyd, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to J. Lane Greenlee, Esq. (December 11, 2001).

Question 2.

Would you support creating a de minimus exception to pre-clearance to focus enforcement efforts where they are needed most? For example, if a polling place is moved less than one-tenth of a mile, DOJ will not review the move unless a voter complains.

I would not be in favor of any move that shifts the burden of proof in the Section 5 preclearance process from a state or political subdivision to potential victims of discrimination. This revision of the scope of Section 5 would undermine four decades of expertise that has been developed on the part of the Department of Justice. Indeed, DOJ has developed a fact-intensive process to review, examine and analyze submissions and usually issue preclearance determinations within 60 days. In making its determinations under Section 5, depending on the type and complexity of the voting change, DOJ looks to factors such as the extent to which a reasonable and legitimate justification for the change exists; the extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change; the extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change; and the extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change.³ In addition, DOJ does not always utilize the entire 60 day statutory period, and expedited requests for preclearance are entertained. Shifting the burden of proof to voters ignores the complexity of the Section 5 review process and underestimates the amount of time and resources that would be required for a citizen to develop and lodge a viable complaint that would likely trigger DOJ action.

Moreover, the imposition of a subject matter exception to the Section 5 review process likely lead to the adoption of voting changes that place minority voters in a worse position. Since implementation of Voting Rights Act, DOJ has issued objections to a wide variety of voting changes including proposed redistricting plans, annexations, changes in the manner of voting; changes in candidacy requirements and qualifications; changes in the composition of the electorate that may vote for candidates for a given office; changes affecting the creation or abolition of an elective office; polling place changes; and various other types of changes. When examining polling place changes, DOJ investigates procedural aspects of the change such as distance from the pre-existing site and proximity to the minority community. However, DOJ also examines substantive aspects of the proposed polling place change such as the historical or social significance of the proposed site, if any. For instance, in 1997, the Department of Justice objected to a polling place change in St. Landry Parish, Louisiana, because the African-American community perceived the site to be "rooted in a history of past discrimination."⁴ Just last month, in May 2006, DOJ objected to a plan that eliminated 86 percent of the polling places in a Texas Community College district, in part, because minority voters had to

³ 28 C.F.R. Part 51.57 (relevant factors)

⁴ Letter from Isabelle Katz Pinzler, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Kathy Moreau, Secretary, St. Landry Parish Police Jury (Section 5 Objection Letter)(October 21, 1997).

travel a greater distance to cast their ballot than under the preexisting system. In addition, DOJ found that polling sites with the smallest proportion of minority voters served relatively few voters (6,500) voters, while polling sites in majority Latino areas served a far larger number of voters (67,000).⁵ Both of these objections illustrate that polling place changes can be retrogressive and should not be dismissed as *per se de minimus*. With Section 5 preclearance requests the context is critical and DOJ has an expertise in assessing the context.

⁵ Letter from Wan J. Kim, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice to Ms. Renee Smith Byas, Vice Chancellor and General Counsel, North Harris Montgomery Community College District (Section 5 Objection Letter)(May 5, 2006).