

Response of Robert McDuff to Written Questions from Senator Edward Kennedy

Question 1.

Your Mississippi Report describes the 1991 statewide redistricting plans for the State Senate and House of Representatives. Both of these plans were objected to by the Department of Justice, because there was significant evidence that they had a racially discriminatory purpose, even though the plans did not have a retrogressive effect. Given the Supreme Court's decision in Bossier II, a voting change today that had a similar invidious purpose would be precleared. Please describe for us what evidence there was for that objection, and also your view as to whether the change in the Section 5 standards after Bossier II has reduced the number of Justice Department objections since 2000. Please give us your perspective on the fact that the number of Justice Department objections has gone down in recent years. What should that tell us about the continuing need for Section 5 today?

Mississippi's 1991 House and Senate plans are examples of redistricting plans that were adopted despite evidence of discriminatory purpose underlying the change. Today, these plans would fall beyond the scope of Section 5 because of the *Bossier II* decision.¹

The DOJ has historically relied upon the *Arlington Heights* test to ferret out those voting changes infected with discriminatory purpose. In *United States v. Bossier Parish School Board*², the Supreme Court confirmed that *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*³, provides the appropriate analytical framework for weighing circumstantial evidence and determining whether invidious discriminatory purpose infected the adoption of a particular voting change. The *Arlington Heights* framework requires careful consideration of whether the "the impact of the official action" "bears more heavily on one race than another," the historical background of the jurisdiction's decision, the sequence of events leading to the challenged action, legislative history and departures from normal procedural sequences and contemporary statements by members of the decision making body.⁴ Numerous cases arising under Section 5 have approved of or adapted this standard to help ferret out discriminatory intent in the Section 5 process.⁵

¹ *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000).

² 520 U.S. 471 (1998)

³ 429 U.S. 252 (1977)

⁴ *Arlington Heights*, 429 U.S. at 266-68.

⁵ See, e.g., *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 472 (1997) (applying the *Arlington Heights* test to assess whether a voting system was enacted for a discriminatory purpose); *City of Pleasant Grove v. U.S.*, 479 U.S. 462, 478 (1987) (approving use of *Arlington Heights* as tool to prove purposeful discrimination in the voting context); *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S. 144, 177 n.6 (1977) (noting that the *Arlington Heights* factors are probative evidence of purposeful discrimination).

Using the *Arlington Heights* framework, the DOJ interposed an objection to the redistricting plans after uncovering evidence of discriminatory purpose in the adoption of the changes. Specifically, DOJ determined that although the proposed plan lacked retrogressive effect, there was significant evidence of a racially discriminatory purpose at play. These indications included the fact that the legislature had turned away an alternative plan and that some referred to this plan as the “Black plan” on the House Floor even though supported by a biracial coalition,⁶ and even as the “nigger plan” behind closed doors.⁷ These overt racial appeals used by officials who played a central role in the redistricting process demonstrated the discriminatory purpose underlying the changes that led to the DOJ objection.

In my view, the decline of Section 5 objections can be attributed, in part, to the Supreme Court’s recent decision in *Bossier II* which eliminated DOJ ability to ferret out discriminatory purpose in the administrative preclearance process. Redistricting plans such as that adopted for the state legislature during the 1990s would likely have been precleared but for the pre-*Bossier II* Section 5 review process. While Section 5 is certainly working well as a deterrent, the records makes clear that race still plays too much of a role in elections in Mississippi and elsewhere, and there is continuing need for the expiring provisions of the Voting Rights Act.

Question 2.

In the Mississippi Report, you also describe a voting change that the City of McComb tried to implement last November, without any attempt to obtain preclearance. The change would have removed a black member of the city’s Board of Selectmen, by changing the requirements for holding office. November 2005 was not 40 years ago. Does this suggest that the need for Section 5 remains strong today?

Ultimately, a three-judge federal court ordered the black selectman restored to his office and enjoined the city from enforcing the change unless preclearance was obtained.⁸ This 2005 Section 5 enforcement matter demonstrates that 1) jurisdictions continue to evade the requirements of the Act by failing to submit changes for preclearance and 2) jurisdictions continue to adopt retrogressive voting changes that, if implemented, can worsen the position of minority voters and erode gains in minority voting strength. As I pointed out in my testimony, this is one of the examples that shows the continuing need for Section 5 and the importance of renewing it.

⁶ Letter from U.S. Department of Justice, Civil Rights Division, Voting Section to State of Mississippi (July 2, 1991) (Section 5 Objection Letter (March 30, 1992)).

⁷ Jay Eubank, Racial Slurs Mar Work on Voting Lines, *The Clarion Ledger*, July 14, 1991 at 1A.

⁸ *Myers v. City of McComb*, No. 3:05 BN, Slip Op. at 481 (S.D. Miss. Nov. 23, 2005) (three-judge court) (unpublished order).

Question 3.

Testimony at the May 10 hearing suggested that Section 5 be allowed to expire, because it imposes too high of a burden on local officials and puts a stigma on them. Please comment of your experience in dealing with city attorneys and local election officials, and whether Section 5 of the Voting Rights Act places too high of a burden on these officials?

Section 5 certainly imposes costs on local officials, but these costs do not outweigh the greater benefits associated with protection of a fundamental civil right. During my experience litigating and handling voting rights matters in Mississippi, I have encountered officials who indicated that the Section 5 process helped ensure that they gave proper consideration to the impact that particular voting changes had on minority voting rights. Indeed, many jurisdictions view the Section 5 process as one that encourages diligence in enacting non-retrogressive, non-discriminatory voting changes. Given this experience, I do not think that Section 5 coverage stigmatizes public officials who work within the covered jurisdictions – instead, it serves as a check to ensure that jurisdictions enact changes that lack both retrogressive effect and purpose. Moreover, Section 5 is concerned not simply with intentional discrimination, but changes that are unintentionally retrogressive. So the Section 5 review process does not presume the existence of intentional discrimination on the part of particular officials.

However, the persistence of racial polarized voting and other legacies of the past can have a stigmatizing effect, and it is important that Section 5 remain in place to prevent the implementation of voting changes that exploit those legacies and discriminate against minority voters.

Question 4

In your view, what would Mississippi look like without Section 5?

Mississippi remains one of the poorest states in the union with a population that is 36 percent black, the highest of any of the 50 states. State and local officials frequently erected obstacles to prevent black people from voting, and those obstacles were a centerpiece of the evidence presented to Congress to support passage of the Voting Rights Act of 1965. Although Mississippi has come a long way in its enforcement of minority voting rights, there are still contemporary examples of discrimination in voting. The impact of this is evidenced by the inability of African Americans to win statewide office since Reconstruction, the use of racial appeals in campaigns, and the number of DOJ objections interposed to retrogressive voting changes.

With much to be done, Section 5 remains an important factor in Mississippi's quest toward full equality for all of its citizens. Without Section 5, I fear backsliding would result. In the 19th century, many of the gains of Reconstruction were eliminated when the federal government stopped enforcing civil rights.. The protections of Section 5 should not be withdrawn now.

After the Act was passed, Mississippi's government worked hard to undermine it. In its 1966 session, the state legislature changed a number of the voting laws to limit the influence of the newly enfranchised black voters, and Mississippi officials refused to submit those changes for preclearance as required by Section 5 of the Act. Black citizens filed a court challenge to several of those provisions, leading to the U.S. Supreme Court's watershed 1969 decision in *Allen v. State Board of Elections*, holding that the state could not implement the provisions unless they were approved under Section 5.⁹

Without Section 5, Mississippi would not have achieved the progress that it has. As a result of the Voting Rights Act, one of the state's four members in the U.S. House of Representatives is black. Twenty-seven percent of the members of the state legislature are black. Many of the local governmental bodies are integrated, and 31 percent of the members of the county governing boards (known as boards of supervisors) are black. These changes would not have come to pass without Section 5 of the Voting Rights Act and court orders obtained after extensive litigation. Since its first objection in 1969, DOJ has objected to Mississippi voting changes 169 times -- 112 since Section 5 was reauthorized in 1982. These changes involved election districts for Congress, the state legislature, most of the county governing boards in the state, and many of the cities and school boards. In addition, federal observers have been sent to particular locations in Mississippi to observe elections pursuant to provisions of the Act on 548 separate occasions since 1966, far more than any other state. Two hundred and fifty of those have been since the 1982 reauthorization.

All of this means that in Mississippi, as in the other covered states, the full protections of the 1965 Voting Rights Act must remain in place. As long as people are willing to ignore the law, and as long as race plays an excessive role in political life, there is potential for backsliding that must be avoided at all costs. The problem of race stemming from slavery and its legacy has been Mississippi's greatest burden. Important changes have occurred since the passage of the Act. But if those changes are to live on, and if Mississippi is to move forward in the coming years, the structure of legal protections that the Section 5 preclearance process has provided must not be dismantled or diminished.

⁹ 393 U.S. 544 (1969).