

Response of Robert McDuff to Written Questions from Senator Patrick Leahy

- 1) Assistant Attorney General Wan Kim testified last week that the percentage of voting changes leading to DOJ objections under Section 5 has declined. Some have cited this declining percentage as evidence that Section 5 is no longer needed. In your opinion, what explains this declining percentage? Is the declining percentage of objections relevant to the question of whether Section 5 should be extended?**

Section 5 of the Voting Rights Act should be extended because it provides an effective mechanism to eradicate both purposeful voting discrimination and its continuing effects. Section 5 has been the primary catalyst for significant increases in minority political representation and participation throughout the State of Mississippi and beyond. By preventing backsliding and ensuring that jurisdictions do not retrogress minority voting strength, Section 5 has operated as an important safeguard to shield minority voting rights.

Some witnesses who testified during the hearings have made note of the declining number of DOJ objections in recent years. However, the effectiveness of Section 5 cannot be measured by objection rates alone because these statistics do not reveal the various ways that the preclearance process operates. For example, these statistics do not account for the deterrent effect of Section 5, which prevents many jurisdictions from adopting discriminatory changes in the first place.

They also do not account for those voting changes that were withdrawn after the Department of Justice made formal more information requests (MIRs) by mail.¹ A study completed by Professors Luis Ricardo Fraga and Maria Lizet Ocampo examined the impact of letters issued by the Justice Department requesting more information (MIRs) about pending Section 5 submissions. Generally, these letters may signal to a submitting jurisdiction that DOJ has concerns regarding the potentially retrogressive effect or purpose of a particular proposed change. In many instances, jurisdictions that received an MIR withdrew the proposed change, submitted a superseding change, or made no timely response which effectively terminates a pending submission. In Mississippi, for example, DOJ issued 874 MIRs between 1982 and 2005 which led to the effective withdrawal of a total of 93 changes. Overall, Fraga and Ocampo conclude that MIRs enhanced the deterrent effect of Section 5 by 51%.²

Finally, some of the decrease in the number of objections may also be attributable to recent Supreme Court cases that severely restricted the effectiveness of Section 5

¹ See Luis Ricardo Fraga, et al., *More Information Requests and the Deterrent Effect of Section 5* (May 23, 2006) (assessing the deterrent effect of Section 5 through an examination of the issuance of more information requests (MIRs) from the Justice Department).

² *Id.* at 4.

including the *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier II*) and *Georgia v. Ashcroft*, 539 U.S. 461 (2003) rulings. Specifically, *Bossier II* restricted the Justice Department from objecting to voting changes enacted with discriminatory purpose³ while the *Georgia v. Ashcroft* ruling allows for the elimination of viable opportunity districts when they are replaced with amorphous "influence districts."⁴ A recent study revealed that discriminatory purpose served as the basis for 43 percent of all objections made in the administrative preclearance process prior to the *Bossier II* ruling.⁵

2) You prepared a report on the operation of the Voting Rights Act in Mississippi and the importance of Section 5 to that State. Does that report contain recent examples of the use of discriminatory tactics which abridged or denied the right to vote of minority citizens and, if so, can you describe them?

The Mississippi State Report is replete with recent examples of persisting discrimination at all levels of local, state and federal government. In addition to overt racial appeals, Mississippi's officials have employed the classic arsenal of discriminatory tactics, including creating redistricting plans that purposefully dilute Black voting strength (as was the case in the 1991 State House and Senate plans), switches to at-large elections, and discriminatory annexations. These voting changes would have had adverse effects on African-American voters had they not been met with objections under Section 5.

The 1991 redistricting plans for the state legislature were denied preclearance by DOJ, in part, because there was evidence of discriminatory purpose underlying the adoption of the plans.⁶ Analysis of the legislative history leading up to the adoption of the plan revealed the racist and hostile attitudes of some legislators. Indeed, certain alternative plans were labeled "nigger plans" by white legislators behind closed doors.⁷

Although not in my report, I mentioned in my testimony that in 2001, the Town of Kilmichael, Mississippi, cancelled its general election for alderman and mayor, after the all-White Board of Aldermen realized that, given 2000 census data, African-Americans comprised a majority of both the town's total population and registered voters. The cancellation prompted an objection from the Justice Department on the grounds that the voting change prevented African-Americans from electing candidates of their choice (since several African-Americans had already qualified for the town's elections).⁸

³ *Bossier*, 528 U.S. at 328.

⁴ *Georgia*, 539 U.S. at 498.

⁵ See Peyton McCrary, Christopher Seaman, and Richard Valelly, *The End of Preclearance as We Knew It: How the Supreme Court transformed Section 5 of the Voting Rights Act*, 11 Mich. J. Race. & L. (forthcoming Spring 2006).

⁶ Letter from US Department of Justice, Civil Rights Division, Voting Section to Town of Kilmichael, Mississippi (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 Letter from Ralph Boyd, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to J. Lane Greenlee, Esq., December 11, 2001.

These examples are by no means an exhaustive list of the various discriminatory tactics used by jurisdictions to retrogress minority voting strength. Rather, they illustrate a pattern of voting discrimination in the State of Mississippi, and the tactics that some officials may attempt to employ in their desires to maintain a stranglehold on political power at various levels of government. These examples also reflect the continued importance of Section 5 in prohibiting retrogressive changes that would otherwise have worsened the status and position of minority voters in jurisdictions throughout the state.

3) For any examples you provided in response to question 2, what would have happened in these cases if Section 5 did not exist? How much more difficult would it have been for minority voter to invalidate these changes if Section 5 did not exist? Why wouldn't a Section 2 action work just as well?

In my experience, litigation under Section 2 will not be sufficient to prevent the discriminatory voting changes that would likely reemerge in the absence of the Section 5 preclearance requirement. Adequate legal, financial and human resources did not exist in Mississippi in the past 40 years to bring a lawsuit in lieu of every one of the 169 objections that have been issued. Those resources do not exist today, and given persistent socio-economic disparities between Blacks and whites, I have little hope that this reality will change in the near future.

Voting rights is intensely complex litigation that is both costly and time-consuming. To be appropriately presented, these cases require costly experts including historians, social scientists and statisticians, among others. Having litigated a great number of voting rights matters in the State of Mississippi, I know that there are not enough lawyers who specialize in this area to carry the load. I also know that it is incredibly difficult for minority voters to pull together the resources needed to push private challenges under the Act. Without the mechanism of Section 5 in place to bar retrogressive voting changes from implementation, we will likely witness the resurgence of discriminatory voting changes that will not be adequately or evenly addressed by private litigation under Section 2.

4) Assistant Attorney General Wan Kim testified last week that covered jurisdictions have overwhelmingly complied with Section 5 of the VRA. Yet we have heard suggestions that Section 5 has been so successful it is no longer needed. Why would overwhelming compliance with a law become a reason for doing away with it? Shouldn't we continue to do what works?

I do not believe that we have seen "overwhelming compliance" with Section 5. Since the 1982 renewal, DOJ has interposed 112 objections to various types of proposed voting changes in the State of Mississippi. In addition, there have also been a number of enforcement actions to ensure that jurisdictions do not seek to evade the requirements of the Act by failing to submit their voting changes for preclearance. As recently as November 2005, a three-judge federal court enjoined the City of McComb from

enforcing a state court order it had obtained that removed a black member of that city's Board of Selectmen from his seat by changing the eligibility requirements for holding that office. The three-judge court noted that the state court clearly altered the pre-existing practice, yet the city failed to submit the change for preclearance. The court ordered the Black selectman restored to his office and enjoined the city from enforcing the change unless preclearance was obtained.⁹

In addition, the state failed to submit a number of laws that were passed adding new state trial court judgeships elected under a numbered post system. In 1986, the federal district court in *Kirksey v. Allain* was required to step in and enjoin further elections for those seats until preclearance was obtained.¹⁰ State officials then submitted the changes to DOJ. Ultimately, DOJ interposed an objection to the numbered post requirement for many of the judgeships finding the changes retrogressive in effect.¹¹

In 1997, the U.S. Supreme Court revisited the issue of Section 5 non-compliance when state officials refused to submit for Section 5 review a number of changes in state law made to conform to the National Voter Registration Act. The Court unanimously held, in *Young v. Fordice*, that state officials had violated Section 5 and could not go forward with the changes until preclearance was obtained.¹²

Nonetheless, Section 5 has been tremendously effective in barring voting changes that are retrogressive in effect and purpose. Section 5 has also helped remove barriers to voting for minority voters throughout the State of Mississippi and helped lead to significant increases in the number of minority elected officials at the local, state and federal level. Its success in this regard should not be used as a reason to amend or end Section 5.

5) We have heard arguments that Section 5 is no longer needed because of its success in not only preventing, but deterring, discriminatory voting practices. You practice in a covered jurisdiction and have no doubt witnessed significant progress in minority participation and representation over the decades. I wonder if you have an opinion on the deterrent effect of Section 5 preclearance. Can a successful deterrent still be a success if it is no longer operational? Won't softening or removing this successful deterrent risk the emergence of new abuses?

Given my experience litigating voting rights cases during the last 20 years, I believe that the gains of the past can be quickly undone without the Voting Rights Act. Voting in black-white elections is still racially polarized. Although thirty-six percent of

⁹ *Myers v. City of McComb*, No. 3:05-cv-00481 (S.D. Miss. Nov. 23, 2005) (three-judge court) (unpublished order)

¹⁰ 635 F. Supp. 347 (S.D. Miss. 1986) (three-judge court).

¹¹ Letter from US Department of Justice, Civil Rights Division, Voting Section to the State of Mississippi (Section 5 Objection Letter (July 1, 1986).

¹² 520 U.S. 273 (1997).

Mississippi's population is Black, the highest percentage of the fifty states, no Black person has been elected to a statewide office in Mississippi since Reconstruction. The vast majority of Black elected officials in Mississippi were elected from majority Black districts, and most of those districts were created as a result of the provisions of the Voting Rights Act. Moreover, elections are still driven by racially polarized voting, as most white voters are unwilling to support black candidates in black-white contests regardless of their qualifications. If Section 5 expires, there is a serious potential for this racial division to be exploited by those who wish to return to the some of the worst features of the days of the past.

6) Professor Gaddie has testified about his report in the House of Representatives' hearings. Have you reviewed his report and, if so, do you believe it includes relevant evidence? Doesn't his comparison of the record of discrimination in covered jurisdictions compared to non-covered jurisdictions ignore the widely recognized deterrent effect of Section 5?

I understand that Professor Gaddie seeks to challenge the constitutionality of the coverage formula and suggests that a comparison of the record of discrimination between covered and non-covered jurisdictions is the relevant inquiry. In assessing the viability of the coverage formula, the appropriate focus should be on its demonstrable deterrent effect, the history of discrimination that gave rise to the designation of covered jurisdictions and the evidence that has been presented of persistent forms of discrimination in those areas.¹³ The coverage formula, which determines which jurisdictions are subject to the special requirements of Section 5, has withstood constitutional scrutiny on several occasions.¹⁴ In addition, the Supreme Court has acknowledged that the selective geographic reach of Section 5 was justified by the exceptional history of voting discrimination within the covered jurisdictions.¹⁵ Section 5 of Voting Rights Act represents carefully tailored legislation that falls within the broad sweep of Congressional authority under the Fourteenth and Fifteenth Amendments, and protects the constitutional rights of citizens living in states such as Mississippi and others with both historical and contemporary evidence of persistent voting discrimination.

7) In your professional opinion, does the existing coverage formula requiring pre-clearance of voting changes need to be altered?

The existing coverage formula that determines which jurisdictions are subject to coverage under Section 5 does not need to be altered given the inherent structure of the Act. In particular, the bail-out provision outlined in Section 4(a) and the bail-in

¹³ 42 U.S.C. § 1973b (1982).

¹⁴ See *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); *City of Rome v. United States*, 446 U.S. 156, 180 (1980)(rejecting a Section 5 constitutional challenge); *Lopez v. Monterrey*, 525 U.S. 266 (1999)(same); *County Council of Sumter County, S.C. v. United States*, 555 F. Supp. 694, 707 (D.D.C. 1983).

¹⁵ *Katzenbach* at 334. See also *An Introduction to the Opening Provisions of the Voting Rights Act and Legal Issues Relations to Reauthorization Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (Statement of Laughlin McDonald, Director ACLU Voting Rights Project (May 2006).

mechanism outlined in Section 3(c) of the Act work to ensure that the scope of Section 5 is appropriately revised. Section 4(a) establishes a bailout process that is extremely liberal and achievable for those jurisdictions that enjoy full minority participation in the electoral process. It is my understanding that all jurisdictions that have sought to opt out from coverage under Section 5 have been able to do so. Section 3(c) of the Act, the "bail-in" mechanism, allows a court to order a non-covered jurisdiction to submit its voting changes in accordance with the requirements of Section 5.¹⁶ As these two features of the Act provide a mechanism for jurisdictions and courts to expand or reduce the scope and reach of Section 5, I believe that there is no need to revise the coverage formula.

Moreover, in 1982, Congress did not alter the coverage formula given the record that was developed about historical and persisting discrimination that persisted in the covered jurisdictions. An extensive record has been developed before this Congress that demonstrates that voting discrimination continues to impair minority electoral opportunity within covered jurisdictions such as Mississippi. Given this, I believe that Congress has the authority to renew Section 5 with the same coverage formula intact.

8) Mr. McDuff, you have worked on voting rights cases for decades in the State of Mississippi. In your experience, does coverage under the Voting Rights Act stigmatize the public officials you work with in the covered jurisdictions?

In my experience, Section 5 coverage does not stigmatize public officials who work within the covered jurisdictions. I have dealt with many of them, and I believe most accept Section 5 as a proper way of insuring that the concerns of all groups are considered and as a legitimate means of avoiding voting changes that intentionally or unintentionally turn the clock back on racial progress. However, ongoing discrimination in the political process, particularly racially polarized voting, continues to have a stigmatizing effect on minority voters. The reality of racially polarized voting has been documented by a long litany of court decisions and has manifested itself in recent elections as discussed more fully in my report and my written testimony.

¹⁶ See *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990), *aff'd*, 498 U.S. 1019 (1991); *Sanchez v. Anaya*, Civ. No. 82-0067M (D.N.M. 1984) (three-judge panel)(authorizing preclearance of redistricting plans over a ten year period); The Continuing Need for Section 5 Preclearance Before S. Comm. On the Judiciary, 109th Cong. (2006) (Statement of Pamela S. Karlan, Kenneth and Marie Montgomery Professor of Public Interest, Stanford University School of Law)(May 16, 2006).